Court of Appeal File Numbers: CA4595 and CA45953
Vancouver Registry

COURT OF APPEAL

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

BETWEEN:

REGINA

Respondent

AND:

DAVID ANTHONY GOODERHAM (CA45950)
JENNIFER NATHAN (CA45953)

Appellants

APPELLANTS' REPLY

David Anthony Gooderham

4609 West 11th Avenue
Vancouver, BC V6R 2M6

Tel: (604) 224-3382
Email: dagooderham@gmail.com

Appellant

Jennifer Nathan

908 3rd Avenue
New Westminster, BC V3M 1P3

Email: jennifer_nathan@hotmail.com

Appellant

Lesley Ruzicka

Ministry of Attorney General
Criminal Appeals and Special Prosecutions
3rd Floor, 940 Blanchard Street
Victoria, BC V8W 3E6

Tel:(779) 974-5156
FAX: (250) 387-4262

Counsel

TABLE OF CONTENTS

ISSUES IN REPLY

Issue I in Reply: Evidentiary Record

1. The Respondent's Factum at paragraphs 50 and 51, advancing the Crown's submission that it was open to the trial judge to draw his inference about the "contingency", refers to selected extracts from the Appellants' proposed evidence. The Respondent has inaccurately described the meaning and import of a central part of the evidence cited. Paragraph 50 purports to describe "potential mitigation scenarios that could be employed to achieve the necessary cuts", thus asserting that the Appellants presented evidence of mitigation scenarios that could support the judge's inference.

2. The mitigation scenarios presented to the trial judge do not constitute evidence as to the economic or technological feasibility of achieving any particular amount of emissions reductions. The mitigation scenarios provide only a measure of the magnitude of the cuts in annual global emissions required (by a specified future date) to keep the rise of the atmospheric carbon concentration level to less than, for example, 450 ppm.[1] The mitigation scenarios provide no evidence to support a finding that there is a reasonable chance, or any chance, that the magnitude of the reductions depicted will be achieved, or that there is a "contingency" they might be achieved.

3. Other kinds of evidence must be relied on to address whether there is a chance or any degree of likelihood that cuts of the required magnitude can be achieved. Baseline projections (based on existing emissions reduction measures already adopted, current technologies, and assumptions about future economic growth and energy demand, etc.) do provide evidence of whether the annual level of emissions by a future date, for example by 2030, will increase, or

[1] The Appellants' summary of evidence in the Outline, Appendix M at para. M.3 – M.6 (AB 155); Part 16, at para.16.4-16.6 and Figure xi (AB 102); para.16.19 -16.23 (AB 105); Appendix S, at para. S.1- S.17 (AB 167); Part 17 at para. 17.39 (AB 114) regarding the mitigation scenarios reported in the *IPCC Special Report on Global Warming to 1.5°C*

whether they could decline sufficiently to achieve the required deep reductions.[2] In some instances[3], baseline studies incorporate additional emissions reduction policies (promised but not yet implemented) to calculate whether such "additional policies", if implemented in future, will lower emissions by the required amount.

4. The multiple baseline scenarios cited by the Appellants are crucial evidence in this appeal. They all show that the annual level of global emissions is currently projected to continue increasing to 2030. They constitute objective evidence about the actual intentions of governments and industries, or about the future emissions outcomes of their actions and economic policies, whether intended or not. They demonstrate that the subjective beliefs and understanding of the Appellants about the rising trend of global emissions, and their profound concern and fears about that, were at the time of their arrests in 2018 reasonable and consistent with the most authoritative sources of objective evidence. The Appellants cite the findings of the IPCC's 2014 Report, which was based on 300 baseline studies; the *UN Emissions Gap Report 2016*[4]; and the *UN Emissions Gap Report 2017* that concluded global emissions are projected to rise to 6% above the 2016 level by 2030; and the IPCC *Special Report* (2018)

Issue II in Reply: Lawful alternative

5. In paragraph 56, the Respondent quotes the Appellants' submission (App. Factum, para. 92-99) that "A lawful alternative must be one that offers a reasonable chance to avoid the peril." That approach, the Respondent says, is inconsistent with *Latimer*. But at paragraph 30 in *Latimer*, the Court states:

> The second requirement for necessity is that there must be no reasonable legal alternative to disobeying the law. *Perka* proposed these questions, at pp. 251-52: "Given the accused has 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?*" (emphasis in original). If there was a legal alternative to breaking the law, there is no necessity. … that

[2] Outline, Part 16 at para 16.7-16.18 (AB 103)
[3] *UN Emissions Gap Report 2017*, App. Factum para. 9, 24 (1), and 34; Outline, Part 17, at para 17.13 - 17.25 (AB 112); the Outline, Part 17 at para 17.20 (AB 111) addresses the baseline projection published in the *IPCC Special Report on Global Warming to 1.5°C*
[4] Outline, Appendix T at para T-9 (AB 172)

> requirement involves a realistic appreciation of the alternatives open to a person; the accused need not be placed in the last resort imaginable, but he must have no reasonable alternative.[5] *(emphasis added)*

Issue III in Reply: "morally involuntary conduct"

6. In paragraph 54, the Respondent states the trial judge correctly held that the Appellants' subjective beliefs were not objectively reasonable "because the test of necessity requires "immediate pressure … on the person to act, negating his or her ability to act", citing *R. v. Nwanebu*. The presence or absence of "immediate pressure" on the accused has no relevance to determining whether the Appellants' subjective beliefs were reasonably based on the objective evidence. They are two separate questions.

7. The court in *Nwanebu*, addressing the treatment of Imminence in a case of duress (*Ruzic*), states "there must be a close temporal connection between the threat and the harm that caused the accused's will to be overborne at the time he or she committed the offence." Also: "threats of future harm could cause a person's behaviour to be morally involuntary". And: "the focus 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".[6]

8. In a case of duress, pressure (by threat) is placed on the person to act negatlng her ability to act freely. In such a case, her ability to exercise her moral judgment, to make a true choice, is crushed. Against her will, she robs a bank. She loses, or temporarily surrenders, her moral capacity to make a moral choice. In all such cases, evidence of that disabling pressure, and the effective disabling of her ability to make a moral choice, is the gist of the defence.

9. *Nwanebu* was of course a necessity case. But the particular facts closely aligned it with the duress cases. The accused was not in fact facing an imminent

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[5] *R. v. Latimer*, 2001 SCR 1, paragraph 30
[6] *R. v. Nwanebu*, paragraphs 61 and 62

peril. But psychiatric evidence showed that he perceived he was facing a threat. The forensic evidence was sufficient to establish that his "will" had been "overborne" by the pressure of imagined threats. His medical condition negated his ability to act freely. Hence, his behaviour was "morally involuntary".

10. The Appellants do not contend that their mental capacity to make a moral choice had been crushed or impaired. They submit that disobeying the law was no true choice. The question is not whether their "will" was literally overborne, or whether the apprehended threat (as a kind of "pressure") disabled their ability to make a moral choice. Rather, the analysis requires (1) a fact sensitive assessment of the nature and magnitude of the climate peril and its imminence and (2) a determination of whether, in a humane and civilized society, persons fully informed of the unfolding catastrophe would consider doing nothing and obeying the law as a true choice. The second question engages societal values. As Dickson J. explained in *Perka*, "Such a conceptualization accords with our traditional legal, moral, and philosophical views as to what sorts of acts and what sort of actors ought to be punished."[7]

11. The respondent says that the Appellants "could have … done nothing", citing *Latimer* para. 39. In *Latimer* (2001) there was no imminent peril. The condition of the incapacitated daughter, murdered by the accused, was not facing any emergency but on the objective medical evidence was suffering from "an obstinate and long-standing state of affairs".[8] There was no peril to be avoided.

12. In *Perka*, using the hypothetical example of a lost mountaineer who disobeyed the law to break into a mountain cabin to save his own life, Dickson J. acknowledged that in those circumstances a choice to obey the law (and lose his life) would have been "no true choice at all". In such a case, disobeying the law may be excused, notwithstanding that the act is voluntary:

> Conceptualized as an "excuse" however, the residual defence of necessity is, in my view, much less open to criticism. It rests on a realistic assessment of human weakness,

[7] *Perka v. The Queen*, [1976] 1 S.C.R. 232, p. 250
[8] *R. v. Latimer*, paragraph 38

> recognizing that a liberal and humane criminal law cannot hold a person to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or altruism, overwhelmingly impel disobedience.[9]
>
> The lost alpinist who, on the point of freezing to death, is not literally behaving in an involuntary fashion. He has control over his actions to the extent of being physically capable of abstaining from the act. Realistically, however, his act is not a "voluntary" one. His "choice" to break the law is no true choice at all: it is remorselessly compelled by normal human instincts.[10] *(emphasis added)*

13. Dickson J. acknowledged that the defence of necessity is an "ill-defined and elusive concept". In articulating a principled rationale for necessity, he is guided by the proposition that the absence of an opportunity to make a true choice could excuse criminal liability, citing Fletcher *Rethinking Criminal Law*:

> The principle of respect for individual autonomy is implicitly confirmed whenever those who lack an adequate choice are excused for their offence.[11]

14. In his hypothetical example, Dickson J. posed the case of an individual who in a conscious and voluntary act breaks the law to save his own life. However, he explicitly includes an act of altruism ("self-preservation or altruism") in his analysis of emergency situations that a humane and liberal criminal law would excuse from liability. We must ask why, in the identical circumstances, a person acting out of compassion would not equally be excused for intervening and breaking into the cabin to save the mountaineer's life. In the example, choosing "to do nothing" (do not break into the cabin and thus die in the snow) is no true choice. An act of altruism, actuated by compassion, is no different in substance. Compassion requires a conscious weighing and reflection on a threated harm to another person. It involves a weighing of the actor's own ethical values. Compassion, like pity and fear, is part of our system of ethical reasoning, "marking the world for our concern, and thence in directing our attention to the suffering of others".[12] The suffering of others may be as much our own concern

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[9] *Perka v. The Queen*, [1984] 2 SCR 232, p. 248
[10] *Perka*, p. 249
[11] *Perka*, p. 249
[12] Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions*, Chapter 6 "Tragic Predicaments", p. 322

as our own lives, or more so. In the gravest circumstances of imminent peril, a person who is precluded from acting to avoid (or limit) unspeakable loss and harm to others has no true choice.

15. Whether the Appellants had a true choice when they disobeyed the injunction in 2018 must be decided in light of the proposed evidence. Mitigation scenarios show the required reduction in annual global emissions by 2030 to give a 66% chance of limiting warming to less than 1.5°C is 20-30 $GtCO_2eq$, equivalent to a 50% reduction of global emissions. All baseline projections show emissions will continue increasing to 2030 – to 6% above the 2016 level – even after counting all promised reductions under the Paris Agreement. India, China, Russia, and Saudi Arabia (together 40% of global emissions), plus many poor nations, will contribute no reductions before 2030. The world's remaining countries (including Canada) would be bound to reduce their emissions 80% on average to stay within the 1.5°C limit, a fanciful outcome. The IEA's baseline projections show global oil consumption (35% of total global CO_2 emissions) will continue increasing to 2040, a conclusion confirmed by Canada's own NEB projections of future oil demand. The Appellants' objectively reasonable belief was, and is, that limiting the heating of the earth to 1.5°C is beyond reach.

16. The Appellants' understanding of the grave and immeasurable consequences of that failure, for human life and for natural systems, is based on scientific evidence presented to the court below. A trial judge must decide whether, when faced with that belief and understanding of unspeakable loss and suffering, and driven by reason and compassion to act to prevent even greater suffering, a liberal and humane society would say that the Appellants had a choice to obey the law and do nothing. The Appellants say that by any measure of our shared values, that was no true choice.

Issue IV in Reply: "emergency" and the Carbon Reference Cases

17. On the "emergency" issue, the Saskatchewan Court has ruled that the problem is not short run. It did not address the central question whether there is

any likelihood warming above 1.5°C or 2°C can be avoided, or address the immediacy of the action required to avoid those catastrophic outcomes:

> Climate change is doubtless an emergency in the sense that it presents a genuine threat to Canada. However, the factual record before the Court cannot sustain a view that the climate change challenge is in any way short run or that the Act is intended to have, or expected to have, a life of limited duration. This is unlike wars as typically understood. They are conflicts of uncertain length but nonetheless conflicts with an endpoint. Notwithstanding that the Paris Agreement sets goals to be accomplished by 2030, Canada does not suggest the Act will operate in anything other than an indefinite or long-term timeframe.[13]

18. The submissions and evidence put forward by Canada and by B.C. in the Saskatchewan case supported that conclusion. The Factum of the Attorney General of British Columbia filed in the Saskatchewan proceeding stated:

> 8. In a 2018 Special Report, the Intergovernmental Panel on Climate Change (IPCC) concluded that, in order to keep global warming to 1.5°C over pre-industrial levels, global emissions of carbon dioxide would need to fall to about 45% of 2010 levels by 2030 and reach "net zero" (as much leaving the atmosphere as entering it) by 2050 (footnote 4). Canada committed to pursue efforts to meet the 1.5°C target in the 2015 Paris Agreement (footnote 5).

19. The first part of the above statement (the need to cut global emissions 45% by 2030) accurately describes a crucial "short run" aspect of the "climate change challenge". Achieving "net zero" by 2050 points to the long-term character of the problem. Footnote 4 in the above quote cites the *Summary for Policy Makers* for the IPCC's *Special Report on Global Warming of 1.5°C*.[14]

20. The Appellants' summary of expert evidence explains the qualified meaning of reaching "net zero" by 2050.[15] Based on the mitigation studies relied on by the IPCC, which model the entire 45% cut required by 2030 as fully achieved and further deep cuts continuing to 2050, there is a 66% chance the atmospheric carbon concentration can be kept within the level consistent with

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[13] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, para. 203.
[14] Citing SPM-15. The Summary for Policy Makers was attached as Exhibit D to the Affidavit of John Moffet.
[15] Outline, Part 16 at paragraphs 16.4 -16.6 and Figure xi (AB 103)

1.5°C *but only provided* viable carbon dioxide removal technologies (CDR) are available to remove additional “residual emissions” from the atmosphere over the balance of the 21st century. The IPCC *Summary* filed in the Saskatchewan case acknowledges at section C3 that all the mitigation pathways that project limiting warming to 1.5°C by 2050 assume future CO_2 removal in the order of 100 – 1000 $GtCO_2$ by CDR, and acknowledges the feasibility of that is unproven.

21. The immediate peril lies in the short run. Based on the summary of evidence in the present case, a trial judge could find that it is virtually certain the 45% reduction will not be achieved by 2030. The ruling by the Saskatchewan Court of Appeal that climate change is not an “emergency” within the meaning of Canadian constitutional law does not assist the court on that central issue.

All of which is respectfully submitted,

Dated at the City of Vancouver, Province of British Columbia, this 22nd day of May 2020.

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David Anthony Gooderham

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Jennifer Nathan

LIST OF AUTHORITIES

Para. No.