COURT OF APPEAL

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA, BEFORE THE HONOURABLE JUSTICE VERHOEVEN, SITTING WITH A JURY, FROM THE VERDICT PRONOUNCED ON THE 9TH DAY OF JULY 2022, AND FROM THE SENTENCE PRONOUNCED ON THE 12TH DAY OF OCTOBER 2022.

REX

RESPONDENT

v.

AMY ELYSIA SORANNO (CA48615)
NICHOLAS STEVEN GEORGE SCHAFER (CA48616)

APPELLANTS

APPELLANTS' JOINT FACTUM

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OPENING STATEMENT

2. The Appellants, Nicholas Schafer and Amy Soranno, were convicted by a jury of one count each of mischief and break and enter to commit an indictable offence, with both charges arising from a temporary and peaceful occupation of the Excelsior Hog Farm on April 28, 2019. The offences were committed to draw public attention to the condition of the animals raised and slaughtered in secrecy at the farm. While the protest was upsetting to the farm's owners, the Appellants caused no damage and did not impede access to the property generally. Nonetheless, the conviction implies that the Crown *did* establish that the actions at least temporarily disrupted performance of some farm chores, including insemination of the female breeding pigs.

3. This appeal is founded on two separate errors made by the trial judge. First, at trial, the Appellants unsuccessfully attempted to admit video evidence of the farm's operation to show why they felt compelled to act and establish a fuller picture of the extent to which they intended to "obstruct, interrupt of interfere with the *lawful use*, enjoyment or operation of property". The trial judge refused to admit it, concluding that the potentially unlawful treatment of the pigs was irrelevant. The decision led directly to a guilty verdict. The Appellants were prevented from showing that the unlawful use of property affected the extent to which their acts "obstructed" the complainants. The ruling also eliminated any possibility of arguing that the Appellants *believed* that that their actions were lawful, providing them with a colour of right for their conduct.

4. Second, given the Crown's theory that mischief was caused by the obstruction of farmers trying to do chores and breed certain pigs, the trial judge incorrectly admitted evidence from a veterinarian who discussed the importance of biosecurity protections for the animals. The evidence was prejudicial to the defence, as it could only have been used by the jury to "punish" the Appellants for putting the animals at risk, when there was no evidence to show this occurred, and, even if it did, this fact had no impact on any offence for which the Appellants were charged.

PART 1 – STATEMENT OF FACTS

A. Overview

5. The Appellants, Nick Schafer and Amy Soranno, along with a third accused, Roy Sasano, were tried by a jury on an indictment listing five separate criminal counts: three for breaking and entering and commit an indictable offence (mischief) and two for mischief. After a successful application to direct a verdict on three counts,[1] one charge each of break and enter and mischief remained. The jury deliberated for a day before returning finding the Appellants guilty on all four counts. Mr. Sasano was acquitted.

6. The trial itself was preceded by a number of pre-trial applications, most of which are not relevant to this appeal. Over a week in late March and early April 2022, the trial judge ruled against the defence on seven separate matters:

a. Amy Soranno's statements to police were voluntary (unnumbered *voir dire*);[2]
b. The accused were not entitled to documents from the BC SPCA (*Voir Dire* #1);[3]
c. He found no breach of s 7 in respect of lost evidence (*Voir Dire* #2);[4]
d. The accused were not entitled to vet records held by Excelsior Farm (*Voir Dire* #3);[5]
e. Evidence seized from Soranno's cell phone was admissible (*Voir Dires* #4 & 5);[6]
f. Evidence seized from Schafer's cameras was admissible (*Voir Dire* #7);[7] and,
g. The expert evidence of Dr. David Dykshorn was admissible (Voir Dire #6).[8]

7. At trial, after an eighth *voir dire*, the trial judge refused to permit the defence to ask questions or adduce evidence directed at showing that the hogs at Excelsior Farms were subjected to ill treatment by the farm's owners.[9]

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[1] Ruling on Directed Verdict Application, *Trial Transcript*, Volume 2 at 582/44- 583/2.
[2] *R. v. Soranno*, 2022 BCSC 566.
[3] *R. v. Sasano*, 2022 BCSC 711.
[4] *R. v. Sasano*, 2022 BCSC 712.
[5] *R. v. Sasano*, 2022 BCSC 713.
[6] *R. v. Sasano*, 2022 BCSC 714.
[7] *R. v. Sasano*, 2022 BCSC 715.
[8] *R. v. Rigear*, 2022 BCSC 1123.
[9] *R. v. Soranno*, 2022 BCSC 1432.

8. Ground #1 of this appeal contests the ruling on *Voir Dire* #8, though aspects of *Voir Dire* #2 will also be touched on. Ground #2 of this appeal addresses *Voir Dire* #6, though the Appellants are not specifically contesting the decision to qualify Dr. Dykshorn as an expert prior to trial. The remaining rulings, including the unnumbered ruling, are not at issue in this appeal.

9. The Crown called ten witnesses. Leaving aside five police officers called to authenticate various exhibits or provide uncontested supporting details, the Crown case rested on the testimony of five witnesses:

- Cst. Kevin Murray, the primary officer tasked with resolving the protest. He spoke with protesters and dealt with the farm owners;
- Calvin and Jeffrey Binnendyk, the farm owners who provided key evidence relating to both counts of break and enter and mischief;
- Cst. Jaycene Mitchell, the officer tasked with extracting text messages from Ms. Soranno's phone that were tendered as admissions at trial; and,
- David Dykshorn, a veterinarian who provided factual evidence in terms of his observations at the farm during the protest, and opinion evidence about biosecurity on hog farms more generally.

10. The defence called no evidence.

B. The Facts

11. Three brothers, Calvin, Ray and Jeff Binnendyk [referred to below as Calvin, Ray and Jeff, respectively], own a 120 acre hog farm – Excelsior Farms – in Abbotsford, British Columbia. The farm holds anywhere from 13,000 to 15,000 hogs at a time in a number of structures.[10] Excelsior Farm is a "farrow to finish" operation. It breeds the sows through artificial insemination. Piglets are born there, and get raised all the way up to slaughter weight. Breeding stock are kept as well, to rebreed sows and females, and to have litters of piglets repeatedly, as part of a "closed operation".[11]

12. The process begins with female sows entering a gestation crate for 5 days. A farmer walks behind the crates with a boar to see which sows are in heat. The boar does

[10] Evidence of C. Binnendyk, Trial Transcript, Vol. 1 at 353/1-7; Vol. 2 at 412/40- 415/7.
[11] Evidence of D. Dykshorn, Trial Transcript, Vol. 2 at 495/19-37.

not impregnate the sow, however. Instead, a farmer artificially inseminates those ready to breed. Once inseminated, sows move to another small crate for 3 weeks. After that time, they move to a group pen for most of the remainder of their pregnancy.[12] Days before going into labour, sows are moved into a farrowing crate for the birth of the piglets and the next four weeks while babies nurse. At all times, sows remain indoors, usually in small crates, and, aside from the time in group housing, they are kept alone.[13] The cycle repeats until sows can no longer breed, at which point they are slaughtered.[14] Male pigs are grown until they reach an appropriate weight, at which point they are slaughtered.

13. In March of 2019, Calvin found the remnants of a camera battery chewed up in the hallway of their barn. Calvin and Jeff subsequently located two other batteries, one in the farrowing room and another at the loading dock, and a hidden camera. After watching a short excerpt of video recorded on the camera, they called the police.[15] Later, they installed cameras of their own to monitor activity on the farm.[16]

14. This was not Excelsior's first time being concerned about people watching their operation. Calvin testified that CTV had recently run a story outlining allegations of poor animal welfare practices at the farm. That coverage had hurt the family's feelings because it contained "disinformation" and CTV did not speak to the family before airing it.[17]

15. On April 28, 2019, a large group of people arrived in a bus at Excelsior Farm. Once alerted, Calvin and Jeff raced to intercept the "visitors" moving towards the hog barn. They attempted to stop people from entering the barn, but were unsuccessful. 30-40 protestors entered the breeding room, while others stayed outside. The visitors were described as dressed in "full like white suits on and holding flowers saying it was a peaceful protest".[18] Police were called to attend at the facility.[19]

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[12] Evidence of C. Binnendyk, *Trial Transcript*, Vol. 2 at 419/20-35
[13] Evidence of C. Binnendyk, *Trial Transcript*, Vol. 2 at 416/35- 419/30.
[14] Evidence of C. Binnendyk, *Trial Transcript,* Vol. 2 at 420/1-38.
[15] Evidence of C. Binnendyk, *Trial Transcript,* Vol. 1 at 342/45- 344/17; J. Binnendyk, Vol. 2 at 435/1-29.
[16] Evidence of J. Binnendyk, *Trial Transcript*, Vol. 2 at 435/33-41
[17] Evidence of C. Binnendyk, *Trial Transcript*, Vol. 2 at 426/20-40; 431/7-29; J. Binnendyk, Vol. 2 at 479/39-480/17; 482/19-35.
[18] Evidence of C. Binnendyk, *Trial Transcript*, Vol. 1 at 344/42- 345/41.
[19] Evidence of C. Binnendyk, *Trial Transcript*, Vol. 1 at 345/47- 346/30; J. Binnendyk, Vol. 2 at 437/1-36.

16. Sgt. Kevin Murray of the Abbotsford Police service attended at the scene and entered the barn where the Appellants and others were located. He described it as a "section of the barn… lined with pigs in -- in tight enclosures next to each other, and then there were the individuals standing in front of each of these… cages.[20]" He encountered the Appellant Soranno, who identified herself as a spokesperson for the group. Murray advised Soranno the gathering was illegal, and wanted to know what the intentions were.[21] Soranno replied that they wanted the media to be able to tour the barn, and then the group would leave voluntarily.[22] Murray then secured agreement from the Binnendyks for the media to tour the barn, accompanied by Soranno – who had to remain quiet during the tour – and a veterinarian.[23] According to Murray, "Ms. Soranno was true to her word. She didn't utter a peep [or] make any comments to anybody, so she fulfilled absolutely her end of the deal.[24]" All of the protestors then left the barn voluntarily, including the Appellants, and were arrested. Murray also testified that during the two hours for which he was on site, "the normal operations of the barn couldn't continue".[25]

17. The protestors stayed for six hours, though arresting them took most of that time. Calvin testified that as a result of the trespass, "there was a bunch of chores that definitely didn't get done. The breeding never got done that day. And probably a bunch more that didn't get done that didn't even realize at the time because we're a bit kerfuffled.[26]"

18. While the protest went on inside the barn, a group of protestors that did not include the Appellants were outside, but on the property, arguing with a group of Excelsior Farm supporters. There was yelling and tension between the two groups.[27]

19. At all times, Calvin and Jeff were able to go where they wanted on the farm without being impeded, except for a portion of the breeding room referred to as the "breeding aisle", which could not be entered "because there was cops on either side and it was filled

[20] Evidence of K. Murray, *Trial Transcript*, Vol. 1 at 283/37-42.
[21] Evidence of K. Murray, *Trial Transcript*, Vol. 1 at 283/46- 284/29.
[22] Evidence of K. Murray, *Trial Transcript*, Vol. 1 at 288/8-13
[23] Evidence of K. Murray, *Trial Transcript*, Vol. 1 at 288/14- 291/23
[24] Evidence of K. Murray, *Trial Transcript*, Vol. 1 at 291/24-26
[25] Evidence of K. Murray, *Trial Transcript*, Vol. 1 at 327/40-41
[26] Evidence of C. Binnendyk, *Trial Transcript*, Vol. 1 at 347/23-27.
[27] Evidence of K. Murray, *Trial Transcript*, Vol. 1 at 309/21- 310/18; C. Conway, Vol. 1 at 329/23-332/35.

with people.[28]" In cross-examination, Calvin admitted that all of the barn chores for that day were performed except for the breeding of sows, though not to their full "potential". He did not attempt to breed the sows at all.[29] Calvin testified about how upset he and his family were by the intrusion.[30] Jeff, who was not scheduled to work that day, spent the entire day dealing with the protest and associated matters.[31]

20. In support of its case, the Crown also filed videos, pictures and messages gathered from phones and cameras seized from the Appellants. The messages revealed that the Appellants were involved in setting up the hidden cameras and that they intended to trespass onto Excelsior Farm to drum up media interest in the mistreatment of animals they believed was occurring there. There were also messages outlining some of the harms the group had seen on the hidden video footage.[32]

PART 2 ERRORS IN JUDGMENT

21. The Appellants raise the following grounds of appeal:

(1) The trial judge erred in excluding defence evidence showing the poor treatment of pigs on the farm where the protest was held; and,

(2) The trial judge improperly addressed expert opinion evidence on the biosecurity risks posed by entering a farm.

[28] Evidence of J. Binnendyk, Trial Transcript, Vol. 2 at 480/41- 481/33.
[29] Evidence of C. Binnendyk, *Trial Transcript*, Vol. 2 at 422/30- 423/18.
[30] Evidence of C. Binnendyk, *Trial Transcript*, Vol. 1 at 348/41- 349/3.
[31] Evidence of J. Binnendyk, *Trial Transcript*, Vol. 2 at 435/1-29; 457/14-38.
[32] Evidence of J. Mitchell, *Trial Transcript*, Vol. 2 at 501-559.

PART 3 ARGUMENT

GROUND 1: THE TRIAL JUDGE ERRED IN EXCLUDING DEFENCE EVIDENCE SHOWING POOR TREATMENT OF PIGS ON THE FARM

A. Overview

22. In a pre-trial decision, the trial judge held that treatment of farm animals at Excelsior Farms was irrelevant to the case, despite it providing the underlying basis for the protest that occurred.[33] At trial, he reiterated this point, concluding "that allowing cross-examination on the evidence would be inappropriate in this case… I must be mindful of a number of factors, one of which is the distorting effect of irrelevant evidence going before a jury. Another is the obvious fact that the defendants have a political agenda in seeking to publicize the video evidence [which] was apparently illegally obtained.[34]"

23. The trial judge reached the wrong conclusion, for four reasons. First, the evidence was relevant to address whether the owners of the farm were engaged in the "lawful use" of their property when they were obstructed by the Appellants. Second, if the treatment of the animals did not constitute an unlawful use of property, the evidence of serious harm being caused to the animals could have grounded the *belief* that such use was unlawful, providing the Appellants with a colour of right in their actions. Third, the evidence provided important proof regarding the motivation for entering the property. Finally, the trial judge focused on irrelevant considerations in excluding the evidence.

24. In summary, the trial judge concluded at an early stage that this trial needed to be focused narrowly on the Appellants' conduct without allowing for any examination of what had provoked it. The farm evidence was critical to several aspects of the defence case, and its exclusion compromised the Appellants' right to a fair trial.

B. Factual Background

25. Though it was the trial judge's ruling on Voir Dire #8 that ultimately prevented the Appellants from receiving a fair trial, the seeds for this ruling were planted in a pre-trial

[33] *R. v. Sasano*, 2022 BCSC 712 (lost evidence had no impact on accused).
[34] *R. v. Soranno*, 2022 BCSC 1432 at para. 71.

application. In Voir Dire #2, the Appellants sought to have the proceedings stayed on the basis of lost evidence. There was no dispute that: (1) police lost the SD video cards obtained from the Binnendyks documenting hours of footage concerning the treatment of animals on the farm;[35] (2) the cards should have been preserved; and (3) the manner in which the evidence was handled constituted unacceptable negligence.[36]

26. Notwithstanding these findings, the application was dismissed. The trial judge concluded that the evidence had little relevance. Despite not hearing full submissions on the matter, he found it "highly unlikely that the question of "lawful use" will in fact be an issue at the trial.[37]" He went on to state that "there is no suggestion that the Binnendyks and Excelsior farm were not entitled to use the property as a pig farm [and] a breach of a farm Code of Practice would not transform their lawful use into an unlawful use.[38]"

27. At trial, the matter arose directly during cross-examination of Calvin Binnendyk. After Calvin testified in chief, defence counsel sought to probe the matter of lawful use by asking about the treatment of pigs on Excelsior Farm. Before this line of questioning was halted by the trial judge, counsel managed to extract the following:

- Calvin was adamant that all applicable laws were respected on the farm;[39]
- At the same time, he was unaware of specific rules about boars and general requirements involving hog treatment. His basis for believing he complied with existing laws he didn't know of was that "I'm a farmer and I do my good work every day and I was born and raised on the farm, I just -- I just know what I know".[40]
- Examination of the 13,000-15,000 of the pigs to check their health needs was generally performed by walking through the farm and looking at them;[41]
- The farm operators are always gentle with the pigs;[42] and,
- He never prodded pigs with an electric prod (a forbidden practice) or kicked them, though he did not recall whether it ever happened on the farm.[43]

[35] *R. v. Sasano*, 2022 BCSC 712 at para. 4.
[36] *R. v. Sasano*, 2022 BCSC 712 at para. 20.
[37] *R. v. Sasano*, 2022 BCSC 712 at para. 40.
[38] *R. v. Sasano*, 2022 BCSC 712 at para. 47.
[39] Evidence of C. Binnendyk, *Trial Transcript*, Vol. 1 at 353/34-41.
[40] Evidence of C. Binnendyk, *Trial Transcript*, Vol. 1 at 358/4-24.
[41] Evidence of C. Binnendyk, *Trial Transcript*, Vol. 1 at 355/27-36.
[42] Evidence of C. Binnendyk, *Trial Transcript*, Vol. 1 at 357/5-35.
[43] Evidence of C. Binnendyk, *Trial Transcript*, Vol. 1 at 356/30-30.

28. At a break, the trial judge questioned the relevance of the cross-examination, expressing his conclusion that "I don't see the relevance of any of this." Notwithstanding the lack of a Crown objection, he demanded the defence establish why the questioning should be permitted.[44] After submissions, the trial judge closed this line of cross, and also excluded a video prepared from recordings obtained by the Appellants. That video, which the trial judge watched, showed dead, diseased and distressed pigs, pigs being prompted by electric prods and baby pigs tossed around. The Binnendyks were often present.[45]

29. Following his earlier ruling, the trial judge concluded the evidence had no relevance. With respect to the need for any interference to affect "lawful use", he concluded that the case law revealed "a fairly narrow compass to the concept of lawful use, enjoyment, or operation of property". The trial judge framed the question as being whether mischief would be negated "if an accused can show some illegal activity on the part of a lawful owner, operator, etc., having some connection with the property, then the lawful use or enjoyment or operation of the property could be challenged or rejected.[46]" He expressed concern that charges of mischief would always be subject to proof "that there were no unlawful activities… in some way related to the property, or the use of the property, or enjoyment of the property, in order to make out the offence".[47]

30. As a result of these conclusions, the trial judge held that he was obligated to exclude all evidence of this sort as irrelevant.[48]

C. Exclusion of Defence Evidence

31. Relevance as an evidentiary construct was canvassed in detail by the Supreme Court in *R. v. Schneider*,[49] released shortly after *Voir Dire* #8. In *Schneider*, the Court emphasized that relevance considers whether evidence tends to increase or decrease the probability of a fact at issue. Rowe J. noted that "[t]he threshold for relevance is low and judges can admit evidence that has modest probative value." Furthermore, "[a]

[44] Discussion, *Trial Transcript*, Vol. 1 at 359/14- 360/18.
[45] *R. v. Soranno*, 2022 BCSC 1432 at paras. 31-32.
[46] *R. v. Soranno*, 2022 BCSC 1432 at para. 49.
[47] *R. v. Soranno*, 2022 BCSC 1432 at paras. 55-57.
[48] *R. v. Soranno*, 2022 BCSC 1432 at para. 70.
[49] *R. v. Schneider*, 2022 SCC 34.

judge's consideration of relevance "does not involve considerations of sufficiency of probative value" and "admissibility . . . must not be confused with weight".[50]

32. Though it was not the focus of the *voir dire* ruling, it is worth noting that trial judges should be very reluctant to exclude relevant defence evidence. Because of the "fundamental tenet of our judicial system that an innocent person must not be convicted… it follows… that the prejudice must *substantially* outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law.[51]"

D. Lawful Use

33. The trial judge's decision to exclude the evidence in question was predicated on the treatment of pigs being irrelevant to the question of lawful use. In the process, he made two legal errors. First, his interpretation of "lawful use" is inconsistent with the jurisprudence, which holds that the phrase requires proof that the alleged mischief interfered with a *legal* exercise of property rights. Second, by treating all uses of property equally, he ignored the fact that animals are a very unique form of "property" and that limits placed upon their care and handling by a variety of laws restrict the means by which they can be "used, operated or enjoyed" in a lawful manner. In effect, the special designation of animals in law makes a consideration of lawful use essential to any assessment of whether mischief took place.

(i) *Lawful Use is Tied to Property Rights*

34. The trial judge concluded that despite Parliament's express requirement that mischief interfere with the "lawful use, enjoyment or operation of property",[52] the Appellants could not rely upon "some illegal activity on the part of a lawful owner, operator, etc., having some connection with the property" as a way of challenging proof of this element.

[50] *R. v. Schneider*, 2022 SCC 34 at para. 39.
[51] *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 611. See also *R. v. Grant*, 2015 SCC 9 at para. 19.
[52] Interestingly, the French version of the Code uses the term "légitime", which translates to "legitimate", rather than "légal", which can only be understood as "lawful".

He relied primarily upon his interpretation of the clause derived from four authorities: *R. c. Lévesque*; *R. v. Janusas*; *R. v. Klimowicz*; and *R. v. Manoux*.[53]

35. *R. c. Lévesque*[54] is the most significant, as it is the only appellate level authority, a recent decision of the Quebec Court of Appeal. But it does not stand for the proposition for which it was cited, and it certainly does not "giv[e] a fairly narrow compass to the concept of lawful use, enjoyment, or operation of property",[55] as the trial judge suggests. On the contrary, the decision ties "use, enjoyment or operation" of property to a *lawful or legitimate* exercise of those rights. As Gagnon J.A. wrote for the Court, referring to the Court's earlier decision in *R. v. Drapeau*:[56]

> [H]ow can one claim to use property legitimately without this use being based on a recognized right? The right to enjoyment of property… must necessarily find a basis in the law to be considered as legitimate (" lawful use"). Judge Chamberland recognizes this himself when he speaks of "the act of drawing from property that a person legally holds", which seems to me to be the counterpart of the opinion of Judge Fish when the latter speaks an offense "in relation to property or rights in property".[57]

36. In other words, for mischief to occur the act impeded must involve a "legitimate" or lawful use, operation or enjoyment of property. The Code does not protect interferences with illegal conduct with property.

37. *R. v. Janusas*[58] takes a similar approach. It accepts earlier Ontario authority holding that purely unlawful uses of property cannot found the basis of a mischief complaint.[59] It goes on to conclude that when there are unlawful *and* lawful uses, it remains mischief to obstruct the lawful uses. *R. v. Manoux*[60] is far removed from the case

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[53] He also purported to rely upon *R. v. McQueen*, 2022 QCCQ 2801, though *McQueen* does not deal with this question.
[54] *R. c. Lévesque*, 2022 QCCA 510.
[55] *R. v. Soranno*, 2022 BCSC 1432 at para. 46.
[56] *R. v. Drapeau* (1995), 96 C.C.C. (3d) 554 (Que. C.A.). In that case, at para. 32 [Emphasis in original], Fish J.A. (as he then was) noted that "enjoyment" was restricted to "the *entitlement or exercise of a right.*"
[57] *R. c. Lévesque*, 2022 QCCA 510 at para. 68 [TRANSLATION]. In original: [C]omment prétendre se servir légitimement d'un bien sans que cet usage se fonde sur un droit reconnu? Le droit à la jouissance d'un bien, le *right of enjoyment*, doit nécessairement trouver une assise dans la loi pour être considéré comme légitime (« *lawful use* »). Le juge Chamberland le reconnaît lui-même en parlant de « l'action de tirer d'un bien qu'une personne détient légalement», ce qui me semble être le pendant de l'opinion du juge Fish lorsque ce dernier parle d'une infraction « in relation to property or rights in property».
[58] *R. v. Janusas*, 2010 ONSC 2068.
[59] *R. v. Kirchner*, 2005 ONCJ 45.
[60] *R. v. Manoux*, 2017 ONCJ 58.

at bar, involving a situation where the accused attempted to benefit from *his own* unlawful subletting of a property to avoid a mischief charge for surreptitiously recording the movements of his tenants.

38. *R. v. Klimowicz*[61] comes closest to the trial judge's position of property use being irrelevant, though it also has a major distinguishing factor, in that the accused broke and entered even though he "could not have known when he entered on the property that its use was unlawful (assuming it was). He may have suspected that was the situation, but that expectation is not enough to justify the unlawful entry." At its highest, this case suggests (without authority) that a person must have an honest belief in unlawful use before being able to raise this as an issue in defence of a mischief charge.

39. As such, there exists authority for the proposition that a mischief does not result where the impugned conduct interrupts the *unlawful* use, operation or enjoyment of property. This is exactly what the statute says, and this Court should adopt the Quebec Court of Appeal's approach to the law. Ironically, the trial judge appears to have recognized the correctness of this approach, though he removed the jury's ability to rule on the matter. In his charge to the jury, he stated:

> Lawful use means that the user of the property has the legal right to use the property in the way it was being used when the obstruction, interruption, or interference that the Crown alleges occurred…
>
> There is no evidence in this case that the owners of the barn were not permitted to use it in the way it was being used. I tell you that, as a matter of law, the owners of the barn were lawfully entitled to use, enjoy, or operate the barn for raising pigs.[62]

40. The trial judge is correct, and there was no such evidence before the jury. But the trial judge's ruling was the cause, excluding all the proof that could have led the jury to decide anything other than what they were directed.

(ii) *Animals are Not Property in the Ordinary Sense*

41. All of the cases set out above appear to recognize that lawful or legitimate use is an element of the offence, and that interference with an unlawful or illegitimate use does not constitute a mischief. What they do not address fully is how to characterize unlawful

[61] *R. v. Klimowicz*, 2021 ONSC 2589 at para. 21.
[62] Charge to the Jury, *Trial Transcript*, Vol. 2 at 667/35-39; 668/9-14.

or illegitimate uses. For the purpose of this case, the question should be: did the Appellants' action interfere with a lawful property use? The trial judge unhesitatingly answered for the jury that "it did", because the farm owners were engaged in a lawful activity – hog farming – and could use and operate their property as they saw fit. Unlawful conduct towards these hogs was deemed irrelevant to the questions being decided.

42. With respect, the matter is not so simple. The trial judge recognized that "lawful use" does require *some* analysis of the property's character, and the rights being exercised, noting that an argument about lawful use *might* be available if someone were charged with interfering with a lab dedicated to methamphetamine production. But he saw two problems with extending that analogy. The first was that "it might be said that the illegal use of the property [in that example] is of a more fundamental character".[63] The second problem was temporal, in that he saw no connection between the unlawful conduct on the videos and the conduct interfered with on the morning of the protest.

43. It is easier to begin with the second concern first. The expressed concern about temporality is interesting, especially in light of the lost evidence claim that focused on recently obtained video of the farm's operations. But ultimately temporality is an evidentiary question, not a legal one. Whether or not the Appellants' had sufficient evidence to raise a claim of unlawful use – in that there was *some* evidence to support that proposition – could only be addressed after the evidence was tendered.

44. The Appellants had every right to question the Crown witnesses on the types of unlawful conduct performed at the barn, and the witnesses' knowledge of it. The temporal nature of the examples related to the weight and probative value of the evidence, not its relevance. To put it another way, the Appellants were prevented from showing that the activities they impeded – the insemination of the hogs, for example – were unlawful, because they were not permitted to ask any questions on this topic, or show examples of other unlawful conduct that might be revealing. A lack of temporality is a factor in admission – but it does not define relevance.

[63] *R. v. Soranno*, 2022 BCSC 1432 at para. 57.

45. The trial judge's fundamental concern appears to be based on concerns about a "slippery slope" that would lead to more acts of unpunishable mischief:

> The implications of the defendants' argument are worth considering. Every piece of real property, in particular, is subject to a myriad of federal, provincial or local laws, especially here in terms of, for example, animal raising or husbandry. Whether the real property is a house, a factory, a farm, or a business, the question is whether other activities that take place on the real property are relevant to s. 430. Put another way, is Parliament's intention in saying "lawful use" in s. 430 so wide that if there is a challenge, the Crown must establish that there were no unlawful activities that are in some way related to the property, or the use of the property, or enjoyment of the property, in order to make out the offence? Are those activities to be the subject of offences and trials under s. 430?

46. This "slippery slope" description of the Appellant position does not reflect their argument. The question is not whether "the Crown must establish that there are *no unlawful activities* that are in some way related to the property", but whether the accused are permitted to suggest that the use of property they impeded was unlawful. This ultimately requires an examination of the property use and the rights associated with that property, but it does not mean that unlawful activities in some way "related to the property", like a housing code violation, render the use unlawful.

47. The trial judge actually recognized that *some* uses might be unlawful:

> The defendants argue, by analogy, that if real property, for example a residence, is being used for an illegal purpose, such as a marihuana grow operation or a meth lab, that the Crown would fail to establish lawful use or, of course, the accused could challenge that part of the element that the Crown must establish. The simple answer to that is that those are not the facts of the case before me. The case before me is a question of alleged mistreatment of the animals, and the issue is whether that is relevant... But I would note that in those examples, it might be said that the illegal use of the property is of a more fundamental character, and would have no apparent temporal connection to whatever the Crown might be alleging in such cases as to the obstruction, interference, or interruption.[64]

48. What the trial judge ignored is that there is *no real difference* between a "meth lab" and a barn that perpetuates cruelty and distress to animals on a constant basis.[65] Both properties are operated with unlawful purposes and outcomes with respect to the property rights being exercised. Moreover, in performing his "slippery slope" analysis the trial judge completely ignored the animals at the heart of this case. Unlike a home "meth lab", which

[64] *R. v. Soranno*, 2022 BCSC 1432 at paras. 55-57.
[65] To be clear, the Appellants are not asserting that this level of cruelty and distress was proven in this case, but that is primarily because the trial judge refused to permit evidence on this question.

cannot suffer harm, with property subject to a very small number of legal restrictions, because "a person's home is their castle",[66] animals are the *only* form of private property whose interests are protected *for their own benefit* by a myriad of regulations and statutes. As the Alberta Court of Appeal recently stated in *R. v. Chen*:[67]

> In *R v Alcorn*, the Court… state[d] categorically that animals are sentient beings and "not objects": para 41. The court also opined that, by enacting s 445.1 of the *Criminal Code,* "Parliament recognized, and intended that courts also recognize, that cruelty to animals is incompatible with civilized society": para 42. I agree that animals, sentient beings that experience pain and suffering, *must be treated as living victims and not chattels*. Smashing a pet through a window is not the same as smashing a window.

49. The Court in *Chen* recognized that animals are a special form of property, noting that "we have moved from a highly exploitive era in which humans had the right to do with animals as they saw fit to the present where some protection is accorded under laws based on an animal welfare model.[68]" This is not just the view of the Alberta Court of Appeal. In *R. v. D.L.W.*,[69] the Supreme Court of Canada stated that protecting animals is a "fundamental value". In her dissenting opinion (on other grounds), Justice Abella referenced the "transformed legal environment consisting of more protection for animals."

50. Both the federal and British Columbia government have promoted these changes, all of which increasingly chip away at an owner's ordinary right to use, control, ignore or dispose of (animal) property in any way that does not harm another person's private or public interest. In 2008, Parliament enacted changes to the sentencing provisions for animal cruelty offences.[70] In his opening remarks sponsoring the legislative proposal in the House, the Hon. Charles Hubbard noted the change in attitude by stating "[i]n this House and in the media the issue of animal cruelty has been getting more attention… It is very important that the animals within our society receive proper care, proper protection and proper concern by our legislators."[71]

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[66] *R. v. Stairs*, 2022 SCC 11 at para. 49.
[67] *R. v. Chen*, 2021 ABCA 382 at para. 27, referring to *R. v. Alcorn*, 2015 ABCA 182.
[68] *R. v. Chen*, 2021 ABCA 382 at para. 27, referring with approval to *Reece v. Edmonton (City),* 2011 ABCA 238 at para. 54, per Fraser CJA, dissenting.
[69] *R v DLW,* 2016 SCC 22 at paras. 69 & 141.
[70] *Criminal Code*, R.S.C. 1985, c. C-46, s. 445, as amended by *An Act to amend the Criminal Code (Cruelty to Animals)*, S.C. 2008, c.12.
[71] *House of Commons Debates*, 39th Parl., 1st Sess., No. 118 (26 February 2007) at 1110 (7278) (Hon. Charles Hubbard, (Miramachi, Lib.)[Emphasis Added]. This speech was made in respect of Bill S-213, the

51. The British Columbia *Prevention of Cruelty to Animals Act*[72] imposes many important restraints on the "rights" of property owners. Most importantly, it states that a person "responsible for an animal must not cause or permit the animal to be, or to continue to be, in distress." It also requires that "an operator engaging in a regulated activity [which includes farming] (a) *must comply* with each requirement and duty set out in, and (b)must not engage in any practice or carry out any procedure that is prohibited under a regulation respecting the regulated activity."

52. These legal enactments suggest that the treatment of animals is an important public concern. Moreover, they recognize the inherent vulnerability of animals, especially those used in a regulated setting, and restrict the ordinarily unencumbered right of owners to damage, ignore or destroy their property. It is wrong to conclude that the "fundamental character" of a property's use is more acute in the situation of a meth lab than a barn that is mistreating animals regularly, as the Appellant's believed this barn was.

53. In this case, the Appellants hoped to show that the farm they entered was not what it seemed, and was regularly engaged in harmful practices that were contrary to provincial and federal law. In the very limited cross-examination that did take place, they were able to set a foundation to demonstrate that the owners had little interest in knowing the legal requirements intended to protect animals from harms. Instead, one owner relied for his belief that all conduct at the barn was lawful on the fact that, "I'm a farmer and I do my good work every day and I was born and raised on the farm -- I just know what I know".

54. There was evidence available that would support the barn being used in a generally unlawful manner. This was not the case of interference with a house that extended over the legal property line, or with a car that emitted noise louder than permitted. The Appellants hoped to show that the fundamental character of this barn involved the unlawful use of animal property, and that could have raised reasonable doubt about an essential element of the offence.

predecessor of an identical Bill ultimately enacted (Bill S-203) after S-213 died when Parliament was dissolved for a federal election.

[72] The *Prevention of Cruelty to Animals Act*, RSBC 1996, c. 372, ss. 9.1, 9.2.

E. Colour of Right

55. Section 429(2) of the *Criminal Code* provides that "a person shall not be convicted of [mischief] if they act with… colour of right." The term "colour of right" operates to negate the basic application of s. 19 of the *Criminal Code* which provides that "ignorance of the law is no excuse". As Martin J.A. commented in *R. v. Demarco*,[73] "one who is honestly asserting what he believes to be an honest claim cannot be said to act "without colour of right", *even though it may be unfounded in law or in fact*."

56. A colour of right defence can be raised by anyone who honestly believes in a legal state of affairs that negates an element of the offence, even if that belief turns out to be incorrect. In this case, the claim would have focused on the Appellants' belief that an unlawful use of the barn to harm pigs made their occupation a non-criminal trespass and precluded a conviction for mischief. As the Supreme Court held in relation to an unlawful break and enter in *R. v. Simpson*,[74] "the respondents bore the burden of pointing to some evidence upon which a trier of fact could be left in a state of reasonable doubt about the… claim of a colour of right to occupy the commercial space".

57. In this case, the Appellants' belief that their conduct did not constitute mischief turned on the harm they saw being committed against the hogs on the farm property. In essence, their incorrect belief – premised on the assumption that this Court disagrees with the position on unlawful use asserted above – was that the farm's treatment of the pigs was harmful and *not* an exercise of their lawful rights as property owners. As such, interrupting this treatment did not constitute the offence of mischief.

58. Since the colour of right defence turned on a potential interpretation of whether the use of property was lawful, it can be construed as involving a proprietary right, the most common basis for the defence. Should this Court decide otherwise however, this construction is *not essential* to ground a claim of this type. In *Demarco*,[75] Martin J.A. concluded that while *most* colour of right claims focused on errors of a propriety nature, it was "not exclusively" restricted in this way. The leading case on the type of legal errors

[73] *R. v. Demarco* (1973), 13 C.C.C. (2d) 369 at para. 9 (Ont. C.A.).
[74] *R. v. Simpson*, 2015 SCC 40 at para. 32.
[75] *R. v. Demarco* (1973), 13 C.C.C. (2d) 369 at para. 9 (Ont. C.A.).

that can ground a colour of right defence is *R. v. Watson*.[76] Writing for the Newfoundland and Labrador Court of Appeal, Cameron J.A. held that the key to the defence was the honest mistaken belief in legal error – not the nature of the mistake:

> It is the mistake as to the ownership of property or right of possession which may be based on fact or law which generally grounds the defence. However, while the matter is clearer in the context of cases of theft, I hasten to add that a colour of right defence need not be confined to a claim to ownership or proprietary right. It may be a mere belief that the conduct was lawful.

59. In reaching this conclusion, Cameron J.A. cited approvingly from Professor Stuart for the proposition that:

> It has never been explained why this distinction should be made. It is not self-evident why a belief based on an out-of-date criminal law text that it is not stealing to take another's title deeds without permission will not ground a claim of right, whereas a belief based on a misunderstanding of the law of property that another is withholding title deeds, will.[77]

60. This Court's most detailed consideration of colour of right occurred in *R. v. Manuel*.[78] While the Court did not opine directly on this issue, as the focus there was on "moral" claims as opposed to lawful ones, it did refer to *Watson* with approval.[79] It also cited the British Columbia Supreme Court's decision in *R. v. Pena*,[80] where Josephson J. noted that in rejecting a colour of right defence that, "there is no evidence that any accused harboured an honest mistake about the laws of this country as they exist, *whether public or private*, only a belief as to what the law should be if it were to reflect what they believed to be their just cause."

61. This case does not involve a moral claim. The Appellants wanted to question Crown witnesses and show evidence of unlawful acts committed against animals. As discussed above, their primary reason for doing was a belief that unlawful "uses" negated the possibility of criminal illegality. Even if they were wrong in that belief, they deserved the right to explain why they acted and, in particular, tender evidence that they acted as

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[76] *R. v. Watson* (1999), 137 C.C.C. (3d) 422 at para. 20 (Nfld. C.A.).
[77] *R. v. Watson* (1999), 137 C.C.C. (3d) 422 at para. 21 (Nfld. C.A.).
[78] *R. v. Manuel*, 2008 BCCA 143.
[79] *R. v. Manuel*, 2008 BCCA 143 at para. 10.
[80] *R. v. Pena* (1997), 148 D.L.R. (4th) 372 (B.C.S.C.) [Emphasis added]. This extract was cited with apparent approval in *R. v. Manuel*, 2008 BCCA 143 at para. 51.

because of a mistake of law regarding the term “lawful use”. By disallowing this evidence, the trial judge deprived them of any hope of asserting a colour of right claim.

F. Evidence of Motive

62. In the further alternative, this evidence was admissible to provide proof of the Appellants’ motivation in acting the way they did. While it is never essential for the Crown to prove motive unless a legislative provision requires it, “evidence of motive is always relevant on the issue of intent”.[81] Similarly, as this Court held in *R. v. Armstrong*,[82] “a person's personal reason for acting may not be *determinative* of *mens rea*”, but it is unquestionably relevant to the question of intention.[83]

63. The question of intention was critical to a finding of guilt. As the trial judge correctly told jurors, the *mens rea* of mischief would be established if the “accused meant to do something that he or she knew would probably obstruct, interrupt, or interfere with the lawful use, enjoyment, or operation of the property, but he or she [was] reckless whether their conduct would have such consequences.[84]”

64. The video recordings provided useful supporting evidence of motivation that could have shown that the Appellants’ focus on getting media attention for this matter was their only goal, and that they tried to do so in the most unobtrusive way possible. This was not an outlandish claim, or unsupported by facts tendered. Evidence from Crown witnesses showed that the protestors were generally cooperative (aside from not leaving the premises) and tried not to interfere specifically with farm operations.[85] While the jury verdict demonstrates that they were unsuccessful, and did prevent Calvin from performing certain chores, their *intention* might have been viewed differently if the jury had a better sense of *why* they were acting the way they did.

65. Most importantly, this evidence could have helped rebut the Crown suggestion that “the intent was from the outset, to lockdown or shut down the farm, that is to interfere with

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[81] *R. v. Lewis*, [1979] 2 S.C.R. 821 at 833.
[82] *R. v. Armstrong,* 2012 BCCA 248 at para. 52 [Emphasis added].
[83] *R. v. Armstrong*, 2012 BCCA 248 at para. 46, referring to *R. v. Chartrand*, [1994] 2 S.C.R. 864 at 889-890.
[84] Charge to the Jury, *Trial Transcript*, Vol. 2 at 671/23-28.
[85] See paragraph 19 of this factum.

its operation".[86] The alternative conclusion was that the protestors simply wished to draw media attention to animal welfare concerns on the farm, without trying to interfere with property along the way. In other words, it would have supported the defence argument that there was simply no intention to actually obstruct farm operations.[87] As counsel for Mr. Schafer indicated in his closing address, "[t]he intention here and in fact the only goal by anybody was an information gathering process. That's all that's disclosed on the evidence is that the process was to gather information.[88]"

G. Irrelevant Considerations

66. At the conclusion of his reasons, the trial judge noted the "distorting effect of irrelevant evidence on the jury", as well as "the obvious fact that the defendants have a political agenda in seeking to publicize the video evidence, and that this evidence was apparently illegally obtained.[89]" The first point simply restates why irrelevant evidence is excluded. The latter two factors have no bearing on any calculus regarding whether to exclude evidence at all. The evidence is either probative or not. The Appellant's "political agenda" is irrelevant to their right to adduce probative evidence and defend themselves about criminal charges. The "illegal" nature of obtained evidence has never been regarded as a reason to exclude probative *defence* evidence.[90]

GROUND 2: THE TRIAL JUDGE FAILED TO DIRECT THE JURY TO IGNORE THE EVIDENCE OF DR. DYKSHORN

A. Overview

67. As part of its case, the Crown called Dr. David Dykshorn, a veterinarian who attended at the farm on the day of the protest. Qualified as an expert,[91] Dykshorn testified about what he saw personally as well as "the rules with respect to biohazard protocols

[86] Closing Address of Crown, *Trial Transcript*, Vol. 2 at 613/27-29.
[87] See Closing Address of L. Salloum, *Trial Transcript*, Vol. 2 at 636/40-43.
[88] Closing Address of B. Vaze, *Trial Transcript*, Vol. 2 at 625/15-18.
[89] *R. v. Soranno*, 2022 BCSC 1432 at para. 71.
[90] The judge cited no authority, possibly because no such authority exists. See Peter Sankoff and Zachary Wilson, "A Jurisprudential "House of Cards": The Power to Exclude Improperly Obtained Evidence in Civil Proceedings" (2021) 99 Canadian Bar Review 1.
[91] *R. v. Rigear*, 2022 BCSC 1123.

and... the reasons for them".[92] In charging the jury, the trial judge said that Dykshorn "gave expert opinion evidence concerning biosecurity hazards to the animals and steps that should be taken to minimize such risks… [and] *you may consider this opinion evidence in deciding this case*.[93]"

68. The trial judge erred in treating the testimony this way. At the close of the case, the main issue for jurors to decide was whether the Appellants had wilfully obstructed or interfered with any person's lawful use, enjoyment or operation of property. The Crown advised judge and jurors alike that these elements could be established through proof that "the work that Calvin Binnendyk was planning to do that day was disrupted [including] farm chores and… the insemination of the female pigs,[94]" (the physical element) and proof that the Appellants entered the property in order to disrupt the farm operation (the mental element). There was no evidence that biosecurity risks affected the "disruption" or the Appellants' *mens rea*. Dykshorn's opinion was irrelevant and unnecessary. It simply could not assist jurors in deciding any material issue that they needed to resolve.

69. The testimony had prejudicial qualities however. It left jurors with the *impression* that the Appellants had put the pigs' health and safety at risk by entering the barn without proper regard for biosecurity. As Dykshorn testified, when he entered:

> A: We wanted to make sure that we weren't tracking any diseases into the barn that didn't need to be in there, and could pose a threat to the animals on that farm.
>
> Q And what kind of -- are those -- pardon me. What -- what sort of potential problem if you did not change your clothes or did not change your footwear for example?
>
> A You could -- we could've tracked -- we could've tracked pathogens, parasites on our clothing, on our person, into the barn. And if those pigs are susceptible to those bugs, which they are to many, increased mortality and morbidity, or -- or death and sickness could occur on that farm.
>
> Q: And what's the reason with checking in with the farmers before you go into the -- the barns? Was there -- is there -- is that a standard practice, or...?

[92] Submissions of S. Quendack, *Trial Transcript*, Vol. 2 at 502/8-10.
[93] Charge to the Jury, *Trial Transcript*, Vol. 2 at 656/20-23 [Emphasis added].
[94] Charge to the Jury, *Trial Transcript*, Vol. 2 at 688/29-34.

> A Yeah, it's -- it would be standard practice if you were visiting to touch base with the owner or the operator of that farm, so you can get clearance to go on that farm, so they can know you're there, know where you're going, and… if they have any concerns about any threats you might impose with biosecurity risks on that farm.

70. As expert evidence from a respected authority, this testimony needed to be addressed with care. Instead of telling the jury to ignore the evidence once it became clear that the purpose for which it had first been tendered no longer existed, the trial judge told jurors to use Dykshorn's testimony without restraint "in deciding the case". Given the prejudicial aspects of this evidence, this error warrants a new trial.

B. Factual Background

71. Before trial, the Crown applied to qualify Dr. Dykshorn as an expert witness in veterinary medicine and animal health. At the end of a one-day *voir dire*, the trial judge admitted the evidence.[95] In the judgment, the trial judge outlined the circumstances in which Dykshorn came to be involved in the case and described why the expertise was required. As the protest unfolded, the Abbotsford Police Department invited Dykshorn:

- to be an independent observer as to the events taking place there; namely, the protest;
- to assess the condition of the animals, in the context of the presence of the protestors, and the possibility of a media tour to take place; and, to assist the Abbotsford Police Department with respect to biosecurity protocols that should be adopted in the circumstances.[96]

72. While present, Dykshorn also conducted a general assessment of the health of the animals and the general condition of the farm.

73. The Crown suggested that the expert opinion would help jurors decide five contested factual points:

> a. Whether the Appellant's conduct in question interfered with the lawful use or enjoyment of property or caused obstruction or interruption or interference with the use of property;
>
> b. The overall condition of the pigs and the state of the farm;

[95] *R. v. Rigear*, 2022 BCSC 1123.
[96] *R. v. Rigear*, 2022 BCSC 1123 at para. 2.

c. Whether the presence of the protestors caused stress to the pigs;

d. Whether the presence of the protestors represented a potential biosecurity hazard or risk to the health of the pigs; and,

e. To counter a potential necessity defence, to counter an argument that the actions were necessary because the animals were being maltreated.[97]

74. The defence agreed that the evidence was relevant, likely because at that stage of the trial, counsel was *hoping* to discuss the health of the pigs and question Dr. Dykshorn about practices that were visible on the video recordings in the Appellant's possession, all as part of the "lawful use" argument discussed in Ground 1.

75. The trial judge admitted the evidence, though without delineating *which* of the Crown purposes were advanced by the testimony:

> The apparent opinion that the Crown intents to elicit from him with respect to biosecurity is not an overly technical or specialized one. I referred to it earlier. It is whether the presence of the protestors represented a potential biosecurity hazard to the health of the pigs. I have no difficulty concluding that Dr. Dykshorn could give an opinion in that respect and is qualified to do so. I also have no difficulty concluding that an opinion that Dr. Dykshorn would give in that respect is something that would be necessary to assist the trier of fact in this case, the jury, who otherwise would not have any particular knowledge of biosecurity as it relates to farm animals.[98]

76. The first mention of Dr. Dykshorn at trial occurred when the Crown adverted to his evidence in the opening address to the jury on June 27, 2022. The Crown noted that Dykshorn had been called to the farm on April 28, 2019, "in order to assess the state of the farm and the health of the animals". Again, no indication was provided for *why* such evidence was relevant to anything the jurors had to decide, though the Crown also noted that Dykshorn "will be able to also tell you about some of the biosecurity protocols that hog farms employ and the reasons for those protocols.[99]"

77. Calvin and Jeff both alluded to risks posed by protestors. Calvin stated that "[w]e don't really let anybody in the barns for biosecurity reasons… [to prevent outside bugs from coming into the barn to make the animals sick.[100]" Jeff wanted to stop the protestors,

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[97] *R. v. Rigear*, 2022 BCSC 1123 at paras. 6-7.
[98] *R. v. Rigear*, 2022 BCSC 1123 at para. 12.
[99] Opening Address of S. Quendack, *Trial Transcript*, Vol. 1 at 259/27-35.
[100] Evidence of C. Binnendyk, *Trial Transcript*, Vol. 1 at 346/37-47.

"[b]ecause I have no idea where these people came from, what kind of diseases were on them, nothing, I had no idea. So we just wanted to stop them from entering.[101]"

78. On June 29, 2022, the trial judge issued the ruling that is the focus of the first ground of appeal, concluding that evidence of mistreatment of the pigs on the farm was irrelevant to the trial. The ruling had the effects discussed in Ground 1, but its impact on other evidence was unclear. After Jeff testified about the risks posed to biosecurity, the defence objected, stating that it was unfair to allow him to talk about biosecurity risks when the defence was unable to counter this by showing that the animals were already in poor health because of conduct by the farms' owners. The trial judge disagreed, stating, "the effects of the events that day on the pigs is not irrelevant, I didn't make such a ruling, that's number one. I said that questions having to do with maltreatment of the pigs and breach of regulations are not relevant. So the question of whether there was interference, obstruction, and the consequences and so on, that's -- that's not irrelevant."

79. There is good reason to question the trial judge's decision on this point. The Appellants were charged with mischief. The Crown eschewed the ability to convict them for causing actual damage to the pigs (s 430(1)(a)) before trial. Given that fact, the only possible relevance of biosecurity risks would have been to show how those risks impeded the owners' ability to operate or enjoy the pigs. There is simply no evidence that this was the case.[102] While the protestors' presence might have made it difficult for Calvin to operate the farm, he never testified that he was unable to perform his chores or inseminate the female sows because of risks to biosecurity.

80. This decision to limit examination of animal health eliminated the need for Dr. Dykshorn's testimony. This became apparent when the Crown attempted to question the witness about the "general activity level" of the pigs when he entered the barn. The defence objected, contending that it was unfair to question Dykshorn about the pigs

[101] Evidence of J. Binnendyk, *Trial Transcript*, Vol. 2 at 437/42-46

[102] See, similarly, *R. v. Klimowicz*, 2021 ONSC 2589 at para. 17: "The Crown also argues that there was potential mischief in relation to the breach of bio-security and disturbance of the animals. The evidence at this trial was that no harm befell the mink as a result of Mr. Klimowicz entering the barns. He took measures to ensure there would be no breach of bio-security and there was none. In my view, a harm that might have occurred, but did not, cannot constitute mischief."

becoming stressed by the protestors' actions when they were unable to compare the animal's health and well-being to other times when they were shown to be at risk of severe harm. Defence counsel argued there was no probative value in showing how the pigs might have suffered from the Appellant's presence.

81. The trial judge agreed, suggesting that by this point, evidence of mischief related exclusively to the interruption of *farm activities* at the barn, not on "damage" suffered by the animals, noting that "if I understand the Crown's case and the evidence so far. I mean there was one specific example, that's what I heard, about fertilization, insemination of female pigs because that was one of the morning's planned operations, but there was more general evidence about chores generally.[103]"

82. He asked the Crown directly whether it was alleging that "the protest, the presence of the people there, was there harm to the pigs by that; that is, within the meaning of the mischief section?" The following exchange then occurred:

> THE CROWN: …Bearing in mind what my friend has said, I think it's not that significant to the Crown's case in terms of stress and excitement of -- of the animals.
>
> THE COURT: I thought you told me before as a matter of fact, during *voir dires*, that harm to the animals in a more general sense was not relied upon by the Crown.
>
> CROWN: Right. And the Crown's still not saying that harm was done… I don't think the general excitement or noise level, or activity level of the animals is particularly relevant to the -- the issues that need to be determined. So I'm content to move on to a different area of questioning which I think will focus more on generally the rules with respect to biohazard protocols and sort of the reasons for them, and -- and have the expert -- or have the witness speak to -- to that -- that type of area.[104]

83. The Crown then questioned the witness about biosecurity concerns, how a safe environment could be compromised, and the types of precautions farmers and veterinarians take to limit the impact of their interaction with pigs on farms like Excelsior.

84. The relevance of this evidence was never discussed, but by this point the original purposes for Dykshorn's testimony were no longer material. The Crown expressly resiled from Purpose A – whether the conduct caused obstruction or harm to the pigs. The same

[103] Discussion, *Trial Transcript*, Vol. 2 at 492/2-7.
[104] Discussion, *Trial Transcript*, Vol. 2 at 492/37- 493/11.

is true of Purpose C – whether the Appellants caused harm by stressing the animals – and Purpose B, the general condition of the pigs and state of the farm. And the defence never raised a necessity defence (Purpose E), either because they no longer felt it was possible to do so or never had any intention of going down this path. In any event, general testimony about biosecurity risks bore no relationship to this purpose.

85. All that remained was Purpose D: whether the presence of the protestors represented a potential biosecurity hazard or risk to the health of the pigs. Unfortunately, as was the case when the *voir dire* was held, the Crown never explained *why this actually mattered*. By the time Dr. Dykshorn testified, the Crown's case focused exclusively on showing that the protest had disrupted the operation of the farm. It tendered no supporting evidence of *actual* biosecurity issues that materialized, which might have grounded a conviction under s 430(1)(a).

86. While Calvin Binnendyk testified that large groups of people were not permitted on the farm generally in order to prevent risks to biosecurity, this had nothing to do with the "disruption" of his ability to operate farm property. Instead, he testified that "there was a bunch of chores that definitely didn't get done. The breeding never got done that day. And probably a bunch more that didn't get done that didn't even realize at the time because we're a bit kerfuffled.[105]"

87. In cross-examination, Binnendyk clarified that the protestors did not prevent him from accessing any room in the barn, and he was able to feed and water the pigs in the breeding room where the protestors were located. He confirmed, however, that he was unable to run a boar past the breeding sows while the protestors were there, and could not complete his chores as he ordinarily would.[106]

88. This, rather than any biosecurity risks that were never fully explored, became the focus of the Crown's theory on mischief. In the Crown's jury address jurors were told to turn their attention "to the evidence or the testimony of the property owners with respect to their inability to conduct their regular chores and their regular business in the usual

[105] Evidence of C. Binnendyk, *Trial Transcript*, Vol. 1 at 347/21-27.
[106] Evidence of C. Binnendyk, *Trial Transcript*, Vol. 1 at 429/8- 430/17.

time, in the usual way.[107]" Biosecurity was not mentioned, and neither was Dykshorn. Instead, the Crown focused on the disruption from the protest, and the consequences suffered by the farm owners.[108] In closing, he stated that the protestors "intended, in my submission, to prevent the property owners from accessing their property in the breeding barn in particular, and conducting their normal business until their objectives were satisfied, and that's exactly what they did.[109]"

89. Counsel for Mr. Schafer did briefly refer to Dr. Dykshorn, albeit exclusively to point out how no evidence of an actual biohazard had been presented.[110] The trial judge then instructed jurors to "consider [Dykshorn's] opinion evidence in deciding this case.[111]"

C. Expert Evidence Must Be Carefully Controlled

90. Though expert opinion evidence is a regular feature of courtroom testimony across Canada, the jurisprudence is replete with warnings about how it must be carefully handled. In *R. v. Nahar*,[112] this Court remarked on the high threshold that had to be met for this evidence type of evidence to be admitted:

> In considering the admissibility of opinion evidence, it is important to recognize that such evidence is, of course, normally not admissible. Witnesses are generally not permitted to testify to the opinions they hold. The principal exception… is the opinion of an expert witness [which] is admissible to prove… relevant facts, where such cannot be satisfactorily proven in some other way.
>
> [O]pinion evidence… is necessary only where the subject matter of the opinion is beyond the common understanding of the trier of fact - where judge and jury cannot be expected to draw the correct inference from the underlying facts or come to a proper factual conclusion that is essential to the resolution of an issue based on those facts. Thus, to be admissible, the opinion of an expert must be both relevant and necessary and… proffered by a witness… properly qualified to express it.

[107] Crown Closing Address, *Trial Transcript*, Vol. 2 at 610/19-25.
[108] Crown Closing Address, *Trial Transcript*, Vol. 2 at 614/24- 615/35.
[109] Crown Closing Address, *Trial Transcript*, Vol. 2 at 615/36-41.
[110] Closing Address of B. Vaze, *Trial Transcript*, Vol. 2 at 628/11-22.
[111] Charge to the Jury, *Trial Transcript*, Vol. 2 at 656/20-23.
[112] *R. v. Nahar*, 2004 BCCA 77 at paras. 19-20.

91. There are many reasons to confine this category of evidence. As the Supreme Court held in *R. v. Mohan*:[113]

> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and having more weight than it deserves.

92. For this reason, the trial judge must act as a "gatekeeper to ensure that expert evidence enhances, rather than distorts, the fact-finding process.[114]" This gatekeeper role is *not* extinguished once the evidence is admitted. On the contrary, as the Supreme Court held in *R. v. Sekhon*:[115]

> Given the concerns about the impact expert evidence can have on a trial - including the possibility that experts may usurp the role of the trier of fact - trial judges must be vigilant in monitoring and enforcing the proper scope of expert evidence. While these concerns are perhaps more pronounced in jury trials, all trial judges - including those in judge-alone trials - have an ongoing duty to ensure that expert evidence remains within its proper scope*. It is not enough to simply consider the Mohan criteria at the outset of the expert's testimony and make an initial ruling as to the admissibility of the evidence.* The trial judge must do his or her best to ensure that, throughout the expert's testimony, the testimony remains within the proper boundaries of expert evidence.

93. Dr. Dykshorn testified at some length about dangers posed by biosecurity hazards. First, he discussed the personal protections he took in entering the barn. Then he discussed why these were important to "make sure that we weren't tracking any diseases into the barn that didn't need to be in there, and could pose a threat to the animals on that farm.[116]" The need for biosecurity protocols was stressed, with the witness opining that:

> [B]iosecurity is very important, especially in commercial-sized operations like this one. Some of the protocols include, I mean basically the perimeter, the physical building, making sure that's in good shape, intact, so to keep out predators, parasites. Maintain control of the air quality in the barn, those kind of things which pose a threat to the health and wellbeing of the animals.
>
> Some things on -- that are common on commercial farms are sanitizing compounds or chemicals at the entrances, and between different rooms in the barns to sanitize your -- your foot equipment, your boots; that would be something we commonly see.[117]

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[113] *R. v. Mohan*, [1994] 2 S.C.R. 9 at 21; *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23 at para. 17. See also *R. v. D.D*., 2000 SCC 43 at para. 57, "[*Mohan*] reflects the realization that simple humility and a desire to do what is right can tempt triers of fact to defer to what the expert says…"
[114] *R. v. Bingley*, 2017 SCC 12 at para. 13.
[115] *R. v. Sekhon*, 2014 SCC 15 at para. 46.
[116] Evidence of David Dykshorn, *Trial Transcript*, Vol. 2 at 494/17-20.
[117] Evidence of David Dykshorn, *Trial Transcript*, Vol. 2 at 494/45- 496/12.

94. Finally, the Crown asked whether it was important to limit the number of people who could enter a farm, with the witness responding that this was desirable to manage the risk to the animals. After all, "the more people you have in the premise -- on the premise, in the barn, the more likely that you can track in a pathogen or parasite that would be detrimental to the health of your herd.[118]"

95. Interesting as the opinion might have been, *it had no bearing on the case being decided*. The Crown tendered no evidence of actual biosecurity risks, and, more importantly, eschewed reliance on this theory of liability. As such, the evidence was irrelevant. The *only* potential use it had was prejudicial: to leave jurors with the impression that the Appellants by entering the farm in a large group had done something risky with the potential to be dangerous for the very animals they were purported trying to "help".

96. It is an error of law to admit expert evidence that has no relevance to the matters being resolved at trial, or is unnecessary because the value it provides is minimal. As LeBel J. stated in *R. v. Gibson*,[119] the relevance inquiry "…is of particular significance where the admissibility of expert evidence is in issue, because of the risk that such evidence will be accepted uncritically and given more weight than it deserves." This is not a situation like *R. v. Pedersen*,[120] where an expert was wrongly permitted to testify, but the appeal dismissed under s. 686, because the trial judge "carefully instructed the jury on the severe limitations of the [expert] evidence, and eliminated any realistic possibility of the evidence being used to the prejudice of the accused". The only instruction urged the jury to consider the evidence without restriction, and did not tell them that purported biosecurity concerns had no relevance to any matter they had to decide.

97. Though the defence in this case did not object to Dykshorn's testimony as irrelevant, and expressed no concern about the jury charge, this does not obviate the trial judge's role to charge the jury correctly. As the Supreme Court held in *R. v. Sekhon*:[121]

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[118] Evidence of David Dykshorn, *Trial Transcript*, Vol. 2 at 496/44- 497/3.
[119] *R. v. Gibson*, 2008 SCC 16 at para. 57.
[120] *R. v. Pedersen*, 2016 BCCA 47 at para. 72.
[121] *R. v. Sekhon*, 2014 SCC 15 at para. 48. See also *R. v. D.M.*, 2022 ONCA 429 at para. 52 (failure to object to absence of jury charge regarding the proper treatment of expert evidence not fatal as there was particular risk that jury would engage in an impermissible pattern of reasoning at the invitation of the Crown);

> It is foreseeable that mistakes will be made and that, as happened in the instant case, testimony that strays beyond the proper scope of the expert evidence will be given. It is also foreseeable that defence counsel may fail to object to the testimony at the time the problematic statements are made. In a jury trial, once the statements have been made, it may be somewhat more difficult to address the problem - *but a remedial instruction advising the jury to disabuse their minds of the inadmissible evidence will generally suffice*.

98. In admitting the expert's evidence and charging the jury, it is unfortunate that the trial judge did not follow his own ruling regarding the relevance of animal health to this case, where he noted that:

> The fact that evidence similar to that which is put forward here was considered in those cases is not helpful to the defendants' argument. In judge-alone cases, sometimes evidence of questionable relevance is permitted to be adduced because doing so may be the simplest and easiest course. The court can decide its relevance at a later time. In judge-alone trials, it is a simple matter for judges to disabuse themselves of evidence that they determine, in the fullness of time, is not relevant.
>
> My duty on this jury trial is to ensure, as gatekeeper, that the evidence admitted is kept within proper bounds.[122]

PART 4 NATURE OF ORDER SOUGHT

99. The Appellants seek an Order that: the appeals be allowed, the convictions set aside, and a new trial ordered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Edmonton, Province of Alberta, this 26th day of April, 2022.

Peter Sankoff
Counsel for the Appellant

R. v. Cook, 2020 ONCA 731 at para. 71 ("trial judge's duty to act as a gatekeeper is not displaced where counsel fails to object or fails to assist the court in dealing with highly prejudicial evidence... There is a heightened need to take appropriate action to preserve or restore trial fairness.")

[122] *R. v. Soranno*, 2022 BCSC 1432 at paras. 63-64.

TABLE OF AUTHORITIES

OTHER SOURCES

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House of Commons Debates, 39th Parl., 1st Sess., No. 118 (26 February 2007) at 1110 (7278) (Hon. Charles Hubbard, (Miramachi, Lib.)[Emphasis Added].	50
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STATUTORY PROVISIONS

	Para.
Criminal Code, R.S.C. 1985, c. C-46, s. 445, as amended by *An Act to amend the Criminal Code (Cruelty to Animals)*, S.C. 2008, c.12.	50
The *Prevention of Cruelty to Animals Act*, RSBC 1996, c. 372, ss. 9.1, 9.2.	51