COURT FILE No.: 03-9303

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

GEORGE VASTIS and 1255723 ONTARIO INC.

Before Justice of the Peace Woloschuk
Heard on June 3, 17, 24, October 7, 14, 21, December 12, 16, 2004, February 15, 24, March 23, May 17, April 5, June 7, 8, September 19, 23, October 26, 18, December 15, 2005.
Reasons for Judgment released on April 20, 2006

John A. Olah ..... **for the Regional Municipality of Halton.**
David Crocker ..... **for the defendant George Vastis and 1255723 Ontario Inc.**

JUSTICE OF THE PEACE Woloschuk, J. S.:

The defendants are charged, with five counts, that on or about the 2nd day of April, to the 11th day of April 2003, at the Town of Milton, Part Lots 19 and 20, Concession II (NDS), 4237 Fourth Line, did commit the offence of destroying a tree located in an Environmentally Sensitive Area contrary to s. 3 (a), Regional Municipality of Halton By-law 79-83 and s. 19 (1) (b) of the *Forestry Act*, R.S.O. 1990, c.F. 26 as amended.

The defendants are also charged, with five counts, that on or about the 2nd day of April, to the 11th day of April 2003, at the Town of Milton, Part Lots 19 and 20, Concession II (NDS), 4237 Fourth Line, did commit the offence of destroying a tree located in woodlot contrary to s. 4, Regional Municipality of Halton By-law 79-83 and s. 19 (1) (b) of the *Forestry Act*, R.S.O. 1990, c.F. 26 as amended.

The defendants are charged, that on the 14th or 15th day of July 2003 , at the Town of Milton, Part Lots 19 and 20, Concession II (NDS), 4237 Fourth Line, did commit the offence of destroying a tree located in an Environmentally Sensitive Area contrary to s. 3 (a), Regional Municipality of Halton By-law 79-83 and s. 19 (1) (b) of the *Forestry Act*, R.S.O. 1990, c.F. 26 as amended and did destroy a tree located in a woodlot contrary to s.4 Regional Municipality of Halton By-law 79-83 and s. 19 (1) (b) of the *Forestry Act* , R.S.O. 1990, c.f. 26 as amended.

Background

The property in question is located at 4237 Fourth Line in the Town of Milton on the border with the Town of Oakville. Fourth Line is on the west of the property and Lower Base Line is to the north. There is a creek running through the south of the property. The area just east of the Fourth Line is farmland and the area of the property just north of the 407 highway and north of Sixteen Mile Creek is the forested area in question.

There are two sets of charges; there are the April charges and the July charges; one set against Mr. Vastis and one set against the corporate defendant. Mr. Vastis is the president, and his wife Helen Vastis is the secretary of 1257723 Ontario Inc. the corporate defendant,

The allegations are that cutting took place in an Environmentally Sensitive Area (ESA), and in a woodlot. For the purpose of the by-law; ESA means any Environmentally Sensitive Area defined and designated in the Official Plan of the Region and a woodlot means an area not less than; 1,000 trees per hectare (400 trees per acre) of any size.

The section of the by-law the Crown is relying on is section 3; "no person shall destroy by cutting, burning or other means any tree located in an environmentally sensitive area," and section 4; " No person shall destroy by cutting, blasting, burning or by any other means a tree located in a woodlot."

On April 11, 2003 William Gaines, of Halton Conservation Authority, who is designated as an enforcement officer, attends the property after receiving information about activity on it and observes two substantial clearings. Later that day Cory Harris, a Water Resources Engineer and Provincial Offences Officer, with several other officers attend the property to enforce the regulations of the Conservation Authority. A number of photographs where taken and the site was walked for a period of about three hours.

Nine sites where cleared and the clearings and the configurations were, for the most part, long and narrow. The Crown's position is that these nine long and narrow clearings are in fact half a golf course or a nine hole executive golf course. The defence contends it was cleared of trees, for farming purposes.

Excavators and other equipment were present on the site. Graystone was identified as the contracting company on site that day. Trees were being removed by an excavator and the destroyed trees where being left in the middle of these tracts.

A meeting took place, on the site, on April 15, 2003 with Mr. Vastis and a number of representatives of different agencies including the Town of Milton, the Conservation Authority, The Town of Oakville and the Region of Halton.

Additional photos where taken by Mr. Harris on behalf of the Conservation Authority while walking the entire site in question, showing extensive cutting of trees in the area.

On April 29, 2003 Mr. Gaines re-attended the site visiting all nine clearings and took samples of the DBH and found 43 of the 50 trees measured did not meet the minimum cutting requirements of the bylaw. He served letters "stop work orders" requesting that no further work be continued.

On May 13, 2003, the Conservation Authority obtained a search warrant to fly over the property in question, and on the 14th of May the fly over takes place and a number of photographs are taken showing the nine cleared areas, where tree cutting took place.

On June 17, 2003 the information was sworn with respect to the first set of charges.

On July 15th 2003, Mr. Harris re-attends the property in question after receiving information that heavy equipment was working on it.

He took photographs which show bulldozers working to push branches and trees into the clearings which in his view where actually damaging the regenerated growth and this led to the second set of charges before this court.

Agreed Facts

George Vastis is an officer and director of 1255723 Ontario Inc., which owns the property in question. Mr. Vastis participated in these activities as an agent for the corporation. There is no dispute that the corporation owns the property in question. The defendant acknowledges that the clearings took place and that Graystone was contracted to do it.

Elements of the offence to be proven

Location and time of offence
Issue of identity, who the trees were cut by
If the trees where cut in an ESA, (an environmentally sensitive area)
If the trees where cut in a woodlot

April 2003 charges

I am satisfied from the evidence that the subject property is at 4237 Fourth Line, Part Lots 18, 19, and 20 in the Town of Milton. This is confirmed by oral as well as documentary evidence (including exhibits 2 thru 9). Both Cory Harris and William Gaines, from Halton

Conservation, testified that they attended the property on April 2, and 11, 2003. They both said they observed heavy equipment, operated by Graystone contracting, destroying trees. Randy Gray of Graystone Contracting testified his company cleared the property in question.

I find that George Vastis directed the cutting of the trees. This is confirmed by a number of documents as well as oral testimony. Exhibit 41, a contract between Graystone and Mr. Vastis deals with the issue of clearing the lands of trees. Exhibit 42 is an invoice made out to the defendant corporation (1255723 Ontario Inc.) for the clearing, as well as exhibit 40, an invoice from D-Survey deals with the lands in question and was ordered by Mr. Vastis. The landowner is the corporate defendant (exhibit 9) and it is clear, from the corporate profile (exhibit 10) that Mr. Vastis at that time was the President as well as Director.

This is all confirmed by oral testimony as well. Randy Gray of Graystone testified that Mr. Vastis signed the contract and he was present at the site almost daily when the clearing took place. In fact Mr. Vastis himself confirms that he decided to clear the trees and made arrangements to have it done. He also testified that he marked the trees to delineate the areas where the clearing was to take place. Mr. Anthony's testimony as well as Mr. Brooks who assisted Mr. Vastis in the marking of trees also confirms this.

The oral and documentary evidence (exhibit 17) clearly indicates that the property in question is within an ESA. Testimony from David Chalmers, an expert witness for the defence, confirmed this, as did Brenda Axon, and Carolyn Hart DeLoyde, a former planner with Halton Region. The evidence is clear that the clearing took place within ESA 16.

I am satisfied after hearing from Mr. John McNeil, a forester and arborist, working with the Town of Oakville, that the area cleared was in a woodlot. He indicated that on his visit on April 24, 2003 he used standard forest mensuration practices to come to that conclusion. No credible evidence was presented to contract this procedure or his conclusion.

I am satisfied for these reasons that the Crown has proven beyond a reasonable doubt the *actus reas* and the elements of the offences of April 2003.

July 2003 Charges

Exhibit 28 and 29 are 'Stop Work Orders' dated April 29, 2003 both addressed to the corporate defendant, 1255723 Ontario Inc. to the attention of Mr. Vastis. The first order is from Conservation Halton while the second is from the Town of Oakville. It is clear from the evidence that the said property is not in Oakville but Milton, so I won't consider the Oakville order except to say it clearly stated to Mr. Vastis that the area being cleared was within an ESA.

The first stop order however is valid, and clearly indicates that the Region's by-law 79-83 prohibited the cutting or removal of trees designated in an ESA or woodlot. Mr. Goodman, the defendants' lawyer dealing with the real estate transaction of the property, testified that Mr. Vastis was told about this issue as he discussed with him the letter he received from the

Region in May of 2003. (Exhibit 57). The letter dealt with the removal of the material from the cleared area. It stated "..before that work would occur, our client would require a meeting on site with Mr. Vastis and his contractors to discuss the logistics of how Mr Vastis intends to complete the work. Any further damage to trees could result in charges under the Region's Tree cutting by-law for new damage..."

It is clear from the evidence that the accused continued removing material from the clearings, not withstanding the stop work orders he received. Both Mr. Harris and Mr. Gaines observed heavy equipment working on the property in question on July 15, 2003, as well as the 16th by Mr. Gaines. They testified that in the clear areas regenerating trees where being crushed by the equipment.

Mr. McNeil testified he also attended the property on July 15 and 16 . He took plot samples which showed regeneration and that the sample also met the test for the definition of a woodlot. He also testified that on his return on July 16th the regenerating trees in the sample plot were reduced to one.

Exhibits 24 and 33 are photographs that indicate the regeneration and also show the heavy equipment working in the area. This leads me to conclude that the equipment destroyed the regenerated growth, trees.

Mr. Vastis in his testimony confirms that he did in fact hire contractors to clear the debris from the April clearing operation and therefore for these reasons I find that the Crown has proven the *actus reas* and the elements of the offences of July 2003, beyond a reasonable doubt.

Defences

These are Strict Liability offences. The defendants raised four separate defences to the charges before this court.

Unreasonable Search (Section 8 of the *Charter*)
Statutory Exception
Officially induced error (with respect to the April charges only)
Due diligence

Charter Defence

I will first deal with the unreasonable search issue. The defence position is that the evidence of John McNeil and William Gaines from their site visits on April 24 and 29, 2003 be excluded pursuant to section 24 (2) of the Charter because of the violation of the defendants' Section 8 rights under the Charter.

Section 8 of the *Canadian Charter of Rights and Freedoms,* sets out that " everyone has the right to be secure against unreasonable search and seizure.

The Crown argued that the defendants should be precluded from seeking *Charter* relief at this late point in the proceedings. Mr. Olah submitted that the defence raised a number of *Charter* questions through the course of the proceedings and they were all dismissed. He indicated that defence counsel made a decision not to follow the normal procedure or the agreed-upon procedure, but instead chose to delay the *Charter* argument to his closing submissions, for tactical reasons and therefore as a result the Crown is prejudiced.

Mr. Crocker for the defence submitted that the Crown in his written submissions acknowledges that notice was provided in May 2004, that the defendants would be bringing a *Charter* motion to challenge the reasonableness of the searches at the property. Therefore the Crown, in his view, cannot now claim to have been surprised or prejudiced by the defendants' argument.

I have reviewed the transcript of proceeding of June 17, 2004 and though there appears to be agreements as to the timing of this *Charter* motion it is however clear to me that Mr. Crocker did not abandon this motion, he stated "I don't intend to bring a *Charter* motion today. I have not and I do not abandon my right to raise *Charter* issues and, with all due respect to my friend. It's my decision as to when that best benefits my client and the court and it was my decision that it was not going to be today, but not that we are not going to bring a *Charter* motion. We absolutely still think that the *Charter* issue is alive,"

I am therefore prepared to consider this *Charter* motion by the defence.

Defence submissions

Mr. Crocker submitted that after the April 15, 2003, inspection of the property by the regional authorities it had become an investigation. Accordingly, he argues that the investigations carried out on April 24, and 29, 2003 constitute warrant less, unreasonable searches in violation of the defendants' rights and the evidence obtained from those searches-namely, any evidence that the tree clearing occurred on a wood-lot should be excluded.

He acknowledges that statutory powers of inspection are permissible in a regulatory context, but states that pursuant to *R. v. Jarvis*, " statutory powers of inspection do not extend to inquiries made once the predominant purpose of those inquiries is the determination of penal liability."

He submits that on April 11, 2003, both Cory Harris, a Water Resources Engineer/ Provincial Offences Officer for Halton Region Conservation Authority and Bill Gaines, a By-Law Enforcement Officer for the Region of Halton Tree Conservation By-law entered the property, each relying on separate statutory authority for doing so.

He submits that both Mr. Harris and Mr. Gaines testified that they were convinced that cutting took place on the property in a wood lot and ESA. They both became aware that the owner of the property was Mr. Vastis. They returned to the property with other persons on April 15, 2003 and in the company of Mr. Vastis walked the property, took photographs and used a GPS to identify the location of tree clearings.

He indicated that Mr. Harris admitted in cross-examination that Mr. Vastis was not cautioned in advance of this attendance.

On April 24, 2003 Mr. Crocker submits that John McNeil and Craig Williams, By-Law Enforcement Officers for the Town of Oakville, attended at the property without a warrant and without permission from the defendants. It is at this time that Mr. McNeil sampled random plots and was thereby able to confirm that the forested area in the property qualified as a wood lot.

On April 29, 2003 Mr. Crocker adds that Mr. Gaines and Mr. McNeil attended at the property and met with Mr. Vastis. On that day Mr. Gaines measured trees piled in cleared areas. It was at this time that Mr. Vastis was served "stop work" letters from the Region of Halton and the Town of Oakville.

It was on May 13, 2003 that the Region of Halton obtained a search warrant in order to take aerial photographs of the property, which was executed on May 14, 2003.

His argument is that by April 15, 2003 the Region possessed reasonable grounds to suspect that a violation of the by-law had occurred, at least with respect to the cutting of trees within an ESA.

He further submits that Mr. McNeil and Mr. Williams attendance on the property on April 24, 2003, was not for the purpose of inspection, but rather in an investigatory context- namely to obtain evidence to demonstrate that the cutting on the property occurred in a woodlot.

He further submitted that there is no evidence that Mr. Vastis was informed in advance of the April 29 visit that the Region believed violations had occurred and that the were attending to obtain further evidence in respect to such violations, nor was Mr. Vastis cautioned in any way in advance of this visit.

He argues that Mr McNeil, Williams and Gaines could not rely on any statutory authority to enter and search the property after April 15, 2003. The Region he claims should have either obtained informed consent from Mr. Vastis or it should have sought a warrant if it wished to investigate further.

Accordingly, Mr. Crocker submits that the attendances at the property on April 24, and 29, 2003 must be considered warrant less searches, unsupported by any statutory authority, and *prima facia* unreasonable. This in his view is enunciated in *R. v. Inco*.

He submits that the remedy should be exclusion of the evidence pursuant to s. 24 of the *Charter*. It is the defendants' position that the evidence obtained on these days, namely the measurement of trees for the purpose of determining if cutting took place in a woodlot, was not otherwise discoverable.

Mr. Crocker argues that in considering the seriousness of the breach, considering *R. v. Caslake* the court may consider the obtrusiveness of the search, the individual's expectation of privacy in the area searched, the existence of reasonable and probable grounds, and the good faith of the police.

He submits that the search required the regional authorities to be on the defendants' land for a significant amount of time and that the Region knew it had reasonable and probable grounds and was in possession of all the evidence it required to lay charges against the defendants by April 15, 2003. Nonetheless, the regional authorities continued to rely on statutory powers of inspection to gather evidence to support a prosecution instead of obtaining a warrant and did not caution Mr. Vastis before attending. This he suggests that the search was not carried out in good faith and this factor weighs against the admission of the evidence as commented on, in *R. v. Caslake*.

In the end he submits that these offences are not criminal in any way, and while the evidence is important to the Crown in respect to the charges pursuant to s.4 of the by-law one must consider the following from *Maitland Valley Conservation Authority V. Cranbrook Swine Inc.*
"There is a public interest in maintaining the environment and preventing pollution but is clearly not as pressing as ensuring compliance with criminal statutes. There is a countervailing interest to maintain integrity of compliance with the *Charter*, the highest law of the land."

Crown submissions

Mr. Olah on behalf of the Crown submitted that the issue is the reasonableness of the searches on April 24 and 29, 2003. He accepts that the onus is on the Crown to show that despite the search being conducted without a warrant, the search was not unreasonable for the purposes of the *Charter*.

He submits that the "predominant purpose" test is well established in Canadian law and is reflected in the leading case of *R. v. Jarvis*, a tax case where the investigation involved an audit which eventually took on the characteristics of a criminal investigation, the Supreme Court held that a distinction must be drawn between the audit functions of tax officials and their investigative functions. He quotes from that decision " To determine whether the predominant purpose of an inquiry is the determination of penal liability, one must look at all the factors that bear upon the nature of the inquiry. Apart from a clear decision to pursue a criminal investigation, no one factor is determinative. Even where reasonable grounds exist

to suspect an offence exists, it will not always be true that a predominant purpose of an inquiry is the determination of a penal liability."

He submitted that Mr. McNeil testified that he arrived late at the inter-agency site meeting on April 15, 2003 and consequently did not inspect the property on that date. He restricted his attendance to the driveway where he met Mr. Vastis. Mr. McNeil testified that he returned on the property on April 24, 2003 accompanied by Mr. Craig Williams, a by-law officer with the Town of Oakville and two surveyors. The stated purposes of the visits were; to determine whether there had been a breach of the Town of Oakville's tree cutting by-law and to determine the exact northern boundary location between the municipalities of Oakville and Milton. His other purpose to enter onto the property and take sample plots was to determine if the forested areas qualified as a woodlot.

He submits that Mr. McNeil on behalf of the Town of Oakville did not have reasonable grounds to lay charges and, nor could a decision have been made to proceed with an investigation into penal liability before April 24, 2003. His predominant purpose in attending on April 14, he submitted was not to investigate and collect with respect to the commission of an offence by the accused, but rather to exercise his statutory authority to inspect within the scope intended by the Town of Oakville by-law.

Mr. Olah concedes in his submissions that Mr. Gaines knew that the lands were located in ESA 16. He first attended the property pursuant to section 11 of the Region of Halton Tree Conservation by-law. He observed the property from the adjacent hydro right-of-way, and saw a clearing about 3 to 4 acres in size, which appeared to be of recent origin. He entered onto the property saw two trucks with Graystone Contracting name and phone number on the side, and attempted to call. He left a message. He left the property, and confirmed that no approvals or permits had been given for the cutting. He also conducted a corporate search and confirmed the identity of the landowner.

Mr. Gaines spoke to Mr. Vastis and arranged a meeting with Mr. Vastis and the other agencies on April 15, 2003.It was at this time, Mr. Olah submitted that Mr. Gaines concluded that the area was a woodlot and that a total of about 20 acres had been cleared.

Mr. Olah submits that Mr. Gaines in re-examination confirmed that as of April 11, 2003, he did not feel he had sufficient information to make a determination that charges should be laid. Following the meeting on April 15, 2003 Mr. Gaines did have a strong suspicion that an offence had been committed, but those fell short of reasonable and probable grounds to charge.

Mr. Gaines returned to the property on April 29, 2003 and testified the purpose of his visit was to verify the sizes of the trees, and to take representative sample of measurements of those trees that were piled within the clearings. On that day he also served stop work orders to Mr. Vastis by pre-arranged appointment with Mr. Vastis.

The Crown submits that the evidence of Carolyn DeLloyde is critical in determining the issue of when the decision was made to proceed with charging Mr. Vastis. She was provided with photographs from the fly-over pursuant to a search warrant issued in early May 2003. It was only after superimposing a drawing of the ESA 16 from the Region's Official Plan over the aerial photographs provided that she was able to state conclusively that the destruction in this case took place within an ESA.

As to remedy if there is a finding that an unreasonable search and a violation of section 8 of the *Charter*, he submits that the evidence should be admitted in view of the legal principles developed under section 24 of the Charter, the remedy provision.

Mr. Olah submitted a number of cases of The Supreme Court of Canada for review including *R.V. Collins* and R. v. *Stillman*, *R. v. Caslake* dealing with this issue. In *Collins* he submits the Court found 'all the circumstances/factors' must be considered in determining if the admission of evidence brings the administration of justice into disrepute.

In *Stillman*, the Crown submits the Court made a distinction between "conscripted" and "non-conscripted" evidence, Conscripted evidence is defined as evidence which the authorities have compelled the accused to participate in providing. Non-Conscripted evidence the Crown submits is a more straightforward concept. It is evidence that the accused was not compelled to participate in creating or discovery of and therefore the Crown submits this type of evidence will rarely operate to render the trial unfair, and where the impugned evidence is found to be non-conscripted, the analysis should proceed to the second step of the *Collins* test.

In the end Mr. Olah submits that the evidence collected at the site visits on April 24, and 29, 2003 is non-conscripted evidence as defined in *R. v. Collins* and *R. v. Stillman*. Therefore he submits that although the offences in this case are regulatory rather than criminal offences, they are nonetheless serious, and the area affected by the destruction of trees is of significant environmental importance in the region and since the alleged *Charter* breach was not serious the evidence should not be excluded in this case.

Charter Motion decision

I have reviewed the pertinent case law as well as the submissions and evidence as it relates to the *Charter* Motion by the defendants.

I am satisfied that Mr. McNeil's visit to the Property on April 24, 2003 was an inspection within the scope of the Town of Oakville By-law. He had to determine if the property was in Oakville and if the forested areas that where cleared qualified as a woodlot. He had two surveyors present with him and in fact it was found that the property was not in Oakville but in the Town of Milton. The evidence is also clear that he had statutory authority to do that. As to the visit of April 15, Mr. McNeil testified he did not inspect the Property on that day. He

met Mr. Vastis in the driveway at the entrance of the property. I found his evidence to be credible. There is no violation of the Defendants' *Charter* rights in this case.

In Mr. Gaines case it appears that he knew that the property was located in ESA 16. He testified that he had a strong suspicion that an offence had been committed. Though the Crown argued that though he had a strong suspicion it fell short of reasonable and probable grounds to lay any charges.

However, Mr. Gaines had enough information to return to the Property on April 29, 2003 and serve Mr. Vastis with 2 stop orders. This was a pre-arranged meeting with Mr. Vastis. He then continued to take representative sample of measurements of those trees piled within the clearings. This seems reasonable to me. On many occasions stop work orders are issued dealing with by-law, occupational health and safety, and other regulatory matters, but they do not in all cases lead to charges being laid. It is a way to make sure people and corporations abide by the rules and correct any inadequacies.

Most compelling to me however is the evidence of Carolyn DeLoyde. Her testimony was credible and trustworthy. She clearly indicated that after she was provided with photographs from the fly-over conducted by Mr. Harris and Mr. Gaines she superimposed a drawing of ESA 16 from the Region's Official Plan over the aerial photograph and only then was she able to say conclusively that the destruction took place in the ESA. The aerial photographs where obtained pursuant to a search warrant issued by a judicial officer, in May 2003.

She testified she prepared a memo with an analysis and it was then that the Region decided they had reasonable and probable grounds to charge the defendants'. This in my view is appropriate under all the circumstances.

It is also clear from the evidence that Mr. Goodman was aware of some of these meetings with Mr. Vastis and the Region's officials and was a participant on at least one occasion and received correspondence on the matter from the Region. As the defendants' legal counsel at the time one would think he had his clients rights in mind and would advise him appropriately.

For these reasons I find that neither attendance constituted an unreasonable search and therefore there is no violation of s. 8 of the *Charter*. But even if I had found that the searches where unreasonable I would not order the exclusion of the evidence in question because it is not an appropriate remedy for the following reasons.

If I had found a breach of the *Charter,* then the remedy provision of Section 24 of the *Charter* would kick in.

Section 24 states the following:

(1) Anyone whose rights of freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy, as the court considers appropriate and just in the circumstances.
(2) Where, in proceedings under subsection (1), a court concludes evidence was obtained in a manner that infringed or denied any right or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regards to all the circumstances, the admission of it in the proceedings would bring the administration of justice in to disrepute.

Clearly exclusion of evidence is not automatic. In this case there is no credible evidence that the actions of the enforcement officers where deliberate, wilful or flagrant. If there were any technical breaches of the Charter they where minor and in my view made in good faith. It is also clear that the evidence was conscripted evidence; it was not contingent on Mr. Vastis' participation.

In *R. V. Caslake* the Supreme Court also indicated additional factors that should be taken into consideration before evidence is excluded; like the obtrusiveness of the search, and the individual's expectation of privacy, just to name two.

In this case this property was not the defendants' home or office. Though there was a building on the property there was no evidence of any violation of those premises. Mr. Vastis resided in a different community.

This was farmland with a wooded area. It was clearly visible from the 4th line and was farmed by a tenant farmer. During these events many contractors were working on the property and where visible from the roadside or the hydro right of way. This was land owned by a corporation for farming and other purposes. There is limited expectation of privacy either subjectively or objectively under these circumstances.

And finally in my view, the exclusion of this evidence because of a possible minor breach of the *Charter* could result in an acquittal, for serious charges dealing with environmental issues that are in the forefront in this Region and therefore neither a stay of proceedings or the exclusion of this evidence is warranted. In my view the admission of this evidence would not bring the administration of justice into disrepute.

The Motion is denied.

Prior to dealing with the other three defences put forward by the defendants' I will deal with the issue of Mr. Vastis's credibility as well as the issue whether the cut areas was intended for use as farm land, as contented by the defence, or a golf course, as contended by the Crown. Both these issues in my view affect the out come of the defendants' position.

Mr. Vastis's Credibility

I found Mr. Vastis's testimony to be not credible and trustworthy as it relates to many material issues before this court. There were internal inconsistencies, implausible statements, exaggerations, and contradictions by other witnesses.

These are examples:

MFTIP program:

Mr. Vastis testified that he had no knowledge of the MFTIP program. (Management Forest Incentive Program which is a program that lowers taxes on properties.) Yet the evidence is clear that a letter dated March 21, 2002 (exhibit 53) was sent to the corporate defendant notifying him how to continue the program on the property in question. There is also a letter from his counsel Mr. Goodman dated May 3, 2001 (exhibit 56) indicating that" at the end of each calendar year, you must submit a new annual plan for the manage Forest Tax Incentive Program..." Though at one point he denies reading the reporting letter from his lawyer in respect of this expensive and large property he later acknowledges that "Yes I read this letter it was just to remind me for my payments, the mortgage payments..."

This in my view is not plausible, considering his evidence that he was clearing the land to save tax monies, yet it's right before him in two letters and he does not read them. One letter he cannot even remember receiving the other he does not read carefully. This is just not plausible under these circumstances. It appears that Mr. Vastis had other reasons in mind in clearing his land.

Municipal Property Assessment Corporation:

Mr. Vastis testified that after receiving the property assessment in the fall of 2002, he noticed that the evaluations were different from the previous year,

He went to the Assessment office and met with Mr. Rilling. He left his meeting with Mr. Rilling with the impression that the tax program no longer existed and that in order to reduce his taxes he had to farm the land and clear the land.

Mr. Rilling however testified that the conversation with Mr. Vastis lasted some five to ten minutes, which took place in the lobby and denied there was any discussion about clearing lands.

The involvement of Helen Vastis in 1255723 Ontario Inc.

When asked by his counsel "what was her involvement in the company if any?"

Mr. Vastis responded " Absolutely nothing."

However under cross-examination he contradicts his earlier testimony by admitting that when he had problems with the region, he had asked her to help him. She made a representation to a committee of council with respect to the corporation .

Permits:

Mr. Anthony of Graystone negotiated the contract with Mr. Vastis for the removal of trees. He testified that he advised Mr. Vastis to contact Mr. Harris of the Halton Region Conservation Authority about getting a permit for removal of the trees.

He stated, " I told Mr. Vastis that he should talk to Conservation Halton...To contact Conservation Halton. I gave Cory Harris' name as a contact person."

When asked why he gave Mr. Harris' name at Conservation Halton, Mr. Anthony replied, "Well any time you're around woodlots or forested area, you know, Conservation Halton have jurisdiction on these areas and you try to get the Provincial bodies that deal with those areas to come out and have a look at what to do and go through the permit system."

Mr. Vastis however, denied having any discussions with Mr. Anthony about permits. Also presented as evidence, is a contract with Mr. Vastis and Graystone (exhibit 41), which states "George responsible for all necessary permits."

Mr. Anthony has previously done business with Mr. Vastis and provided oral testimony pursuant to a subpoena. There appears to be no motive for him to be untruthful and his oral evidence is supported by the previously mentioned contract (exhibit 41).

Another issue dealing with permits is Mr. Vastis' contention that he was told by the Milton Planning Department staff that he did not require a permit to clear the lands.

Mr. Vastis testified that he went to the planning department as directed by "the woman from the Milton Tax Department" . He stated that when he walks in " some lady come up, and ask me what I want and I told her that I'm here to see if I need a permit to clear some farmland that I have at Fourth Line..."

He indicated that this person walked away from her desk and spoke to another lady who was behind another counter. The second lady asked him " if this land I'm clearing is for commercial uses..." " I say no I'm clearing this land for some farmland" ... "Actually it was little more to it. When I was asking if it's commercial I say well I don't farm the land but it's rented...So that is the-they agree that this is commercial use and they told me , not the first lady the second lady, that you don't need a permit."

During cross-examination Mr. Vastis admitted that the whole conversation took between 30 seconds to one minute. Though he testified that this information was very important to him he had no knowledge to whom he was speaking, no names, he does not put it to paper, and

Mr. Crocker's letter (exhibit 69) claims Ms. Stockley conveyed this information to Mr. Vastis when at trial it clearly indicates that the second person is in fact Ms Koopmans.

In any event both Ms. Stockley and Ms Koopmans denied making any such statement to Mr. Vastis.

There is also other evidence, which strongly suggests that Mr. Vastis decided to proceed with the clearing of the land prior to his attendance at the Milton planning department. The rental agreement between Mr. Vastis and Graystone (exhibit 41) is dated February 2, 2003 and Mr. Gray testified he and Mr. Anthony walked the property in question several times and dug test holes, to see how much frost there was in the ground in December 2002.

Therefore the meeting could not have taken place in the timeline that Mr. Vastis suggests, nor did it transpire in the way Mr. Vastis indicates.

The marking of trees and the advice about erosion:

Mr. Vastis testified that Mr. Brooks was not involved in marking the trees to be removed. When asked if Mr. Brooks was involved in identifying for you the areas to be cleared by Graystone, he answered "no." However Mr. Gray testified he observed Mr. Brooks marking some trees.

Mr. Vastis' testimony is also contradicted by Mr. Brooks, who testified on behalf of the defence, that he directed Mr. Vastis, which trees to mark. He stated " I gave him direction on what to mark." And when specifically asked if he actually placed ribbons on trees he answered, " I may have helped him but he was the primary marker." This confirms Mr. Gray's evidence, that he observed Mr. Brooks marking some trees, and this clearly contradicts Mr. Vastis's testimony.

Dealing with the issue of erosion again the evidence between Mr. Vastis and Mr. Brooks, who testified on behalf of the defence is not consistent.

Mr. Vastis testified that the idea to cut the trees in sections came from Mr. Brooks. However Mr. Brooks contradicts Mr. Vastis by stating that he only instructed Mr. Vastis on buffering the valley lands and nothing more. His evidence is that he did not instruct Mr. Vastis to clear the lands in strips as he suggested.

Trees Mulched for farming purposes:

Mr. Vastis testified that in July 2003 he hired a contractor to mulch the trees that had been cleared. Also during cross-examination he stated that all trees were either mulched up or burned.

However a photograph taken By Ms DeLoyde (photo 8, of exhibit 39) clearly shows a five-axle tractor-trailer combination leaving the property with a large amount of cut trees. When

confronted with this information Mr. Vastis admitted he gave permission for the removal of these trees. What is most unbelievable he then states " the man who was going to clear it up, he says he likes to get some wood for firewood..."

It is clear from the photograph (exibit39) that the amount of long logs is of such magnitude that this statement defies logic and common sense and is just not credible.

There are other contractions like Mr. Vastis at one point stating that two lawyers told him from the Region that the prosecution of this matter was political, and then in cross-examination recanting that statement.

Mr. Vastis also states that when he walked the property the first time he observed much cutting and destruction that in his words it was unbelievable. This testimony is however contradicted by Mr. Williams who was the forester who supervised the thinning operations carried out by the previous owners.

In the end all these credibility faults by Mr. Vastis makes me conclude he is not a credible witness. His testimony was at odds with a number of witnesses, contradicted by photographs, corporate filings and letters. My conclusion is that his evidence on material matters cannot be considered reliable.

The Issue whether the area cut was for a golf course

Mr. Cory Harris testified he reviews golf courses in the course of his job with Conservation Halton, and is a golfer. He stated that during the fly-over he took photographs of the property in question (Exhibit 23) and in his view the clearings appear to represent a golf course layout.

Mr. William Gaines, with Conservation Halton, estimates he has visited a couple of hundred farms within the Region of Halton. He testifies, "he has never seen agricultural lands configured in this manner..." and commented to Mr. Vastis "that it looked like a golf –course layout."

Mr. John McNeil, Town of Oakville manager of Forestry and Cemetery Services, a professional forester and arborist, testified in his 20-year career he has never seen anything like this in the hundred of properties he has visited. He said, " the cutting was also not consistent with his general understanding of farming practices because of the small size and narrow, irregular shape of the clearings." He indicated it looked like a golf course.

Ms Carolyn Hurt-DeLoyde is a senior planner with the Region of Halton. She indicated that she has been on many golf course developments with applicants. She stated "the cut areas had the look and feel of a golf course because of the manner in which the cuttings had taken place, the fact that they were in long strips, the width felt like a golf course."

Mr. Davor Drobac is an engineering and construction surveyor, who prepared the survey entered as exhibit21, in these proceedings. He testified that he was not told what the layout was for, but he stated to him it looked like a golf course.

Mr. Randy Gray is the principal owner of Graystone Contracting who Mr. Vastis contracted to clear the property of "thousands of trees." He testified that he had cleared a wide variety of properties during his career. He stated " it did not appear to him that the was cutting farm fields due to the configuration of the clearings."

Mr. Frank Anthony, general manager of Graystone, and for 35 years was a farmer in the area. He testified he initially met Mr. Vastis a number of years ago when Mr. Vastis was building a driving range, at Bovaird and Mississauga Road. He stated " some areas consistent with farmlands, but some strips were very narrow and would not lend themselves to use of large farm equipment, just smaller farm equipment."

Mr. Doug Brooks is involved in golf course construction. His company Environlinks, builds golf courses, does landscape construction, snow ploughing and property maintenance. His business is primarily based on the golf industry and he estimated that he has been involved in about 50 golf courses or golf related businesses. He met Mr. Vastis about 1985. He has done several projects for Mr. Vastis, which included a driving range in Mississauga. He claims Mr. Vastis never told him that he intended to build a golf course on the property in question.

Mr. Don Loeb, was a farmer for 35 years, he was the only farmer member of a four person Ontario team engaged to promote Environmental Farm Plan throughout Atlantic Canada and his farm was the subject of a case study for the Senate of Canada's *Soil at Risk* Report. During the trial he was permitted to give opinion evidence in farming matters including crop production and soil management. He testified that the strips of clearings (exhibit 72) are inconsistent with how farmers cultivate their land. It was his view that the clearings were not consistent with good farming practices and that in 35 years of farming and visiting other parts of Canada he has never seen such a configuration for a farm.

Joseph Girodat is a farmer who farms Mr. Vastis' property. He testified that Mr. Vastis cleared it with the intention of having him farm it. He testified that he preferred larger fields he stated "..because of the width of his equipments so that he can get in and maximize the efficiency of the equipment." He also agreed that all the clearings are irregular in shape and narrow which results in inefficient use of his equipment.

Mr. Vastis denies that the clearings were created for the use of a golf course. But his actions in using Mr. Brooks, a golf course contractor, to assist him in determining which areas to clear defy this denial. I have already concluded that his testimony as to material matters before this court are not reliable therefore taking his evidence out of the equation the evidence is overwhelming; it includes the numerous aerial photographs, (exhibit 23) the survey, (exhibit 21), the corrected version of Mr. Charlton's report, (exhibit 72), and the oral evidence as just enunciated by a number of credible witnesses, that in my mind clearly indicates that these clearings were intended for the future use as a golf course.

Statutory Exemption Defence

The defendants' rely on S. 7(1) (a) of the by-law, which provides that the by-law does not interfere with the right of a person who has been the registered owner of the land for at least two years to cut the trees thereon for his own use.

The property was transferred to 1255723 Ontario Inc. and 109629 Ontario Inc. by the previous owners on March 15, 2001 (exhibit 3), which is more than two years before the time of the trees were cleared on the property. Though the defendant corporation was not the sole owner for a period of two years, it is in my view not necessary to be the sole owner to avail oneself of the exemption provided by this by-law. It would be no different if a married couple would own this land together and one would avail themselves of this exemption.

Since I have previously determined that the clearing where cut for the purpose of a golf course and not farmland as proffered by the defendants', therefore the farming exception does not apply and this would be one reason why this defence fails.

Also, it is clear that on July 28, 2003, (exhibit 39) a photograph shows a truck removing from the property a large quantity of logs. There is no way to suggest that this was for the defendants' personal use. In fact I had dealt with this issue earlier in these reasons and found Mr. Vastis's explanation not acceptable.

Finally, I am satisfied that the woodlots in question, where within an ESA. Both Brenda Axon, the manger of Water Planning Services at Conservation Halton and the defence expert witness Mr. David Chalmers, confirms this.

Ms. Axon testified the " it is one of the largest remaining forested units below the Niagara Escarpment." She continued, "the clearing work has severely impacted this section of the ESA and basically destroyed the woodlot. The function of the interior forest habitat conditions has been completely lost. It is the worst destruction of habitat that she has seen in her 25 years in the field."

Mr. Chalmers conceded that there was "no issue that the cutting in this case took place in an environmentally sensitive area."

Therefore I am of the opinion that the exemption relied upon by the defence would be inoperative and would also cause this defence to fail.

Officially Induced Error Defence.

The Ontario Court of Appeal for whether an accused may rely on the defence of officially educed error enunciates the test in *Maitland Conservation Authority v. Cranbrook Swine Inc.* as follows:

(a) the accused must have considered the legal consequences of its action and sought legal advice;
(b) the legal advice obtained must have been given by an appropriate official;
(c) the legal advice was erroneous;
(d) the person receiving the advice relied on it; and
(e) the reliance was reasonable.

I have already found Mr. Vastis's testimony not to be credible or reliable earlier in my reasons. As it relates to the testimony of his alleged conversations with the Town of Milton planning staff I find that Ms. Koopmans and Ms. Stockley's testimony is reliable and preferable to Mr. Vastis's.

In review of the evidence it is clear that there where major inconsistencies to whom gave him "critical advice." Ms. Stockley was consistent and direct in her oral testimony and in a letter to Mr. Crocker dated Dec. 4, 2004 (exhibit 70) clearly states that she would not have told Mr. Vastis that he did not need a permit, since it was not her place to do so. She was a receptionist. Mr. Vastis a sophisticated businessman who would have dealt with municipalities dealing with permits on numerous occasions should have known or would have known that a receptionist's advice even if it was given could not an should not be relied on.

Ms. Koopmans was a senior planner with the Town of Milton in 2003. She recalled in her testimony Mr. Vastis produced a tax bill with his name on it for the property in question. She testified that this took place in May of 2003 and that Mr. Vastis was inquiring about tree clearing and tax assessment issues. Since the Greenlands and ESA designations in the Official plan with respect to the property triggered certain land use regulations she testified she told Mr. Vastis the regional tree cutting by-law would apply as well as the municipal site alteration process. She testified that as senior planner she had no authority to approve tree cutting under the Region's by-law and told Mr. Vastis he may need approvals from the Region and possibly Halton Conservation.

Mr. Vastis provided no credible evidence that he received an erroneous legal opinion or advice from an official 'who is responsible for the administration of enforcement of the particular law," as required by case law, as in *R. v. Cancoil Thermal Corp.*

There is an onus of the defendant to find the appropriate official and in this case the Town of Milton officials did not even administer the Region Municipality of Halton's By-Law No. 79-83.

Though I am satisfied from the evidence that the advice was not given as suggested by the defendants' but even if it was Mr. Vastis should not have relied upon it.

The evidence clearly indicates that Mr. Vastis is a sophisticated experienced businessman who has been dealing with development of properties for many years.

The evidence indicates he has purchased many lands and developed them for gas stations and has interest in five farms, two golf-driving ranges and some eight gas stations. Even his lawyer Mr. Goodman testified and described Mr. Vastis as " very sophisticated" in real estate matters.

Therefore even if the advice were given as stated by the Defendants, this defence fails.

Due diligence defence

As to the issue of Due Diligence the seminal case is by the *Supreme Court of Canada* in *R. v. Sault Ste. Marie, where* it explains that the Crown does not have to prove the existence of *mens rea* but only the *actus reas* of the prohibited act and it states:

"...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."

It is clear from all the evidence that Mr. Vastis did not take reasonable steps as required by law. Mr. Anthony told him from Graystone that he should get a permit. He ignored that advice. In fact as early as 2002 Mr. Anthony testified that he advised Mr. Vastis that he should talk to Conservation Halton. He even gave him Mr. Harris's name as a contact person there. Mr. Vastis ignored that advice as well.

Though he is a sophisticated developer he failed to consult with his lawyer Mr. Goodman before starting to clear his land. Even though the contract with Graystone (exhibit 41) indicates that Mr. Vastis is responsible for all necessary permits he ignores that as well.

Though he has been involved regularly with environmental issues dealing with development of gas stations he does not consult with any other professionals like a planner or even his lawyer Mr. Goodman whether he needed permits to destroy the trees. This was not a case of a few trees but many acres of trees. Clearly he proceeded without taking any due diligence in this matter. No reasonable person would destroy all these trees without finding out if they can. He did not.

Mr. Dragicevic and expert witness for the defence provided opinion testimony as to the zoning and development potential of the property. Even he testified that if Mr. Vastis had consulted him he would have advised him of the tree preservation or conservation by-laws. However Mr. Vastis did not consult any experts or consultants prior to cutting the trees and he should have.

It appears from the evidence that Mr. Vastis did not even consult with his wife, a lawyer and the secretary of the defendant corporation. These are not actions that can be considered reasonable in the context of a due diligence defence.

I have taken into consideration *Regina v. Fell*, which deals with the issue of whether both the corporation and the officer, president and the directing mind of the corporation could be convicted. The court in this case found that a conviction could be registered on both. It is clear from the evidence that Mr. Vastis, was an officer and president of the defendant corporation and he controlled the activities dealing with the offences of April and ~~June~~ July 2003. I am satisfied that convictions can be registered on both defendants.

Mr. Vastis decided to clear large areas of what was a pristine forested area. The trees where on his land but he did not consider the consequences of destroying many acres of trees or the long-term effects on the environment. He did not take the appropriate steps to make certain he was abiding by all the regulation and by-laws that are in place to protect Environmental Sensitive Areas. Considering all the evidence it is clear to me that this was done without any concerns to the environment, and in total contempt of the rules. This was someone trying to get ahead of the regulations and attempt to develop a golf course without proper oversight or approvals.

For all these reasons I find that the Crown has proven the elements of the offences beyond a reasonable doubt for all the charges in April and July 2003, and therefore I find George Vastis and 1255723 Ontario Inc. guilty of the charges before this court and convictions are registered.

Delivered orally and released: April 20, 2006

Signed: "Justice of the Peace J. S. Woloschuk"