my ruling this morning with the people present in the room, and I don't know that from - from what I - this is an issue of consent, and R. *v. Wills* particularly, and I believe that that can be done without putting the trial in any - in any jeopardy at all.

So I'm going to go ahead with my decision here. So I apologize in advance, that I tend to be a bit wordy. So I have typed out a response to the *voir dire,* and it does go on a bit, so I hope that you can be somewhat patient ... (recording stops) through it. I assure you that I spent a fair amount of time in reviewing the material that was given, the exhibits that were given to me. I had access to the disk of the two days, and used that to go back over and listen again to comments. So here is my decision on the *voir dire.*

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RULING ON VOIR DIRE

MACKEY, J.P. (Orally):

A Ministry of the Environment judicially-approved search warrant was issued on July the 3rd, 2007, and executed on July the 4t'', 2007, on Lacombe Waste Services. The search warrant contained a number of parameters that confined the search generally to business records relating to waste shipments between Lacombe Waste Services and four specific companies, covering the period August 22°d, 2005 to

December 5th, 2006.

We know that somewhere between 2:45 p.m. and 3:08 p.m., Officer King requested consent to the seizure of discovered documents which were outside of the search warrant parameters. The request included a process of sealing the documents, if no consent was given, and returning the next day for a judicially-approved search warrant.

The seminal case presented at trial during the *voir dire* is that of R. v. *Wills* from the Ontario Court of Appeal dated 1992. This case confirms the standard test; that is, to establish that on the balance of probabilities, six criteria must be met in the application of the waiver doctrine.

Therefore, the issue at hand is whether the Crown has established, more likely than not, that George Neilson, as the president of Lacombe Waste Services, and the person in charge at that time, voluntarily consented to the taking of documents not listed as part of the parameters identified in the search warrant. The issue relates directly to Exhibit A, which includes typed correspondence between Mark Sklivas and Tom Neilson dated September 18th, 2002, with attachments. This document forms the basis for count number 4 covering the period August 8th, 2002, and ending on or about September 18th, 2002, at the Ottawa site.

The R. v. *Wills* criteria are, on a

balance of probabilities, that:

> (i) there was a consent, **express or** implied;
>
> (ii) the giver of the consent had the authority to give the consent in question;
>
> (iii) the consent was voluntary ... and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
>
> (iv) the giver of the consent **was aware** of the nature of the police conduct to which he ... was being asked to consent;
>
> (v) the giver of the consent **was aware of** his ... right to refuse to permit the police to engage in the conduct requested, and
>
> (vi) the giver of the consent **was aware** of the potential consequences of giving the consent.

Given these strict criteria, the Court of Appeal has obviously chosen to raise the bar regarding search warrants and the consent required in dealing with items outside of the parameters of the warrant itself.

In so doing, the Court has reaffirmed the importance and central role in searches of the warrant and the integrity of the judicial process of review and authority. The *Wills* decision speaks to the reasonable controls required for the state to exceed their judicially-approved authority.

There are three important aspects relating to reasonable control in my decision. Firstly, regarding the issue of consent, the case of R. *v. Colson* refers to it as being "informed, express and voluntary," as well as "voluntary, informed and knowledgeable," to put it in another way. The common theme is that a person in authority must be well aware of what is being requested and the consequences, along with the inherent right of a citizen to refuse and/or seek counsel. Secondly, the *Wills* case further notes that:

> The force of the consent given must be commensurate with the significant effect which it produces.

Thirdly, *R. v. Korponay* also notes that silence or mere lack of objection does not constitute a lawful waiver. This speaks to one's awareness and comprehension of the rights and obligations regarding consent.

The exhibit book entered by defence and noted as both "Number 3" and "Exhibit 3," with admitted documents under Item 11 titled "Search Warrant" on page 31, lists all of the warrantless seizures, with documented times starting at 10:32 a.m. and finishing at 6:40 p.m., according to the exhibit register. This register lists Exhibit A as being catalogued at 3:38 p.m. This became a contentious issue as the outcome may suggest that non-warrant documents were only discovered after consent

was given.

There are other discrepancies noted regarding the critical meeting with George Neilson between Exhibit C and D which form the notes of Officers King and Sudds. Investigator Sudds lists the meeting at 2:45 p.m. while Investigator King shows a time of 3:08 p.m. This may be nothing more than one's belief as to when the conversation began as opposed to being underway. However, Investigator Sudds also notes a consent given by George Neilson at 3:28 p.m. while Investigator King shows a time of 4:25 p.m. This is too long a period of time to accept the previous assumption. However, this does not reveal anything more than recording discrepancies, even though we know that Bell Telephone records show a 10-minute long call to legal counsel commencing at 3:16 p.m. and finishing at 3:26 p.m.

Given that George Neilson testified that he immediately went from his office into the hallway and spoke to Investigator King, it is likely that Investigator Sudds' time of consent at 3:28 p.m. is the most accurate. Although there is some question as to who was at the original meeting to obtain consent, it is undeniable that Investigator King met, at the minimum, with George and Tom Neilson and asked for George Neilson's consent for, depending on whom you believe, a single package of documents or all documents found

outside of the search warrant parameters. The notes of the two officers indicated a request for documents, but George and Tom Neilson are equally adamant that they believed only one document package was requested.

It was noted that the Lacombe staff was fully compliant, and indeed one staff member was considered invaluable in the search process. It is reasonable to believe that this fulsome cooperation, particularly beyond any legal requirement, was supported by management. This is consistent with George Neilson's comments about being engaged when communicating with the Ministry of the Environment. George Neilson claims that Investigator King came into his office with a package of papers, which he denies was the Exhibit A that the investigator indicated. Of note, defence took the position that Exhibit A had not even been found at the time of the meeting, given the recorded time.

Mr. Neilson did say that Investigator King told him they had uncovered more information that they would like to take and needed his consent. He further said that there was no requests for any other documents and there was only the one meeting.

When shown Exhibit E4, George Neilson confirmed that to be the package he reviewed with legal counsel which he said related to one truck pulling two loads. He further indicated that the paperwork related to a

company called Techni-Cite. This was confirmed by Tom Neilson and Paul Nagy.

As noted, there was an issue raised regarding the number of meetings, who was in attendance and who heard what, but I am satisfied that George Neilson met with Officer King and that George and Tom Neilson, as well as Paul Nagy, reviewed the document package privately, that legal counsel was contacted by phone, and that George Neilson almost immediately spoke to Investigator King and gave his consent.

Before dealing with that specifically, let me review the *Wills* criteria again and answer the questions that have been raised:

1. Was there consent? Yes, and it was expressly given after a discussion with legal counsel;
2. The giver of the consent George Neilson certainly had the authority to give the consent in question;
3. The consent was voluntary when one considers that George Neilson took time to review the document and speak to legal counsel for some ten minutes before rendering a decision, although the way in which the available options were presented as "Either give permission or we'll seal the documents and return tomorrow with another warrant," came dangerously close to negating the

freedom to choose otherwise;

4. There is, however, a question as to whether the giver of the consent was aware of the nature of the investigator's conduct to which he was being asked to consent, and I will return to that issue;

5. The giver of the consent was certainly aware of his right to refuse to permit the Ministry of the Environment to engage in the conduct requested, given the instructions from Officer King, as well as presumably from legal counsel, and finally;

6. The giver of the consent was aware of the potential consequences of giving the consent as he sincerely stated that, when it came to the Ministry of the Environment, he was totally zoned in.

A good point was made by Mr. Herlihy when he asked George Neilson why he hadn't filed an application for the return of the documents right after the search warrant. Why wait to raise it at trial and not immediately? If one felt that the state had intruded beyond their authority into your business affairs, it might seem a normal reaction to seek a legal remedy at that time. Mr. Neilson replied that he didn't see the point, and in fact said, "The

cat's out of the bag."

Now, this might be seen as an admission to some wrong, but given what I have seen of Mr. Neilson, it appears more likely to be a colloquial manner of speech referring only to the fact that they had already taken things so, as he said, "I didn't see the point."

The critical point in this *voir dire* can be stated as: What was it that George Neilson believed he was consenting to? He certainly consented to something, and that is undeniable.

So let me return to the crux of the matter. Investigators King and Sudds both say the request for consent was based on finding certain documents of interest and wanting to take others as they came across them. Indeed, the process of collecting dozens of warrantless documents continued for over eight hours.

This is probably as good a time as any for the Court to turn its attention to the issue of credibility. Neither the investigators nor the management team at Lacombe Waste Services have shown any clear lack of credibility to the Court. There may be issues of precision in note-taking, questions of recollection from almost three years ago, and differences as to what was said or presented, but none of this rises to the level of concern. I am prepared to see this as a weakness in word-of-mouth agreements as

opposed to any greater concern, and even though credibility is important to the Court, particularly for officers of the government, the main issue at hand is consent as defined by R. v. *Wills.*

The evidence presented by the investigators, including their notes, is not sufficient to undermine the firm position presented by George and Tom Neilson throughout cross-examination regarding the document they reviewed or the consent given. There is no conclusive evidence to support the assertion that any 2002 documents were shown to George Neilson at any time.

Similarly, the 2005 Chemtech document listed as Exhibit B appears to fall within the warrant parameters and, therefore, not a warrantless search issue. I must accept the defence position that there are clear deficiencies in regards to these documents.

It is also patently unreasonable to believe that the president of any company, after seeking legal counsel, would acquiesce to a blanket approval for inspectors to take whatever documents they wanted that were outside of the judicially-approved search warrant. Even if I accept that there was a misunderstanding regarding what document was ultimately reviewed and understood to be at issue at that time, it is too difficult to imagine a corporation, with legal advice, agreeing voluntarily to such an open-ended

fishing expedition.

Therefore, on this *voir dire,* the Court rules that it is more likely than not that proper consent was never given for any document outside of the search warrant parameters except that of Exhibit E4. There is no proof that the consent represented an informed, knowledgeable and unequivocal waiver, with the exception of the noted Techni-Cite package. The force of consent cannot be said to be commensurate with the effect, and any lack of objection on Mr. Neilson's part does not constitute a lawful waiver.

In the end, it appears to the Court that this could have been avoided by providing a written list for the person in authority to review. It may not have produced the sought after results but it certainly would have come significantly closer to confirming consent.

* * * * * * * * * * *

THE COURT: I should've asked you in advance, just because of the time it took to read that, whether you would like to have or whether it would be appropriate to have a short break, at this point, so that you can just consider the effect of this, or whatever procedures you want to follow, at this point, or whether we just immediately move into the trial proper.

MS. SAXE: Your Worship....

MR. HERLIHY: We're going to ask for a short break just so that Mr. - Officer King can