November 14, 2020

CIVIL DISOBEDIENCE AND THE DEFENCE OF NECESSITY: PATHWAYS FORWARD

Civil disobedience is an opportunity to use the legal process to direct the public's attention to a grave injustice. It is a path of non-violence, and relies on reasoning and evidence. It tests the law, inviting the Court to examine a terrible unfolding injustice and measure it against the law's own proclaimed principles. In our case, the B.C. Court of Appeal failed the test. The defence must be put forward again and again.

To all those who have supported and taken an interest in this legal case, Jennifer Nathan and I wish to explain to you why we have decided not to pursue a further appeal to the Supreme Court of Canada in our case based on the defence of necessity.

The discussion below looks at what could be the most promising and effective pathways forward in the courts to challenge and halt the Trans Mountain pipeline expansion. While we do not think a further appeal to the Supreme Court of Canada in our case offers an effective path, we strongly believe that the defence of necessity remains an essential and possibly viable defence that should be raised with careful preparation in new cases.

Our decision turns on three main considerations, as follows: assessing the chances of success on a further appeal to the Supreme Court of Canada (SCC); considering the practical effectiveness of an appeal, even if it turned out to be successful in the final result; and the problem of "time", because even with a successful appeal we would not be in a position to call evidence about climate change at a full trial until about 2023.

The grounds of appeal and chances of success

Three essential requirements must be met to establish this rare defence: the accused person must show (1) that at the time they disobeyed the law they were facing an "imminent peril"; and (2) that they had no "lawful alternative" to avoid the peril, other than acting as we did to disobey the injunction order; and (3) that their disobeying the law was "involuntary". The concept of "involuntary" has a special meaning in the law governing the defence of necessity in Canada.

To successfully establish the defence at trial, we would have to prove all three of those requirements. Failing to prove a single one is fatal.

Our original application (to Affleck J.) was a pre-trial application to obtain leave (i.e. permission from the court) to call expert evidence to support our defence of necessity. To succeed on that application, we had to show (based on the summary of proposed evidence we presented to the Court) that there was an "air of reality" to our defence. An "air of

reality" means that, based on our proposed evidence and assuming it is all proven at trial to be "true" (i.e., what is actually happening to the climate system, the causes of that, the immediacy and gravity of the impending loss) a jury at a full trial "could" agree that we are in fact facing an "imminent peril".

Similarly, we had to show that there was an "air of reality" to our claim (the second requirement) that, by the spring and summer of 2018 when we disobeyed the injunction order, we had no lawful alternative. To properly address that issue, the Court would be obliged to assess, among other things, the amount of time remaining to avoid irreversible and very serious climate change. The Court was bound to ask: was there still enough time remaining to allow the accused citizens a realistic opportunity to pursue other means ("lawful alternatives") to avoid the peril? The Court would have to decide the question based on the summary of expert evidence we presented to the Court. The Court was not permitted to speculate. It was obliged to be guided by the evidence, which clearly explains the very short time remaining.

In this case, based on the evidentiary record, we believe we demonstrated (to a standard adequate to meet the "air of reality" threshold of proof) that the world is now facing an "imminent peril", and that Canada's continued expansion of its oil sands production to 2030 and 2040 (facilitated by the Trans Mountain pipeline) will materially contribute to irreversible heating of the earth's surface, to levels well above 2°C.

At our original hearing in December 2018, our trial judge (based on speculation unfounded by evidence) drew an inference that future policy changes (which he did not identify) may avoid any dire outcome.

The three judges of the B.C. Court of Appeal have not affirmed the trial judge's finding on that important point.

In fact, the appeal judges did not consider the record of scientific evidence at all. They merely declared that it was not necessary for them to decide, one way or the other, whether we are facing an imminent peril.

Instead, the Court of Appeal decided that we could not show there is any "air of reality" to the other two essential requirements needed to make out the necessity defence. We had a number of "lawful alternatives', they said. They also said our unlawful conduct in disobeying the injunction order was not "morally involuntary".

Accordingly, to succeed in an appeal in the Supreme Court of Canada (SCC), we would have to persuade the SCC to over-turn the conclusions reached by the B.C. Court of Appeal on those two points. We would be obliged to satisfy the SCC that (i) there were no "lawful alternatives" available to us and (ii) that our actions were "morally involuntary". We would have to persuade the SCC that the B.C. Court of Appeal was wrong on those two key points.

A more detailed analysis of the issues

To be successful, there are in fact a series of issues that will have to be resolved in our favour by the SCC:

1. Imminent peril

To begin, the Court of Appeal was completely silent on the primary issue, which is whether the evidentiary record shows that there is "an air of reality" to our contention that we are facing an "imminent peril". To succeed in the SCC, we must persuade that Court that the body of evidence we presented meets the "air of reality" test on that issue: i.e., that assuming our evidence is "true", a jury "could" find that based on the objective evidence an imminent peril exists. I believe we can have a fairly good level of confidence that we can win on that issue. But that is just the first requirement.

I should add that the strict language of the law requires that we show that the imminent peril is a "virtual certainty". It is a very stringent test. We have a high level of confidence we could succeed on this first issue, but there remains some uncertainty about how the SCC would actually decide even that issue.

My own view on this crucial first issue is possibly more optimistic than many experienced and capable lawyers would give us. I have a detailed knowledge of the proposed expert evidence about climate science and of the current emissions projections set out in the evidentiary record, based on about 8 years of closely following the various reports and public review processes that have examined these questions. Jennifer Nathan also brings to this case her detailed knowledge of the scientific evidence, going back to about 2006. We both approach this decision (about whether to pursue a further appeal) with an awareness of the gravity and exigency of the climate situation. However, it is very possible that a lawyer, familiar with appeals to the Supreme Court of Canada, looking at the adjudicative record with fresh eyes, and who has a realistic understanding of the limitations on the capacity of an appeal court to approach a very complex and unprecedented subject-matter like this one, may be more pessimistic about our chances on the first issue.

Whether or not we are too optimistic on the first issue, showing that we are facing an imminent peril is just the first requirement.

2. What is the meaning of "lawful alternative"?

The second requirement is that we show we had no lawful alternative.

On the matter of lawful alternatives, an initial question arises: must a "lawful alternative" be one that offers the accused person some realistic chance of avoiding the peril? (I have discussed this specific issue at pages 9-10 of the paper posted on our website). We say, based on other cases decided in the past by the SCC, that a lawful alternative must mean a lawful option that would give us a chance to avoid the impending harm. The Court of Appeal in its judgment did not address that question, one way of the other. But it did say

that "doing nothing" was, in the circumstances of this case, a lawful alternative. Doing nothing would not offer us (or any other citizen) any chance at all of avoiding the peril.

Similarly, in all the other examples of lawful alternatives that the Court cites (i.e., engaging in political activity), the Court makes no mention at all, one way or the other, of whether those suggested alternatives in fact offer any meaningful chance to avoid the peril. In order to effectively challenge the Court of Appeal's conclusion about the lawful alternatives, we must first persuade the SCC that any lawful alternative, in order to be a true alternative, must be one that offers some realistic chance to avoid the peril. That requires the SCC to re-visit *R v. Perka* and the *Latimer* case, and that they agree with our interpretation of those two decisions.

I think we have a fair chance of succeeding on this issue. It was in my view a fundamental error by the Court to make findings that various "lawful alternatives" offer a means to avoid the peril, without first making a determination about the imminence of impending loss and suffering (i.e., that it was not already too late to avoid the onset of the peril).

3. In these circumstances, "doing nothing" is not a lawful alternative

Assuming that we successfully persuaded the SCC that we are right on point #2, we would still have to take the Court through each of the six examples (see the Court of Appeal judgment at para.102) and show that none of those examples can truly be "lawful alternatives".

If we are right about the first issue (that we are facing an imminent peril and that we are already in "the last resort imaginable", or even worse that it is already too late to keep warming within 1.5°C), clearly "doing nothing" is not an alternative.

4. Is bringing "civil litigation" against the government a lawful alternative?

We then must go through the same kind of analysis with each of the other supposed lawful alternatives. "Civil litigation" is one of those. We would be bound to direct the SCC to the evidence about the timeline, about the rising atmospheric carbon concentration level, and the exigency of the impending loss and harm, and the immediate need to implement massive emissions reductions on a global scale. We would also point to the lengthy delays, measured in years, required to advance complex litigation to a conclusion (i.e., 3 to 5 years) and also the uncertainties of litigation.

If we are already in "the last resort imaginable", we say we are not bound to wager everything (i.e. the irrevocable destruction of all natural systems that support human life) on the uncertain outcome of civil litigation, which could not possibly achieve any effective remedy altering government policy before, say, 2023 or 2025 at the earliest.

We would say, on this specific issue (whether by the summer of 2018 pursuing "civil litigation" was a lawful alternative), that based on the evidence we presented to the Court we met the "air of reality" test: a jury *could* agree with us that given our evidence showing the "imminence" of the peril and its catastrophic character and taking into

account the time consuming process of civil litigation and its uncertainty, that in the spring and summer of 2018 the option of relying on "civil litigation" offered no realistic chance of avoiding the peril. The option of bringing a lawsuit against the Government of Canada would take three to five years, and whether such a claim would ultimately prove successful is uncertain. The problem is that if we wait three to five more years to find out the answer - until 2023 or 2025 - it will by then be too late to effectively address the problem.

I think our chances of succeeding in the SCC on this specific issue are fair, if the Court were to accept in full the scientific evidence about the brevity and unforgiving nature of the time remaining to implement deep emissions cuts. By a "fair" chance of success in this context of trying to assess a court outcome on these unprecedented legal questions, I mean something in the area of 25% to 50% and that may be too optimistic. I can see the SCC prevaricating, and saying that it is not clear that the time is so short that civil litigation offers no realistic chance of effectively changing the government's actions.

5. Is continuing to use the "democratic process" a lawful alternative?

We must then do the same kind of analysis with respect to the supposed alternative of using the political process to put pressure on the government to "withdraw its authorization for the project". The starting point of that analysis, again, is found in the evidentiary record showing the extremely short time remaining (or more precisely, that no time remains) to start reducing global oil production. The evidence also confirms that the pipeline project has already been authorized, and it is already under construction. "The horse is already out of the barn". Further, the record of events between December 2013 and November 2016, during the environmental approval process, shows that all attempts by citizens during that period to raise questions about climate science and the emissions implications of the pipeline were blocked by the NEB, and then by the Federal Court of Appeal. By 2018, we say, the available time for effective "democratic" intervention had gone by.

I think we would have some "fair" chance of persuading the SCC that in the circumstances, based on our evidentiary record, there is an "air of reality" to our contention that by the spring and summer of 2018 further engagement in the "political process" no longer offered any realistic chance that we could alter government policy, not within the brief time remaining, and that a jury "could" find in our favour on this specific issue. But whether the SCC would agree depends, of course, on whether it accepts and agrees that our evidence demonstrates the immediacy of the climate threat.

Great uncertainty exists because the SCC can simply declare that the evidentiary record is not so clear that by 2018 *all opportunities for effective political action were closed*. The SCC can seize on a penumbra of uncertainly and simply declare that even by 2018 using "the democratic process" still remained a lawful alternative. Ultimately, the SCC has a lot of latitude to shape its answer on this issue to fit the outcome it wants. The Court will be extremely reluctant to acknowledge that its own vaunted judicial process (which ultimately controls the outcome of any "civil litigation") is unlikely to respond effectively.

6. "Protest outside the prohibited area" as a lawful alternative

I will only briefly reference here the "fourth" and "fifth" supposed lawful alternatives: that we could have "chosen to protest outside the prohibited area" or that we could have "removed" ourselves from the "enjoined area" when asked (CA judgment, para.102).

Would protesting from the sidelines (and standing by while the construction work proceeded) have been an effective "alternative"? Would it have been effective if Rosa Parks had stood up and passively given her seat to the white passenger on the segregated bus, obeying the order of the white bus driver in Montgomery Alabama? Instead, in fact, she refused to stand and move to the back of the bus.

In rare cases, disobeying the law offers a pathway to effective action after years of political action and protest from the sidelines have proved ineffective.

It is impossible to foresee with any certainty how the SCC would handle this point, but I have very low confidence that we could have any chance of success on this point. The uncertainty arises, in part, from the fact that the defence of necessity has rarely been considered in other cases of civil disobedience, where the act in question (disobeying the law) was *deliberately* chosen – as in most instances of civil disobedience – to direct the public's attention to a terrible injustice. The *MacMillan Bloedel v. Simpson* case, which concerned civil disobedience against old-growth forest logging, and the abortion clinic protest cases are the only examples where the deliberate disobedience of the law was the subject matter of a defence of necessity plea in a "protest" case.

In most situations, standing on the sidelines achieves nothing because it goes unnoticed. Our argument must be that standing outside the "enjoined area" is equivalent to doing nothing. It would offer no meaningful chance of avoiding the peril. But will judges on the SCC be prepared to acknowledge that in some situations, however rare, a deliberate act defying the law could be the only means to actuate a change in government policy? I think not.

7. Applying to set aside the injunction as a lawful alternative

This is the "lawful alternative" that in my view would be the most problematic for us if we were to take this case to the SCC.

Arguably, it is not really a lawful alternative at all: setting aside the injunction offers no means at all to halt the construction work, or to challenge the authorization of the pipeline (I have discussed this at length at pages 10 to 12 of the commentary posted on our website).

The requirement that we were obliged to apply to set aside the injunction is rooted in a decision of the B.C. Court of Appeal (*MacMillan Bloedel*), a case that has stood as a precedent for many years. That precedent would have to be effectively over-ruled by the SCC for us to succeed on our appeal. My own view is that this requirement (to apply to set side the injunction before we disobey the order) while it is billed as a "lawful alternative" is in substance and in reality a procedural requirement (however it is

labelled) aimed to ensure that judges' injunction orders are always "inviolable," especially in situations that involve any public confrontation or potential conflict.

I cannot see the SCC overturning that supposed rule or principle in our case. It is not impossible. But I think we would face overwhelming difficulties. That one point, by itself, could defeat our entire appeal.

8. Our acts disobeying the law were "morally involuntary"

The third essential requirement is that we show that our acts disobeying the injunction order in the spring and summer of 2018 were "morally involuntary".

If we cannot make out that third requirement, our appeal to the SCC will fail – even if we prevail on all of the other specific issues that relate to the "lawful alternative" argument.

I have already set out a full discussion of the "morally involuntary" issue in my commentary piece "No Air of Reality" (see: "You had a choice": the meaning of "moral choice", p. 23 – 26, https://dagooderham.com/essays/no-air-of-reality-the-bc-court-of-appeal-climate-change-imminent-peril-and-moral-choice/). In that discussion, I have put our side of the argument as strongly as I could based on my reading of the cases and especially the judgment of Justice Dickson in *R v. Perka*.

There is a compelling argument, based on the evidentiary record showing the extreme danger of our situation and the unforgiving timeline, and the unspeakable loss and suffering if we continue on this path, that a jury "could" agree that from the perspective of a humane society the choice of obeying the injunction order in this case, and thus standing by and doing nothing, was "no true choice at all".

But I think the chances of the SCC agreeing with our argument on this crucial issue are slight. It would seem that for these judges and perhaps for most people, the idea that events might have reached a point so perilous that our normal obligation to obey the law might be suspended is beyond their reach.

At a more prosaic level, the SCC judges could also be attracted to the notion that, however bad it is, there was in a strict legal sense no "immediacy" between the threatened harm and our own lives or welfare in 2018, in the sense of something that would happen directly to us within a very short period of time, measured in days or weeks, or whatever short period of time they think is called for to avoid what they see as the "mask of anarchy" (opening the 'floodgates' to mass lawlessness). In other words, the Courts will be slow to translate the language of Justice Dickson (his "rescue ship" metaphor and our choices when it becomes clear that the rescue ship is not coming) into our present reality. They will find our talk about "compassion" for the fate of others as unpersuasive and something not even worthy of discussion.

Conclusion

I think the chances of getting leave to appeal to the SCC are slight. But even if we get leave, I think the chances of a successful outcome are small. I have summarized my assessment here. I emphasize, however, that the kind of reasoned analysis set out above probably overstates the precision of the decision-making process that would actually occur if this case were to reach Canada's highest court. More likely, the SCC would focus on one or two issues that they think would be sufficient to "dispose" of our appeal.

I can see we could prevail on the important first issue, and possibly on issue 2. If we are successful on issue 2, we should be able to prevail on issue 3 (that "doing nothing" cannot possibly be counted as a "lawful alternative").

I think that a very careful and assiduous panel of SCC judges, if they were to fully recognize and acknowledge the immediacy and existential character of the peril, might give us some chance of prevailing on issues 4 and 5. The SCC might possibly agree that, assuming our proposed evidence is true and credible, a jury *could* conclude that pursuing "civil litigation" and relying on the "political process" to solve the problem (and avoid the existential climate peril} threat cannot be counted on as viable lawful alternatives.

But whether we can prevail on issue 6 (that we had an alternative to protest lawfully "outside the prohibited area") is highly uncertain. Can we persuade the SCC that protesting from the sidelines in fact offered no effective means to stop the construction of the pipeline?

I think we have very slight chances of success on issues 7 (applying to set aside the injunction) and 8 ("morally involuntary conduct").

Therefore, even assuming we prevail on issues 1 and 2, the chances on succeeding on the other issues are highly uncertain. Several offer only very slight chances of success. If we fail on any one of those issues, the entire appeal fails.

Therefore, in our view, this is a case with very little prospect of success in the end. We may not even get the SCC to address the most important issue, issue 1 (the "imminent peril" of climate change).

B. Effectiveness

I next discuss the matter of effectiveness, and for that purpose refer to three recent Charter cases, two of them commenced against the Government of Canada. All three involve litigation concerning climate change. The first case is known as *Cecilia La Rose v. AG Canada.* Lawyer Joe Arvay is counsel for the sixteen young Plaintiffs in that case supported by the David Suzuki Foundation (commenced October 25, 2019). The second case is *Dini Ze' Lho'Inggin v. AG Canada,* a claim by Wet'suwet'en people in northern B.C. (commenced on February 10, 2020). Their lawyer is Richard Overstall. Both involve claims against Canada based on Section 7 rights under the Charter and on other

constitutional law grounds. Both cases were brought in the Federal Court of Canada. A third important case is *Sophia Mathur v. Her Majesty the Queen* (commenced November 25, 2019) against the Government of Ontario in the Superior Court in that province. All three cases are recent, started within the past year.

I wish to comment here on the significant differences between these three civil litigation cases, and our criminal law case.

In our case, the B.C. Court of Appeal declined to even consider the evidence about climate change and it did not decide whether climate change is a real threat, let alone whether it presents an "imminent peril". Our case therefore provides no judicial ruling on that fundamental question, one way or the other. That is the great disappointment of our case.

There were a number of other unhelpful features of the criminal law that were unique to our case and which do not arise in the three civil litigation cases.

First, in the criminal law context of our case we had to show that climate change is an "imminent peril", which the Court of Appeal refers to as the "first requirement". To prove imminence, we had to prove that a dire climate outcome is "virtually certain'" (not just "likely" or "foreseeable"). That goes well beyond what a civil claim will have to show.

We also had to prove (a second requirement) that when we disobeyed the law (in the spring and summer of 2018) we had no other "lawful alternative" to avoid the peril of climate change. The B.C. Court of Appeal was able to dismiss our case based on its contention that we could have used the "political process" to try to persuade the Government of Canada "to withdraw its authorization for the [pipeline] project". That requirement obviously does not apply in the three civil cases that are based on breaches of Section 7 Charter rights. If the Government of Canada's actions (and its failures to act) are infringing the young Plaintiffs' constitutional rights, it is no answer for Canada to say that they should try engaging in the political process!

Thirdly, to succeed in our case we also had to show that our conduct in disobeying the law was "morally involuntary" (this issue is discussed at pages 22-26). Again, that difficult and abstruse requirement of the criminal law does not arise in the civil litigation cases based on Section 7 of the Charter.

And, in the civil cases, the claimants are allowed to call expert evidence on climate change as of right. In our defence of necessity case, we had to apply for leave (beg for permission) to do so. That is what our appeal was all about: the trial judge, Affleck J., refused to allow us to call any evidence about climate science at our trial. The Court of Appeal has unfortunately agreed with him.

Another significant difference is that even if the defence of necessity in our case was completely successful, our case offered no effective remedy against Canada. We would just get acquitted. So victory in our case would have been largely symbolic (although of

course our really important objective was to get the Court to acknowledge that climate change is an "imminent peril").

In contrast, the three Charter-based cases, if they are successful, could result in remedies that compel the Government of Canada to actually change its climate policy. An example of that kind of extraordinary success is found in the *Urgenda Foundation v. The State of the Netherlands*, the case decided by the highest Dutch Court on January 13, 2020.

Finally, in the civil litigation cases the Plaintiffs have the power to demand "discovery" of the Government's documents, and also the right to conduct an examination of a representative of the government under oath. These are formidable tools to challenge the government and uncover so-far concealed information about their knowledge about the climate change risks, and their "insider information" about Canada's chances of even remotely meeting its Paris commitments by 2030.

For all those reasons – and most of all because of the rapidly vanishing timeline – I think the Charter-based cases are now clearly the best vehicle to confront the government on this issue, insofar as the Courts might offer a path forward. But I emphasize that Charter litigation is not the only legal path forward. I will discuss the defence of necessity further below.

The path forward for these three Charter-based civil litigation cases will not be trouble free. They are formidably complex legal cases. The governments (Canada and Ontario) are relying on "strike motions" to dismiss these claims as quickly as possible.

On October 27, 2020, the Federal Court summarily dismissed the *Cecilia La Rose* case. The Government of Canada at a two-day court hearing on September 30 – October 1, 2020, argued that the claim had no proper basis in Canadian law and that it was not "justiciable", that it was "speculative", and should be entirely struck out. Unfortunately, in the *Cecilia La Rose* case, Canada's strike motion was successful.

The Government of Canada is employing, and will continue to employ, a very aggressive legal strategy bringing these "strike motions" aimed to get the Charter cases dismissed before they even have a chance to get to trial.

The *Sophia Mathur* case: decision November 12, 2020

A very positive development on November 12th shows the potential force of these Charter cases, despite the massive effort by government to block that legal avenue**.** Following a similar attempt by the Ontario government to "strike out" the claim by the Plaintiffs in *Sophia Mathur v. HM Queen*, Justice Carole J. Brown, a judge on the Ontario Superior Court, rejected the government's application to terminate the case. In her comprehensive and clearly written 55-page decision, Justice Brown has explained why the seven young claimants in that action should be allowed to take their claim to trial.

The Ontario judgment begins with this paragraph setting out the context of the case, citing an earlier ruling by the Ontario Court of Appeal that deals with the constitutionality of the carbon pricing law enacted by the Federal Government:

> *The Court of Appeal for Ontario has noted that "there is no dispute that global climate change is taking place and that human activities are the primary cause": Reference re Greenhouse Gas Pollution Pricing Act, 2019) ONCA 544, 146 O.R. (3d) 65 ("Carbon Pricing Reference"), at para. 7. These activities, which include the combustion of fossil fuels like coal, natural gas and oil and its derivatives, release GHGs into the atmosphere. When incoming radiation from the Sun reaches the earth's surface, it is absorbed and converted into heat. GHGs act like the glass roof of a greenhouse, trapping some of this heat as it radiates back into the atmosphere, causing surface temperature to increase: Carbon pricing Reference, para 8-9.*
>
> — *Sophia Mathur v. HM the Queen in Right of Ontario*, 2020 ONSC 6918, para 4

Justice Brown recounts in her judgment that the Ontario government had taken the position that the Plaintiffs' legal action was "bound to fail" because it was based on "unprovable speculations" (that was the submission made by the government's lawyers) about the future climate consequences of Ontario's existing emissions reduction target.

The young claimants' case is based on their allegation that Ontario's target is wholly inadequate. That key allegation is supported by multiple specific references in their written claim showing the magnitude of deep emissions cuts required on a global scale by 2050 to avoid an increase in global average surface temperature that will exceed the 1.5°C, 1.75 °C and 2°C warming limits. They set out detailed particulars of the devastating consequences to natural systems that support human life if those deep reductions are not achieved. They explicitly set out findings of climate science showing, for example, that the global carbon budget remaining to stay within 1.5°C is 420 $GtCO_2eq$, which they will prove at trial based on the testimony of expert witnesses.[1]

The young claimants argued that the facts set out in their pleadings are capable of scientific proof and therefore are not based on assumptions or speculation.

Justice Brown agreed. She concluded:

> *As I have indicated above, this Application is capable of scientific proof and the applicants have already included many facts based on scientific and social science findings … The Applicants should therefore be afforded the opportunity to present their complete evidence in front of the application judge …"*
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> — *Sophia Mathur v. HM the Queen in Right of Ontario*, para. 171

[1] Justice Brown's ruling is based on her review of the facts set out in the Plaintiffs' formal written claim, which is 31-pages in length filed in the Ontario court on November 25, 2019. Para. 56 of the detailed claim sets out particulars of the total remaining amount of CO_2 that can be released into the atmosphere before the world will be irrevocably committed an increase in average surface temperature that will exceed 1.5°C.

The Ontario judge acknowledges that the assessment of the expert evidence should be left to the trial judge. Justice Brown properly recognized that it was not for her, at a preliminary "strike motion" brought by the Ontario government, to decide that the young Plaintiffs' claim was based on "speculation' or that it was "hypothetical", before there was an opportunity for the evidence to be fully heard at trial. She was satisfied that the claimants' evidence, if found at trial to be credible and true, offered a reasonable prospect that they could succeed in their claim against the Ontario government.

The decision in the *Sophia Mathur* case is a major achievement and very promising.

As for the third case, *Dini Ze' Lho'Inggin v. AG Canada*, the Federal Court has not yet released its decision on whether the Charter-based claim in that case will be allowed to proceed to trial.

I think the decision in our own case is a cautionary warning that the judiciary will be slow to open their eyes to what is happening. In our case they found an easy way to avoid even looking at the scientific evidence. The "strike" motions in the civil cases are another warning as to how brutal any kind of litigation will be, criminal or civil.

Therefore, a decision to pursue further climate litigation, or to support climate litigation, should be very carefully focused on cases that have real promise to be effective, and those cases must also be well funded so that it can stand up to the aggressive tactics of our governments.

Subject to the problem of the strike motions, I believe the Charter-based cases are very encouraging in terms of potential effectiveness. I am hoping that the *Cecelia La Rose* case (struck out by the Government of Canada on October 27, 2020) will be appealed, or re-constituted (with some changes in the way it is pleaded) so that a new case in its place can survive further efforts by the Trudeau Government to eliminate it as a legal threat.

I think there are real opportunities to see additional groups of citizens band together to commence and financially support further legal actions based on Section 7 Charter rights against Canada, and also against the B.C. government.

My big concern about the Charter-based cases is the long timelines required to bring complex civil litigation of that kind to trial (and through the inevitable appeals). The Federal Government has infinite resources to delay that process, as the U.S. government has done in the *Juliana* case. The one thing we don't have is time.

C. The problem of time: a further appeal to the SCC is too late

Preparing and getting our case to a full appeal in the SCC could take another year and a half, and perhaps longer before we see a judgment. That would mean, even with a completely successful outcome, that we would not be calling expert evidence at a full trial in B.C. until sometime in 2023.

I think that would be too late, especially given that our case offers at best nothing but a symbolic victory. It offers no effective remedy against the Government of Canada.

For all these reasons, we have decided, reluctantly, that our two-year effort in this case to raise the defence of necessity to the charges of criminal contempt brought against us for disobeying the pipeline injunction order in the spring and summer of 2018 has run its course. But we believe that the defence of necessity is still an essential defence to raise in ongoing civil disobedience litigation. It is the only means citizens have to raise in the courtroom, in the immediate future, the profound ethical issues that lie at the heart of this fight. New evidence that has become available since our original hearing in early December 2018 has increased the prospect that raising the necessity defence in a new case will be successful. At the very least, it is a means to air at a public hearing evidence about the climate implications of the Trans Mountain pipeline expansion.

While a future trial in one of the Charter cases by 2023 (or maybe not till 2024) will also be very late in the day, at least a successful civil action based on Section 7 Charter rights could have a real impact on government policy. Also, the ongoing civil actions over the next few years could have a powerful impact on public discourse and an educative role. An appeal to the SCC in our criminal case will be effectively invisible for the next two years, and will be of no interest to anybody except perhaps to a few legal scholars. As one journalist told me a few days after the judgment in our case was released on September 21, 2020, for most media, unfortunately, "there is no story" in what the Court of Appeal has done.

D. Civil Disobedience and the Defence of Necessity

Many people will continue to be guided by their consciences and will take direct action to delay and oppose the construction of the Trans Mountain expansion. The defence of necessity can still be raised in future cases. The Court of Appeal has not ruled that the defence can never apply. They have not made a finding that we are not already facing an imminent peril. They chose not to look at the evidence.

The judges just said that in the circumstances of our case, which arose in 2018, we had other "legal alternatives" to avoid the climate peril. We will soon be entering 2021. Sadly, the evidence now shows that the circumstances have markedly worsened in the past two years. The evidence has changed. The annual level of global emissions has continued to increase. The atmospheric carbon concentration has continued to rise. Canada's oil sands production has continued to grow, while the remaining time to reverse directions and achieve the required deep cuts in global oil consumption by 2030 has now been shortened by two years, and we will soon have lost three years. With every passing year, the Crown's argument about "lawful alternatives" is becoming more obviously a legal fiction, a fig leaf, a deception.

The defence of necessity should be raised again and again, until it cannot be denied.

D.G.