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COURT OF APPEAL
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Court File Numbers: CA45950 & 45953
Lower Court Registry Number: 27829
Lower Court Registry Location Vancouver

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ON APPEAL FROM the order of Honourable Mr. Justice Affleck of the Supreme Court
of B.C. pronounced on the 11th day of March 2019

BETWEEN:

Her Majesty the Queen

Respondent
(Plaintiff)

AND:

David Anthony Gooderham & Jennifer Nathan

Appellants
(Defendants)

APPELLANTS' FACTUM

Appellant:

David Anthony Gooderham and
Jennifer Nathan

Leo McGrady, Q.C.

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Respondent:

Her Majesty the Queen

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CHRONOLOGY

Date	Event
September 2013	IPCC published the first part of the <i>Fifth Assessment Report</i> (AR5), <i>Climate Change 2013: The Physical Science Basis</i>
January 24, 2014	National Energy Board rejected application by the City of Vancouver to expand List of Issues for inquiry.
October 16, 2014	Federal Court of Appeal dismissed City's leave application
May 2015	Canada submits Nationally Determined Contribution (NDC) under the terms of the UN Framework Convention on Climate Change.
December 2015	Paris Agreement: Canada and other countries commit to emissions reductions.
March 19, 2016	Federal Government publishes methodology of upstream greenhouse gas emissions assessment in the Canada Gazette, <i>Interim Measures for Pipeline Reviews</i> .
May 19, 2016	National Energy Board (NEB) released report recommending approval of Trans Mountain Project.
May 19, 2016	Draft report published, <i>Review of Related Greenhouse Gas Emissions Estimates for the Trans Mountain Expansion Project</i> ("upstream emissions assessment").
November 1, 2016	Ministerial Panel report released.
November 25, 2016	Final report of the "upstream emissions review" released.
November 29, 2016	Order-in-Council authorizes Trans Mountain Expansion Project.

November 2017	Publication of <i>UN Emissions Gap Report 2017</i> .
March 15, 2018	Trans Mountain Pipeline ULC granted an injunction.
March 24, 2018	Appellant Nathan arrested.
May 29, 2018	Government of Canada purchases Trans Mountain Pipeline.
August 20, 2018	Appellant Gooderham arrested.
October 7, 2018	<i>IPCC Special Report on Global Warming to 1.5°C</i> .

OPENING STATEMENT

The Appellants filed a Notice of Application in which they sought leave of the court below to raise the common law defence of necessity to the charge of criminal contempt of court.

The Appellants' defence was that they acted in the belief that the rapidly advancing warming of the earth, and the resulting impacts on natural systems and human livelihoods constituted an imminent peril. The question to be determined at trial was whether that belief was a reasonable belief, taking into account the objective evidence that the Appellants sought to call at trial.

The outline of proposed evidence shows the earth is presently on a path to warming of more than 3°C above the pre-industrial level; that warming above 1.5°C will cause grave and irrevocable loss and harm; and the impacts will markedly worsen as warming approaches 2°C and above.

The expert evidence shows that to have a chance to avoid any of these dire outcomes, the annual level of global emissions would have to begin unprecedented deep reductions at the latest by 2020, with further deep cuts on a massive scale repeated every year over the next decade to 2030. Yet the uncontradicted facts presented to the court show global fossil fuel use and global emissions are projected to continue to rise to 2030. The proposed evidence shows that the expansion of Canada's oil sands production, facilitated by the pipeline, will materially contribute to the continued growth of global oil production and emission over the next decade.

Affleck J. dismissed the application. He found there is a contingency that adaptive societal measures may be taken by governments and businesses in future to avoid any dire outcome. The Appellants respectfully submit that Affleck J, failed to apply the Vukelich procedures to the application. The proposed evidence presented by the Appellants to Affleck J. provided no basis whatsoever for his finding of a contingency.

PART 1 – STATEMENT OF FACTS

1. This is an appeal from the summary refusal to admit evidence to support the defence of necessity in criminal contempt proceedings arising from public disobedience of an injunction.

Background

2. On March 15, 2018, Trans Mountain Pipeline ULC was granted an injunction restraining the named defendants and others with notice of the injunction from physically obstructing, impeding or preventing access to its sites or work areas including the Burnaby and Westridge Marine Terminals.

3. On March 24, 2018, the Appellant Jennifer Nathan was arrested for blocking access to the Burnaby Terminal. The Appellant Nathan admits that she intended to disobey the injunction in order to draw attention to her opposition to the proposed construction of the pipeline.¹

4. On August 20, 2018, the Appellant Gooderham was arrested for blocking access to the Westridge Marine Terminal. The Appellant Gooderham admits that he intended to delay or halt the construction of the pipeline and to publicly show his opposition. Both Appellants were aware the construction of the pipeline had been authorized by a Federal Order in Council (“OIC”).²

5. Prior to the beginning of their trial for criminal contempt, the Appellants filed a notice of application in which they sought leave of the court below to raise the common law defence of necessity to the charge of criminal contempt of court.

6. The Appellants’ proposed defence was that they acted in the belief that the advancing warming of the earth and the resulting impacts on natural systems and human livelihoods is an imminent peril. A question to be ultimately decided

¹ *Trans Mountain*, paragraph 7 (AB 299)

² *Trans Mountain*, paragraph 9 (AB 300).

at trial is whether that belief was a reasonable belief taking into account the objective evidence that they sought to call at trial.

7. The pre-hearing leave application followed the procedure approved by this Court in *Regina v. Vukelich*.³ Those procedures⁴ require that on the pre-hearing application Affleck J. was bound to *assume the truth of the facts* the applicants seek to establish in support of their entitlement to the remedy sought.⁵ The facts must disclose a basis *upon which the court could make the order*.⁶

8. The Appellants filed a written summary of the evidence they proposed to call at trial, including expert evidence on matters of climate science and projections of Canada's emissions and global emissions to 2030 and after, and the relationship between rising global emissions and the present and future impacts of rising surface temperature on human and natural systems. The summary of evidence, referred to as the Appellants' Outline of Proposed Evidence (hereinafter referred to as "Outline"), sets out in Part 18 the available evidence about the impacts that have already occurred and gives particulars of the worsening impacts that will occur as warming increases from the existing rise of 1°C above the pre-industrial level to 1.5°C and 2°C.⁷

The proposed evidence

9. The Outline shows that even if all countries in the world (including Canada) were to fully implement all the commitments they have already made under the Paris Agreement⁸ to reduce their own national emissions by 2030 (referred to as their Nationally Determined Contributions or "NDCs"), the surface of the earth by 2030 will still be irrevocably committed to warming that will far

³ [1996] B.C.J. No. 1535, paragraphs 17-26.

⁴ The *Vukelich* procedures are addressed in paragraph 59, page 15 below.

⁵ *Regina v. Armstrong*, [2010] B.C.J. No. 1486 (BCSC), paragraph 29.

⁶ *Vukelich*, page 7.

⁷ Outline, Part 18 (AB 115).

⁸ Outline, Appendix B, at paragraphs B.11-2.12 describes the commitments made by Canada under the December 2015 Agreement (AB 128).

exceed the promised 2°C threshold. The *UN Emissions Gap Report 2017*, cited in the Outline explains the importance of the next eleven years:

*“Looking beyond 2030, it is clear that if the emissions gap is not closed by 2030, it is extremely unlikely that the goal of keeping warming to well below 2°C can still be reached. Even if the current NDCs are fully implemented, the carbon budget for limiting global warming to below 2°C will be about 80% depleted by 2030. Given currently available carbon budget estimates, the available carbon budget for 1.5°C warming will already be well depleted by 2030.”*⁹ (emphasis added)

10. The emissions “gap” is the difference between the currently projected level of global emissions in 2030 (assuming that all existing NDCs are fully implemented) and the much lower level of global emissions required to keep warming “well below 2°C”.

11. The UN report concludes that we are on a path to more than 3°C warming:

*Full implementation of the unconditional NDCs and comparable action afterwards is consistent with a temperature increase of about 3.2°C by 2100 relative to pre-industrial levels.”*¹⁰ (emphasis added)

12. According to the Outline, the world now has eleven years to achieve a massive transition in energy use, or it is “extremely unlikely” the goal of keeping warming to well below 2°C can be reached.¹¹

13. The Outline shows that Canada has committed to construct two major new pipeline expansions, Trans Mountain and Line 3,¹² that will facilitate a substantial increase in oil sands production, which will grow our domestic emissions by 44 million tonnes (Mt) by 2030 above the 2015 level (by far the largest source of

⁹ Outline, Part 17 at paragraph 17.24 (AB 112), *UN Emissions Gap Report 2017*.

¹⁰ Outline, Part 17 at paragraph 17.25 (AB 112), *UN Emissions Gap Report 2017*.

¹¹ Outline, Part 17 at paragraph 17.24 (AB 112).

¹² The Trans Mountain Project expands the capacity of the existing line from Edmonton to Burnaby, B.C., from 300,000 bpd to 890,000 bpd: Outline, Part 9 at paragraphs 9.7 to 9.10 (AB 80). Line 3 adds 370,000 bpd of new capacity. It is routed from Alberta to Superior, Wisconsin. The two projects together add 960,000 bpd of new capacity: see Outline, Part 5 at paragraph 5.1 (AB 70) and also Part 9 at paragraph 9.9 (AB 80).

emissions growth in the Canadian economy) and significantly contribute to the further growth of global oil supply to 2040.¹³

14. The Appellant Gooderham affirmed his belief that adequate reductions cannot be achieved within the next twelve years (now eleven years) to keep average surface warming within the 1.5°C pathway, and that there is no reasonable likelihood emissions can be reduced fast enough to keep the increase within 2°C. He attested that the most significant activity in the Canadian economy increasing our emissions is the oil sands industry, which is projected to continue increasing its emissions to 2030. The Appellant Nathan affirmed her belief that the approval of the project was the greatest roadblock “to any contribution that Canada could make to move the world away from climate tipping points”.¹⁴

The contingency

15. Summarily dismissing the application, Affleck J. found that “there is a contingency” that the serious impacts caused by climate change, or at least any dire outcome, can be prevented. On the basis of that “contingency”, he concluded that the peril in the Appellants’ case is merely “foreseeable and likely”, but it is not “virtually certain”.¹⁵

16. Affleck J. did not provide any basis for his finding that such a contingency exists.

¹³ Outline, Part 5 at paragraph 5.1 and Figure iii (AB 70); Part 13 at paragraph 13.3 (AB 93); and Appendix M (AB 155).

¹⁴ Second Affidavit of David Gooderham, sworn November 21, 2018, paragraphs 107-123 (AB 215); Affidavit of Jennifer Nathan, sworn November 21, 2018, paragraphs 28-34 (AB 294).

¹⁵ *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 50 (“*Trans Mountain*”), paragraph 54-55 (AB 327).

OTHER PROPOSED EVIDENCE PRESENTED AT THE VUKELICH HEARING

17. One of the questions on this appeal is whether the facts presented by the Appellants at the *Vukelich* hearing provided any evidentiary basis for the finding that a contingency exists of the kind described.

18. The facts presented at the *Vukelich* hearing identified *inter alia* six areas of proposed evidence that are material in any assessment of whether the further increase in global average surface warming can be limited to less than 1.5°C or, failing that, less than 2°C.

I. The rising atmospheric carbon concentration level

19. The Outline shows the relationship between the rising annual level of global emissions, the rising concentration of greenhouse gases in the atmosphere, and warming of the earth's surface. The proposed evidence about the atmospheric carbon concentration level and its significance is found in Part 15 of the Outline.¹⁶

20. A concentration level of 450 parts per million (ppm) is broadly equivalent to a 2°C increase in global average surface temperature. The concentration reached 405 ppm in 2017. It is now rising 20 parts per million (ppm) per decade. In recent years the annual increase has been higher – rising 3.0 ppm in 2016.

21. In addition to carbon dioxide, studies calculate the warming effect of other GHGs, principally methane and nitrous oxide. The combined concentration of all GHGs is measured as “CO₂ equivalent” (CO₂eq). The Outline shows that the combined concentration level will exceed 450 ppm CO₂eq by 2030, equivalent to a 2°C increase in global average surface temperature – if we continue on the present emissions path.¹⁷

¹⁶ Outline, Part 15 (AB 99); Part 16 at paragraphs 16.19-16.23 and 16.34-16.38 (AB 105); Appendices R and S (AB165).

¹⁷ Outline, Part 15 at paragraphs 15.12-15.13 (AB 101); Part 16 at paragraphs 16.19-16.23 (AB 105); and Appendix R (AB 165). Paragraphs R.11- R.13 summarize the proposed evidence

II. The magnitude of the global emissions “gap”: staying within the 1.5°C and 2°C limits

22. To keep the increase in global warming to less than 2°C, the annual level of global emissions must decline from the currently projected 2030 level of 55.2 billion tonnes of CO₂eq (GtCO₂eq) down to an annual level of 41.8 GtCO₂eq or less – a reduction of 13.4 GtCO₂eq. That would require cuts *by all emitting countries averaging 25% worldwide*.

23. To limit global warming to the lower range of 1.5°C, the annual level of global emissions must decline by *50% below current levels* by 2030. That would require a 20-30 GtCO₂eq reduction in annual global emissions by 2030, below the projected 2030 level.

24. The proposed evidence about the emissions “gap” is found in the Outline in Part 17. With respect to annual emissions levels and the 2°C limit, the available evidence establishes that:

(1) Total global emissions reached 51.9 GtCO₂eq in 2016, including CO₂ and all other GHGs from fossil fuel use and industry, and from land use. Based on current policies, and taking into account emissions reduction measures already in place and assuming all unconditional NDCs are fully implemented over the next decade, total emissions are projected to reach 55.2 GtCO₂eq by 2030.¹⁸

(2) Total GHG emissions from all human-induced sources must not exceed 41.8 GtCO₂eq by 2030, if the 2°C target is to be attained with a higher than 66% chance of success.¹⁹

explaining the difference between “equilibrium climate sensitivity” and “transient climate response” (AB 167).

¹⁸ Outline, Part 17 at paragraphs 17.17-17.19 (AB 111).

¹⁹ Outline, Part 17 at paragraph 17.21 (AB 112).

- (3) To have a 66% chance or better of keeping the increase of global surface warming to less than 2°C, the world's economies will have to reduce the annual level of their aggregate emissions by 13.4 GtCO₂eq by 2030, a 25% reduction below the currently projected 2030 level of 55.2 GtCO₂eq.²⁰ That would require eliminating an amount equivalent to all the emissions released by the US and EU in 2016.²¹

25. The emissions gap is affirmed by a second source of proposed evidence, the October 7, 2018 IPCC *Special Report on Global Warming to 1.5°C* – which concludes keeping increased warming well below 2°C will require by 2030 a reduction in annual global emissions to a level 20% below the 2010 level.²²

26. Based on the 2018 IPCC *Special Report*, the proposed evidence shows that in order to limit global warming to the lower range of 1.5°C, global emissions must decline by about 45% from 2010 levels by 2030 (*about 50% below the present level*). That would require a 20-30 GtCO₂eq reduction in annual global emissions by 2030, below the projected 2030 level of 52-58 GtCO₂eq.²³

27. The IPCC *Special Report* shows marked differences in outcomes for human societies and natural systems as warming increases from the current 1°C to an increase of 1.5°C, and further adverse impacts to 2°C.²⁴ Three examples show the impacts of seemingly small increases. With the global average increase now at 1°C, Canada's arctic region has warmed 3°C in the last three decades – a massive change seen in the loss of seasonal ice cover in the Arctic Sea.²⁵

²⁰ Outline, Part 17 at paragraphs 17.18 -17.22 (AB 111).

²¹ Outline, Part 17 at paragraph 17.1 and Figure xii (AB 108). Total projected US emissions in 2017 were 5.3 GtCO₂ and EU total was 3.5 GtCO₂ (not including methane and other GHGs or land use emissions); Paragraph 17.10 (AB 110) shows annual CO₂ emissions for Russia (1.63 GtCO₂), Japan (1.21 GtCO₂), Iran (0.66 GtCO₂), and other countries.

²² Outline, Part 17 at paragraphs 17.31 - 17.35 (AB 113 - 114).

²³ Outline, Part 17 at paragraphs 17.26 – 17.36 (AB 113-114), citing the 2018 IPCC *Special Report*.

²⁴ Outline, Part 17 at paragraph 17.32 (AB 113).

²⁵ Outline, Part 18 at paragraph 18.9 (AB 116).

28. Assuming average global temperature increase is limited to 1.5°C, about one-third of the present-day mass of glaciers in the high mountains of Asia (Hindu Kush-Himalayas, the Tibetan Plateau, and Central Asia), already in retreat, will be lost by the end of this century.²⁶ Glacial melt waters, especially in the dry seasons in hot arid regions through much of the world, are essential to water supply, agriculture, and survival for hundreds of millions of people. At 4°C, by 2100 glaciers worldwide will be largely gone.²⁷

29. Above 1°C all coral reefs are at “high risk”, and at 1.5°C virtually all coral reefs will be gone by 2100.²⁸ About 30% of annual global CO₂ emissions are absorbed into the oceans every year. That process is increasing ocean acidification, impairing the growth of coral reefs and marine ecosystems.²⁹

30. There are no existing commitments by signatories to the Paris Agreement to make additional reductions to their national emissions, which might even partially close the gap. There is no mechanism under the Agreement to compel signatories to increase their commitments.³⁰

III. Baseline projections and mitigation studies

31. The Outline includes a summary of the findings of baseline (business-as-usual) scenarios, which estimate the future path of global emissions based on existing policies and assuming that no significant new carbon-reduction policies will be adopted, beyond those in place or *already committed for future implementation*. The baseline scenarios all show that global CO₂ emissions will continue to rise to 2030 and until the end of this century.³¹

²⁶ Outline, Appendix U (“Evidence about glacier loss and impacts on human settlement”) at paragraph U.16 (AB 175).

²⁷ Outline, Part 18 at paragraphs 18.32-18.42 (AB 119).

²⁸ Notice of Application, at paragraph 28 (AB 10), citing IPCC *Special Report on Global Warming to 1.5°C*.

²⁹ Outline, Part 16 at paragraph 16.38 (AB 108) and Part 18 at paragraph 18.50 (AB 122).

³⁰ Outline, Part 17 at 17.23 (AB 112); also Appendix T at paragraph T.12 (AB 173).

³¹ Outline, Part 16 at paragraphs 16.12 and 16.17 (AB 104-105).

32. In its Fifth Assessment Report, the Intergovernmental Panel on Climate Change (IPCC) concluded that the only pathways consistent with keeping warming below 2°C require emissions reductions on a global scale starting by 2020. Otherwise, the 2°C limit will be exceeded.³²

33. The findings of the baseline projections and mitigation studies are set out in Part 16 of the Outline.³³

34. The *UN Emissions Gap Report 2017* provides an updated projection of future emissions growth, looking at the period to 2030. It concludes that even if all signatories to the 2015 Paris Agreement fully implement all their promised NDCs, the level of global emissions is projected to rise to 55.2 GtCO₂eq by 2030, 6% above the 2016 level.³⁴

35. Over the past twenty years, the annual level of global emissions from fossil fuel burning has continued to increase every year, never once declining in absolute terms, save for the single year of 2008 when the world financial crisis brought negative economic growth to many industrial economies.³⁵

IV. Growth of global oil consumption and the 2°C limit

36. Global oil consumption must *start to decline by 2020* if warming is going to be able to stay within the 2°C limit. The Outline cites a series of studies by the International Energy Agency (IEA) that include both business-as-usual projections showing continued growth in global oil consumption to 2040 (in particular the “New Policies Scenario”), and also a mitigation study called the “450 Scenario”.

37. The “450 Scenario” assumes future cuts in the use of oil, coal, and natural gas are adopted to limit the long-term rise of average global temperature to

³² Outline, Part 16 at paragraphs 16.19-16.23 (AB 105-106), and Appendix S at S.14-S.17 (AB 170).

³³ Outline, Part 16 at paragraphs 16.1 - 16.23 (AB 102) and Appendix S (AB 167).

³⁴ Outline, Part 17 at paragraph 17.19 (AB 111); also Appendix T at paragraph T.9 (AB 172).

³⁵ Outline, Part 14 at paragraph 14.1-14.7 and Figure ix (AB 94).

2°C.³⁶ The “450 Scenario” published in the IEA’s *World Energy Outlook 2015* is based on a 50-50 chance of keeping warming below the 2°C threshold. It concludes that, to meet that goal, global oil consumption would have to start to decline by 2020.³⁷

38. Oil accounts for 34% of global CO₂ emissions from burning fossil fuels. Although emissions from coal burning (40% of the total) are beginning to decline, coal demand increased by 1% in 2017. Emissions from natural gas (19%) are increasing – and expected to continue to increase for another decade.³⁸

39. Notwithstanding the need to curb oil consumption to meet the 2°C limit, the Appellants’ Outline cites multiple sources to show that the world’s major oil-producing countries, including Canada, are projected to continue expanding oil production to 2040 and, in the case of Canada, are currently building new infrastructure to facilitate that expansion.

40. The proposed evidence regarding global oil consumption is found in the Outline at Part 13 and Appendix M.³⁹

41. The IEA’s “New Policies Scenario” affirms that global oil consumption is projected to *continue to increase* to 2040.⁴⁰ It takes into account the benefit of carbon reduction measures *already adopted or planned*, for example future improvements in fuel efficiency, which are expected to slow the future rate of increase in oil consumption – but total consumption will still increase.⁴¹

42. The January 2016 report by Canada’s National Energy Board (NEB), *Canada’s Energy Future 2016*, confirmed “continued growth in global oil

³⁶ Outline, Part 13 (AB 93) and Appendix M (AB 155).

³⁷ Outline, Appendix M (AB 155).

³⁸ Outline, Part 14 at paragraphs 14.10 (AB 96) and 14.27-14.29 (AB 99); Part 16 at paragraphs 16.29-16.33 (AB 107).

³⁹ Outline, Part 13 (AB 93) and Appendix M (AB 155).

⁴⁰ Outline, Part 13 (AB 93), and Appendix M (AB 155): The International Energy Agency’s (IEA) “New Policies Scenario”.

⁴¹ Outline, Appendix M at paragraph M.5 (AB 155).

demand” to 2040.⁴² The NEB’s report of May 19, 2016, recommending approval of the Trans Mountain Project, accepted that global oil consumption would increase to 2040. The NEB did not consider whether the continued expansion of oil production to 2040 can be consistent with a 2°C world.⁴³

43. The November 25, 2016 report prepared by Environment and Climate Change Canada, *Review of Related Greenhouse Gas Emissions Estimate for the Trans Mountain Expansion Project* also accepted that global oil consumption will continue to increase for another twenty-five years.⁴⁴ Addressing the impact of future policies aimed to limit warming to 2°C, the report states that “the impact on Canadian oil sands is unclear”. It did not discuss at all the impact of future policies aimed to limit warming to 1.5°C.⁴⁵

44. Canada’s oil sands production is projected to grow from 2.3 million barrels per day (bpd) in 2015 to 4.5 million bpd in 2040.⁴⁶ Because Canada holds the world’s second largest oil reserves, second only to Saudi Arabia (third largest if we count Venezuela’s heavy oil deposits), that puts Canada among a group of about seven major oil-producing countries that have large enough reserves to substantially increase production during the next two decade. All are currently projected to increase their crude oil production to 2040.⁴⁷

45. The IEA’s March 2018 report, *Global Energy and CO₂ Status Report 2017*, confirms that global oil demand is going to continue to grow. It reported that in 2017, global oil demand rose by 1.6% (an additional 1.5 million bpd). That growth was much higher than the annual average of 1% seen over the last decade.⁴⁸

46. The difficulty of reversing these trends is explained by the pervasive reliance of the global economy on oil, gas, and natural gas. The overall share of

⁴² Outline, Part 1 at paragraphs 1.1-1.5 (AB 63).

⁴³ Outline, Part 8 at paragraphs 8.1-8.4 (AB 77), and Appendix Q (AB 163).

⁴⁴ Outline, Part 9 at paragraph 9.6 (AB 79).

⁴⁵ Outline, Appendix N at paragraph N.4 (AB 158).

⁴⁶ Outline, Part 1 at paragraphs 1.4-1.5 (AB 64).

⁴⁷ Outline, Appendix M at paragraphs M.7-M.9 (AB 156-157).

⁴⁸ Outline, Part 14 at paragraph 14.27 (AB 99).

fossil fuels in the world's total energy supply is about 81%, a level virtually unchanged over the past three decades.⁴⁹ The availability of renewable energy sources (principally solar and wind) is altering that dependency, but the transition is very slow because, with rapid economic growth, the world's increasing appetite for energy is still driving up total fossil fuel consumption every year, in most countries. For example, in 2017 global energy demand increased by 2.1%, driven by economic growth of 3.7%. 72% of that rise in energy demand in 2017 was met by an increase in fossil fuels consumption, and only 25% by renewables.⁵⁰

47. The expert evidence showing the link between economic growth and the continuing rise of global emissions is summarized in Part 14 of the Appellants' Outline. That crucial relationship is explained by the *carbon intensity of production*. As long as the energy system continues to be overwhelmingly dependent on carbon-based fuels, and until a deep structural transformation of our energy system begins to shift us away from that reliance (i.e., in transportation), all economic growth in most of the world's economies will continue to be accompanied by growth of CO₂ emissions.⁵¹

V. Significant limitations on future emissions cuts to 2030

48. The proposed evidence shows that two of the four largest emitting economies are projected to contribute relatively little or nothing to future cuts to 2030. China, the world's largest emitter (28% of the global total), is projected to achieve no significant reduction in the annual level of its emissions before 2030.⁵² India's emissions (7% of the global total) will continue to grow to 2030. India's emissions are 1.8 tonnes of CO₂ (tCO₂) per person, compared to 16.6 tCO₂ per person for the USA and 7.2t CO₂ for China. Very low per capita

⁴⁹ Outline, Part 14 at paragraph 14.26 (AB 99), IEA March 2018 report.

⁵⁰ Outline, Part 14 at paragraphs 14.19-14.30 (AB 98), IEA March 2018 report.

⁵¹ Outline, Part 14 at paragraphs 14.13-14.18 (AB 97). Canada's transportation emissions show no decline since 2005: Appendix A, Figure xv (AB 125).

⁵² Outline, Part 14 at Figure x (AB 97); Part 17 at paragraphs 17.1 – 17.12, in particular para. 17.5 (AB 108 - 110).

emissions reflect severe poverty, leaving poorer countries no margin to further reduce their total emissions.⁵³

49. Any deep reductions of global emissions (aspiring to cuts of 25% to 50% on a global average) would have to come disproportionately from a smaller number of technologically advanced countries.

VI. Canada's emissions

50. Canada's existing NDC is to reduce emissions 30% by 2030 below the 2005 level. That would require an approximate 200 Mt reduction below the expected 2030 level, down to 513 Mt.⁵⁴

51. The oil and gas industry is Canada's largest emitting sector (26% of national emissions). The oil sands industry is by far the largest source of emissions growth in the entire Canadian economy. But under the Government of Canada's published plans for emissions reduction to 2030, total oil and gas sector emissions are projected to be 192 Mt by 2030, *showing no decrease at all below the 2016 level – and a 21% rise above the 2005 level.*⁵⁵

52. Canada's Heavy Industry emissions (10% of Canada's total) are projected to continue to *increase* above the current level and by 2030 show no reduction below the 2005 level – even after taking into account all promised “additional policies” by governments. The Agriculture and Waste sectors (17% of Canada's total combined) show no reductions at all by 2030 below the current level.⁵⁶

53. No source of evidence summarized in the Outline, including those released subsequent to the November 29, 2016 Order approving the Trans

⁵³ Outline, Part 14 at paragraphs 14.11-14.17 and Figure x (AB 97); Part 17 at paragraph 17.5 (AB 109).

⁵⁴ Outline, Appendix B at paragraph B.11 (AB 128).

⁵⁵ Outline, Appendix A (AB 123); Part 5 (AB 70); Part 7 (AB 76-77); Figure xviii (AB 139); Part 12 at paragraphs 12.6-12.10 and Figure viii (AB 89); Appendix F and Figure xviii (AB 139); also Appendix L (AB 150) regarding the emissions impact of B.C.'s liquid natural gas (LNG) industry.

⁵⁶ Outline, Part 12 at Figure viii (AB 89).

Mountain Project, provides any basis to support a finding Canada will meet its NDC commitment.⁵⁷

54. The government's *Review of Related Greenhouse Gas Emissions Estimates for the Trans Mountain Expansion Project* did not address whether oil sands growth could be reconciled with Canada's commitment to reduce its total emissions to 513 Mt by 2030 (Part 9 and Appendix H). The Ministerial Panel report (November 1, 2016) concluded that the question "remains unanswered" (Part 10). The NEB refused to consider the question at all (Part 8).⁵⁸

55. Even if the available evidence could support an inference that Canada might achieve the needed 200 Mt cut in its annual emissions within the next eleven years to meet its existing NDC commitment, there is no basis in the evidence to find any chance that Canada can increase its NDC to materially contribute to closing the 13.4 GtCO₂eq global emissions gap. Canada is the world's 10th largest emitter by volume and one of the world's highest emitters per capita. Canada accounts for 1.6% of global emissions. Increasing Canada's NDC to cover a 1.6% share of the global emissions gap would require that Canada lower its annual emissions level by an additional approximate 200 Mt by 2030 – that is, 200 Mt below the existing 513 Mt target.

THE DECISION BY AFFLECK J.

56. On the basis of his "contingency" finding, Affleck J. found that the defence of necessity has no air of reality.

57. The court below also dismissed the application on the additional grounds that (a) the defence of necessity may not apply where the peril (in this case the peril of climate change) is authorized by law, adopting the ruling of Chief Justice

⁵⁷ Part 6 (AB 73) "Evidence about Alberta's emissions to 2030"; Part 7 (AB 76) "Evidence about Canada's emissions to 2030"; Part 12 (AB 88) "Pan Canadian Framework"; Appendix F (AB 139) "Meeting the 2030 target of 517 Mt"; and Appendix J (AB 148) "Report of the Auditors General (March 2018)".

⁵⁸ Outline, Part 8 (AB 77); Part 9 (AB 79) and Appendix H (AB 142); Part 10 (AB 84).

McEachern in *McMillan Bloedel*,⁵⁹ and (b) on the further ground that the applicants had available to them an alternate lawful means to avoid the peril, namely to apply to set aside or vary the injunction.

PART 2 – ERRORS IN JUDGEMENT

58. In summarily ruling that the defence of necessity had no reasonable prospect of success⁶⁰, Affleck J. erred in law in failing to apply the *Vukelich*⁶¹ procedures to the Appellants' application for leave to lead defence evidence.

PART 3 – ARGUMENT

The Court failed to assume the truth of the facts relied on by the Appellants and relied on facts not before the Court

59. The procedures enunciated by this Court in *Vukelich*, *supra* require that on a pre-trial application to lead evidence:

- a. The judge is required to assume the truth of the facts the applicants seek to establish in support of their entitlement to the remedy sought;⁶²
- b. the applicants' statement of grounds must disclose a basis upon which the court could make the order;⁶³
- c. the moving party is required to show there is a reasonable likelihood that the hearing can assist in determining the issues before the court;⁶⁴ and

⁵⁹ *Trans Mountain*, paragraphs 56-57 (AB 328); *McMillan Bloedel v. Simpson* (1994), 90 B.C.L.R. (2d) 24.

⁶⁰ *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 50 ("*Trans Mountain*") paragraph 62.

⁶¹ *Regina v. Vukelich*, [1996] B.C.J. No. 1535; leave to appeal refused, [1996] S.C.C.A. 461, ("*Vukelich*").

⁶² *Regina v. Armstrong*, [2010] B.C.J. No. 1486 (BCSC), paragraph 29.

⁶³ *Vukelich*, page 7.

⁶⁴ *Regina v. Pires & Lising*, 2005 SCC 66, paragraph 35.

- d. The inquiry is not whether the defence of necessity should in fact excuse the applicants' actions, but whether the trier of fact should have been left to consider this defence. The correct test on that point is whether there is an air of reality to the defence.⁶⁵

60. The ultimate issue to be decided (with two other issues: "lawful alternatives" and proportionality) is whether the Appellants' subjective belief that we are facing an imminent peril is reasonable, having regard to the available objective evidence.

61. In determining that there was no reasonable prospect that the defence of necessity would be successful, Affleck J. conflated the ultimate issue with the more limited decision he was required to make on this preliminary application: have the applicants demonstrated in their summary of proposed evidence a body of expert evidence on the basis of which a trial judge could make the order sought.

62. Despite the absence of any evidence to this effect, Affleck J. made a finding that "adaptive societal measures may be taken" to avoid a dire outcome:

*Whether government, private industry, and citizens take these measures is a contingency that takes these changes outside of "virtual certainty" and into the realm of "foreseeable or likely"*⁶⁶ (emphasis added)

63. The expert evidence summarized in the Outline shows the length of the time remaining to avoid the most serious outcome (i.e., just twelve more years, to 2030), and it defines the size of the emissions "gap" that would have to be closed within that time period, in order to keep warming within the 2°C limit (the amount is 13.4 GtCO₂eq, or about a 25% cut below current levels).

⁶⁵ *Regina v. Latimer*, 2001 SCC 1, paragraph 35.

⁶⁶ *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 50 ("*Trans Mountain*"), paragraph 55 (AB 327)

64. The Outline shows “it is clear that if the emissions gap is not closed by 2030, it is extremely unlikely that the goal of keeping warming to well below 2°C can still be reached ...”⁶⁷. On this application, Affleck J. was bound to assume the truth of the facts the applicants seek to establish in support of their application.

65. Affleck J. erred in drawing an inference, unsupported by evidentiary material, that the “contingency” exists. His finding contradicts all available baseline projections and ignores the proposed evidence of multiple factors that will continue to drive the growth of global emissions over the next eleven years (i.e., the projected continued increase in global oil production and consumption.)

66. There was nothing in the summary of evidence available to support the finding that “adaptive societal measures” could achieve the required 13.4 GtCO₂eq of emissions cuts within the next eleven years – or even that it may be possible. No studies or opinions are cited in the Outline of Proposed Evidence indicating that governments or business have adopted or implemented measures to achieve cuts on that scale between now and 2030. Nor is there evidence that such a plan would be viable in the time remaining, technologically or economically, even if governments and businesses globally did initiate envisioned “societal measures” by 2020.

67. This is not the kind of inquiry on which judicial notice may be relied on to support the court’s finding, given the highly technical and scientific nature of the issues and evidence.⁶⁸ A finding that “societal measures” on a global scale could cut the annual level of global emissions 25% or even 50% below the current level by 2030 would require expert evidence from energy economists and others who,

⁶⁷ Outline of Evidence, Part 17, paragraph 17.24, citing the *UN Emissions Gap Report 2017*.

⁶⁸ *The Law of Evidence in Canada*, 4th ed., Sopinka, Lederman & Bryant, Lexis Nexis, section 19:15, page 1318: “Judicial notice is the acceptance by a court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof of the truth of a particular fact or state of affairs. Facts which are (a) so notorious as not to be the subject of dispute among reasonable persons; or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy, may be noticed by the court without proof of them by any party.

by training and experience, are qualified to assess the viability of policies and technological transformations that might achieve the required cuts.

68. Even if there were some evidence to support such a contingency, the judge's finding does not include any appraisal of the degree of certainty of the contingency, which is essential to properly decide if the likelihood or chance of closing the emissions gap is sufficiently high to materially diminish the imminence of the climate peril. A contingency, if it is very slight – like the contingency we have of winning the lottery – could not be material in deciding that the climate peril is less certain.

69. The applicants' summary of evidence shows that, unless the 13.4 GtCO₂eq emissions "gap" can be closed, it is "extremely unlikely" the world can avoid exceeding the 2°C limit. At a full trial, even if the trial judge were provided some evidence that such a contingency exists, the court could well find, if the judge were to accept the proposed evidence as credible, that any likelihood of achieving the required deep emissions cuts is so uncertain as to not materially diminish the imminence of the climate peril. This case has an "air of reality" on the central issue.

The defence of necessity: the objective test

70. In assessing whether the Appellants' beliefs about the imminence of the peril and the degree of certainty of its occurrence are reasonable, the test is a modified objective test. The Supreme Court in *Latimer, supra*, addressed the standard that will govern the assessment:

Is the standard objective or subjective? A subjective test would be met if the person believed he or she was in imminent peril with no reasonable legal alternative to committing the offence. Conversely, an objective test would not assess what the accused believed; it would consider whether in fact the person was in peril with no reasonable legal alternative. A modified objective test falls somewhere between the two. It involves an objective evaluation, but one that takes into account the situation and characteristics of the particular accused person. We conclude that, for two of the three

requirements for the necessity defence, the test should be the modified objective test.⁶⁹
(emphasis added)

71. The Appellants' beliefs and understanding about the current state of emissions and the time remaining to avoid irrevocable and grievous consequences are reasonable beliefs, consistent with the available objective evidence: thus, to stay within the 1.5°C limit, the gap is 20-30 GtCO₂eq; for 2°C, the gap is 13.4 GtCO₂eq.

72. In weighing the likelihood and effectiveness of future mitigation efforts being taken on the unprecedented scale required over the next eleven years to stay within the 1.5°C or 2°C limits, the Appellants affirm in their affidavit evidence that they formed their beliefs based on the available and uncontradicted scientific studies and emissions data published by governments and international bodies and other objective evidence, including *inter alia*:

- a. The record of failure to meet past reduction commitments, including Kyoto (1997), Copenhagen (2009) and continued failure since 2015 by signatories to the Paris Agreement to increase their NDCs: Outline, Appendix B (AB 127).
- b. Unabated growth in the annual level of global emissions from fossil fuel burning during the past 20 years, notwithstanding past commitments and repeated warnings by authoritative international bodies and studies: Appellants' Factum, paragraph 35, and Outline, Part 14 (AB 94).
- c. All major oil producing states (including Canada) continue to the present to embrace policies that will expand global oil production to 2040: Appellants' Factum, paragraphs 36-47.
- d. Baseline projections of global emissions including studies released in 2017 and 2018 all show continued future increases to 2030, and thus

⁶⁹ Latimer, *supra*, paragraph 32.

confirm there has been no significant recent change in existing policy intentions by “government, private industry and citizens”: Appellants’ Factum, paragraphs 31-35.

- e. In the case of Canada, the Auditor General reported March 27, 2018, “It is unclear how Canada will meet this target,” and “most governments in Canada were not on track to meet their commitments”: Outline, Appendix J (AB 148).
- f. Alberta’s *Climate Leadership* report November 2015 acknowledged the province’s promised future policies are not consistent with global 2°C goals, and concluded that adopting more stringent measures “is not tenable”: Outline, Part 6 at paragraph 6.14 (AB 75).
- g. Even with a sudden change in policy intentions, the timelines between implementation of new carbon-reduction measures and the start of any substantial impacts on annual emissions levels can take years, and the outcomes in some cases are highly uncertain.⁷⁰

73. The modified objective test must take into account the “situation and characteristics” of the particular accused person.

74. The objective evidence available to the Appellants was materially restricted by the refusal of the Government of Canada during the approval process for the Trans Mountain Pipeline to answer crucial questions about whether the proposed expansion of oil sands production to 2030 is consistent with Canada’s explicit commitments under the Paris Agreement. The government itself shut the door on public disclosure of crucial objective evidence.⁷¹

⁷⁰ In achieving its successful transition from coal-fired electricity to natural gas and renewables, the shutdown of Ontario’s 14 coal-fired electricity plants took over 10 years, see Part 2 at paragraph 2.3 (AB 64); ambitious plans announced in 2008 for large-scale adoption of carbon capture and storage (CCS) technology in Alberta did not prove to be economically viable and were abandoned in 2014: see Part 3, paragraphs 3.10-3.13 (AB 68) and Appendix C (AB 129).

⁷¹ Outline, Part 8 (AB 77) and Appendices M, N, and O (AB 155-161).

The test for “imminence”

75. That the test for imminence has a dual nature is supported by the Supreme Court’s decision in *Latimer*. This language embraces both tests for imminence: temporal imminence as well as a degree of certainty of occurrence:

*In short, disaster must be imminent, or harm un-avoidable and near. It is not enough that the peril is foreseeable or likely; it must be on the verge of transpiring and virtually certain to occur.*⁷²

76. Dickson J., in his judgment in *Perka v. The Queen*⁷³, explained that the imminence of the peril serves to “test” whether there were other options open to the defendant to avoid the peril:

The requirement that the situation be urgent and the peril be imminent, tests whether it was indeed unavoidable for the actor to act at all. In Lafave and Scott, Handbook on Criminal Law (1972), p. 338, one reads:

It is sometimes said the defence of necessity does not apply except in an emergency – when the threat of harm is immediate, the threatened disaster imminent. Perhaps this is but a way of saying that, until the time comes when the threatened harm is immediate, there are generally options open to the defendant to avoid the harm, other than the option of disobeying the literal terms of the law.

But in circumstances where the harm, already occurring, is going to worsen and become unendurable, the interval of time before the more destructive harm occurs does not justify an inference that there are “options open to the defendant to avoid the harm”.

77. Alternatively, in considering the relevant time frame, and whether in a particular case there is sufficient time remaining to avoid the peril by pursuing reasonable lawful alternatives, the court in *Latimer* agreed “the accused need not be put in the last resort possible”⁷⁴ The accused is not bound to defer acting for

⁷² *R. v. Latimer*, 2001 SCC 1, paragraph 29.

⁷³ *Perka v. The Queen*, [1984] 2 SCR 232, at p. 251; (1975), 28 C.C.C. (2d) 385 at p. 400.

⁷⁴ *R. v. Latimer*, paragraph 30.

so long that, when it finally becomes clear to a degree of certitude that the peril is not going to be avoided by lawful means, the peril has become unavoidable and irrevocable. The accused is not bound to wait until it is too late.

78. The world's economies must achieve specified annual reductions in global emissions between now and 2030. The reductions must begin by 2020. They must be repeated every year over the next decade to reduce total emissions 25% below the currently projected 2030 level (in addition to the full implementation of all NDCs) to give us a 66% chance of avoiding an increase in warming that exceeds the 2°C limit. The required cut is 20-30 GtCO₂eq to stay within the 1.5°C limit.⁷⁵

79. The Appellants' argument in the court below was that there is no time left to achieve those cuts, due to the rapid rise of the atmospheric carbon concentration level. In the first 150 years of industrialization it increased 40 ppm. Since 1958, it has risen another 90 ppm, to 405 ppm in 2017. Current projections show it will reach 450 ppm CO₂eq by 2030 – equivalent to 2°C warming.⁷⁶

80. The question is whether this precipitous rise in the atmospheric carbon concentration level can be curbed (it cannot be entirely halted) within the next eleven years, and whether it can be curbed sharply enough and fast enough to avoid a more dire outcome.⁷⁷

81. Unless and until that question is answered, it cannot be said that there remains time to pursue lawful means to halt the state action in Canada that is directly adding to and aggravating the peril. The Appellants' belief is that the remaining time is not sufficient, a belief each of them formed based on the objective evidence available to them over the past years, and referred to in their

⁷⁵ Paragraphs 24-27 of the Appellants' Factum, and Outline, Part 17 at paragraphs 17.34-17.36 (AB 114), and Appendix T at paragraph T.8 (AB 172).

⁷⁶ Paragraphs 19-21 of the Appellants' Factum, and Outline, Part 15 (AB 99).

⁷⁷ Paragraph 21 of the Appellants' Factum, and Outline, Part 16 at paragraphs 16.4-16.6 (AB 102) and 16.24-16.28 (AB 106).

affidavits. The Appellants submit that, at best, the proposed evidence shows they have been “put in the last resort possible”.⁷⁸

ALTERNATIVE GROUNDS ON WHICH THE DEFENCE OF NECESSITY WAS REJECTED IN THE COURT BELOW

82. Affleck J. dismissed the application on two additional grounds: that the peril was authorized by law and that there existed the legal alternative available to the Appellants of applying to set aside the injunction.

The peril was not authorized by law

83. The Judge considered himself bound by the adamant words of Chief Justice McEachern in *McMillan Bloedel*, which he quotes:

*Second, I do not believe the defence of necessity can ever operate to avoid a peril that is lawfully authorized by the law. M&B had the legal right to log in the areas in question, and the defence cannot operate in such circumstances.*⁷⁹

84. The Trans Mountain Project was authorized by the Order in Council. The Order did not authorize the peril. The Appellants’ application is based on a detailed summary of the three key procedures (see Parts 8, 9, and 10 of the Outline) that preceded the Order. In particular, the approval process refused or declined to answer the two fundamental questions about whether (i) the rising annual level of emissions from the extraction process (“upstream emissions”) are consistent with Canada’s 30% reduction commitment by 2030, and (ii) whether the increase in cumulative GHG emissions resulting from Canada’s contribution to rising global oil consumption (“downstream emissions”) is consistent with the 1.5°C and 2°C warming limits.⁸⁰

85. The Order in Council did not authorize the peril or acknowledge that expanded oil sands production facilitated by the Project over the next decade

⁷⁸ Paragraph 65 of the Appellants’ Factum, and *R. v. Latimer* at paragraph 30.

⁷⁹ *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 50 (“Trans Mountain”) paragraph 56.

⁸⁰ Outline, Parts 8, 9, and 10 (AB 77-84); also Appendices N and O (AB 157-161).

(and to 2040) would contribute to advancing climate change and its impacts: see Part 11, “The Order in Council”.⁸¹

86. The *McMillan Bloedel* case involved an authorization for logging in a particular tree farm licence area. The purpose of the authorization was to cut a defined area of forest and in that case the worst outcome, the apprehended peril, would be the clearcutting of a particular tenure or cutting area. In such a case, it may be inferred that the cutting authorization had contemplated that outcome.

87. Even in a case where the law purports to authorize a peril, this proposition if applied without discrimination would bar the defence of necessity in the gravest situations where it is abundantly clear that, for the accused, obedience to the law “is no true choice at all”.⁸² It contradicts the basic rationale of why the defence exists in common law set out in *R. v. Perka*, where Dickson J. in his judgement examines the principled basis of the concept of “moral or normative involuntariness”. Dickson J. cites George Fletcher for the proposition that a legal system should be organized on the principle of respect for the “autonomy” of individual citizens. The absence of an opportunity to make a true choice or, in Fletcher’s terms an “adequate choice”, should excuse criminal liability. Dickson J. states that he agrees with Fletcher’s formulation of the rationale for excuses in criminal law, which includes this statement:

*This principle of respect for individual autonomy is implicitly confirmed whenever those who lack an adequate choice are excused for their offence.*⁸³

88. If this court takes the view that the Order in Council of November 29, 2016, by implication authorizes the peril, the Appellants invite the court to reconsider the ambit of the *McMillan Bloedel* decision. Here the evidence about climate science and global emissions “fundamentally shifts the parameters of the debate”.

⁸¹ Outline, Part 11 (AB 84-88), in particular paragraphs 11.14 -11.21.

⁸² *Perka v. The Queen*, [1984] 2 SCR 232, at p. 251; (1975), 28 C.C.C. (2d) 385 at p. 398.

⁸³ *Perka v. The Queen*, supra, at p. 249 ;(1975) 28 C.C.C. (2d) at 399.

Stare decisis is not a straitjacket that condemns the law to stasis:

The trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised, and (2) where there is a change in the circumstances or evidence that “fundamentally shifts the parameters of the debate.”⁸⁴

The Flexibility of the Common Law

89. The appropriateness of reconsidering common law rules when circumstances change, or when new issues arise, is addressed in the judgment of Justice Iacobucci, speaking for the Supreme Court, in *R. v. Salituro*, 1991 CanLII 17 (SCC), [1991] 3 S.C.R. 654. He stated:

... this Court has signalled its willingness to adapt and develop common law rules to reflect changing circumstances in society at large. ... [W]hile complex changes to the law with uncertain ramifications should be left to the legislature, the courts can and should make incremental changes to the common law to bring legal rules into step with a changing society.

90. The Appellants also refer to recent decisions in which existing common law rules concerning defamation have been adapted to changing circumstances. In *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R 640, the Court developed a new defence of responsible communication on matters of public interest.

91. In *Crooks v. Newton*, 2011 SCC 47, the ruling excluded hyperlinks from the scope of the publication rule. In this case, the Court recognizes that what is at stake in a defamation case is not only the individual's interest in protecting his own reputation, but the public's interest in protecting freedom of expression. It acknowledges that Pre-Charter approaches to defamation law had “largely leaned towards protecting reputation”. The Court recognized the need to change the law to achieve “a proper balance” of those interests:

⁸⁴ (Canada (Attorney General) v. Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 42); Carter v. Canada (Attorney General) (2015), para. 44.

*Interpreting the publication rule to exclude mere references [hyperlinks] not only accords with a more sophisticated appreciation of Charter values, but also with the dramatic transformation in the technology of communications...*⁸⁵

Applying to set aside the injunction does not constitute a “lawful alternative” in the circumstances of this case.

92. A lawful alternative must be one that offers a reasonable chance to avoid the peril. Setting aside the injunction would not have delayed or halted the construction of the pipeline. The lawful foundation of the pipeline company’s right to proceed with construction was the Order in Council.

93. The Appellant Gooderham deposed that in an application to set aside the injunction, he would have been bound to disclose that his purpose in seeking such an order was to allow him to block access to the construction site in order to halt or delay construction. There can be no reasonable expectation that, given evidence of that kind, the presiding judge would have agreed to lift the injunction, or vary it to accommodate that disruption.⁸⁶

94. The only effective way to act to halt or delay the peril through challenging the injunction would have been to challenge the validity of the Order in Council, and to challenge the failures of the approval process. That would have been barred as a collateral attack.

95. Further, the Appellants return to the points made in paragraphs 66-69. If, as the Appellants contend, there was by early 2018 no appreciable chance left to keep the atmospheric carbon concentration from exceeding 450 ppm CO₂eq, it cannot be said that applying to set aside the injunction in March or in August of 2018 offered any lawful alternative to avoid the peril. It was already too late. Alternatively, the Appellants had already been placed in the last resort possible.

⁸⁵ *Crookes v. Newton*, 2011 SCC 47, at paragraphs 31-33.

⁸⁶ Second Affidavit Gooderham, November 21, 2018, paragraph 115 (AB 217).

96. The Appellants submit that it would be incorrect in law to conclude that what Justice Affleck calls the adamantine rule in *MacMillan Bloedel* decision supports the proposition that the necessity defence can never apply when there is an injunction in place. The ruling is qualified in its terms. At paragraph 44 of *MacMillan* Chief Justice McEachern refers to the judgment in *R. v. Perka*:

“Dickson J. made it clear that this unusual defence may be applied only in true emergent circumstances [i.e., where an imminent peril is shown], and only when the person at risk has no alternative but to break the law...”

97. The implication of the above words is that if an imminent peril is truly shown, and if that coincides with a situation in which the person at risk has no lawful alternative (i.e., where there is no reasonable prospect that any lawful alternative could avoid the peril or it is too late to employ the “lawful alternative” to avoid the peril), failure to attempt to employ that lawful alternative would not be a bar to successfully invoking the necessity defence. Therefore, if in the circumstances the evidence shows it is too late to avoid the peril, failure to apply to set aside the injunction would not be a bar to raising the defence.

98. At paragraph 45, Chief Justice McEachern stated, “In my judgment, the Defendants had alternatives to breaking the law, namely they could have applied ... to set aside the injunction.”

99. In context, “had alternatives” must mean alternatives that offered some reasonable prospect of avoiding the peril. It follows that in the logging case situation, Chief Justice McEachern was satisfied that the alternative of applying to set aside the injunction did offer a reasonable chance of avoiding the peril.

100. If so, the ruling in *MacMillan Bloedel* is not adamantine. It depends on how advanced the peril is, and whether it is already too late to avoid the dire outcome (for example, avoiding the 1.5°C limit in the Appellants’ case). *MacMillan Bloedel* leaves open that in a case of the gravest approaching peril, the failure to apply to set aside the injunction will not necessarily preclude the defence.

101. Before the ruling in *MacMillan Bloedel* can be a complete bar to the necessity defence, there needs to be a proper inquiry into the imminence and character of the peril to decide whether sufficient time remaining to pursue any “lawful alternative” – which must have some reasonable chance of success.

102. In his subsequent June 7, 2019 decision in *Trans Mountain Pipeline ULC v. Mivisair*, 2019 BCSC 1246, referring to his earlier ruling in the Appellants’ case, Affleck J. stated that “a fact-specific analysis as required by *Latimer* was conducted...” In stating that he had conducted a “fact-specific analysis” (see paragraph 28 of the June 7, 2019 decision) in his earlier ruling, he is implying that before he applied the *MacMillan Bloedel* ruling in the Appellants’ application he had ascertained that the apprehended climate peril was not imminent:

“I accept the Crown’s submissions and emphasize that the outcome in Gooderham was dependent on the facts of that case and not simply on the proposition that this Court was bound by the language of Chief Justice McEachern at para, 45 and 46”.

— *Trans Mountain v. Mivisair*, 2019 BCSC 1246 at paragraph 28

103. In a case that seeks to raise the defence of necessity, the ruling in *Macmillan Bloedel* does not preclude the need to ascertain whether the apprehended peril is imminent and whether it is already too late to avoid it.

104. The facts presented by the Appellants at the hearing below show that, even assuming all NDCs promised by Canada and other countries under the Paris Agreement are fully implemented within the next eleven years, projected global emissions to 2030 will commit the world to increased warming of more than 1.5°C and it is extremely unlikely warming can be kept to less than 2°C.

105. The first question is whether there is a contingency that may allow us to avoid those dire outcomes. The second question is whether it has a sufficient degree of likelihood or chance of closing the emissions gap as to negate the Appellants’ submission that there is an air of reality to their case. The Reasons for Judgment do not disclose that any fact-specific analysis was conducted by

Affleck J. to answer those questions. Only a full hearing at trial can assist in determining the issues before the court.

PART 4 – APPEAL OF SENTENCE

106. The Appellants' appeal pursuant to section 731 (1) of the *Criminal Code* from the sentence imposed by Affleck J. on January 17, 2019, of 28 days in prison for the Appellant Gooderham, and 150 hours community service for the Appellant Nathan.

107. The Appellants say that the above sentences are excessive given the following factors as to their character and the circumstances of the offence:

1. Both are first-time offenders.
2. Both have led exemplary lives as law-abiding citizens, the Appellant Gooderham as a litigation counsel in Vancouver, and the Appellant Nathan as a science educator in the Yukon and British Columbia.
3. Before his arrest, the Appellant Gooderham had spent the previous five years of his life, since his retirement from law practice in 2012, engaged in efforts to persuade the Government of Canada to conduct an environmental inquiry to ascertain whether the proposed expansion of oil sands production to 2040, facilitated by the Trans Mountain project, could be consistent with Canada's commitments to limit the increase of global warming to less than 2°C. In that effort he made submissions to Environment Canada and to the Ministerial Panel, and to elected Members of Parliament. His efforts were unsuccessful.
4. The Appellant Nathan had, in the course of teaching climate change to teenagers as a high school science teacher for over a decade, become immersed in the scientific reports and other writings of climate scientists. She became increasingly aware of the seriousness of the climate crisis and retired early to dedicate herself to raising public awareness to the inadequate reception of the science by society and government.

5. They both acted out of the highest motives – altruism. Neither stood to gain any personal benefit from their actions. They were motivated entirely by concerns for young people and children, and by the worsening and irrevocable loss and harm to human life and the natural world. Their protests were entirely peaceful and were in all other aspects entirely respectful of the Court.

108. The Appellants say that an appropriate sentence for the Appellant Gooderham would have been 7 days in prison, and for the Appellant Nathan a suspended sentence and probation.

PART 5 – ORDERS SOUGHT

The Appellants respectfully seek the following orders from this court:

109. That the conviction of the Appellants be quashed.
110. That the matter of their contempt be returned to Affleck J. or another Justice of the Supreme Court for a determination.
111. That the Court be directed to permit the Appellants to provide actual evidence in support of the defence of necessity.
112. That in the event the Appellants are unsuccessful in having their conviction quashed, they seek an order that their sentences be quashed and that the sentence for the Appellant Nathan be suspended, a probation order substituted; and for the Appellant Gooderham, an order that he be sentenced to 7 days in prison.

All of which is respectfully submitted.

Dated at the City of Vancouver, Province of British Columbia, this 18th day of November 2019.

Leo McGrady, QC
Counsel for the Appellants

LIST OF AUTHORITIES

Authorities	Page # in factum	Para # in factum
<i>Canada (Attorney General) v. Bedford</i> , 2013 SCC 72	25	88
<i>Carter v. Canada (Attorney General)</i> , 2015 SCC 5	25	88
<i>Crooks v. Newton</i> , 2011 SCC 47	26	91
<i>Grant v. Torstar Corp.</i> , 2009 SCC 61	25	90
<i>McMillan Bloedel v. Simpson</i> (1994), 90 BCLR (2d) 24	15, 23, 24, 25	57, 83, 86, 88
<i>Perka v. The Queen</i> , [1984] 2 SCR 232	21, 24, 27	76, 87, 96,
<i>R. v. Salituro</i> , 1991 CanLII 17 (SCC)	25	89
<i>Regina v. Armstrong</i> , [2010] BCJ No. 1486 (BCSC)	2, 15	7, 59
<i>Regina v. Latimer</i> , 2001 SCC 1	16 19, 21, 22, 23, 28,	59, 70, 75, 77, 81, 102
<i>Regina v. Pires & Lising</i> , 2005 SCC 66	16	59
<i>Regina v. Vukelich</i> , [1996] B.C.J. No. 1535; leave to appeal refused, [1996] SCCA 461	2, 5, 15	7, 17, 18, 58, 59
<i>Trans Mountain Pipeline ULC v. Mivasair</i> , 2019 BCSC 50	5, 15, 16, 23	15, 58, 62, 83
The Law of Evidence in Canada, 4 th ed., Sopinka, Lederman & Bryant, Lexis Nexis	18	67