

SUPREME COURT OF YUKON

Citation: *R v Dillabough*, 2021 YKSC 64

Date: 20211222
S.C. No. 20-AP010
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

AND

JAMES DILLABOUGH

APPELLANT

Before Justice E.M. Campbell

Megan Seiling

Counsel for the Respondent

James Dillabough

Appearing on his own behalf

REASONS FOR DECISION

INTRODUCTION

[1] Mr. Dillabough was convicted of failing to keep his domestic goats within an enclosure approved by an inspector contrary to a control order made pursuant to the *Animal Health Act*, SY 2013, c. 10 (the “*Act*”).

[2] Following Mr. Dillabough’s conviction, the trial judge ordered, as a penalty under the *Act*, that:

- (i) he be prohibited from owning or having custody or control of domestic sheep or goats in the Yukon until December 31, 2024;
- (ii) he remove any goats under his care and control from the Yukon or destroy any goats under his care and control by November 4, 2020, at 5:00 p.m.;

- (iii) any goats remaining under his care and control as of November 4, 2020, at 5 p.m., be forfeited to the Government of Yukon; and
- (iv) as of November 4, 2020, at 5:00 p.m., the Government of Yukon be entitled to seek an order from the Supreme Court of Yukon authorizing entry onto Mr. Dillabough's property to seize any goats or sheep still under his care and control.

[3] Mr. Dillabough appeals his conviction and sentence (the order made against him).

ISSUES

[4] This appeal raises the following issues:

- (i) Did the trial judge err in finding Mr. Dillabough guilty considering the Animal Health Unit's interpretation of Control Order 2018-001, according to which it required Mr. Dillabough to have an approved enclosure in place before testing his goats?
- (ii) Did the trial judge misapprehend the evidence at trial?
- (iii) Did the trial judge err by imposing a sentence that is demonstrably unfit, or by making an error in principle, failing to consider a relevant factor, or erroneously considering an aggravating or mitigating factor that had an impact on the sentence he imposed on Mr. Dillabough?

Issue 1 **Did the trial judge err in finding Mr. Dillabough guilty considering the Animal Health Unit's interpretation of Control Order 2018-001, according to which it required Mr. Dillabough to have an approved enclosure in place before testing his goats?**

[5] Control Order 2018-001 (the "Control Order"), which came into force on January 1, 2020, imposes conditions and restrictions for the keeping and transport of

domestic sheep and goats in the Yukon. The Control Order was established to control the spread of pathogens capable of causing respiratory disease transferring from domestic goats and sheep to wild goats and sheep (more particularly *Mycoplasma ovipneumoniae* ("M. ovi")). The Control Order applies to the whole territory.

[6] Section 8 of the Control Order sets out a number of requirements for possessing or keeping goats or sheep in the Yukon, including a fencing requirement and a testing requirement.

[7] The trial judge found Mr. Dillabough guilty on the basis that he did not have and had failed to complete, within the timeline provided by an Animal Health Unit inspector, an approved enclosure within which he could contain his goats as mandated by the Control Order.

Positions of the parties

[8] Mr. Dillabough's position is that his goats did not have to be contained within an approved enclosure until the Animal Health Unit started testing his goats for the purpose of the Control Order. Mr. Dillabough submits that, on several occasions, he requested that the Animal Health Unit attend his property to test his goats. However, according to Mr. Dillabough, they refused to test his goats or refused to commit to a date when they would attend his property to test his goats. As a result, Mr. Dillabough submits that he did not have the obligation to keep his goats in an approved enclosure within the material times, and should not have been found guilty of failing to keep his goats in an approved enclosure because the Animal Health Unit had refused to come and test his goats.

[9] Crown counsel states that the Animal Health Unit had a policy requiring that domestic goats and sheep be contained in an approved enclosure prior to testing for the purpose of the Control Order. Crown counsel submits that the policy is in line with the terms of the Control Order.

[10] Crown counsel submits that a person must satisfy each of the conditions listed in s. 8 of the Control Order to legally possess sheep and goats in the Yukon. Crown counsel submits that the testing and the enclosure requirements set out in s. 8 are not interdependent of each other, in that the enclosure requirement does not depend on compliance with the testing requirement. Therefore, Crown counsel submits that it was not unfair or improper for the Animal Health Unit to refuse to test Mr. Dillabough's goats until he satisfied the enclosure requirement. Crown counsel points out that Mr. Dillabough was found guilty of failing to keep his goats within an approved enclosure, not of failing to have his goats tested pursuant to the Control Order.

[11] In the alternative, Crown counsel submits that the Animal Health Unit's policy, requiring that an approved enclosure be in place prior to testing the animals, was justified based on the terms of the Control Order. Crown counsel points out that s. 8(c) of the Control Order states that the testing must be done in accordance with methods approved by the Chief Veterinary Officer. Crown counsel submits that the policy in place reflected a method of testing that was reasonable based on the objectives of the Control Order and the purpose of the testing.

Facts

[12] The evidence at trial reveals that the Animal Health Unit had an internal policy requiring that sheep and goats be contained in an approved enclosure while they were

being tested for pathogens of concern under the Control Order. In that regard, the Animal Health Unit required that, at least, a temporary enclosure and a long-term fencing plan be completed prior to testing to ensure that sheep and goat owners were committed to move towards compliance with the long-term fencing requirement before investing public resources in testing the animals.

[13] The evidence of Dr. Magnusson, a veterinarian and a health inspector with the Animal Health Unit, reveals that this internal policy, requiring the containment of animals being tested, was established:

- (i) to ensure the safety of the animals, the producer, and government employees conducting the testing; and
- (ii) to restrict contact between the animals being tested and others, during the testing period, to ensure the validity of the results.

[14] Dr. Magnusson testified that the testing period under the Control Order takes a minimum of three months for animals that have not been tested before. The animals are tested once at the beginning of the testing period and every 30 days thereafter over a three-month period. If an animal tests positive for the pathogen of concern (more specifically *M. ovi*), an order that the animal be destroyed is issued.

[15] Also, Dr. Magnusson testified that the enclosure required under the Control Order must meet three objectives to be approved by an Animal Health inspector. It has to:

- (i) keep the sheep and goats contained on the keeper's property;

- (ii) prevent the possibility of nose-to-nose contact across the fence line between domestic animals on the inside and wild animals on the outside; and
- (iii) reasonably prevent the entry of wild animals into the containment area that holds domestic sheep or goats.

[16] Dr. Magnusson's evidence is to the effect that, when the Control Order came into force in 2020, the Animal Health Unit afforded some leeway to sheep and goat owners with respect to the containment requirement. As the Animal Health Unit was cognizant of the costs associated with building long-term enclosures for animals that would have to be put down if they tested positive for the pathogens of concerns, it allowed owners and keepers to contain the animals in approved temporary enclosures for testing, as long as the owners also developed a long-term fencing plan and discussed the details of that plan with an inspector to ensure that the owners intended to comply with the long-term containment requirement. Temporary enclosures were approved as long as they provided an area where the animals could be safely tested, and prevented the animals being tested from being in contact with other animals. Only Animal Health Unit inspectors can approve enclosures.

[17] It is not disputed that Mr. Dillabough owned goats and that he kept them, at all material times, on his property located (below 1,000 metres in elevation) in the Yukon.

[18] The evidence at trial reveals that, on a number of occasions, Mr. Dillabough requested that the Animal Health Unit attend his property to test his goats. However, they refused to tell him when they would test his goats until he fulfilled the requirement of an approved temporary enclosure and provided a plan for a long-term fence or

containment for his goats. In that sense, Dr. Magnusson's evidence confirms Mr. Dillabough's evidence and submissions that the Animal Health Unit refused to tell him when they would attend his property to test his goats.

[19] Mr. Dillabough questioned the qualifications of Yukon government staff to determine what constitutes an appropriate fence or enclosure for his animals. He also questioned the conduct of certain Yukon government employees. However, the evidence of Dr. Magnusson regarding the criteria used to determine the suitability of a proposed temporary or long-term enclosure, and the reasons behind the policy requiring that an approved enclosure be in place prior to testing the animals, remains essentially uncontradicted.

Analysis

[20] This ground of appeal raises a question of interpretation of the Control Order. This is a question of law reviewable on the basis of correctness (*Housen v Nikolaisen*, 2002 SCC 33 at para. 8).

[21] Section 21 of the *Act* provides that the minister(s) in charge of the *Act* may make a control order to establish, in the whole or any part of the Yukon, a control area "in order to prevent, detect, control, suppress or mitigate the risk of a hazard in that area."

[22] A hazard is defined, among other things, as: "a disease or a biological, chemical or physical agent, that is likely to adversely affect the health of an animal or human" (s. 1(1) of the *Act*).

[23] The Control Order at issue in this case (Control Order 2018-001) was made pursuant to s. 21 of the *Act*. It came into force on January 1, 2020, and applies to all of the Yukon.

[24] The hazard identified in the Control Order is respiratory disease affecting thinhorn sheep and mountain goats (s. 3 of the Control Order).

[25] The reasons for making the Control Order are stated in the Control Order itself as follows:

Wild thinhorn sheep and mountain goats are at risk of developing respiratory disease if they are exposed to certain pathogens that are often carried by domestic sheep and domestic goats. Respiratory disease can spread rapidly once introduced into wild sheep or goat populations, causing high mortality rates and can significantly reduce herd productivity. The pathogen of greatest concern is *Mycoplasma ovipneumoniae*; its transmission from domestic sheep and domestic goats to wild sheep populations in other Canadian jurisdictions has resulted in outbreaks of respiratory disease. The purpose of this Control Order is to protect thinhorn sheep and mountain goat populations by preventing, detecting, controlling, and suppressing the transmission of pathogens capable of causing respiratory disease, including but not limited to *Mycoplasma ovipneumoniae*.

[26] Mr. Dillabough questioned the need for the Control Order based on his experience as a long-time resident and farmer in the Yukon, as well as his observations regarding the increase of the wild sheep and goat population in some parts of British Columbia. However, Mr. Dillabough did not take any steps to challenge the validity or legality of the Control Order or of any of its provisions during his trial or sentencing proceeding.

[27] The Control Order imposes conditions and restrictions on the possession of domestic sheep and goats in the Yukon. More specifically, s. 8 of the Control Order provides that:

A person may possess a domestic sheep or domestic goat on land that is below 1,000 metres in elevation¹ where the following conditions have been met:

¹ I note that s. 7 provides that “[a] person who owns or has possession, control or custody of a domestic sheep or a domestic goat must not allow it on land that is over 1,000 metres in elevation.”

- (a) the domestic sheep or domestic goat is within an enclosure approved by an inspector within the previous calendar year;
- (b) the enclosure referred to in paragraph (a) is identified with a sign provided by an inspector that is placed in a conspicuous place on the enclosure;
- (c) the domestic sheep or domestic goat has, within the previous calendar year, been tested for pathogens capable of causing respiratory disease, with testing methods and results approved by the Chief Veterinary Officer; and
- (d) in the case of a domestic sheep or domestic goat over four months of age, it has a permanent identifier that is
 - (i) in accordance with the Canadian Sheep Identification Program,
 - (ii) in accordance with the Canadian National Goat Identification Program,
 - (iii) a microchip provided by the Animal Health Unit, or
 - (iv) approved in writing by the Chief Veterinary Officer.

[28] The wording of s. 8 is not ambiguous. The use of the expression “where the following conditions have been met”, which precedes the list of four conditions, coupled with the use of the conjunction “and” between the second to last and the last conditions enumerated at s. 8, indicates that each of the listed conditions must be fulfilled in order to legally possess domestic goats or sheep in the Yukon. In addition, s. 8 does not set out an order in which the testing and the containment requirements must be fulfilled, nor does it make the containment requirement conditional to, or dependant on, the testing requirement (or on obtaining a date for testing by government officials). Therefore, the containment and the testing requirements are not interdependent. While it may be said

that these two requirements are complementary in achieving the goals of the Control Order, they remain two distinct conditions that must be met separately.

[29] As a result, I find that the wording of s. 8 of the Control Order does not support Mr. Dillabough's position that he either did not have the obligation to contain his goats within an approved enclosure until the Animal Health Unit started testing them or did not have to finish building an approved enclosure before the Animal Health Unit committed to a date to testing his animals.

[30] In addition, based on the evidence adduced at trial, I am of the view that the inspectors of the Animal Health Unit had the authority to require Mr. Dillabough to build an approved temporary enclosure prior to testing or committing to testing his goats.

[31] Section 8(c) of the Control Order provides that domestic sheep or goats are to be tested with methods and results approved by the Chief Veterinary Officer.

[32] The evidence reveals that the Control Order is enforced by three Animal Health inspectors and the Chief Veterinary Officer.

[33] The word "method" is not defined in the Control Order or in the *Act*. However, the ordinary meaning of the word "method" refers to the notion of how something is done or accomplished. Also, in the dictionary, "method" is defined as "a procedure or process for attaining an object" Daphne A. Dukelow, *Canadian Dictionary*, 3d (Scarborough: Ontario: Thomson Carswell, 2004).

[34] In that sense, requiring that animals be contained in an approved enclosure while they are being tested, qualifies as an element or a step of a procedure or a process to follow when conducting the testing under the Control Order; or, simply put, is part of how the testing of the animals is to be performed or conducted.

[35] In addition, the evidence at trial establishes that this requirement was based on considerations for the safety of the animals, the producer, and government employees conducting the testing. The other reason behind the policy was to prevent the animals being tested from being in contact with other animals during testing in order to ensure the validity of the testing.

[36] In light of these considerations, I am of the view that the Animal Health Unit's requirement that testing occur while the animals are in an approved enclosure is reasonable and in line with the main purpose and object of the Control Order (which is to protect the population of wild sheep and goats in the Yukon by taking measures to prevent and control the spread of respiratory diseases from domestic animals to wild animals) and the purpose of testing (which is to determine whether domestic animals carry the pathogens responsible for the respiratory diseases).

[37] As a result, I find that the policy requiring that animals be kept in an approved enclosure while they are being tested constitutes a valid means to enforce a method of testing that falls within the purview of s. 8(c) of the Control Order.

[38] In addition, based on the above-mentioned evidence, I am satisfied that the Animal Health Unit's policy, which required not only that a temporary enclosure be in place but also that a long-term fencing plan be provided prior to testing (to demonstrate the owner's commitment to move towards compliance) is based on reasonable and valid considerations, including the use of public resources involved in testing the animals.

[39] Therefore, I find that the trial judge was correct not to acquit Mr. Dillabough based on Mr. Dillabough's interpretation of the Control Order because the testing and

the fencing requirements set out at s. 8 of the Control Order are not interdependent. In addition, I find that the Animal Health Unit had the authority to refuse either to test Mr. Dillabough's goats or to commit to a date to test his goats for the purpose of the Control Order, until he complied with the temporary enclosure requirement and submitted a long-term fencing plan pursuant to s. 8(c) of the Control Order.

[40] Therefore, this ground of appeal is dismissed.

Issue 2 Did the trial judge misapprehend the evidence at trial?

[41] The trial judge found that the Crown had proven beyond a reasonable doubt that, between April 29 and August 18, 2020:

- (i) Mr. Dillabough possessed domestic goats in the Yukon;
- (ii) the Control Order was in effect and applied to Mr. Dillabough; and
- (iii) Mr. Dillabough's goats were not contained in an enclosure approved by an inspector.

[42] On that basis, the trial judge found Mr. Dillabough guilty of failing to comply with a condition of the Control Order by possessing domestic goats that were not within an enclosure approved by an inspector, contrary to s. 57(2)(a) of the *Act*.

Positions of the Parties

[43] Mr. Dillabough submits that the trial judge misapprehended the evidence and that his errors had a material impact on his assessment of the Crown witnesses' credibility and reliability. According to Mr. Dillabough, the judge's misapprehension of the evidence led him to erroneously rely on the Crown witnesses' evidence to find him guilty of failing to keep his goats in an approved enclosure. Mr. Dillabough submits, among

other things, that the trial judge ignored the evidence that the Animal Health Unit acted in bad faith in this case.

[44] In addition, Mr. Dillabough submits that there was no evidence to support the trial judge's finding that he did not have or had not completed an approved enclosure to contain his goats between April 29 and August 18, 2020. Mr. Dillabough submits that, as a result, the trial judge's finding of guilt is unreasonable and not supported by the evidence.

[45] Crown counsel submits that s. 57 of the *Act*, which is the section under which Mr. Dillabough was charged, creates a strict liability offence. As a result, she submits that the Crown's burden of proof is discharged by proving beyond a reasonable doubt that the accused committed the act prohibited by the statutory provision (*actus reus*). In this case, it meant that the Crown had to prove beyond a reasonable doubt that Mr. Dillabough had failed to keep his goats in an approved enclosure contrary to the Control Order that applied to him.

[46] Crown counsel adds that, in case of strict liability offences, an accused may defend themselves by establishing, on a balance of probabilities, that they exercised due diligence. Crown counsel submits that Mr. Dillabough did not offer evidence that amounts to due diligence and that the trial judge was correct in not considering that defence.

[47] Crown counsel submits that the trial judge's review and assessment of the evidence is consistent with the evidence at trial. Crown counsel adds that there is nothing in the record or the trial judge's reasons for decision to suggest that he misapprehended any of the evidence in any material way.

[48] Crown counsel submits that the trial judge did not err in relying on the Crown witnesses' evidence in finding Mr. Dillabough guilty of the offence with which he was charged. Crown counsel points out that Mr. Dillabough's evidence did not conflict with Dr. Magnusson's evidence on the material facts proving the essential elements of the offence. In addition, Crown counsel submits that Mr. Dillabough did not challenge the evidence of the Crown witnesses at trial in any credible or material way.

[49] Finally, Crown counsel submits that Mr. Dillabough's evidence that he would have finished the construction of the temporary enclosure quickly had the Animal Health Unit agreed to test his goats is not evidence of reasonable care but of persistent non-compliance.

[50] Mr. Dillabough submits that the trial judge failed to recognize and address several errors and inconsistencies in the testimony of Dr. Magnusson and Matthew Ball when he assessed their evidence, and that those errors had a material impact on the conclusions he reached regarding the Crown witnesses' credibility and reliability. Mr. Dillabough submits that the errors he identified shows that the trial judge erred in relying on their testimony to convict him.

Misapprehension of evidence

[51] There are different ways by which a trial judge may misapprehend the evidence. As stated by the Court of Appeal of British Columbia in *R v Gill*, 2018 BCCA 275 at para. 58:

A misapprehension of the evidence may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 218 (Ont. C.A.). ...

[52] Therefore, to succeed under this ground of appeal, Mr. Dillabough first has to show that the trial judge misapprehended the evidence. In addition, he has to show that:

[60] ... the trial judge misapprehended the evidence, ... “in a manner that could have affected the outcome” (emphasis added): *Lohrer* at para. 7, citing *R. v. C.(R.)* (1993), 81 C.C.C. (3d) 417 at 420 (Que. C.A.), Rothman J.A., dissenting (adopted on appeal [1993] 2 S.C.R. 226). To put it another way, in *R. v. Pham*, 2008 BCCA 272 at para. 29, this Court found that the trial judge’s evidentiary errors occasioned a miscarriage of justice because “it cannot be said [the trial judge] necessarily would have reached the same conclusion on the appellant’s credibility” in the absence of those errors.

[53] As I find, for the reasons that follow, that the trial judge did not misapprehend the evidence, this ground of appeal cannot succeed.

Facts

[54] The Crown called two witnesses to testify at trial, Dr. Kristenn Magnusson and Matthew Ball.

[55] Mr. Dillabough testified in his defence.

Testimony of Dr. Kristenn Magnusson

[56] Dr. Magnusson, a veterinarian and a health inspector with the Animal Health Unit of the Government of Yukon, was the main witness for the Crown. I have already referred to parts of Dr. Magnusson’s evidence at trial in reviewing the question of interpretation raised by this appeal. The other parts of her evidence that are relevant to this ground of appeal are as follows.

[57] At the time of trial, Dr. Magnusson had held the position of health inspector with the Animal Health Unit for 18 months. Prior to taking that position, she had been a

clinical veterinarian for 17 years. Dr. Magnusson's primary responsibilities with the Animal Health Unit are the implementation and the enforcement of the Control Order.

[58] Dr. Magnusson testified that the Control Order is enforced by three Animal Health inspectors, including her, as well as the Chief Veterinary Officer. As part of her work, Dr. Magnusson oversees the management and the implementation of the Control Order and conducts the testing of small ruminants in the Yukon.

[59] Dr. Magnusson testified that the Control Order has two main requirements:

- (i) the containment of domestic sheep and domestic goats on the keeper's property, and
- (ii) the testing of each individual sheep and goat in the Yukon. Dr. Magnusson stated that the animals are tested for a respiratory pathogen of concern, a bacteria called *Mycoplasma ovipneumoniae* or "M. ovi". When an animal tests positive for the bacteria, the Chief Veterinary Officer issues a direction ordering that the animal be destroyed.

[60] According to Dr. Magnusson, the Animal Health Unit works collaboratively with the Agricultural Branch of the Government of Yukon for the implementation of the fencing requirement because the Agricultural Branch has additional expertise and experience in lands, fencing materials, and design. However, only an animal health inspector has the power to approve a fence.

[61] In addition, an enclosure must meet three objectives to be approved under the Control Order. These objectives are:

- (i) to contain domestic sheep or goats;

- (ii) to prevent the possibility of nose-to-nose contact across the fence line between the domestic animals and the wild animals; and
- (iii) to reasonably prevent the entry of wild animals into the containment area.

[62] The Control Order came into effect on January 1, 2020, and expires on December 31, 2024. However, Dr. Magnusson testified that the Government of Yukon started advertising the Control Order before it came into force. The government had meetings with producers and encouraged sheep and goat owners to contact them about the Control Order. They also encouraged owners to come into compliance with the Control Order and started testing animals as early as 2019.

[63] On January 29, 2020, Dr. Magnusson sent a letter to Mr. Dillabough by registered mail to notify him of the coming into force of the Control Order and to ask him to contact the Animal Health Unit or the Agricultural Branch to confirm whether he had domestic sheep or goats. When she sent that letter, Dr. Magnusson was aware that Mr. Dillabough had met with the Chief Veterinary Officer and another colleague in early 2019 to discuss the Control Order.

[64] Following the issuance of the letter, Mr. Dillabough phoned and left a message with the office administrator of the Animal Health Unit. On February 4, 2020, Dr. Magnusson reached Mr. Dillabough by phone. During their conversation, Mr. Dillabough acknowledged that he was aware of the Control Order. He also acknowledged that he had goats and requested that they be tested. Dr. Magnusson and Mr. Dillabough discussed the testing and fencing requirements of the Control Order. Dr. Magnusson also told Mr. Dillabough that, according to the Animal Health Unit's policy, a representative of the Agricultural Branch would have to join her for her first on-

site visit to assess the containment for his animals. Mr. Dillabough replied that representatives from the Agricultural Branch were not welcome on his property.

Dr. Magnusson told Mr. Dillabough that she would look for an alternative way to move towards compliance and would call him back. She also mentioned the financial compensation available to him should he determine that he is not in a position to comply with the Control Order and chose not to keep his goats.

[65] On February 6, 2020, Dr. Magnusson phoned Mr. Dillabough and spoke to him. She told him that they had found an alternative to a representative of the Agricultural Branch attending his property with her. She said that she would be prepared to accept that he submits a long-term containment plan that would meet the three objectives of the Control Order and that would set out the fencing materials, the location of the fence and a timeline for completion.

[66] On February 19, 2020, Dr. Magnusson phoned Mr. Dillabough to follow up with him. She emphasized that she would like to be apprised of his plans to move forward to achieve compliance with the Control Order by the end of that month.

[67] She did not hear back from Mr. Dillabough until she phoned him on April 2, 2020. On that date, she repeated to him that he needed to provide a fencing plan before she could come and test his goats. She told him that if he did not initiate and achieve compliance, he would be in a situation of non-compliance with the Control Order, which is an offence under the *Act*.

[68] Dr. Magnusson testified that her decision not to attend Mr. Dillabough's property to test his goats until he provided a complete fencing plan was based on the need to know that sheep and goat owners are committed to moving towards compliance prior to

do so. Dr. Magnusson added that she understands that owners do not want to build a long-term containment that might require considerable amount of time and money before finding out whether they can keep their animals through testing. However, her unit needed at least a fencing plan to know that there was a commitment to move towards compliance before investing public resources in testing the animals.

[69] Dr. Magnusson did not hear back from Mr. Dillabough after their telephone conversation of April 2, 2020. As a result, on April 29, 2020, she issued a notice of non-compliance that she sent to Mr. Dillabough by registered mail. In that letter, she notified Mr. Dillabough that he had until May 30, 2020, to: (i) complete and provide his containment plan, and (ii) identify the breed, sex, date and place of birth (or purchase) of each of his goats, to demonstrate that he intended to comply with the Control Order.

[70] After the notice was delivered, Mr. Dillabough contacted the office of the Animal Heath Unit and left a message. On May 5, 2020, Dr. Magnusson phoned him back and left a message. Mr. Dillabough did not return her phone call. She tried to reach him by phone again on several occasions without success. On May 12, 2020, Dr. Magnusson left a voicemail to Mr. Dillabough stating that this was the last time she would try to contact him, that he had the notice of non-compliance she had sent to him, and that they would await his containment plan. However, Dr. Magnusson did not hear back from Mr. Dillabough. Dr. Magnusson acknowledged that she only tried to reach Mr. Dillabough at his home (landline) phone number because it was the number she had used to reach him before. She acknowledged that she did not try to reach him on his cell phone number, which he had provided to her at some point. Dr. Magnusson added that Mr. Dillabough never complained about her using his landline to contact him.

[71] On July 29, 2020, Dr. Magnusson and Jay Lester, an animal protection officer with the Animal Health Unit, visited Mr. Dillabough's farm to investigate the issue of his non-compliance. Mr. Dillabough's property is located off the North Klondike Highway in the Yukon, at approximately 650 metres elevation. When they arrived, Dr. Magnusson and Jay Lester were met by Mr. Dillabough. They explained the purpose of their visit to him. They also cautioned him that Mr. Lester had a body camera on him; that their visit would be recorded; and that anything gathered and anything said could be used as evidence with respect to the issue of non-compliance with the Control Order.

Mr. Dillabough acknowledged that he understood what they said.

[72] During her visit, Dr. Magnusson observed four goats that were loose and scattered across Mr. Dillabough's property. She saw two more in a shed.

Dr. Magnusson also observed that there was barb wired fencing around Mr. Dillabough's property. However, she explained that the fencing was not sufficient to contain his goats because the horizontal barbwire strands stood approximately 12 to 18 inches apart. According to Dr. Magnusson, the size of the opening between the wires was big enough to allow goats to go through the fence. In addition, she noticed that the road leading up to Mr. Dillabough's house was not gated. She testified that it was open. In cross-examination, Dr. Magnusson stated that she knew what a Texas Gate (cattle guard) was, that she did not recall seeing one at the entrance of Mr. Dillabough's property, and that, in any event, a Texas Gate would not meet the fencing requirement of the Control Order. As for the shed in which she had seen two goats, Dr. Magnusson stated that it was dark and not large enough to contain the six goats she had seen on Mr. Dillabough's property on a long-term basis. Dr. Magnusson also observed some

fencing in the area behind the shed. However, in her opinion, that fencing was not sufficient to contain the goats either.

[73] Dr. Magnusson explained her concerns with respect to the fencing requirements to Mr. Dillabough during that visit. They talked about the fact that the shed with additional yard space could be adequate on a temporary basis to contain his goats for the duration of the testing period. Mr. Dillabough also showed her an area where he thought he could have his long-term containment. Dr. Magnusson talked about the requirements for containment, including the fact that the animals would have to be contained at all times. Mr. Dillabough voiced concerns about the costs. According to Dr. Magnusson, Mr. Dillabough's plan was not specific enough to allow her to approve his long-term fencing plan at the time.

[74] Mr. Dillabough stated that he could have the smaller and temporary containment ready for testing within a week. Dr. Magnusson gave him until August 15, 2020, to complete it and to provide the details of his long-term containment plan. She later extended that deadline to August 18, 2020.

[75] On August 18, 2020, Dr. Magnusson phoned Mr. Dillabough and spoke to him. She asked him if his goats were contained and he replied in the negative.

Dr. Magnusson specifically asked him if he had finished constructing the fencing behind the shed (temporary containment). Again, Mr. Dillabough replied in the negative.

Mr. Dillabough asked her to tell him when they would attend his property and he would put his goats in the enclosure. Dr. Magnusson told Mr. Dillabough that his goats had to be contained for the duration of the testing period, not in at night and out during the day. She also said that the fencing requirements had been reviewed with him on a number of

occasions. Mr. Dillabough replied that he had showed her where he intended to construct the long-term containment. Dr. Magnusson acknowledged that he had done so but that he still had to submit a fencing plan that met the criteria of the Control Order. Mr. Dillabough stated that he did not agree with that. Dr. Magnusson stated that these were the regulations and that he needed to provide a long-term containment plan before they could attend his property to test his goats. Mr. Dillabough asked her again to tell him when they would attend his property to test his goats and he would contain them. At that point, Dr. Magnusson told Mr. Dillabough that she considered this situation to be a case of non-compliance. She also told him that she would not be contacting him again and that he could call her. Dr. Magnusson stated that she was not certain whether Mr. Dillabough heard everything she said because he hung up on her at that time.

[76] Dr. Magnusson did not speak to Mr. Dillabough after that last telephone conversation. He did not contact her after that either and there is no indication that he contacted someone else with the Animal Health Unit after August 18, 2020, in relation to the fencing requirement.

[77] Mr. Dillabough did not submit his long-term containment plan on or by August 18, 2020. There is no evidence that he submitted one after that date.

[78] A few days later, Mr. Dillabough was charged with failing to contain his goats within an approved enclosure.

Voir dire

[79] Mr. Dillabough made a number of statements against interest during his telephone conversations with Dr. Magnusson. On February 4, 2020, he admitted to having and keeping goats on his property. On August 18, 2020, he acknowledged that

he had not yet completed the temporary enclosure he had discussed with Dr. Magnusson and, thus, that his goats were not contained in an approved enclosure. Both statements were found to be voluntary and admissible at trial by the trial judge after *voir dire*s.

[80] I note that Mr. Dillabough refused to have the evidence adduced in the *voir dire*s entered in the trial proper. Mr. Dillabough asked a number of questions to Dr. Magnusson during the two *voir dire*s that had more to do with his defence than with the issue of voluntariness. However, Mr. Dillabough did not repeat those questions during Dr. Magnusson's cross-examination in the trial proper. Mr. Dillabough only asked her a few questions regarding the presence of a Texas Gate in his entryway. Nonetheless, as Mr. Dillabough represented himself at trial and on appeal, I have decided, for the purpose of this appeal, to consider Dr. Magnusson's answers to Mr. Dillabough's questions in the *voir dire*s, even though, technically, they do not constitute evidence in the trial itself.

[81] I pause here to note that, even though Mr. Dillabough did not question the trial judge's decision regarding the voluntariness of his statements on appeal, I am of the view that the evidence adduced during the *voir dire*s supports the trial judge's finding that the statements were made voluntarily. I am also of the view that the trial judge provided adequate assistance to Mr. Dillabough throughout the trial and gave him leeway in terms of permissible questioning during the *voir dire*s.

[82] Going back to Dr. Magnusson's evidence in the *voir dire*s. She acknowledged that Mr. Dillabough had, as far back as 2019, requested that his goats be tested, and

that, at the time, he had indicated that his goats were contained in a shed the size of a large room.

[83] Dr. Magnusson stated that she was not aware whether the Chief Veterinary Officer wanted Mr. Dillabough's goats to be put down, in 2019, as asserted by Mr. Dillabough.

[84] Dr. Magnusson acknowledged that, on February 4, 2020, Mr. Dillabough told her that his goats were contained in a small area and asked her to test his goats. However, Dr. Magnusson stated that, based on the description of the containment area provided by Mr. Dillabough at the time, she determined that it was not adequate for the duration of the testing period. Dr. Magnusson also stated that, during their conversation, Mr. Dillabough told her that he had eight goats: six adults and two kids; not seven adults and one kid, as asserted by Mr. Dillabough.

[85] Dr. Magnusson recalled seeing two adult goats in Mr. Dillabough's shed on July 29, 2020. She did not recall seeing a baby goat. She did not recall whether the shed had windows. However, she recalled it being dark in the shed even though she attended Mr. Dillabough's property during the day.

[86] Dr. Magnusson did not recall that Mr. Dillabough had explained to her why he refused to put his containment plan in writing, as asserted by Mr. Dillabough.

[87] Dr. Magnusson acknowledged that she knew how to use a computer. She also acknowledged that, on or after their August 18th conversation, she did not look up his property on the internet to see if she could find out whether he had built the temporary enclosure. In addition, she acknowledged that she did not attend Mr. Dillabough's property after August 18, 2020, to see if he had built the temporary enclosure.

[88] Dr. Magnusson denied that, during their conversation of August 18, 2020, Mr. Dillabough told her that he only had one piece of wire left to put up to complete the enclosure. She reiterated that she asked Mr. Dillabough whether he had completed the containment behind the shed and that his answer was a simple no. She also denied that Mr. Dillabough had told her that the fence was “not a hundred percent” completed instead of a simple no.

[89] Dr. Magnusson stated that she reached Mr. Dillabough on his cell phone on August 18, 2020. However, prior to that, she had phoned him on his landline, which was the number he had left for them to call him back in February 2020. Dr. Magnusson stated that that number worked fine as she was able to reach Mr. Dillabough and leave messages for him even in May 2020.

Testimony of Matthew Ball

[90] Matthew Ball, Director of Agriculture with the Government of Yukon from 2017 to mid-October 2020, was the second witness for the Crown.

[91] Mr. Ball is familiar with the Control Order. His evidence is that the Agriculture Branch has a role to play in the implementation of the Control Order in that it supports the Animal Health Unit by providing expertise in the areas of fencing and containment. In addition, the Agriculture Branch is responsible for providing financial compensation to owners of animals that have to be put down pursuant to the Control Order.

[92] Mr. Ball has known Mr. Dillabough for approximately 19 years. He has attended Mr. Dillabough’s property approximately 15 times over the years. The last time he attended Mr. Dillabough’s property was on June 4, 2020, to conduct a fence inspection

in relation to a grazing lease program unrelated to the Control Order. Mr. Dillabough was with him at the time and he had Mr. Dillabough's permission to attend his property.

[93] During his visit, Mr. Ball saw six free roaming goats on Mr. Dillabough's property. Mr. Ball noticed that, at least, part of the fence around Mr. Dillabough's property was composed of four strands of horizontal barbwire, and that the first horizontal barbwire strand was located approximately 18 to 20 inches above ground. According to Mr. Ball, the opening he saw was big enough to allow goats to go under the fence. In addition, Mr. Ball testified that there was enough space between the barbwire to allow goats to go through the fence. Mr. Ball testified that he told Mr. Dillabough that he was not supposed to have his goats out and around his property as he did, and that he needed to build a fence or have a plan in place.

[94] In cross-examination, Mr. Ball acknowledged that Mr. Dillabough's goats were well fed.

[95] Mr. Ball also acknowledged that Mr. Dillabough had relayed to him his concerns regarding the Agriculture Branch's handling of documents he had provided to them in the past. Mr. Dillabough's concerns came from the disappearance of a map and a letter that Mr. Dillabough had provided to the Agriculture Branch. However, Mr. Ball testified of having no personal knowledge of the incident because it would have occurred decades prior to Mr. Ball joining the Agriculture Branch.

Testimony of James Dillabough

[96] Mr. Dillabough testified in his defence. He did not dispute most of Dr. Magnusson's testimony regarding their interactions in relation to the Control Order. However, Mr. Dillabough's evidence diverge from Dr. Magnusson's evidence with

respect to their telephone conversation of August 18, 2020. Mr. Dillabough acknowledged that he had a telephone conversation with Dr. Magnusson on or about August 18, 2020. However, he disputes that he simply responded in the negative when Dr. Magnusson asked him if he had completed the fence. While he did not remember exactly what he said, he stated that he would have said something to the effect that he was almost finished or nearly done. Mr. Dillabough added that he asked Dr. Magnusson when they would come to test his goats. However, he stated that she would not answer that question. Mr. Dillabough added that, if the Animal Health Unit had committed to test his goats on a certain date, he would have completed the fence quickly and the animals would have been within the enclosure before they arrived. According to Mr. Dillabough, the Animal Health Unit could have tested his goats and he would have kept them in the containment area from then on. Mr. Dillabough stated that, despite his repeated requests, the Animal Health Unit refused to come to his property to test his goats. Mr. Dillabough questioned how the government could charge him for failing to keep his goats within an enclosure when the government refused to test them. Mr. Dillabough reiterated his belief that his goats did not have to be in an enclosure until the government started testing them considering, among other things, the costs of feeding them in an enclosure as opposed to letting them graze on pasture on his property. Mr. Dillabough added that he has lived on his property just off the North Klondike Highway since 1965 and that he has never seen a wild sheep or goat on his property. [97] Mr. Dillabough's evidence is that he had less than two hours of work left on his fence when he spoke to Dr. Magnusson on August 18, 2020. He added that the fence was completed on or about August 20, 2020. Mr. Dillabough testified that the Animal

Health Unit, and more specifically Dr. Magnusson, never contacted him after August 18, 2020. He added that Dr. Magnusson never came to his property to inspect the fence after their last telephone conversation.

[98] In addition, Mr. Dillabough testified that he never agreed to submit a long-term containment plan in writing.

[99] Mr. Dillabough stated that the Animal Health Unit had his cell phone number and could have reached him at that number after his landline was cut off in the middle of May 2020 instead of unsuccessfully trying to reach him on his landline as they did. Mr. Dillabough asserts that the Animal Health Unit refused to use his cell phone number.

[100] In addition, Mr. Dillabough testified that he has a Texas Gate (cattle guard) at the entrance of his property that prevents his animals from leaving his property.

[101] Mr. Dillabough testified that he started asking the Animal Health Unit to attend his property and test his goats as early as February 2019. Mr. Dillabough stated that he had eight goats at the time that he kept in a 24 x 24 foot building for the winter. The building had eight-foot walls, three windows and a door. According to Mr. Dillabough, that building was suitable as a temporary containment for the duration of the testing period. He added that his plan was to add another containment area for his goats after the testing period.

[102] Mr. Dillabough added that Dr. Magnusson should have been aware that he had a 24 x 24 foot building on his property that was appropriate to contain his goats. However, he acknowledged that he did not show it to her or mention it to her when she attended his property on July 29, 2020. Mr. Dillabough pointed out that Dr. Magnusson did not

ask to see that building. According to Mr. Dillabough, Dr. Magnusson should have been aware of the existence of that building because Jay Lester and two veterinarians from her unit would have seen it when they attended his property in January 2019 at the request of the Agriculture Branch. Mr. Dillabough stated that Dr. Magnusson's colleagues attended his property in his absence and without his permission. However, Mr. Dillabough did not provide any evidence regarding how he became aware of that visit or obtained that information as he was not at his property at the time.

[103] Mr. Dillabough's evidence is that, on several occasions, he requested that the Animal Health Unit attend his property to test his goats. However, they refused to do so because he would not allow a representative of the Agriculture Branch on his property. Mr. Dillabough's evidence is that he confronted Mary Vanderkop, the Chief Veterinary Officer, about the Animal Health Unit's refusal to attend his property to test his goats. Ms. Vanderkop told him that the Animal Health Unit would not attend his property because he would not let a representative of the Agriculture Branch attend his property with them. It is in that context that she asked him when he was going to put his goats down.

[104] Mr. Dillabough confirmed that he distrusts the employees of the Agriculture Branch and will not let them attend his property because he is of the view that they have lied to him too often. Mr. Dillabough pointed out that Matthew Ball is one of the few individuals from that Branch that he allows on his property. According to Mr. Dillabough, the employees of the Agriculture Branch do not know much about fences and are not qualified to approve them. Mr. Dillabough's concerns regarding the Agriculture Branch include an incident involving, what Mr. Dillabough qualifies as, the suspicious

disappearance and convenient reappearance of a map and a letter from the Ta'an Kwäch'än Council that he had provided to the Agriculture Branch, which led to him losing a sizeable portion of land.

[105] Mr. Dillabough is of the opinion that his goats do not have to be contained in an enclosure until the day the Animal Health Unit starts testing them. Mr. Dillabough also pointed out that the price of hay and the price of the materials required to build an enclosure is expensive.

[106] Mr. Dillabough testified that his boundary fence is composed of four to eight barbwire strands. Mr. Dillabough stated that his fence is sufficient to prevent wild animals from getting into the smaller containment area he has for his goats on his property. Mr. Dillabough acknowledged that his goats would be able to go under or between the portion of his fence that is composed of four barbwire strands. However, he added that his goats do not need to leave his property because they are well fed.

Analysis

[107] Mr. Dillabough submits that the trial judge failed to consider a number of issues arising out of Dr. Magnusson's and Matthew Ball's testimony that negatively affected their credibility. Mr. Dillabough submits that the trial judge's error had a material impact on his decision to find him guilty of the offence charged. Mr. Dillabough raises the following issues.

a) The presence of a Texas Gate at the entrance of Mr. Dillabough's property

[108] Dr. Magnusson testified in examination-in-chief that there was no gate at the entrance of Mr. Dillabough's property. She then stated in cross-examination that she did not recall seeing a Texas Gate when she attended Mr. Dillabough's property on

July 29, 2020. Mr. Dillabough testified that there is a Texas Gate at the entrance of his property that prevents his animals from escaping his property. Mr. Dillabough submits that Dr. Magnusson's failure to notice the Texas Gate demonstrates (i) that she does not know what a Texas Gate is; and (ii) that she was untruthful when she testified to knowing what it is. Mr. Dillabough submits that Dr. Magnusson's untruthfulness affects her overall credibility. According to Mr. Dillabough, the trial judge disregarded and failed to address that issue prior to accepting Dr. Magnusson's testimony, and more specifically, her opinion that a Texas Gate does not meet the enclosure requirement of the Control Order.

[109] The trial judge addressed the issue of the Texas Gate at paras. 12 and 13 of his decision as follows:

[12] There was a Texas gate, which is a device used to keep livestock within an enclosure that essentially has horizontal pipes and gaps in between the pipes so that the animals are not comfortable walking on it lest their feet fall through the gaps and they get stuck or break their leg or something like that. Other than that, Dr. Magnusson indicated there was no gate.

[13] There was a Texas gate. Dr. Magnusson was familiar with what a Texas gate is, as am I – from Saskatchewan, I have seen many Texas gates, so I know the theory behind them – but she did not feel even a Texas gate would be enough.

[110] The trial judge did not specifically address the fact that Dr. Magnusson's testimony varied to some degree between her examination-in-chief and her cross-examination.

[111] However, the trial judge's finding that there was a Texas Gate at the entrance of Mr. Dillabough's property demonstrates that he accepted Mr. Dillabough's evidence

over Dr. Magnusson's evidence in that regard. The trial judge also concluded that there was no gate other than the Texas Gate at the entrance of Mr. Dillabough's property.

This conclusion is consistent with the evidence of both Mr. Dillabough and Dr. Magnusson.

[112] In addition, I am unable to accede to Mr. Dillabough's position that Dr. Magnusson's answers automatically lead to the conclusion that she was lying when she testified to knowing what a Texas Gate is, and that the trial judge erred in failing to recognize her untruthfulness. I note that Dr. Magnusson had been a veterinarian for approximately 17 years prior to accepting the position of inspector with the Animal Health Unit. In addition, Mr. Dillabough did not really probe Dr. Magnusson's assertion that she knew what a Texas Gate was when he cross-examined her. While Mr. Dillabough testified that, in his opinion, a Texas Gate would prevent his goats from exiting his property through his entryway, he did not otherwise challenge Dr. Magnusson's contrary opinion.

[113] Overall, I am of the view that Dr. Magnusson's lack of recollection regarding the Texas Gate does not rise to a level where it necessarily affects her credibility and reliability as a whole. As a result, I do not find that the trial judge erred in his assessment of the evidence revolving around the issue of the Texas Gate.

[114] In any event, there was ample evidence from the testimony of Mr. Ball and Dr. Magnusson to conclude, as the trial judge did, that Mr. Dillabough's goats were not properly contained and could have escaped his property through parts of Mr. Dillabough's boundary fence. In addition, Dr. Magnusson's opinion that Mr. Dillabough's boundary fence does not meet the requirements of the Control Order is

supported by Mr. Dillabough's admission that part of his boundary fence would be insufficient to contain his goats, if they ever wanted to leave his property.

b) Dr. Magnusson's description of Mr. Dillabough's small shed

[115] Mr. Dillabough submits that the photographs of the containment area he built for his goats, which I accepted as fresh evidence on appeal, demonstrate that

Dr. Magnusson's description of the small shed in which he kept some of his goats was inaccurate; and that this new evidence negatively affects her credibility. Mr. Dillabough

submits that the photographs demonstrate that the small shed he showed to

Dr. Magnusson on July 29, 2020, does have a window that provides a lot of light.

According to Mr. Dillabough, the photographs contradict Dr. Magnusson's evidence that it was quite dark inside that building.

[116] I note that the photographs, which I accepted as fresh evidence, were not before the trial judge. Therefore, he could not have considered them.

[117] I have considered the photographs. I agree that they show that Mr. Dillabough's shed has a window. However, the only photograph depicting the interior of the shed reveals that the window did not provide much light. In fact, I find the interior of the shed to be on the dark side. As a result, I am of the view that the photographs adduced as fresh evidence on appeal do not contradict Dr. Magnusson's evidence in any material way.

[118] In any event, even if I were to accept that the inside of the shed was not as dark as Dr. Magnusson remembered it to be, this inconsistency would not be sufficient to affect her overall credibility.

[119] In his decision, the trial judge noted that Dr. Magnusson had found Mr. Dillabough's small shed too dark to approve it as an enclosure for his goats. While the trial judge's statement conformed with the evidence at trial, it did not encompass all the reasons provided by Dr. Magnusson to explain why she thought that the small shed was not an appropriate enclosure. Dr. Magnusson also testified that the small shed was not big enough to house all of Mr. Dillabough's goats.

[120] In addition, Dr. Magnusson's testimony reveals that she agreed that the small shed coupled with an additional fenced yard space could be adequate, on a temporary basis, to contain Mr. Dillabough's goats for the duration of the testing. Therefore, the issue of whether the small shed was as dark as attested by Dr. Magnusson played a very peripheral role in the case before the Court.

[121] I pause here to say that most of Dr. Magnusson's testimony regarding her interactions with Mr. Dillabough were not challenged in any material way or contested by Mr. Dillabough.

c) Matthew Ball's evidence regarding the location of Mr. Dillabough's property

[122] Mr. Dillabough does not dispute that he has known Matthew Ball for approximately 19 years. However, Mr. Dillabough wondered how someone he has known for so long could mistakenly state that he lives on the North Columbia Highway, as shown by the transcript of his testimony, when he has never lived there.

Mr. Dillabough submits that such an obvious mistake raises issue with the credibility and reliability of Mr. Ball's overall testimony, which the trial judge failed to address.

Mr. Dillabough asserts that the transcripts are certified and, as such, presumed to be accurate.

[123] At the hearing of the appeal, Crown counsel requested that I listen to the recording of the proceeding, as she suspected that there was an error in the transcript.

[124] The evidence at trial reveals that Mr. Dillabough's property is off the North Klondike Highway. In light of the fact that Mr. Dillabough and Mr. Ball have known each other for a long time, and considering the nature of the error put forward by Mr. Dillabough, I determined that it was appropriate to listen to the recording of the proceeding.

[125] While the sound of the recording is not perfect, I am satisfied that Mr. Ball said in his testimony that Mr. Dillabough lives off the "North Klondike Highway" and not off the "North Columbia Highway" as written in the transcript. Therefore, the error identified by Mr. Dillabough cannot be attributed to Mr. Ball.

[126] As a result, I must reject Mr. Dillabough's assertions regarding the credibility and reliability of Mr. Ball.

d) The Animal Health Unit's actions in Mr. Dillabough's case

[127] The evidence at trial (especially the evidence regarding the interactions between Dr. Magnusson and Mr. Dillabough) does not support Mr. Dillabough's assertions that the trial judge ignored the evidence that the Animal Health Unit acted in bad faith in his case. Therefore, I am of the view that the trial judge did not err in not mentioning or addressing that issue in his decision.

[128] At trial, Mr. Dillabough testified to having a conversation with the Chief Veterinary Officer during which she asked him when he was going to put down his goats.

Mr. Dillabough submits that this statement, coupled with the Animal Health Unit actions and negative response to his repeated requests that they test his goats, reveal that the

Animal Health Unit never intended to test his goats because they wanted to have his animals put down.

[129] First, I note that Mr. Dillabough did not provide many details about his conversation with the Chief Veterinary Officer. Mr. Dillabough's evidence is that, on several occasions, he requested that the Animal Health Unit attend his property to test his goats. However, they refused to do so. Mr. Dillabough testified to confronting Ms. Vanderkop about the Animal Health Unit's refusal. According to Mr. Dillabough, Ms. Vanderkop responded that the Animal Health Unit would not attend his property because he would not let a representative of the Agriculture Branch come along with them. It is in that context that she would have asked him when he was going to put down his goats.

[130] Second, there was no evidence adduced at trial that can reasonably lead to the conclusion that the Animal Health Unit enforced their policy more rigidly against Mr. Dillabough than they did with other sheep or goat owners. Instead, the evidence reveals that Dr. Magnusson reached out to Mr. Dillabough and tried to facilitate his compliance with the Control Order. Dr. Magnusson worked around Mr. Dillabough's refusal to have an employee of the Agricultural Branch attend his property with her to assess his fence, as per the Animal Health Unit's practice or policy, and by permitting him to provide a long-term containment plan in writing. On July 29, 2020, she visited his property and, after a discussion with him, gave him additional time to complete a temporary enclosure for his goats despite the fact that the Control Order had already been in effect for approximately six months. In addition, the evidence reveals that Dr. Magnusson's reasons for not approving the structure and fence that were already in

place on Mr. Dillabough's property were reasonable. Finally, as pointed out by the trial judge, Mr. Dillabough's statement that Dr. Magnusson should have known that he had a 24 x 24 foot building (which, he contends, was a suitable enclosure for testing his goats) when he did not show it to her let alone mention it to her, is questionable. In addition, I am of the view that Mr. Dillabough's assertion that Dr. Magnusson's colleagues would have seen that building when they attended his property in his absence and without his permission in the winter of 2019, should be treated with caution because he did not explain how he found out about that visit. In any event, the fact that Dr. Magnusson's colleagues may have attended Mr. Dillabough's property does not necessarily lead to the conclusion that she must have been aware that he had a 24 x 24 foot building he thought was suitable to contain his goats, or that the building was acceptable. Finally, Dr. Magnusson's acknowledgement (in cross-examination in the first *voir dire*) that, during their telephone conversation of February 4, 2020, Mr. Dillabough described to her a building the size of a large room, where he thought he could keep his goats during testing, is as close as the evidence came to her being aware of a larger size building on Mr. Dillabough's property. However, Dr. Magnusson also testified to telling Mr. Dillabough, that based on the description he had provided over the phone, that particular building was not adequate to house his goats for the three-month testing period.

[131] In that context, neither the Chief Veterinary Officer's discussion with Mr. Dillabough nor the fact that the Animal Health Unit refused to test Mr. Dillabough's goats prior to him completing an approved enclosure and providing a long-term

containment plan in accordance with their valid policy, constitute evidence of bad faith as contended by Mr. Dillabough.

[132] As a result, I am of the view that the evidence does not support Mr. Dillabough's view that the Animal Health Unit acted in bad faith in his case, and that the trial judge erred in not addressing that issue.

[133] Overall, I find that the errors and omissions put forward by Mr. Dillabough in support of this ground of appeal are either not borne out by the evidence, or did not, and could not have affected the trial judge's finding regarding the credibility and reliability of the witnesses and, ultimately, his finding of guilt.

e) Did the trial judge err in finding that there was evidence upon which he could conclude beyond a reasonable doubt that Mr. Dillabough had failed to build an approved enclosure within the material times?

[134] It is not disputed that neither Dr. Magnusson nor one of her colleagues attended Mr. Dillabough's property after their conversation of August 18, 2020. Also, it is not disputed that she did not attempt to use Google Earth or any other software, as suggested by Mr. Dillabough, to determine whether he had completed the temporary enclosure. As a result, Mr. Dillabough also submits that there was no evidence upon which the trial judge could have found that he had not completed the temporary enclosure within the timeline given by Dr. Magnusson, and, therefore, had failed to contain his goats within an approved enclosure as mandated by the Control Order. Mr. Dillabough questioned how the trial judge could have accepted Dr. Magnusson's evidence that he had not built an adequate fence when she failed to attend or look up his property to make timely observations to that effect and to confirm he had not done so. Mr. Dillabough added that one can say things on the phone that are not necessarily

accurate. Essentially, Mr. Dillabough submits that there is no evidence upon which the trial judge could have concluded that he had not built his temporary enclosure by the end of the day on August 18, 2020.

[135] The trial judge correctly found that Dr. Magnusson, as an animal health inspector, had the authority to approve enclosures under the Control Order. The trial judge also found that Dr. Magnusson visited Mr. Dillabough's property on July 29, 2020, and that, at the time, she observed goats "roaming freely on his property."

[136] The trial judge also reviewed Dr. Magnusson's evidence that, when she visited Mr. Dillabough's property on July 29, 2020, she did not see any enclosure that met the requirements of the Control Order, and that she could have approved.

[137] The trial judge noted that, during Dr. Magnusson's visit, Mr. Dillabough indicated that he could build a temporary enclosure for his goats that would be comprised of one of his buildings and a small fenced area. Dr. Magnusson agreed and gave Mr. Dillabough a timeline to complete his temporary fence. She gave him the same timeline to provide her with a long-term enclosure plan.

[138] The trial judge noted that when Dr. Magnusson phoned Mr. Dillabough on August 18, 2020, he told her that he had not completed the temporary fence. The trial judge acknowledged that Mr. Dillabough testified to saying to Dr. Magnusson that it was "nearly done", which, I note, is essentially an admission that it was not finished.

[139] In addition, during his testimony, Mr. Dillabough specifically admitted that he had not completed the temporary enclosure within the timeline provided by Dr. Magnusson.

[140] Mr. Dillabough represented himself at trial. At the beginning of the trial, the trial judge explained to Mr. Dillabough that the Crown had the burden of proving the

elements of the offence beyond a reasonable doubt. He also explained to Mr. Dillabough that he could, but did not have to, present evidence or testify in his defence. Mr. Dillabough chose to testify.

[141] The photographs of Mr. Dillabough standing beside a fence containing his goats, which I admitted as fresh evidence on appeal, were taken on November 28, 2020, well after the timeline provided by Dr. Magnusson had expired. Therefore, they cannot be relied upon to demonstrate that the fence was finished within the material times.

[142] In addition, the statements against interest that Mr. Dillabough made to Dr. Magnusson on February 4, 2020 (when he admitted to owning goats) and on August 18, 2020 (when he admitted to not having completed the temporary enclosure) were found admissible after *voir dire*s.

[143] The Crown was not required to adduce further evidence on what Mr. Dillabough had admitted. Therefore, the trial judge was correct, and entitled to consider, and rely on Mr. Dillabough's out of court statements as well as the admissions he made during his testimony at trial to conclude that he had failed to complete the only enclosure that Dr. Magnusson was prepared to approve within the timeline she had provided to him. The trial judge was also entitled and correct to conclude that Mr. Dillabough's goats were not contained in an approved enclosure at the material times.

[144] Overall, I am of the view that the evidence supports the trial judge's finding, beyond a reasonable doubt, that Mr. Dillabough had failed to contain his goats within an approved enclosure within the material times contrary to the Control Order.

[145] Finally, even though this argument was not specifically raised by Mr. Dillabough on appeal, I am of the view that the trial judge was correct in not addressing the defence

of due diligence or mistake of facts in his decision because the evidence did not give rise to those defences. I would add that I agree with the respondent that Mr. Dillabough was charged with a strict liability offence, which only requires the Crown to prove the *actus reus* of the offence beyond a reasonable doubt. Once the Crown has met its burden of proof, the accused may defend themselves by establishing, on a balance of probabilities, that they either reasonably believed in a set of facts which, if true, would render the act or omission innocent, or they took reasonable steps to avoid committing the offence (see *R v Sault Ste. Marie*, [1978] 2 SCR 1299, 1326).

[146] Overall, I am of the view that the trial judge did not misapprehend the evidence nor did he commit any error in assessing the credibility of the witnesses.

[147] This ground of appeal is dismissed.

Issue 3 **Did the trial judge err by imposing a sentence that is demonstrably unfit, or by making an error in principle, failing to consider a relevant factor, or erroneously considering an aggravating or mitigating factor that had an impact on the sentence he imposed on Mr. Dillabough?**

[148] Instead of sentencing Mr. Dillabough to a fine and/or a period of imprisonment, the trial judge ordered, pursuant to ss. 59 and 60 of the *Act*, that:

- (i) Mr. Dillabough be prohibited from owning or having custody or control of domestic sheep or goats in the Yukon until December 31, 2024;
- (ii) Mr. Dillabough remove any goats under his care and control from the Yukon or destroy any goats under his care and control by November 4, 2020;
- (iii) any goats remaining under Mr. Dillabough's care and control as of November 4 at 5:00 p.m., be forfeited to the Government of Yukon; and

- (iv) as of November 4, 2020 at 5:00 p.m., the Government of Yukon be entitled to seek an order from the Supreme Court of Yukon authorizing entry onto Mr. Dillabough's property to seize any goats or sheep still under his care and control after that period of time.

Positions of the Parties

[149] Mr. Dillabough submits that the sentence imposed by the trial judge is excessive and, therefore, demonstrably unfit.

[150] Mr. Dillabough submits that he should have received a low fine instead of the penalty imposed by the trial judge because this is his first offence with respect to the Control Order. Mr. Dillabough submits that, by ordering him to dispose of his goats and prohibiting him from possessing goats and sheep until the expiry of the Control Order in 2024, the trial judge imposed a sentence that was at the very high end of the range of penalties he could have imposed under the *Act*, thereby imposing a sentence that is clearly excessive considering the circumstances of this case.

[151] Mr. Dillabough also submits that the sentence is unreasonable because, in order to comply with the trial judge's order, he would have had to either remove his goats from the Yukon or otherwise destroy them before the end of the 30-day appeal period.

[152] Mr. Dillabough contends that the trial judge's assertion that he would have let his goats loose on his property during and after the end of the testing period is unfounded and unwarranted, and that the trial judge's unsupported conclusion had an impact on the sentence he imposed.

[153] Mr. Dillabough submits that the evidence adduced by the Crown at the sentencing hearing does not support the sentence imposed by the trial judge.

Mr. Dillabough submits that Dr. Magnusson exaggerated the seriousness of the *M. ovi* situation in the Yukon based on data emanating from the United States not Canada.

Mr. Dillabough contends that Dr. Magnusson misled the Court with respect to the number of animals that tested positive to *M. ovi* in the Yukon and that had to be put down. Mr. Dillabough questions Dr. Magnusson's (Animal Health Unit's) assessment of the situation in the Yukon based on his own observations regarding the increase in the wild sheep population in British Columbia, and on information he received from a third party that testing is not required in that province.

[154] Finally, Mr. Dillabough submits that the transcript of the sentencing hearing reveals that the Crown dictated the sentence imposed by the trial judge.

[155] Crown counsel submits that the sentence imposed by the trial judge was fit and reasonable based on relevant sentencing factors in environmental offences.

[156] Crown counsel submits that, while the trial judge did not address every potential sentencing factor that may come into play in environmental matters, he did not fail to consider any factor that might reasonably have had a bearing on the sentence and did not overemphasize the factors he more expressly considered.

[157] Crown counsel noted that the trial judge's conclusion that there was no reasonable expectation that Mr. Dillabough would comply with an order permitting him to keep his goats was reasonable. In addition, Crown counsel submits that, considering Mr. Dillabough's demonstrated history of non-compliance with the Control Order, it was reasonable for the trial judge to conclude that it was not possible to structure a penalty that would have compelled compliance on the part of Mr. Dillabough and allowed him to continue owning goats in the Yukon.

Facts

[158] The Crown called Dr. Magnusson to testify at the sentencing hearing.

[159] Dr. Magnusson provided evidence regarding *M. ovi*, the pathogen primarily targeted by the Control Order; the danger posed by the respiratory diseases caused by the pathogen to the wild sheep and goat population in the Yukon and its potentially devastating effect on the wild population; the fair size of the population of wild sheep and goats in the Yukon; the presence of a thornhorn sheep habitat in the area where Mr. Dillabough's property is located; the approximate number of domestic sheep and goats in the Yukon; the percentage of domestic animals that tested positive for *M. ovi* and had to be put down; the importance of the Control Order; and its impact on other goats and sheep owners in the Yukon.

[160] Mr. Dillabough cross-examined Dr. Magnusson. In cross-examination, Mr. Dillabough challenged Dr. Magnusson's numbers and conclusions by putting to her that other provinces have decided to manage their populations of wild and domestic sheep and goats differently than the Yukon. He also put to her that the population of wild sheep and goats has increased in British Columbia despite their different management practices.

[161] Dr. Magnusson answered that she could not speak to the evolution of the wild sheep and goat population in another jurisdiction as she has not studied the issue, which also depends on habitat range, population pressures, human interaction, climate change, etc. In addition, she commented that the practice of allowing farmers to take their sheep into the mountains for grazing has resulted in outbreaks and sharp decline in the wild population in certain states of the United States. However, she

acknowledged that the species of wild sheep inhabiting those states are different from the wild sheep species we have in the Yukon.

[162] She acknowledged that there was a record of Yukon government employees attending Mr. Dillabough's property in January 2019 but that no enclosure was approved at that time. She also stated that she did not see metal gates that were closed at the entrance of Mr. Dillabough's property.

[163] Mr. Dillabough did not testify or adduce evidence at sentencing.

Analysis

[164] The maximum penalty for a person convicted for the first time of an offence under the *Act*, is a maximum fine of \$10,000 or imprisonment for a term not exceeding one year, or both (s. 58 of the *Act*).

[165] A judge may also impose a variety of orders in addition to, or as an alternative to, any fine and/or period of imprisonment that may be imposed under s. 58 of the *Act*, including orders prohibiting ownership or custody of animals (ss. 59 and 60 of the *Act*).

[166] In this case, the trial judge chose to make an order pursuant to ss. 59 and 60 of the *Act* instead of imposing a fine, a period of imprisonment, or both on Mr. Dillabough.

[167] It is well established that trial judges have a broad discretion to impose a sentence they consider appropriate within the limits established by law. Accordingly, a sentence imposed by a trial judge is entitled to "considerable deference" on appeal (*R v Lacasse*, 2015 SCC 64 ("*Lacasse*") at paras. 39 and 41).

[168] Therefore, appellate intervention will only be warranted when: (i) the sentence imposed is demonstrably unfit; or (ii) the sentencing judge committed an error in principle, failed to consider a relevant factor or erred in considering an aggravating or

mitigating factor, and that error had an impact on the sentence (*Lacasse* at paras. 11 and 44; *R. v. Joe*, 2017 YKCA at paras. 36 and 40; *R. v. Quash*, 2019 YKCA 8 (“*Quash*”) at para. 26).

[169] A sentence will be demonstrably unfit only if it is clearly excessive or inadequate by falling outside the acceptable range of orders for the offence and the offender (*R v Terroco Industries Ltd.*, 2005 ABCA 141 (“*Terroco*”) at para. 20; *R v Quash* at para. 47).

[170] Therefore, an appeal court should not intervene simply because it “might entertain a different opinion as to the most appropriate sentence” or would have weighed the relevant sentencing factors differently (*R v Beets*, 2018 YKSC 21 (“*Beets*”) at para. 109; see also *Lacasse* at paras. 40, 41 and 49).

[171] Finally, as stated in *Lacasse* at para. 12:

... proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender. The more serious the crime and its consequences, or the greater the offender’s degree of responsibility, the heavier the sentence will be. In other words, the severity of a sentence depends not only on the seriousness of the crime’s consequences, but also on the moral blameworthiness of the offender.

[172] In *Beets*, at para. 75, Gower J. reviewed the sentencing factors applicable to environmental offences. As Mr. Dillabough was sentenced for an offence that falls within that category of offences, the factors enumerated in *Beets* find application in this case as well. Essentially, the factors to consider are:

- 1) the criminality of the conduct/culpability of the offender;
- 2) the nature of the environmental damage/harm;
- 3) the extent of attempts to comply;

- 4) remorse/acceptance of responsibility;
- 5) the size of the “corporate” offender;
- 6) benefits realized by the offence
- 7) offender’s prior record and past involvement with the authorities; and
- 8) deterrence.

[173] I will review the fitness of the sentence imposed on Mr. Dillabough in light of these principles and factors.

Fitness of the Sentence

[174] The trial judge approached the sentencing hearing with a view to impose an order that would allow Mr. Dillabough to come into compliance with the Control Order, and facilitate his ongoing relationship with the territorial authorities responsible for the implementation and enforcement of the Control Order.

[175] However, as the sentencing hearing progressed, it became clear that Mr. Dillabough’s distrust towards the territorial authorities as well as his entrenched views regarding the need, scope, and implementation of the testing and fencing requirements pursuant to the Control Order would make any phase-in type of order unworkable, and would simply bring the parties back before the court.

[176] Faced with, on the one hand, Mr. Dillabough’s uncompromising and, to a certain extent, threatening attitude on display during the sentencing process, and, on the other hand, the evidence adduced by the Crown at sentencing clearly demonstrating the need to act to protect the population of wild sheep and goats in the Yukon from *M. ovi*, the trial judge came to the conclusion that the appropriate disposition in this case was to

impose an order compelling Mr. Dillabough to remove his goats from the Yukon or dispose of his goats within approximately two weeks of his order, and to prohibit him from possessing domestic goats or sheep for the duration of the existing Control Order.

[177] I note that it is not unusual for sentences to take effect immediately or for an offender to be given a period of time shorter than the appeal period to comply with terms of a sentencing order. For example, an offender may be given a fine to pay within a few weeks. It is then up to the offender to seek a stay of the order pending appeal, if they wish to pursue an appeal.

[178] In addition, having reviewed the transcript of the sentencing proceeding, I find that the trial judge's observations and reasoning accord with the evidence adduced at sentencing. I also find that he properly considered Mr. Dillabough's behaviour at the sentencing hearing. Finally, I am of the view that the conclusions reached by the trial judge are reasonable, considering the evidence before him, and that the sentence he imposed is fit. A low fine, as suggested by Mr. Dillabough, would have been wholly inappropriate in this case.

[179] In addition, I see no merit in Mr. Dillabough's argument that the trial judge mistakenly took for granted that he would let his goats loose during and after testing. It is clear from my review of the transcript, that, at that point of the proceeding, the trial judge was simply trying to explain to Mr. Dillabough why the Animal Health Unit was insisting on having a temporary containment in place, as well as a long-term fencing plan, before committing to testing the animals.

[180] While the trial judge did not specifically address the sentencing factors listed in *Terroco* and *Beets*, his reasons for decision, read alongside the exchanges he had with

Crown counsel and Mr. Dillabough during the sentencing hearing, demonstrate that he did not fail to consider any factor that might reasonably have had a bearing on the sentence and did not overemphasize any of the relevant sentencing factors.

- 1) *Culpability; the extent of attempts to comply; and the existence of remorse/acceptance of responsibility*

[181] In *Terroco*, the Court of Appeal of Alberta found that culpability is a dominant factor to consider in sentencing an offender for environmental offences. The Court stated at para. 35:

... The degree of carelessness is a factor in sentencing for environmental offences. Due diligence in sentencing for environmental offences is to be assessed on a sliding scale: the more diligent the offender, the lower the range of fit sentences; alternatively, the less diligent, the higher the range of fit sentence.

[182] In addition, it is well established that acceptance of responsibility and remorse constitute mitigating factors in sentencing an offender.

[183] The trial judge addressed these factors in his reasons for sentence as follows:

[1] ... Unfortunately, it has become very very clear to me that Mr. Dillabough is not going to comply with any order that would result in him being able to become compliant with Control Order 2018-001 (the "Control Order").

...

[10] I have already concluded that, unfortunately, there is no reasonable expectation at all that Mr. Dillabough will be compliant with an order that would permit him to keep the animals. I have tried everything to find some common ground that would help you [Mr. Dillabough] to live in relative peace with the officials and yet be able to continue owning your goats, but you crossed the line when you [Mr. Dillabough] started making, what amounts very close to, criminal threats and, unfortunately, I have no confidence there is anything I can do.

[184] The evidence reveals that the territorial authorities made efforts over a period of many months to reach out to Mr. Dillabough and that they attempted to find workarounds to bring him into compliance. However, Mr. Dillabough resisted those efforts and slowed down the implementation process as much as he could.

[185] The trial judge's conclusion that it was very unlikely that Mr. Dillabough would cooperate with the authorities and comply with the Control Order is well grounded in the evidence as well as in the attitude and behaviour that Mr. Dillabough displayed throughout the trial and the sentencing proceedings.

2) *Environmental damage/harm*

[186] In *Terroco*, the Court of Appeal found that proof of actual harm constitutes an aggravating factor (para. 47). However, considering that harm is not easily identifiable in environmental offences, the Court also stated, at para.47, that: "...the absence of ascertainable harm is not a mitigating but merely a neutral factor ..."

[187] In addition, the Court of Appeal found, at para. 48, that "the potential for harm is also a relevant consideration", and that "[t]he greater the potential for harm, the greater the warranted penalty." The Court of Appeal also stated that the potential for harm is assessed through "the probability of the risk, the nature of the product, the likely magnitude of damage if the risk materializes and the sensitivity of the site including its proximity to population and fragile environments".

[188] There is no evidence in this case that any of Mr. Dillabough's goats have had any contact with wild sheep or goats lest transmitted a respiratory disease to them.

[189] However, Dr. Magnusson's evidence establishes that *M. ovi* poses a real, and serious threat to the population of wild sheep and goats in the Yukon. She also provided

evidence that Mr. Dillabough's property overlaps with wild sheep habitat. While the reasons for decision do not mention that specific factor, the transcript of the sentencing proceeding reveals that the trial judge was alive to that issue.

[190] The transcript of the sentencing proceeding also reveals that trial judge took judicial notice of the negative economic consequences that M. ovi could have on Yukon outfitters.

[191] As a result, I find that the judge properly considered this factor.

3) *Circumstances of the offender; size of the "corporate" offender and benefits realized by the activities; prior involvement with the authorities.*

[192] The trial judge did not expressly consider any benefits Mr. Dillabough may have gained by not complying with the Control Order because neither the Crown nor Mr. Dillabough provided any evidence in that regard.

[193] In addition, the trial judge did not specifically consider any financial loss or any other impact that the loss of Mr. Dillabough's goats (even though the trial judge tried to find a workable solution that would allow Mr. Dillabough, a life long farmer, to keep his goats) may have on him because, aside from the fairly small number of goats that Mr. Dillabough owns, there was no evidence to that effect before him.

[194] Therefore, the trial judge did not err in not specifically addressing that factor in sentencing Mr. Dillabough.

[195] At sentencing, Crown counsel filed a copy of a ticket issued under the *Pounds Act*, RSY 2002, c. 173, to Mr. Dillabough in 2018 for having left his horses at large. Mr. Dillabough was sentenced to a fine of \$125. While the trial judge acknowledged the existence of that prior similar conviction, he did not overemphasize this factor as he

clearly indicated during the sentencing proceeding that he would not be putting much weight on this single regulatory offence ticket.

4) *General and Specific Deterrence*

[196] The Court of Appeal in *Terroco* stated that specific and general deterrence are key components of sentences imposed for environmental offences (para. 53).

[197] The Court of Appeal also stated that: “judges should use the entire arsenal of sentencing options under the relevant environmental legislation to accomplish the sentencing goals including goals related to general deterrence” (para. 57).

[198] Many of the other relevant sentencing factors may inform the need for specific deterrence, such as the degree of remorse and the actions taken to remedy the offending conduct (*Terroco*, at para. 56).

[199] Also, the penalty should have a deterrent effect on others in that industry or sphere of activity (*Terroco*, at para. 60).

[200] The evidence reveals that, while Mr. Dillabough firmly dug his heels and resisted the implementation of the fencing requirement of the Control Order, most domestic sheep and goats owners in the Yukon complied in a timely manner, sometimes at great expenses, with the Control Order. Some owners lost many of their animals because they tested positive to the bacteria. This situation also demonstrates that the bacteria is present in domestic animals in the territory.

[201] As already stated, the evidence establishes that the threat posed by *M. ovi* to the wild sheep and goat population in the Yukon is real.

[202] Therefore, I agree with the respondent that the circumstances of this case warranted a penalty of sufficient severity not only to address the issue of specific

deterrence but also to deter others from not complying with the Control Order going forward.

5) *Other considerations*

[203] In addition, I am of the view that there is no merit in Mr. Dillabough's argument that the Crown dictated the sentence imposed by the trial judge. It is not unusual for counsel to suggest wording for Court orders or to draft court orders that reflect the decision made by the judge in Court for the judge's review and approval. There is nothing in the transcript of the sentencing proceeding that would suggest that Crown counsel did anything other than that. She made her sentencing submissions and, after the judge rendered his decision, properly inquired whether she should draft an order for the judge's review. The judge agreed to proceed that way. There is nothing improper about this procedure.

[204] Overall, I am satisfied that the trial judge properly considered the sentencing factors in light of the circumstances of the offender and the offence before him prior to concluding that the appropriate sentence in this case was an order compelling Mr. Dillabough to remove his goats from the Yukon or dispose of them within approximately two weeks time, and preventing him from possessing sheep and goats until the end of the existing Control Order. In addition, I am of the view that while the penalty was at the higher end of the arsenal of tools at the disposition of the trial judge under the territorial legislation, the penalty he imposed was proportionate in light of all the circumstances of the offender and the offence before the Court.

[205] I will now turn to the impact of the fresh evidence adduced on appeal on the fitness of the sentence imposed by the trial judge.

Fresh evidence on appeal

[206] I granted Mr. Dillabough's application to adduce fresh evidence on appeal, which mainly consists of several photographs of the fence he built and the containment area he now has for his goats. I also authorized Crown counsel to file an affidavit from Dr. Magnusson regarding the adequacy of the containment area depicted in the photographs in light of the fencing requirement of the Control Order.

[207] The photographs confirm Mr. Dillabough's assertions at trial that, at some point after August 18, 2020, he completed the fence for the temporary enclosure for his goats. The photographs also confirm that his goats were contained in that area. In that sense, the photographs have an impact on the assessment of relevant sentencing factors such as the extent of Mr. Dillabough's attempts to comply with the Control Order, mitigation of harm and deterrence.

[208] In addition, there is no indication that Mr. Dillabough has not complied with my order that he keep his goats at all times within the enclosure he built (unless for transporting them for veterinary services) and that he maintain the enclosure in proper working order during the appeal process.

[209] However, in her affidavit, Dr. Magnusson states that the enclosure built by Mr. Dillabough does not conform with the fencing requirement of the Control Order, and, as a result, could not be approved as long-term containment for his goats. It appears that Mr. Dillabough is alive to that issue because he indicated at some point during the appeal process that he only has to build a temporary containment until his goats are tested. Dr. Magnusson also raised concerns with respect to the size of the enclosure, as well as the state of disrepair of the shed that forms part of the enclosed area.

[210] While it may be tempting to give Mr. Dillabough yet another chance to keep his animals, based on the few and late steps he has taken to come into compliance with the Control Order, as evidenced by the photographs he filed on appeal, such a decision would be based on hope, not evidence, that Mr. Dillabough would finally change his entrenched ways and attitude to start cooperating with the authorities in order to come into compliance with a legally adopted Control Order that is aimed at protecting Yukon's wildlife.

[211] Mr. Dillabough's defiant attitude towards the legitimacy and necessity of the Control Order, as well as the authority and qualifications of the territorial government employees tasked with implementing the Control Order, has remained throughout the appeal process. As a result, I am not confident that Mr. Dillabough would comply with any type of phase-in order that would necessarily be required in this case considering the applicable sentencing factors assessed in light of the circumstances of the offender and the offence. In fact, such an order would, in all probability, simply bring the parties back before the court.

[212] As a result, I am of the view that the late steps taken by Mr. Dillabough to come into compliance, as evidenced by the photographs, are insufficient to turn an otherwise fit sentence into a demonstrably unfit sentence that should be overturned.

[213] This ground of appeal is dismissed.

CONCLUSION

[214] Mr. Dillabough's appeal against his conviction and sentence is therefore dismissed.

CAMPBELL J.