CA45950 and CA45953
Vancouver Registry

COURT OF APPEAL

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA FROM THE ORDER OF THE HONOURABLE MR. JUSTICE AFFLECK PRONOUNCED ON THE 11th DAY of MARCH, 2019 AT VANCOUVER, BRITISH COLUMBIA

BETWEEN:

TRANS MOUNTAIN PIPELINE ULC

PLAINTIFF

AND:

DAVID MIVASAIR, BINA SALIMATH, MIA NISSEN, COREY SKINNER (aka CORY SKINNER), UNI URCHIN (aka JEAN ESCUETA), ARTHUR BROCINER (aka ARTUR BROCINER), KARL PERRIN, YVON RAOUL, EARLE PEACH, SANDRA ANG, RUEBEN GARBANZO (aka ROBERT ABRESS), GORDON CORNWALL, THOMAS CHAN, LAUREL DYKSTRA, RUDI LEIBIK (aka RUTH LEIBIK), JOHN DOE, JANE DOE, AND PERSONS UNKNOWN

DEFENDANTS

AND

BETWEEN:

REGINA

RESPONDENT

AND:

DAVID ANTHONY GOODERHAM (CA45950)
JENNIFER NATHAN (CA45953)

APPELLANTS

RESPONDENT'S FACTUM

Lesley Ruzicka
Ministry of Attorney General
Criminal Appeals and Special Prosecutions
3rd Floor, 940 Blanshard Street
Victoria, BC V8W 3E6
Tel: (779) 974-5156
Fax: (250) 387-4262
Counsel for the Respondent

Jennifer Nathan
908 3rd Avenue
New Westminster, BC V3M 1P3
Email: jennifer_nathan@hotmail.com
Appellant

David Anthony Gooderham
4609 West 11th Avenue
Vancouver, BC V6R 2M6
Tel: (604) 224-3382
Email: dagooderham@gmail.com
Appellant

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Part I: Statement of Facts

A. Overview

1. On March 11, 2019, Mr. Justice Affleck convicted the appellants, who are not the individuals named in the original civil proceeding, of criminal contempt of court for breaching an injunction on March 24, 2018 (Nathan) and August 20, 2018 (Gooderham). The injunction had previously been granted by Mr. Justice Affleck on March 15, 2018 and amended on June 1, 2018. The injunction restrained the named defendants and other persons with notice of the injunction from physically obstructing, impeding, or otherwise preventing access by the plaintiff, Trans Mountain Pipeline ULC, its contractors, employees, or agents, to, or work in, any sites or work areas of the plaintiff, including what is referred to in the injunction as the Burnaby Terminal and the West Ridge Marine Terminal (the "Injunction").

2. On March 11, 2019, Ms. Nathan was sentenced to a six-month probation order, which included 150 hours of community service. On March 20, 2019, Butler J.A. suspended Ms. Nathan's probation order until the sentence appeal has been determined.

3. On March 11, 2019, Mr. Gooderham was sentenced to 28 days of imprisonment. On that same date, Groberman J.A. released Mr. Gooderham on bail pending appeal. An extension of Mr. Gooderham's bail pending appeal was granted by Dickson J.A. on November 28, 2019. An application for a further extension of Mr. Gooderham's bail (which expires on May 11, 2020) is pending.

4. At trial, the appellants applied for leave to raise the defence of "necessity" and to lead evidence in relation to two s. 7 *Charter* arguments (abuse of process and an argument related to a novel principle of fundamental justice). Following a *Vukelich* hearing, Affleck J. dismissed the applications: *Trans Mountain Pipeline ULC v. Mivasair,* 2019 BCSC 50 (the *"Ruling*"). With respect to the defence of necessity, he concluded that the appellants could not satisfy the first or second prongs of the test (i.e. a "clear and imminent peril" or that there was "no reasonable legal alternative") based on their proposed evidentiary record: *Ruling*, at paras. 54-55 and 57-59.

5. The appellants have advanced one ground of appeal:

> In summarily ruling that the defence of necessity had no reasonable prospect of success, Affleck J. erred in law failing to apply the *Vukelich* procedures to the Appellant's application for leave to lead defence evidence.
>
> *Appellant's Factum*, at para. 58.

6. The appellants further assert that their proposed evidentiary record provided no basis whatsoever for Affleck J.'s "finding of a contingency": *Appellant's Factum*, at p. iv.

7. The narrow legal issue is whether, having assumed the facts the appellants sought to prove, there was a legal basis for the remedy being sought by the appellants (i.e. leave to adduce evidence with respect to the defence of necessity). The respondent submits that the trial judge correctly concluded, based on the proposed evidentiary record, that the appellants' subjective belief about imminent peril was not objectively reasonable.

8. Further, even if it could be said the trial judge erred in his assessment of the "imminent peril" prong of the necessity test (which the respondent disputes), the appellants cannot establish that they had no reasonable legal alternative. They could have brought an application to challenge or vary the Injunction but failed to do so. They also could have: (1) done nothing, however unappealing this alternative may have been to them (*R. v. Latimer,* 2001 SCC 1, at para. 39); (2) continued to engage in the democratic process; (3) engaged in lawful protest at the site (as did many other citizens concerned about climate change); and/or (4) removed themselves from the gate during the "cooling off period" following the reading of the Injunction or during the five-step pre-arrest process that police followed for all arrests and that became a requirement in the Injunction on June 1, 2018. Regardless of the science and individual affidavits, the appellants cannot show that their conduct was morally involuntary within the framework established in *Perka v. The Queen,* [1984] 2 S.C.R. 232 and *Latimer*.

B. Statement of Facts

9. Affleck J. succinctly summarized the facts in his *Ruling* as follows:

> [7] On March 24, 2018, Jennifer Nathan was arrested for blocking access to the Burnaby Terminal. Ms. Nathan admits she was among a group of about 60 people who stood in front of the entry gate to the Burnaby Terminal. Ms. Nathan intended to disobey the injunction on that day in the presence of many other people in order to draw attention to her opposition to the proposed construction of the pipeline.
>
> [8] On June 1, 2018, the injunction was varied but continued to restrain the defendants and other persons with notice of the injunction from physically obstructing, impeding or otherwise preventing access by the plaintiff, its contractors, employees or agents, to, or work in, any sites or work areas of the plaintiff, including the Burnaby Terminal and the West Ridge Marine Terminal.
>
> [9] On August 20, 2018, David Gooderham was arrested for blocking access to the Westridge Marine Terminal. Mr. Gooderham admits he was among a group of five people who sat in chairs blocking access to the terminal. Mr. Gooderham's intention in disobeying the injunction was also to draw attention to his opposition to the proposed pipeline. Both Ms. Nathan and Mr. Gooderham were aware that the construction of the pipeline was lawful at the time of their arrests. It had been authorized by a Federal Order in Council ("OIC").

10. The appellants admitted the essential elements of the offence in an Admissions of Fact tendered by the Crown: *T.* 4[43] to 9[37]; *Ruling,* at para. 10; *Admissions of Fact, Respondent's Book of Documents*, at pp. 28 (Nathan) and 46 (Gooderham).

11. The appellants advanced the defence of necessity. However, because Affleck J. had previously ruled in related prosecutions that alleged contemnors could not advance the defence of necessity (*Trans Mountain Pipeline ULC v. Mivasair*, 2018 BCSC 874, at paras. 20-30; *Trans Mountain Pipeline ULC v. Mivasair* (13 June 2018), Vancouver Registry No. S-183541 (B.C.S.C.) (transcript excerpt)), the appellants applied for leave to adduce evidence with respect to necessity. They tendered a proposed evidentiary record in the form of three affidavits (*AB* 56-297) as a summary of the scientific evidence that would be tendered at trial: *T.* 10[39-40]. Defence counsel estimated that, if leave was granted, he would need to call "approximately four to five expert witnesses … to substantiate" the evidentiary record: *T.* 11[16-29].

12. In oral submissions, defence counsel reviewed the evidentiary record, and both Crown and defence counsel made submissions about the *Vukelich* procedure and the analytical framework for the defence of necessity.

13. Affleck J. dismissed the application for leave to adduce evidence. He concluded that based on the evidentiary record tendered, the appellants could not meet the first or second prongs of the test (i.e. a "clear and imminent peril" or that there was "no reasonable legal alternative"): *Ruling*, at paras. 54-55 and 57-59.

Part II: Respondent's Position on Issues on Appeal

14. The appellants submit that "[i]n summarily ruling that the defence of necessity had no reasonable prospect of success, Affleck J. erred in law in failing to apply the *Vukelich* procedures to the Appellants' application for leave to lead defence evidence": *Appellants' Factum*, at para. 58.

15. The respondent submits that the trial judge correctly applied the *Vukelich* procedure and did not err in summarily dismissing the application to adduce evidence with respect to necessity. Based on the evidence tendered by the appellants, it was open to the trial judge to draw the inference that the appellants' belief that there was a "clear and imminent peril" (as that term has been interpreted in the context of the necessity jurisprudence) was not objectively reasonable because they were not under "immediate pressure" to act. Further, even if it could be said the trial judge erred in his assessment of the "imminent peril" prong of the necessity test (which the respondent disputes), the appellants cannot establish that they had no reasonable legal alternatives.

Part III: Argument

16. In responding to the ground of appeal, the respondent will: (1) outline the standard of review; (2) review the *Vukelich* procedure; (3) summarize the unique nature of contempt proceedings; (4) set out the analytical framework for the common law defence of necessity; (5) canvas the jurisprudence on the defence of necessity in the protest context; and (6) apply the analytical framework to the present case to illustrate how the trial judge judicially exercised his discretion not to hold an evidentiary *voir dire*.

A. Standard of review

17. Criminal contempt of court is a common law offence and is not found in the *Code*. However, s. 10(2) of the *Code* provides a right of appeal from both conviction and sentence. Further, s. 10(3) provides that Part XXI of the *Code* (procedure on appeals by indictment) applies, with such modifications as the circumstances require.

18. This Court has addressed the standard of review on a *Vukelich* hearing in a number of cases: see, for example, *R. v. M.B.,* 2016 BCCA 476, at paras. 45-48; *R. v. Vickerson*, 2018 BCCA 39, at paras. 60-63; and *R. v. Edwardsen,* 2019 BCCA 259, at paras. 38, 62, 73, 75.

19. In *M.B.,* Bauman C.J.B.C. described the standard of review as follows:

> [45] *Vukelich* established the well-known principle that judges are entitled to decline to hold an evidentiary hearing where an applicant is unable to show that, even assuming the allegations could be proven, there would be no remedy. The discretion to decline to hold a *voir dire* is founded in the need for trial judges to control the course of proceedings and not embark upon enquiries that will not assist the proper trial of the real issues (*Vukelich* at paras. 30-31). Madam Justice Charron, speaking for the Supreme Court of Canada in *R. v. Lising*, 2005 SCC 66, said the accused is required to show a reasonable likelihood that the requested *voir dire* can assist in determining the issues before the court. *Lising* took place in the context of an application seeking cross-examination of an affiant according to the threshold test in *R. v. Garofoli*, [1990] 2 S.C.R. 1421, but this test is applicable to *Charter* applications more broadly (see, for example, *United States v. Ranga*, 2012 BCCA 81 at para. 15).
>
> [46] When reviewing a trial judge's exercise of discretion to refuse to hold a *voir dire*, the standard of review proscribes appellate intervention to "cases in which the discretion has not been judicially exercised" (*R. v. Mastronardi*, 2015 BCCA 338 at para. 63). In *Lising*, Madam Justice Charron provided the following rationale for this deference:
>
> > … The trial judge is in a better position to assess the material, the submissions of counsel and the evidence, if any, in the context of the particular *voir dire* and trial…
> >
> > This deferential standard is important. If not adhered to, trial judges, out of an abundance of caution, are likely to embark upon many unnecessary hearings rather than risk vitiating an entire trial. The trial court's power to control the proceedings then becomes more illusory than real and, in the context of a

> *Garofoli* hearing, the very purpose of the leave requirement is defeated. (at paras. 46-47).
>
> [47] Accordingly, a trial judge's decision to decline to hold a *voir dire* is entitled to deference. To succeed in this appeal, M.B. must establish that the trial judge failed to exercise her discretion judicially.

20. More recently in *Vickerson*, Bennett J.A. described this as a "high threshold for the appellant to overcome" (para. 60) and held that "[a]bsent an argument on appeal demonstrating that the trial judge's discretion in declining to hold a *voir dire* was not exercised judicially, this Court cannot and should not disturb such rulings" (para. 62).

21. In addition, in *R. v. Victoria,* 2018 ONCA 69, in a case that dealt with leave to cross-examine on an ITO, the Court clarified that an exercise of judicial discretion will be afforded deference unless the trial judge has made "an error in principle, a material misapprehension of any evidence or an unreasonable decision" (para. 81).

B. The *Vukelich* procedure

22. A trial judge is not automatically required to hold a *voir dire*. Rather, the judge may, at the request of the Crown, or of his or her own motion, hold a threshold hearing (commonly referred to as a *Vukelich* hearing in B.C.) in which the accused is required to demonstrate that there is a sufficient foundation for the *Charter* application: *R. v. Vukelich,* 1996 CarswellBC 1161 (B.C.C.A.), at paras. 16-26, leave to appeal refused (1997), 114 C.C.C. (3d) vi.

23. These principles have been extended beyond the *Charter* context. For example, in *R. v. Jesse*, 2012 SCC 21, in the context of an application to adduce similar fact evidence, Moldaver J. observed that:

> [63] In cases like the present one, at the *voir dire* stage ... a trial judge could reject a request to lead evidence...if he or she believed there was no reasonable likelihood that it would impact on the admissibility of the evidence. Again, this is a function of the trial judge's right to control the proceedings. Judicial resources are scarce and they ought to be used constructively, not wasted on pointless litigation….

24. More recently in *R. v. Cody,* 2017 SCC 31, the Court expressly endorsed the *Vukelich* procedure and emphasized that judges should exercise their trial management power to summarily dismiss applications where appropriate:

> [38] In addition, trial judges should use their case management powers to minimize delay. For example, before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success. This may entail asking defence counsel to summarize the evidence it anticipates eliciting in the *voir dire* and, where that summary reveals no basis upon which the application could succeed, dismissing the application summarily (*R. v. Kutynec* (1992), 7 O.R. (3d) 277 (C.A.), at pp. 287-89; *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.)). And, even where an application is permitted to proceed, a trial judge's screening function subsists: trial judges should not hesitate to summarily dismiss "applications and requests the moment it becomes apparent they are frivolous" (*Jordan*, at para. 63). This screening function applies equally to Crown applications and requests. As a best practice, all counsel — Crown and defence — should take appropriate opportunities to ask trial judges to exercise such discretion.

25. To similar effect, in *R. v. Simmonds*, 2018 BCCA 205, Dickson J.A. observed that in order to ensure the orderly administration of justice and to minimize delay, judges have the responsibility to "ensure that only those applications which should proceed do proceed" (para 104, emphasis added). More recently in *R. v. Joseph*, 2018 BCCA 284, in the context of considering a *Vukelich* application in relation to an application to withdraw a guilty plea, Garson J.A. noted that "trial judges have the authority to summarily dismiss some applications in a criminal proceeding if the applicant is unable to demonstrate on the material filed that there is a prospect of success on the application" (para. 25).

26. Before turning to the trial judge's application of the *Vukelich* procedure, the respondent will canvas the unique nature of contempt proceedings and summarize the analytical framework for the defence of necessity.

C. The nature of contempt proceedings

27. The respondent submits that the trial judge's application of the *Vukelich* procedure must be considered in the unique context of criminal contempt proceedings.

28. Criminal contempt of court is governed by a summary process, fixed by the court to deal with the exigencies of the situation: *Hayes Forest Services Ltd. v. Forest Action*

Network, 2003 BCSC 1444, at para. 35(f), affirmed 2006 BCCA 156, application for leave to appeal dismissed, 2006 CanLII 39341 (*sub nom Betty Krawczyk v. Hayes Forest Services Limited and Attorney General of British Columbia)*. A trial judge can establish streamlined procedures, including proceeding by way of affidavit (with cross-examination, if requested).

29. It is well-established that contempt hearings by summary procedure do not violate the *Charter* as long as an alleged contemnor has a trial according to the principles of fundamental justice, including the right to be presumed innocent, to be represented by counsel, and to a fair and public hearing by an independent and impartial tribunal: *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *R. v. Cohn* (1984), 42 C.R. (3d) 1 (Ont. C.A.).

30. In *Hayes*, this Court confirmed the trial judge's conclusion that the summary procedure did not violate s. 7 of the *Charter*. In dismissing the s. 7 challenge at trial (2003 BCSC 1444), the trial judge, Harvey J., made the following comments:

> [46] In relation to the summary aspect of the procedure, the exact procedure for the summary determination of a question of criminal contempt is nowhere stated. It may vary from case to case. What is significant about the summary procedure is that the court has a discretion to determine how to proceed, and the court is not bound by time limits or other procedural rules except, of course, the principle of fairness.
>
> [47] I have stated *supra* certain of the principles applicable to the procedures to be followed for the summary hearing.
>
> [48] In my view, the authority of a superior court judge to deal effectively with criminal contempt is not compromised by the *Charter*. At the same time, an alleged contemnor must be treated fairly and afforded his or her equivalent of *Charter* rights and protections, some of which have been commented upon in *R. v. Cohn* (1984), 1984 CanLII 43 (ON CA), 15 C.C.C. (3d) 150. In this regard, the alleged contemnor has the right to know specifically what is charged, the right to cross-examine witnesses, the right to give evidence or call evidence on his or her behalf, the right to make submissions in relation to both guilt and punishment, and the right to be presumed innocent and to require proof beyond reasonable doubt of the allegations of contempt.

> [49] In my view, the current law, properly applied, does not offend against the *Charter*, as long as the court affords appropriate safeguards to the alleged contemnor.
>
> [50] I comment in passing that in *United Nurses of Alberta*, *supra*, McLachlin J., as she then was, stated that criminal contempt does not violate s. 7 of the *Charter*.
>
> [Emphasis added.]

31. The respondent submits that the use of the *Vukelich* procedure in this case was entirely consistent with the streamlined procedures used in contempt hearings.

D. The analytical framework for the defence of necessity

32. The Supreme Court of Canada has outlined three requirements to establish the defence of necessity:

> 1. there must be imminent peril or danger;
>
> 2. the accused must have no reasonable legal alternative to the course of action he or she undertook. In other words, compliance with the law must be demonstrably impossible; and
>
> 3. there must be proportionality between the harm inflicted and the harm avoided.
>
> *Perka v. The Queen,* [1984] 2 S.C.R. 232, at 259
> *R. v. Latimer,* 2001 SCC 1, at para. 28

33. The first and second requirements (imminent peril and no reasonable legal alternative) are evaluated on the "modified objective standard": *Latimer*, at para. 33. The third requirement (proportionality) is measured on a purely objective standard: *Latimer*, at para. 34. In *Latimer,* the modified objective standard was described as follows:

> [33] …While an accused's perceptions of the surrounding facts may be highly relevant in determining whether his conduct should be excused, those perceptions remain relevant only so long as they are reasonable. The accused person must, at the time of the act, honestly believe, on reasonable grounds, that he faces a situation of imminent peril that leaves no reasonable legal alternative open. There must be a reasonable basis for the accused's beliefs and actions, but it would be proper to take into account circumstances that legitimately affect the accused person's ability to evaluate his situation. The test cannot be a subjective one, and the accused who argues that he perceived imminent peril without an alternative would only succeed

> with the defence of necessity if his belief was reasonable given his circumstances and attributes…
>
> [Emphasis added]

34. In other words, the purely subjective beliefs of those involved are not relevant.

35. The Supreme Court has recognized that the defence of necessity needs to be "strictly controlled and scrupulously limited": *Perka,* at p. 250 (para. 38). The defence must "be restricted to those rare cases in which true 'involuntariness' is present": *Latimer*, at para. 27. It "is well established that the defence of necessity must be of limited application. Were the criteria for the defence loosened or approached purely subjectively, some fear, as did Edmund Davies L.J., that necessity would 'very easily become simply a mask for anarchy'": *Latimer*, at para. 27.

36. The defence of necessity is integrally connected to the concept of moral involuntariness. In *Perka,* under the heading "Limitations of the Defence", Dickson J. (as he then was) stressed the concept of involuntariness at pp. 250-252:

> … The appropriate controls and limitations on the defence of necessity are, therefore, addressed to ensuring that the acts for which the benefit of the excuse of necessity is sought are truly "involuntary" in the requisite sense.
>
> In *Morgentaler . . .* I was of the view that any defence of necessity was restricted to instances of non-compliance "in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible". In my opinion this restriction focuses directly on the "involuntariness" of the purportedly necessitous behaviour by providing a number of tests for determining whether the wrongful act was truly the only realistic reaction open to the actor or whether he was in fact making what in fairness could be called a choice. <u>If he was making a choice, then the wrongful act cannot have been involuntary in the relevant sense</u>.
>
> The <u>requirement that the situation be urgent and the peril be imminent, tests whether it was indeed unavoidable for the actor to act at all</u>. In LaFave & Scott, *Criminal Law*. . . one reads:
>
> > It is sometimes said that the defense of necessity does not apply except in an emergency—when the threatened 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—the rescue ship may appear, the storm may pass; and so the defendant must wait until that hope of survival disappears.
>
> At a minimum the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable.
>
> The requirement that compliance with the law be "demonstrably impossible" takes this assessment one step further. Given that the accused had to act, could he nevertheless realistically have acted to avoid the peril or prevent the harm, without breaking the law? *Was there a legal way out*? I think this is what Bracton means when he lists "necessity" as a defence, providing the wrongful act was not "avoidable". The question to be asked is whether the agent had any real choice: could he have done otherwise? If there is a reasonable legal alternative to disobeying the law, then the decision to disobey becomes a voluntary one, impelled by some consideration beyond the dictates of "necessity" and human instincts.
>
> The importance of this requirement that there be no reasonable legal alternative cannot be overstressed.
>
> [Italicized emphasis in original. Underlined emphasis added.]

37. In concurring reasons in *Perka,* Wilson J. offered similar observations at pp. 274-276:

> In discussing justification based on a conflict of duties one must be mindful of the viewpoint expressed by Dickson J. in *Morgentaler v. The Queen . . .* to the effect that "[n]o system of positive law can recognize any principle which would entitle a person to violate the law because in his view the law conflicted with some higher social value". This statement, in my view, is clearly correct if the "higher social value" to which the accused points is one which is not reflected in the legal system in the form of a duty. That is to say, pursuit of a purely ethical "duty" such as, for example, the duty to give to charity, may represent an ethically good or virtuous act but is not within the realm of legal obligations and cannot therefore validly be invoked as a basis on which to violate the positive criminal law. This illustration exemplifies the essential proposition that although "a morally motivated act contrary to law may be ethically justified… the actor must accept the [legal] penalty for his action" . . ..
>
> Similarly, Dickson J. in his reasons for judgment in the present case correctly underlines the fact that a utilitarian balancing of the benefits of obeying the law as opposed to disobeying it cannot possibly represent a legitimate principle against which to measure the legality of an action since any violation of right permitted to be justified on such a utilitarian calculus does not, in Dickson J.'s words, "fit[s] well with the judicial function". The maximization of social utility may well be a goal of legislative policy but it is not part of the judicial task of delineating right and wrong....

> Accordingly, not only can the system of positive law not tolerate an individual opting to act in accordance with the dictates of his conscience in the event of a conflict with legal duties, but it cannot permit acts in violation of legal obligations to be justified on the grounds that social utility is thereby increased. In both situations the conflicting "duty" to which the defence arguments point is one which the court cannot take into account as it invokes considerations external to a judicial analysis of the rightness or wrongness of the impugned act. As Lord Coleridge succinctly put it in *Dudley and Stephens . . .* "Who is to be the judge of this sort of necessity?"
>
> [Emphasis added.]

38. More recently, the Court considered the concept of moral voluntariness in *R. v. Ruzic*, 2001 SCC 24, in the context of the defence of duress. LeBel J., writing for the Court, observed:

> [34] Even before the advent of the *Charter*, it became a basic concern of the criminal law that criminal responsibility be ascribed only to acts that resulted from the choice of a conscious mind and an autonomous will. In other words, only those persons acting in the knowledge of what they were doing, with the freedom to choose, would bear the burden and stigma of criminal responsibility. Although the element of voluntariness may sometimes overlap both *actus reus* and *mens rea* . . . the importance of mens rea and of the quality of voluntariness in it underscores the fact that criminal liability is founded on the premise that it will be borne only by those persons who knew what they were doing and willed it. In a recent essay, Professor H. Parent summed up the nature of what has now become a guiding principle of Canadian criminal law:
>
> > . . . What is meant by a so-called "moral" or "normative" voluntary act is nothing more or less than a voluntary act taken in its accepted meaning of a free and thought out action. At the semantic level, adding the attributes "moral" and "normative" to the expression "voluntary act" has become necessary in light of the state of confusion that currently arises from the coexistence of the materialist and intellectualist approaches to the voluntary act in English and Canadian criminal law. In short, the requirement of a free and thought out act is still a fundamental axiom of our criminal law system. Although the moral element attached to the individual is not, as a general rule, formally expressed in the academic literature or in reported cases, its presence can be deduced from the standard application of criminal responsibility and the various causes of exoneration.
>
> [Emphasis in original.]

39. Moral involuntariness exists where "the accused's agency is not implicated in her doing": *Ruzic,* at para. 46. As Dickson J. explained in *Perka* at 249, a morally involuntary

"'choice' to break the law is no true choice at all; it is remorselessly compelled by normal human instincts". The meaning of "moral involuntariness" must be consistent with the principle that necessity is an excuse, not a justification, as established in *Perka* at 248 and confirmed in *Ruzic* at para. 41. A justificatory defence exculpates acts done to promote the "greater good": *Perka,* at 247. By contrast, an excuse "concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not to be attributed to the actor": *Perka,* at 246-47.

E. Jurisprudence on the defence of necessity in the protest context

40. In *MacMillan Bloedel Ltd. v. Simpson* (1994), 90 B.C.L.R. (2d) 24 (C.A.), McEachern C.J., writing for the Court, held that the defence of necessity did not apply in the context of a contempt of court prosecution arising out of an environmental protest in breach of an injunction:

> 45 In my judgment, this defence cannot be applied in this case for at least two reasons. First, the Defendants had alternatives to breaking the law, namely, they could have applied to the court to have the injunction set aside. None of them did that prior to being arrested. I do not believe this defence operates to excuse conduct which has been specifically enjoined. By granting the order, the court prohibited the very conduct which is alleged against the Defendants. An application to the court, which could be heard on fairly short notice, would have determined whether the circumstances were sufficient to engage the defence of necessity.
>
> 46 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.

41. Similarly, in *R. v. Watson* (1996), 106 C.C.C. (3d) 445 (B.C.C.A.), at paras. 20-23, this Court rejected the defence of necessity in the context of an abortion protest.

42. In four related *Trans Mountain* prosecutions, Affleck J. gave rulings relating to the defence of necessity:

- dismissed application for a pretrial ruling that the defence of necessity is available: *Trans Mountain Pipeline ULC v. Mivasair*, 2018 BCSC 874, at paras. 20-30; *Trans Mountain Pipeline ULC v. Mivasair* (13 June 2018), Vancouver Registry No. S-183541 (B.C.S.C.) (transcript excerpt);

- dismissed application for leave to adduce evidence with respect to necessity: *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 50. This is the ruling under appeal in the present case; and

- dismissed what was framed as a constitutional challenge to this Court's decision in *MacMillan Bloedel*: *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 1246.

43. More recently, a self-represented contemnor referred to the defence of necessity without advancing an evidentiary foundation. Fitzpatrick J. did not address the argument "save to note that Affleck J., in these proceedings, has rejected that defence for other defendants who advanced the same general explanation for their actions, namely saving the environment": *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 2122, at para. 67.

F. The trial judge did not err in summarily dismissing the application to adduce evidence

44. The appellants have not asserted that the trial judge erred in law in his articulation of the *Vukelich* procedure or the test for necessity. Rather, they submit that he erred in his assessment of the proposed evidence.

45. The respondent submits that the trial judge did not err in summarily dismissing the application to adduce evidence with respect to the defence of necessity.

(i) Clear and immediate peril

46. In *Latimer,* the Court clarified the meaning of "clear and immediate peril": "[i]t is not enough that the peril is foreseeable or likely; it must be on the verge of transpiring and virtually certain to occur" (para. 29) (emphasis added). The Court further held that "[w]here the situation of peril clearly should have been foreseen and avoided, an accused person cannot reasonably claim any immediate peril" (para. 29) (emphasis added). As Smith J.A. explained in *R. v. Nwanebu*, 2014 BCCA 387, "the focus is not on the immediacy of the threat; rather it is on whether there is a sufficiently close connection between the threat and the harm such that immediate pressure is placed on the person

to act, negating his or her ability to act freely" (para. 62, emphasis added). This belief must be "honest" and on "reasonable grounds": *Latimer*, at para. 33.

47. Although this Court acknowledged in *Nwanebu* that threats of future harm may establish the requirement of immediate peril, the connection between the threat and the harm must be "sufficiently close … that immediate pressure is placed on the person to act, negating his or her ability to act freely" (para. 62, emphasis added). Further, in *Nwanebu*, the accused's perception that he faced imminent harm was reasonable in light of his traumatic experiences of persecution, torture and attempted assassination by the Nigerian authorities. He committed the offence in the course of attempting to flee Nigeria and reach safety in Canada. There was undisputed expert evidence on the psychological effects of Mr. Nwanebu's experiences and the impact of those experiences on his ability to evaluate his situation.

48. The appellants cannot point to a similar threat or psychological condition that restricted their agency nor can they establish that an imminent peril caused their "will to be overborne": *Nwanebu*, at paras. 62 and 61. Their affidavits demonstrate that they each made a considered decision to protest. Further, despite the asserted imminent peril and the fact that the injunction was granted on March 15, 2018, the appellants did not protest until March 24, 2018 and August 20, 2018.

49. Affleck J. correctly concluded that the evidence did not establish a "clear and imminent peril" within the meaning of the test established in *Latimer* and *Perka*:

> [54] In my opinion a "clear and imminent peril", as that phrase has been employed in the authorities by which I am bound, cannot be demonstrated. The Court in *Latimer* ruled that the peril must be on the "verge of transpiring" (at para. 29). The applicants submit the evidence they intended to put before the court, if permitted, would demonstrate that without immediate remedial action, climate change will become irreversible and catastrophic damage to life on this planet will be inevitable. The subjective belief element of the modified objective test has clearly been met.
>
> [55] On the evidence the applicants seek to offer, rising global temperatures, to a level that is catastrophic to life, is a process that has been happening over many decades. Despite a historical lack of initiative to curb emissions over these same decades, adaptive societal measures may be taken to prevent such a dire outcome.

> Whether government, private industry, and citizens take these measures is a contingency that takes these consequences outside of "virtual certainty" and into the realm of "foreseeable or likely" (*Latimer*, at para. 29). Thus, it cannot be said that the objective element of the modified objective test is satisfied.
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> [Emphasis added.]

50. It was open to the trial judge to draw this inference from the evidentiary record. For example, the documents tendered by the appellants discussed how much time remains to avoid warming that will exceed 1.5° C and 2° C; potential mitigation scenarios that could be employed to achieve the necessary cuts; and how deep the reductions in global emissions would have to be in order to stay within those limits. In the appellants' own words, "[a]ccording 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": *Appellants' Factum*, at para. 12 (emphasis added). Additional examples from the evidentiary record include:

- "the unanswered question is whether this further growth of oil sands emissions by about 44 Mt can be reconciled with Canada's commitment to cut its total emissions to 517 Mt by 2030: *Affidavit of David Gooderham #1,* at para. 2.6 (*AB* 65);

- "[t]he issue is whether a 44 Mt increase in oil sands emissions between 2015 and 2030 can be reconciled with Canada's commitment to reduce our total emissions 30% by 2030 below the 2005 level, down to 517 Mt. Under current policies, the total is expected by 2030. To meet the target, cuts of 200 Mt will have to be achieved within the next decade": Exhibit A to *Affidavit of David Gooderham #1*, at para. 7.1 (*AB* 76);

- "[b]ased on current measures, the *3rd Biennial Report* confirms that only 29 Mt of net reductions are expected between 2020 and 2030 in these four sectors – a fraction of the cuts needed over the next twelve years. "Current measures" is a key term in government projections of future emissions. It means carbon-reduction policies that have already been adopted by the Federal Government and by provincial governments, up to September 2017. We can have a degree of certainty

that these policies will be funded and implemented. They offer some real assurance that the promised emissions reductions will actually occur between now and 2030. The question is whether other future policies, which have not yet been implemented (and which in many cases have not even been developed), will have the capability to achieve the massive reductions needed to meet Canada's 517 Mt target by 2030. Those kinds of promised future policies, not yet adopted, are referred to as 'additional policies'": Exhibit A to *Affidavit of David Gooderham #1*, at paras. 7.6 to 7.8 (*AB* 77, emphasis added);

- the "450 Scenario", a mitigation study 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: Exhibit A to *Affidavit of David Gooderham #1*, at paras. 13.5 to 13.6 (*AB* 94);

- the UN *Emissions Gap Report 2017* "explains the crucial importance of what happens in the next twelve years". The Report states: "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…": Exhibit A to *Affidavit of David Gooderham #1,* Exhibit A, at para. 17.24 (*AB* 112).

- the 2018 International Panel on Climate Change (IPCC) *Special Report on Global Warming* concludes that 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: *Exhibit A* to the *Affidavit of David Gooderham #1*, at paras. 17.31 -17.35 (*AB* 113-114);

- "[t]he question is whether the projected 44 Mt increase can be reconciled with Canada's commitment under the December 2015 Paris Agreement to reduce our total emissions 30% by 2030 below the 2005 level, down to 517 Mt. Under current policies, Canada's total emissions are projected to be 722 Mt by 2030. To meet the target, cuts of 200 Mt will have to be achieved within the next decade": *Affidavit of David Gooderham #2*, at para. 6 (*AB* 180, emphasis added);

- "my actions were based on an informed belief and understanding that the annual level of global GHG emissions have now reached a point, in the context of the already accumulated atmospheric concentration of carbon and other GHG gases in the atmosphere, that if very substantial reductions of crude oil consumption on a global scale do not begin by about 2020, and if such deep reductions are not sustained thereafter over the next number of decades, the world will be unable to successfully keep the increase of average global surface temperature within a threshold of 2°C": *Affidavit of David Gooderham #2*, at para. 7 (*AB*, 180, emphasis added);

- "[m]y belief was, and is, that the additional commitments needed to meet the target, in the order of an additional 13 billion tonnes (Gt) of reductions in the annual level by 2030, almost certainly exceed the additional cuts that in reality can be achieved by 2030: *Affidavit of David Gooderham #2*, at para. 8 (*AB*, 181); and

- "by 2030, global GHC emissions from all human-induced sources must not exceed 41.8 $GtCO_2eq$, if the 2°C target is to be attained with higher than a 66% chance of success": *Affidavit of David Gooderham #2*, at para. 24 (*AB*, 186).

51. It was open to Affleck J. to conclude, based on the proposed evidentiary record, that the appellants' subjective belief that they were facing a "clear and immediate peril" within the meaning of the necessity test was not objectively reasonable. There is no evidence to establish that there was "immediate pressure … placed on the [appellants] to act": *Nwanebu*, at para. 62 (emphasis added).

52. More importantly, regardless of the science, the appellants were "autonomous and freely choosing agents", to use LeBel J.'s words in *Ruzic*, at para. 46, when they made a decision to attend the protest, block the road, and refrain from moving when asked by police. They were not responding to a "clear and imminent peril". Rather, they chose to breach the injunction at a time, date, and location of their choosing in the service of the "greater good": *Perka*, at pp. 247–48.

53. Mr. Justice Affleck's conclusions in a subsequent prosecution, *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 1246, have equal application to the present case:

> [48] I ask the question: Do the facts admitted before me and the evidence that would be led by the applicants on an evidentiary hearing lead to the conclusion that the applicants were deprived of the capacity to act voluntarily? To put the question somewhat differently: Did the applicants disobey the injunction because they had no choice but to do so?
>
> [49] In my opinion, the answer to those questions must be no. I accept that each of the applicants sincerely believes that the expansion of the Trans Mountain Pipeline will have the effect of causing serious damage to the environment. I also find, however, that each made a considered choice, based on that belief, to go to the Burnaby Terminal, or in Ms. Wong's instance the Westridge Marine Terminal, on a particular day with the conscious intention of impeding access to those terminals. Each was aware of the injunction. Each made a decision to disobey the injunction. Each of the applicants' conduct was undoubtedly the product of a free choice made after careful thought.
>
> [50] Even viewing the peril of climate change through the lens of the applicants, each of whom has a heightened awareness of its imminence, none was deprived of the ability to make a choice about how to respond to it.

54. In the appellants' case, Affleck J. correctly held that the proposed evidentiary framework could not support a finding that their subjective beliefs, while sincerely held, were objectively reasonable because the test for necessity requires "immediate pressure…on the person to act, negating his or her ability to act freely": *Nwanebu*, at para. 62 (emphasis added).

(ii) No reasonable legal alternatives

55. Even if it could be said the trial judge erred in his assessment of the "imminent peril" prong of the necessity test (which the respondent disputes), the appellants cannot establish that they had no reasonable legal alternatives. As Affleck J. correctly noted, in the *Reasons for Judgment*, the appellants could have brought an application to challenge or vary the Injunction but failed to do so:

> [57] The applicants, as with the Defendants in *MacMillan Bloedel*, took no steps to seek an order to vary or set aside the injunction nor was it appealed. Therefore, the second branch of the necessity test, "no reasonable legal alternative", cannot be met.

> [58] Given that I have found the first two branches of the necessity test could not be established on the evidence, I need not enter into a proportionality balancing exercise on the third branch of the necessity test.
>
> [59] The applicants take the position that by defying the injunction they were challenging the OIC that authorized the enlargement of the pipeline. I do not agree that is a proper characterization of their conduct for the purposes of defining the necessity issue at their trial. Challenging the OIC may be affected, at least indirectly, through the democratic political process that prevails in Canada, and which influences the decisions of government, and in addition may be affected by adopting the judicial review approach reflected in *Tsleil-Waututh*. The applicants are dismissive of both alternatives to their defiance of the injunction. I do not agree they are entitled to place themselves outside both the law and the democratic process. As Dickson J. stated in *Perka* at 248:
>
> > It is still my opinion that, "[n]o system of positive law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value".

56. The appellants submit that "[a] lawful alternative must be one that offers a reasonable chance to avoid the peril": *Appellants' Factum*, at paras. 92-99. However, that approach is inconsistent with *Latimer*, where the Court held that there must be "no reasonable legal alternative to breaking the law" (para. 39). In *Latimer*, the perceived "peril" was Mr. Latimer's daughter's ongoing suffering due to her chronic health conditions. However, the Court held that Mr. Latimer had a number of legal alternatives to murder, including doing nothing:

> 39 The second requirement for the necessity defence is that the accused had no reasonable legal alternative to breaking the law. In this case, there is no air of reality to the proposition that the appellant had no reasonable legal alternative to killing his daughter. He had at least one reasonable legal alternative: he could have struggled on, with what was unquestionably a difficult situation, by helping Tracy to live and by minimizing her pain as much as possible. The appellant might have done so by using a feeding tube to improve her health and allow her to take more effective pain medication, or he might have relied on the group home that Tracy stayed at just before her death. The appellant may well have thought the prospect of struggling on unbearably sad and demanding. It was a human response that this alternative was unappealing. But it was a reasonable legal alternative that the law requires a person to pursue before he can claim the defence of necessity. The appellant was aware of this alternative but rejected it.
>
> [Emphasis added.]

57. This analysis also provides a full answer to the appellants' challenge to *MacMillan Bloedel* and the assertion that applying to set aside the Injunction was not a reasonable legal alternative: *Appellants' Factum*, at paras. 93, 96-100. If an appellant is being prosecuted for contempt of court for failing to comply with an Injunction, applying to set aside the Injunction that prohibits their conduct will always be a reasonable legal alternative to breaching it.

58. Although not expressly mentioned by McEachern C.J. in *MacMillan Bloedel*, his view that the defence of necessity cannot operate to excuse specifically enjoined conduct reflects the doctrine of collateral attack. As Moldaver J. recently confirmed in *R. v. Bird,* 2019 SCC 7, "[t]here is a powerful rationale for the general rule precluding collateral attacks on court orders" (para. 22). He cited with approval from *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626: "[i]f people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind. The citizens' safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them": *Bird*, at para. 22.

59. Further, in addition to challenging the Injunction, there were a number of other reasonable legal alternatives available. The appellants also could have: (1) done nothing, however unappealing this alternative may have been to them (*Latimer,* at para. 39); (2) continued to engage in the democratic process; (3) engaged in lawful protest at the site (as did many other citizens concerned about climate change); and/or (4) removed themselves from the gate during the "cooling off period" following the reading of the Injunction or during the five-step pre-arrest process that police followed for all arrests and that became a requirement in the Injunction on June 1, 2018.

60. Moreover, regardless of the science and individual affidavits, the appellants cannot show that their conduct was morally involuntary within the framework established in *Perka* and *Latimer*. As Affleck J. observed in a subsequent prosecution, *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 1246:

> [51] Not only did each of the applicants make a free and voluntary decision to defy the injunction, none was deprived of a legal alternative. It is not sufficient to

> assert, as Ms. Wong does, that the legal process is difficult to understand. Thousands of people every year in this province either initiate or respond to legal proceedings. Many become engaged in complex proceedings. *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, in which the Federal Court of Appeal quashed the order in council that had authorized the expansion of the pipeline, is an example.
>
> [52] Moreover, each of the applicants could have made a choice to do nothing in response to their concerns, no matter how distasteful they found that alternative, or each of the applicants could have continued with the options they had previously pursued, albeit with limited success, namely writing to politicians and lobbying government, no matter how frustrating they found those alternatives. Furthermore, the injunction expressly provides, as do the laws of this country, for lawful protest. The evidence demonstrates that many other persons were present at the time of the arrest of the applicants to demonstrate their own opposition to the expansion of the pipeline, but chose to obey the injunction.
>
> [53] Each of the applicants was told by the police that, notwithstanding they had disobeyed the injunction, if they ceased doing so and left the location where they were blocking access to the terminals, they would not be arrested. All of the applicants made a choice to persist in their disobedience.
>
> [54] As was stated in *Perka* and reiterated in *Latimer*, the excuse of necessity applies only in those narrow circumstances where an accused person has been deprived of the ability to act with moral voluntariness. That cannot be said of any of the applicants.

61. In light of the above analysis, it cannot be said that Affleck's discretion was "not judicially exercised" on the *Vukelich* application. Ultimately, the appellants exercised true choice when they breached the Injunction and, as a result, there is no air of reality to the argument that their conduct was morally involuntary. Far from being "remorselessly compelled by normal human instincts" (*Perka*, at 249), the appellants' breach of the injunction was an exercise of agency and a "free and thought out action": *Ruzic*, at para. 34 citing H. Parent, *Responsabilité pénale et troubles mentaux: Histoire de la folie en droit pénal français, anglais et canadien* (1999), at 271.

(iii) The international jurisprudence does not assist the appellants

62. The appellants have provided the respondent with a five-page supplemental factum referring to three additional cases: *Urgenda Foundation v. The State of the Netherlands*, (9 October 2018), C/09/456689/HA ZA 13-1396 (The Hague Court of

Appeal); *Urgenda Foundation v. The State of the Netherlands* (December 20, 2019) (Supreme Court of the Netherlands); and *Gloucester Resources Limited v. Minister for Planning*, [2019] NSWLEC 7 (New South Wales Land and Environment Court), at paras. 422 - 550 (February 8, 2019). These cases were not tendered in the court below.

63. The respondent does not oppose the filing of the supplemental factum but submits that these cases do not assist the appellants.

64. In the court below, Affleck J. reviewed a different body of international jurisprudence tendered by the appellants and concluded that it was of no assistance:

> [60] I am not persuaded that the U.S. authorities are of any assistance on the issue of necessity. It is sufficient to say that there appears to be no "imminence" test in the U.S. jurisprudence. Nor am I persuaded that I should attempt to apply *R. v. Hewke*, an unreported decision of the Maidstone Crown Court in England. The Supreme Court of Canada has cautioned against adopting judicial precedent from foreign jurisdictions, even where they share a similar legal system or a common historical root. As Justice La Forest wrote in *R. v. Rahey*, 1987 CanLII 52 (SCC), [1987] 1 S.C.R. 588 at 639 [*Rahey*], "American jurisprudence, like the British, must be viewed as a tool, not a master". However, by virtue of the doctrine of precedent, there is a master in this case; there is Canadian jurisprudence by which I am bound.
>
> [61] Nor am I inclined to delve into the law of India, Pakistan or the Netherlands. Though foreign domestic decisions may be tempting to apply in novel circumstances and may hold persuasive value, close attention must be given to the specific legal contexts from which they arise. It is evident that the cases put forth are significantly different from the current circumstances. Many arise in the context of civil suits against government for international treaty obligations, or for violations of constitutionally protected rights. As an example, the decision in *Ashgar Leghari v. Federation of Pakistan* invoked the rights to life and dignity, as protected under the Constitution of Pakistan. The Supreme Court of Canada in *Rahey* wrote at 639, "Canadian courts…should be wary of drawing too ready a parallel between constitutions born in different countries in different ages and in very different circumstances." Once again, there is Canadian jurisprudence by which I am bound.

65. Similar observations can be applied to the cases referred to in the supplemental factum. Neither *Urgenda Foundation* nor *Gloucester Resources* are criminal prosecutions and neither considered the "imminence" prong of the common law defence of necessity.

66. Recent Canadian jurisprudence illustrates the importance of context and an assessment based on the applicable analytical framework. For example, although decided in a different legal context, the Saskatchewan Court of Appeal recently concluded that while climate change is an "emergency in the sense that it presents a genuine threat to Canada", it is not an "emergency" within the meaning of the "emergency" branch of the peace order and good government clause in s. 91 of the *Constitution Act, 1867*. As Richards C.J.S., writing for the majority, observed "the factual record before the Court cannot sustain a view that the climate change challenge is in any way short run": *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, at paras. 200-202; see also *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, at paras. 216-219.

67. The international jurisprudence may reinforce the appellants' subjective belief that climate change constitutes an "imminent peril". However, it does not assist them in meeting the binding common law test for necessity set out in *Perka* and *Latimer*.

Part VI: Nature of Order Sought

68. The respondent submits that the appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Lesley Ruzicka
Crown Counsel
Counsel for the Respondent

Dated this 4th day of May, 2020
at Victoria, British Columbia

Part V: List of Authorities

Para. No.