

CANADA / JUDGMENT

Trans Mountain Pipeline ULC v. Mivasair

2020 BCCA 255

COURT

British Columbia Court of Appeal

DECIDED

21 September 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCCA 255 Trans Mountain Pipeline ULC v. Mivasair

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Trans Mountain Pipeline ULC v. Mivasair,

2020 BCCA 255

Date: 20200921

Dockets: CA45950; CA45953

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, Reuben Garbanzo (aka Robert Arbess), 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 and Jennifer Nathan

Appellants

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Harris

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated March 11, 2019 (Trans Mountain Pipeline ULC v. Mivasair, Vancouver Dockets S183541, 27829, and 27830).

The Appellant David Gooderham, appearing in person (via videoconference):

D.A. Gooderham

The Appellant Jennifer Nathan, appearing in person (via videoconference):

J. Nathan

Counsel for the Respondent:

L.A. Ruzicka

Place and Date of Hearing:

Vancouver, British Columbia

July 7, 2020

Place and Date of Judgment:

Vancouver, British Columbia

September 21, 2020

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Harris

Summary:

The appellants were convicted of criminal contempt after blocking access to Trans Mountain work sites. They admitted the offence, but sought acquittals based on the common law defence of necessity. The appellants sought leave to raise the defence and provided the trial judge with an

outline of expert evidence they wished to call to establish its factual foundation. The trial judge found that the defence of necessity carried "no reasonable prospect of success" and did not allow the appellants to call their proposed evidence. They appealed that determination, contending that the trial judge's analysis was legally flawed. Held: Appeal dismissed. On the appellants' proposed evidential foundation, the judge correctly found there was no "air of reality" to the defence of necessity.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

- [1] The appellants knowingly and publicly disobeyed an injunction that prohibited people from impeding access to work sites used by Trans Mountain Pipeline ULC ("Trans Mountain") in expanding a pipeline that transports petroleum products. Their disobedience resulted in convictions and punishment for criminal contempt.
- [2] At trial, the appellants sought to raise the common law defence of necessity, preserved by s. 8(3) of the Criminal Code, R.S.C. 1985, c. C-46.
- [3] The necessity defence excuses criminal conduct based on the principle that "morally involuntary conduct should not be penalized": *R. v. Nwanebu*, 2014 BCCA 387 at para. 55. Canadian criminal law accepts that "a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience": *R. v. Latimer*, 2001 SCC 1 at para. 26, citing *Perka v. The Queen*, [1984] 2 S.C.R. 232 at 248.
- [4] In support of the necessity defence, the appellants proposed to call expert scientific evidence showing that an expanded Trans Mountain Pipeline (the "Pipeline") will facilitate the continued growth of oil sands production in Alberta. In turn, that growth will cause a substantial rise in the annual level of Canada's oil sands emissions to 2030. The increase in annual emissions will prevent Canada from meeting its reduction commitments under the Paris Agreement (2015) and exacerbate an already dire global situation of rapid warming that, in the absence of massive and immediate cuts to emissions, will see the earth's surface temperature increase in excess of 2°C.
- [5] The appellants earnestly believe that the rapidly advancing warming of the earth carries ominous consequences for the natural environment and the means by which humans are able to secure the necessities of life. From their perspective, increasing Canada's annual emissions through an expanded Pipeline constitutes a "clear and imminent peril" within the meaning of the common law. The appellants also contend that impeding construction of the Pipeline was the only reasonable alternative available to them in responding to that peril. As a result, disobeying the injunction was legally excusable.

- [6] The trial judge denied the appellants the opportunity to raise the defence of necessity. On appeal, they contend that the judge committed legal error in reaching that conclusion and they seek a new trial that would allow for a "full hearing" on the defence.
- [7] For the reasons that follow, I would dismiss the appeals. Given the narrowly defined ambit of the necessity defence, there was no air of reality to the defence in the circumstances of this case.

Background

Injunction and Prosecutions for Criminal Contempt

- [8] In November 2016, the federal government issued an order-in-council authorizing the expansion of the Pipeline, which transports petroleum products from Alberta. The authorization followed a report by the National Energy Board ("NEB") recommending approval of the expansion project.
- [9] On March 8, 2018, Trans Mountain filed a notice of civil claim alleging that various named and unknown people were illegally blocking access to sites where work was underway in support of the expansion. Trans Mountain sought an injunction and damages: *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 267 at para. 4.
- [10] The Supreme Court of British Columbia granted the injunction on March 15, 2018, prohibiting people from physically obstructing, impeding or otherwise preventing access to various Trans Mountain work sites, including sites known as the Burnaby Terminal and West Ridge Marine Terminal.
- [11] On March 28, 2018, Trans Mountain filed a motion for civil contempt against people alleged to have breached the injunction. The Attorney General of British Columbia intervened on April 16, 2018, and assumed conduct of the contempt proceedings. Thereafter, the Crown prosecuted the allegations of contempt as criminal contempt: 2019 BCCA 267 at para. 6. See also, *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156 at paras. 3-7.
- [12] In June 2018, the Supreme Court amended the injunction by extending its application to additional work sites and by formalizing a "five step" process for arresting people who were non-compliant. That process included asking alleged contemnors, before their arrest, to cease their unlawful acts and cautioning them that if they continued to act unlawfully, they would be subject to arrest and could face charges: 2019 BCCA 156 at para. 10.

Acts of Contempt

- [13] On March 24, 2018, police arrested Jennifer Nathan for blocking access to the Burnaby Terminal. She was part of a group of approximately 60 protesters who stood in front of that Terminal's entry gate. Ms. Nathan admitted that she disobeyed the injunction in order to draw attention to her opposition to the Pipeline. The disobedience occurred in full view of media and members of the public.
- [14] On August 20, 2018, police arrested David Gooderham for obstructing entry to the West Ridge Marine Terminal. He was with four other persons who sat in chairs blocking access to that site. Mr. Gooderham admitted that he disobeyed the injunction in order to draw attention to his opposition to the Pipeline. The disobedience occurred in full view of video cameras and members of the public.
- [15] At the time of their arrests, the appellants were each aware of the terms of the injunction. Police afforded the appellants an opportunity to leave the enjoined area before their arrest. They elected not to.

Trial Process

- [16] The appellants were tried at the same time. The Crown's case for criminal contempt was adduced through written admissions of fact establishing both the actus reus and mens rea of the offence. After the Crown closed its case, the appellants sought to raise two issues in response to the charges.
- [17] First, they requested to advance the common law defence of necessity. Second, they applied for constitutional remedies, namely: (1) a declaration that the government's approval to expand the Pipeline violated the appellants' s. 7 right to life, liberty and security of the person; and (2) a stay of proceedings under s. 24(1) of the Canadian Charter of Rights and Freedoms for abuse of process. The trial judge summarily dismissed the application for constitutional remedies. That aspect of his decision is not under appeal and I will say nothing further about it.
- [18] The request for a threshold determination on the necessity defence stemmed from rulings made by the trial judge in earlier, related cases: *Trans Mountain Pipeline ULC v. Mivasair*, 2018 BCSC 874 [Mivasair 1] and *Trans Mountain Pipeline ULC v. Mivasair*, 2018 BCSC 1070 [Mivasair 2].
- [19] In *Mivasair 1*, the judge rejected the defence of necessity in the context of protest activity against the Pipeline. He gave a number of reasons for doing so. First, he concluded that an argument there was no reasonable legal alternative to disobeying the injunction was not sustainable without an attempt to vary or appeal the injunction. Second, there was no "imminent risk of an immediate peril" that could be avoided by the wrongful act. Third, the necessity defence cannot excuse the "very conduct that the injunction prohibits". Finally, displays of "public and mass contempt for court orders" are not excusable in "robust

democrac[ies]" where governments can, and often do, change their policies in response to public pressure (at paras. 22-30).

- [20] In *Mivasair 2*, an alleged contemnor gave pre-trial notice that he wanted to advance the defence of necessity. Based on his ruling in *Mivasair 1*, the trial judge declined to entertain the defence:

THE COURT: I've already ruled on that, that the defence of necessity in these proceedings has, to use the common expression, no air of reality. There isn't any basis for that defence that could possibly prevail in these proceedings.

THE COURT: I have applied what I understand to be the law of Canada, the law of British Columbia, to that possible defence, and I have said that it has no application here and can't have. And let me just repeat that this pipeline, of course, has not been built yet and there's no oil or diluted bitumen coming down the pipeline. That, in itself, is an insuperable problem for the defence of necessity.

[Emphasis added.]

- [21] In light of these rulings, the appellants and Crown counsel with conduct of their prosecutions agreed it would be appropriate for the trial judge to make an advance determination on whether the appellants could raise the defence of necessity. The request for leave and the application for constitutional remedies proceeded together, using a process commonly known as a "Vukelich hearing".
- [22] In support of their request for leave, the appellants advised the judge that if allowed to advance the defence, they would call a substantial body of expert evidence to lay a supporting factual foundation. They provided the judge with affidavits outlining their anticipated evidence.
- [23] After reviewing the appellants' material and hearing submissions, the trial judge dismissed the application to raise the defence (with reasons to follow). He concluded that even if the appellants called the entirety of their proposed evidence, that evidence could not support the legal requirements of the defence.

Reasons for Judgment

- [24] The judge's reasons on the Vukelich hearing are indexed as *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 50 ("RFJ").
- [25] He began his analysis by instructing himself on the principles governing the request for leave. Citing *R. v. Cody*, 2017 SCC 31 at para. 38, the judge identified the question before him as whether the defence of necessity had "a reasonable prospect of success" (RFJ at para. 3).
- [26] The judge then set out the appellants' proposed evidence and reviewed the leading authorities on the defence (RFJ at paras. 11, 13-17). This included *Perka* and *Latimer*, cited earlier.

- [27] In *Latimer*, the Supreme Court affirmed that the necessity defence, as defined in *Perka*, has three essential elements: "First, there is the requirement of imminent peril or danger. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be proportionality between the harm inflicted and the harm avoided" (at para. 28).
- [28] The trial judge accepted that the appellants subjectively believe that "without immediate remedial action, climate change will become irreversible and catastrophic damage to life on this planet will be inevitable" (RFJ at para. 54). However, he found their evidence could not support an objectively reasonable basis for believing, at the time they defied the injunction, that they faced an imminent disaster, or a harm that was "unavoidable and near" within the meaning of *Latimer*:
- [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.
- [Emphasis added.]
- [29] The judge also found that the appellants could not show they had no reasonable legal alternative but to disobey the law by contravening the injunction (RFJ at para. 56). They "took no steps to seek an order to vary or set aside the injunction nor was it appealed" (at para. 57).
- [30] In reaching his conclusion on the second element of the defence, the judge looked to the decision of this Court in *MacMillan Bloedel v. Simpson* (1994), 90 B.C.L.R. (2d) 24 (C.A.). Like the appellants in this case, the protest contemnors in *MacMillan Bloedel* did not apply to have the injunction set aside before their arrest. In holding that the defence of necessity was not available in response to a charge of criminal contempt, the Court opined that the defence cannot operate "to excuse conduct which has been specifically enjoined" or to "avoid a peril that is lawfully authorized by the law" (at paras. 45-46).
- [31] In light of his conclusions on the first two elements of the defence, the trial judge decided it was not necessary for him to "enter into a proportionality balancing exercise on the third branch of the necessity test" (RFJ at para. 58).
- [32] In seeking leave to raise the defence, the appellants referred the judge to international jurisprudence in which the concept of necessity has received consideration in cases involving issues related to climate change. He did not find those authorities persuasive:

- [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] 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. 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.
- [33] The trial judge concluded that the defence of necessity had "no reasonable prospect of success" and he denied leave to raise it (RFJ at para. 62).
- [34] Based on the admissions of fact surrounding Ms. Nathan's conduct, she was found guilty of criminal contempt and received a sentence of six months' probation, with 150 hours of community work service. Mr. Gooderham was also found guilty and received a sentence of 28 days' imprisonment.
- [35] The appellants have appealed their convictions and sentences, as of right, pursuant to ss. 10(2)(a) and (b) of the Criminal Code. Ms. Nathan's sentence has been stayed pending resolution of her appeals. Mr. Gooderham is on judicial interim release while awaiting his appeals.
- [36] These reasons address only the appeals from conviction.

Issues on Appeal

- [37] The appellants state one ground of appeal in their factum: the trial judge "erred in law in failing to apply the Vukelich procedures to [their] application for leave to lead defence evidence" (appellants' factum at para. 58; emphasis added).
- [38] However, in their written argument, they voice several concerns about the dismissal of their application, some of which extend beyond procedure and challenge the substantive merits of the judge's determination. The appellants contend:

- a) the judge erred by failing to assume the truth of the facts asserted in support of the necessity defence;
- b) he exceeded his jurisdiction by deciding the merits of the defence without hearing the evidence;
- c) the judge engaged in conjectural or speculative reasoning in holding that "adaptive societal measures" may avoid the asserted peril;
- d) he erred in his conclusion that there were reasonable legal alternatives to defying the injunction. In particular, the judge erred in finding that an application to set the injunction aside constitutes a reasonable alternative because it is highly unlikely that any such application would have been successful, and, in any event, setting the injunction aside would not delay or halt the expansion of the Pipeline;
- e) the judge was wrong to consider himself bound by MacMillan Bloedel; and,
- f) if this Court concludes that MacMillan Bloedel applies, and stands as a bar to raising the defence of necessity in all injunction cases, it is wrongly decided and needs to be revisited.

[39] Although these complaints target different aspects of the judge's reasoning process or the methodology he employed in arriving at his conclusion, they essentially raise the same question, namely, whether the judge correctly found that the defence of necessity had no "reasonable prospect of success".

[40] I propose to resolve the appeals on that basis.

Standard of Review

[41] The Crown contends that a deferential standard of review applies. It says that unless the appellants can show that the trial judge failed to exercise his discretion judicially in declining to allow them to call their evidence, there is no jurisdiction for appellate intervention (respondent's factum at paras. 18-21).

[42] I do not agree that these appeals are subject to deferential review. As I will explain, the trial judge was obliged by law to consider the necessity defence if that defence carried an air of reality based on the proposed evidence. A determination that there is no air of reality expresses a "legal conclusion about the presence or absence of an evidential foundation for a defence" and, as such, it raises a question of law alone: *R. v. Cinous*, 2002 SCC 29 at para. 55; *R. v. Grewal*, 2019 ONCA 630 at para. 37; *R. v. Osolin*, [1993] 4 S.C.R. 595 at 676.

[43] The standard of review on a question of law is correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

Discussion

- [44] I do not consider it necessary to address each of the appellants' complaints because, in my view, there was no air of reality to the second requirement of the necessity defence. This conclusion is dispositive of the appeals. In applying a correctness standard of review, the Court looks at the matter anew and is "free to replace the opinion of the trial judge with its own": Housen at para. 8. Consequently, even in the face of demonstrated procedural or analytical error by the trial judge, if the Court concludes there is no air of reality to the necessity defence on the proposed evidential foundation, the appeals from conviction cannot succeed.
- [45] In their factum, the appellants submit that the "ultimate" issue for the judge to decide was the objective reasonableness of their belief that the advancing warming of the earth, exacerbated by increased emissions, and its resulting impacts, constitutes an imminent peril, "taking into account the objective evidence that they sought to call at trial" (at paras. 6, 60).
- [46] However, to advance the defence of necessity, there must be "evidence sufficient to give an air of reality to each of [its] three requirements": Latimer at para. 36 (emphasis added). Consequently, even if the appellants' proposed evidence could support the first element of the defence, the absence of an air of reality to the second element was fatal to advancing the defence at trial. The judge concluded there was no air of reality to the second element and I agree with his conclusion.
- [47] In explaining why, I will set out the principles governing an air of reality determination; discuss the requirements of the necessity defence; and then show how the judge was correct to find that the defence could not allow for an acquittal in the circumstances of this case.

Process for an Air of Reality Determination

- [48] At trial, the appellants and Crown counsel agreed to have the availability of the necessity defence determined by way of a Vukelich hearing (named after *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A), leave to appeal ref'd [1997] 2 S.C.R. xvi).
- [49] A Vukelich hearing is a summary process typically used by trial judges to determine whether a Charter-based challenge to the admissibility of evidence warrants an evidentiary voir dire: *R. v. Edwardsen*, 2019 BCCA 259 at para. 28; *R. v. Frederickson*, 2018 BCCA 2 at para. 26.
- [50] Judges might also employ Vukelich hearings in assessing the viability of an application for a constitutional remedy that does not seek the exclusion of evidence; for example, an application to strike legislation or an application for a stay of proceedings based on an alleged abuse of process: *R. v. M.B.*, 2016 BCCA 476 at para. 15; *R. v. Armstrong*, 2012 BCCA 242, leave to appeal to SCC ref'd, 34957 (20 December 2012).

- [51] The discretion to deny a voir dire is an important trial management power, allowing judges to "control the course of proceedings and to not embark upon enquiries that will not assist the real issues in the trial": *R. v. Vickerson*, 2018 BCCA 39 at para. 61, citing *M.B.* at para. 45; see also *R. v. Joseph*, 2018 BCCA 284 at para. 19.
- [52] When requesting a Charter-based voir dire, the applicant is required to show a reasonable likelihood that a voir dire can assist in determining the issues before the court: *M.B.* at para. 45, citing *R. v. Pires*; *R. v. Lising*, 2005 SCC 66. Or, as otherwise articulated in *Cody*, the applicant must show a "reasonable prospect of success" in obtaining the sought-after remedy:
- [38] 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. 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.
- [Emphasis added.]
- [53] Here, the appellants combined their request to raise the defence of necessity with an application for constitutional remedies and provided advance written notice of both. The Crown opposed all aspects of the application. In that context, and in light of the judge's earlier rulings on the defence, the resort to a Vukelich hearing is understandable. It provided a practical means by which to manage these issues, particularly given the nature and the volume of expert evidence that the appellants sought to call. If granted leave to raise the necessity defence, the appellants anticipated calling four to five expert witnesses, requiring substantially more time to complete the trial.
- [54] However, it is important to note that in the ordinary course, whether a trial judge should consider a common law or statutory defence, or leave a defence with a jury, is not a matter for which the accused must bring a pre-trial motion or seek permission from the court. Nor is it typically determined by way of a Vukelich hearing. A trial judge has a positive obligation to consider (or put to the jury) all defences that arise on the evidence and potentially lead to an acquittal, even where it is not a defence raised by the accused: *Cinous* at para. 51; *R. v. Finta*, [1994] 1 S.C.R. 701 at 744-745.
- [55] If there is an air of reality to a defence, the trier of fact is obliged to consider it and the Crown bears the onus of disproving one or more elements of the defence beyond a reasonable doubt: *Perka* at 257-58; *Nwanebu* at para. 58. Likewise, if the defence lacks an air of reality, it is not open for consideration. This is so "even when the defence lacking an air of reality represents the accused's only chance for an acquittal": *Cinous* at para. 51.

[56] In a case such as this one, where there is reason to assess the entitlement to raise a particular defence in advance, along with one or more applications for a Charter-based remedy, there is nothing wrong, in principle, with managing those issues through some form of summary process. In fact, trial judges are encouraged, where appropriate, to minimize delay in the trial process by using their inherent (or codified) powers to summarily screen, determine and dismiss applications that do not carry a reasonable prospect of success: *Cody* at para. 38; *Joseph* at para. 25. As noted in *R. v. O'Reilly*, 2017 QCCA 1283, leave to appeal to SCC ref'd, 37737 (7 June 2018):

137 It is incumbent on the trial judge to manage the trial and the various incidents which may arise during trial, including applications for the exclusion of evidence leading to voir dires, so as to ensure that the proceedings do not veer off into debates which are useless or have marginal impact on the real issues at stake.

[57] However, when advance screening does occur, the process undertaken by the trial judge must be careful to respect any distinct procedural or analytical requirements that attach to the issues raised. Certain issues may attract specific notice or particularization requirements (statutory or common law); they may carry different onuses; or there may be different legal tests to apply in assessing viability on a threshold basis. The bundling of issues for a preliminary determination, although practical, must avoid conflating their procedural and substantive requirements, such that the court potentially loses sight of the established principles governing resolution of a particular issue and falls into legal error. This Court has previously cautioned against that type of risk, in the specific context of blended voir dires: *R. v. Nguyen*, 2006 BCCA 397 at para. 12. See also *R. v. Sadikov*, 2014 ONCA 72 at para. 33.

[58] The potential for confusion presented itself in this case because of the combination of common law and Charter-based issues. An application for a constitutional remedy, initiated at the behest of the accused, may be summarily dismissed on grounds that the applicant has not shown a reasonable likelihood that a voir dire can assist in determining the issues before the court, or that there is no reasonable prospect of success: *Cody* at para. 38. The entitlement to raise a common law defence, on the other hand, is determined with reference to a long-established and well defined "air of reality" standard: *Cinous* at para. 50; *R. v. Gairdner*, 2017 BCCA 425 at paras. 3-5.

[59] The air of reality standard mandates a two-pronged enquiry. With reference to the constituent elements of the defence, judges must ask themselves: "whether there is (1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true": *Cinous* at para. 82. The accused does not bear a persuasive burden in meeting that test. Rather, an evidential burden only (at para. 52). See also *Nwanebu* at para. 57.

[60] As explained by the majority in *Cinous*:

53 In applying the air of reality test, a trial judge considers the totality of the evidence, and assumes the evidence relied upon by the accused to be true. The evidential foundation can be indicated by evidence emanating from the examination in chief or cross-examination of the accused, of defence witnesses, or of Crown witnesses. It can also rest upon the factual circumstances of the case or from any other evidential source on the record. There is no requirement that the evidence be adduced by the accused.

54 The threshold determination by the trial judge is not aimed at deciding the substantive merits of the defence. That question is reserved for the jury. The trial judge does not make determinations about the credibility of witnesses, weigh the evidence, make findings of fact, or draw determinate factual inferences. Nor is the air of reality test intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day. The question for the trial judge is whether the evidence discloses a real issue to be decided by the jury, and not how the jury should ultimately decide the issue.

[Emphasis added; citations omitted.]

[61] In advancing a defence, it is not enough to point to a factual foundation that provides "general" support for the defence; rather, to meet the air of reality standard, the already adduced or proposed evidence must be evidence from which the trier of fact "could reasonably draw the inferences necessary to acquit the accused": Cinous at para. 61 (emphasis added). The evidence must be "capable of forming the basis for an acquittal" (at para. 61). "To the extent that the inferences required for the defence to succeed cannot reasonably be supported by the evidence, the defence lacks an evidential foundation" and has no air of reality (at para. 63).

[62] In assessing whether evidence supports the needed inferences, the judge must review the evidence and ask whether, if believed, it "could permit a properly instructed jury acting reasonably to acquit": Cinous at para. 87. During that assessment, a judge must not engage in a credibility analysis, weigh the evidence, make any findings of fact, or draw factual inferences that have determinate impact (at para. 87). If there is "direct evidence" on every element of the defence (other than a mere assertion of its applicability by the accused), the defence must be considered (at para. 88). If there is not direct evidence on every required element, or the defence contains an element that necessitates an assessment of reasonableness, "the question becomes whether the remaining elements of the defence -- that is, those elements of the defence that cannot be established by direct evidence -- may reasonably be inferred from the circumstantial evidence" (at para. 89).

[63] Here, the trial judge dismissed the request to raise the necessity defence on grounds that the defence had "no reasonable prospect of success" (RFJ at para. 62). At first blush, the use of that wording, rather than explicit reference to the air of reality standard, raises the question of whether the judge applied the correct legal threshold in dismissing the appellants' application. Did he overlook or fail to appreciate the two-pronged enquiry mandated by Cinous or the principles that govern a review of the relevant evidential foundation?

- [64] The judge's articulation of the threshold test as a "reasonable prospect of success" is understandable in light of the agreement to proceed by way of a Vukelich hearing and the submissions made by counsel during that hearing. A transcript of the submissions contains no reference to Cinous or the specifics of its two-pronged enquiry. Instead, the trial judge was encouraged to take a consistent approach to all three of the issues raised on the application and ask himself, "on the authority of Cody", whether the appellants had shown a "reasonable prospect of success", or, a "reasonable likelihood that the hearing [could] assist in determining the issues before the court".
- [65] I have reviewed the submissions made in the court below. Although the summary process was framed as a Vukelich hearing, the appellants made clear to the judge that what they were seeking was a finding that "there [was] an air of reality to the defence of necessity" (emphasis added). They described the Vukelich hearing as a "screening tool to make sure that there's some air of reality to the [necessity] argument" (emphasis added). In seeking to have the application dismissed, the Crown also referenced the air of reality standard more than once, submitting that "even if [the judge accepted] all of the applicants' proposed evidence at its highest, it [did] not establish that there [was] an air of reality to the defence of necessity" (emphasis added).
- [66] Although the judge used the phrase "reasonable prospect of success" in dismissing the application, elsewhere in his ruling he recognized that the appellants would call their proposed experts only if the necessity defence was first "held to have an air of reality" (RFJ at para. 11). It is also apparent, from the pre-trial ruling in *Mivasair 2*, cited earlier, that the judge was alive to the Cinous threshold. In declining to allow one of the alleged contemnors in that case to raise the defence of necessity, he referenced his earlier decision in *Mivasair 1*, saying he had "already ruled that the defence of necessity in these proceedings has, to use the common expression, no air of reality" (emphasis added).
- [67] There is no indication from his reasons in this case that the trial judge did any of the things precluded by Cinous. He did not engage in a credibility analysis, weigh the expert evidence, make findings of fact from that evidence, or draw determinate factual inferences. Indeed, at one point the judge asked counsel for the appellants whether that was expected of him. Counsel responded in the negative:

[DEFENCE COUNSEL]: No, My Lord. What I'm hoping and anticipating is that you will -- on the understanding that this evidence could be led, will find that there is an air of reality to the defence of necessity and you will grant leave of the defendants to proceed with that at trial in their defence.

So I'm not asking you to make these findings, but simply understand and acknowledge that this is the basis upon which the defence of necessity will be presented.

THE COURT: You want me to be aware of a body of evidence which could sustain a necessity defence.

[DEFENCE COUNSEL]: Exactly.

[Emphasis added.]

[68] After considering the judge's reasons on the necessity defence, in the context of the submissions made at trial, I am satisfied that, functionally, he made the proper threshold enquiry and, consistent with the framework laid out in Cinous, he found that the defence carried no air of reality on the proposed evidential foundation. On appeal, the appellants have not alleged error specific to the judge's use of the words "no reasonable prospect of success".

Defence of Necessity

[69] This Court recently canvassed the elements of the necessity defence in Nwanebu. After setting out the three requirements, the Court noted that the first two are assessed applying a modified objective lens. The third requirement, proportionality, attracts a purely objective assessment (at paras. 56, 64).

[70] In Latimer, the Supreme Court explained what it means to apply a modified objective lens. The subjective perceptions of the accused are relevant to the first and second elements of the necessity defence, but they are not determinative. A modified objective test requires that those perceptions be reasonably held, taking into account the situation and personal characteristics of the accused:

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

[Emphasis in the original.]

[71] Because of the modified objective test, a subjectively perceived harm will only constitute a clear and imminent peril under the first element of the necessity defence if the accused reasonably believes that the harm is "on the verge of transpiring and virtually certain to occur". Where the perceived harm "should have been foreseen and avoided, an accused person cannot reasonably claim any immediate peril" (Nwanebu at para. 59, citing Latimer at para. 29). The Court acknowledged in Nwanebu that the necessity defence is not restricted to "immediate threats of harm". Threats of "future harm can cause a person's behaviour to be morally involuntary". However, there must be a "sufficiently close enough connection between the threat and the harm such that immediate pressure is placed on the person to act, negating [their] ability to act freely" (at para. 62; emphasis added).

- [72] On the second element of the defence, an accused must reasonably believe, at the time of the wrongful act, that they faced "a situation of imminent peril that [left] no reasonable legal alternative open" to disobeying the law: Nwanebu at para. 65, citing Latimer at para. 33 (emphasis added). The factual existence of one or more legal alternatives will logically inform the assessment of whether that belief was objectively reasonable: Perka at 259. As will the "quality and imminence" of the perceived harm: R. v. Keller, 1998 ABCA 357 at para. 32.
- [73] This Court has previously considered the necessity defence in the context of criminal contempt arising from protest activity.
- [74] In R. v. Toth (1991), 63 C.C.C. (3d) 273 (B.C.C.A.), leave to appeal to the SCC ref'd, 22385 (20 June 1991), the appellant was prosecuted for criminal contempt as a result of his efforts with 15 others to block a doorway to a women's health clinic in Vancouver, contrary to the terms of a court order. The clinic provided abortion services. The appellant testified that he blocked the doorway "to try to prevent the crime of murder" (at para. 5).
- [75] At his trial, he argued that his "disobedience of the injunction ought to be excused on the grounds that such conduct was necessary in order to save the lives of unborn babies" (at para. 6). The trial judge refused the request to call evidence in support of a necessity defence. An excerpt of his reasons is included at para. 6 of the appeal judgment:

it can be seen that the defence of necessity which the defendants seek to raise rests on the footing that disobedience of the order of this court was necessary in order to avoid the imminent peril or harm resulting from the conduct of the plaintiff's clinic which conduct was, and is in fact, lawful.

The fact is that while the defendants characterize the abortion of [an] unborn foetus as a moral, if not a legal, crime, the law of this country, at the moment, does not. It is for Parliament to determine what conduct constitutes a criminal offence and, a[s] noted earlier, in a free and democratic society, that which is not proscribed by law must be deemed lawful. The defendants view the present state of the law as conflicting with their own moral values. Indeed on their behalf, it is said that they follow a higher law and that the present state of the secular law conflicts with that higher law. Thus they are justified in disobeying the secular law. Their claim to the defence of necessity based upon that viewpoint is the very formulation of the defence rejected by Chief Justice Dickson in [Perka] .

The decision to reject the defence was upheld on appeal: "[n]one of the cases on the defence of necessity support[ed] its availability" in Mr. Toth's circumstances (at para. 18).

- [76] MacMillan Bloedel, cited earlier, is another case in which the necessity defence was reviewed in the context of protest activity. There, the Court described the defence as "unusual"--available only "in truly emergent circumstances, and only when the person at risk has no alternative but to break the law" (at para. 44). The Court upheld a trial judge's determination that the defence was not available to logging protesters who argued that the logging was so detrimental to the environment, they were entitled to disobey any court

orders (including an injunction) that enabled the peril to proceed (at para. 42). Writing for the Court, McEachern C.J.B.C. stated that:

45 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.

[77] In *R. v. Watson* (1996), 106 C.C.C. (3d) 445 (B.C.C.A.), leave to appeal to the SCC ref'd, 25332 (5 September 1996), the appellant was convicted of criminal contempt for violating a court order that prohibited specified conduct at or near a women's health centre in Vancouver. Like Mr. Toth, he raised the defence of necessity, contending that his actions were necessary to prevent the commission of alleged criminal offending (abortion services). This Court upheld the trial judge's finding that the defence had no merit in the circumstances:

22 The defence of necessity requires that the wrongful act be committed under pressure which no one could withstand. It also requires that the accused be responding to an "imminent peril" which leaves him no viable alternative but to breach the law. Assuming the Clinic was acting illegally at the time of these events, Mr. Watson could have reported his concerns to the law enforcement authorities.

See also *Everywoman's Health Centre Soc. (1988) v. Bridges* (1990), 62 C.C.C. (3d) 455 (B.C.C.A.) at paras. 69-78.

[78] What these cases tell us is that the necessity defence presents unique and potentially insurmountable challenges where the wrongful conduct is rooted in purposeful defiance of a court order and a public display of disagreement with the lawfulness of the impeded activity, or dissatisfaction with government's policy choices in authorizing that activity.

[79] Criminal contempt requires proof of public defiance or disobedience of a court order, coupled with an intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court: *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 at 931-933, as cited in 2019 BCCA 267 at para. 23. The Supreme Court has made it clear that the defence of necessity is "limited to situations that correspond to its underlying rationale": *Perka* at 250. The "underlying rationale", noted earlier, is that people should not be held to strict obedience of laws in "emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience", rendering their behaviour "involuntary": *Perka* at 248. The concept of

normative involuntariness has "heavily influenced" the requirements of the necessity defence and its availability: *R. v. Ryan*, 2013 SCC 3 at para. 23.

- [80] Consistent with this rationale, the defence is restricted to "violations of the law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it is excused because it was realistically unavoidable": *Perka* at 250. As a result, in applying the defence, the trier of fact must ask whether "the wrongful act was truly the only realistic reaction open to the actor or whether [that actor] was in fact making what in fairness could be called a choice. If [the actor] was making a choice, then the wrongful act cannot have been involuntary in the relevant sense": *Perka* at 251 (emphasis added).
- [81] A significant impediment to application of the necessity defence in the context of planned protest activity, which was the case here, is the deliberate nature of the conduct that grounds the offence. Theoretically, and factually, it is difficult to reconcile this type of conduct with the fundamental premise underlying the defence, namely, that it excuses wrongfulness only for those "who, although morally blameworthy, acted in a morally involuntary manner": *Ryan* at para. 23.
- [82] On appeal, the appellants attempt to downplay the relevance of moral involuntariness to the necessity defence. They say that this is a concept more closely aligned with the common law defence of duress, where "pressure (by threat) is placed on the person to act negating [their] ability to act freely", and the ability to exercise moral judgment is accordingly "crushed" (appellants' reply at para. 8).
- [83] That submission does not find support in the Canadian jurisprudence binding on this Court. It is clear from *Perka* that the moral involuntariness of the accused's wrongful action is a central "criterion" for application of the defence, "measured on the basis of society's expectation of appropriate and normal resistance to pressure" (at 259). As a result, "actions or circumstances which indicate that the wrongful deed was not truly involuntary do disentitle", as does "the existence of a reasonable legal alternative" (at 259). The question is not whether the wrongful conduct was reasonable or justified in light of the circumstances faced by the accused, even where the perceived harm is objectively imminent. Rather, for a jury to acquit applying the necessity defence, there cannot be "any other reasonable responses to the peril that were not illegal": *Perka* at 262 (emphasis added).
- [84] In my view, the planned public defiance of a court order to stop lawfully authorized activity in furtherance of an individual or societal goal, no matter how altruistic or serious that goal may be, is much more akin to a "choice" than to morally involuntary behaviour. As aptly noted in *R. v. English*, 2010 BCCA 564, cases of "true involuntariness" are "rare".

Trial Judge Did Not Err in Finding No Air of Reality

[85] In their factum, the appellants have summarized the evidential foundation they sought to tender in support of the necessity defence. According to that summary, the evidence would show that:

- with the increase in global average temperature now at 1°C higher than the pre-industrial level, Canada's arctic region has already warmed 3°C in the last three decades, resulting in "massive change" to seasonal ice cover in the Arctic Sea;
- even if the increase to average global temperature is kept to 1.5°C, approximately one-third of the "present-day mass of glaciers in the high mountains of Asia will be lost by the end of this century". Glacial melt waters are "essential to water supply, agriculture, and survival for hundreds of millions of people";
- with an increase in warming to 1.5°C, "virtually all coral reefs will be gone by 2100";
- if all countries in the world (including Canada) were to fully implement their Nationally Determined Contributions ("NDC's") under the Paris Agreement to reduce their emissions by 2030, the surface of the earth will still be "irrevocably committed" to warming that will "far exceed" a 2°C threshold;
- as such, there must be a "massive transition in energy use" before 2030 if there is any chance of keeping global warming below 2°C;
- this transition requires that all "emitting countries" cut their emissions by an average of 25% worldwide. To limit the warming to 1.5°C, the annual level of global emissions must decline by 50% below current levels by 2030;
- oil accounts for 34% of global CO₂ emissions from burning fossil fuels;
- global oil consumption must start to decline by 2020 if the earth's warming is to stay within a 2°C limit;
- Canada's oil and gas industry is the country's "largest emitting sector", and the oil sands industry is "by far the largest source of emissions growth in the entire Canadian economy";
- notwithstanding the critical need to curb oil consumption, Canada is projected to continue expanding its oil production to 2040;
- an expanded Pipeline will materially contribute to that increased production;
- a logical consequence of increased oil sands production is a significant growth in Canada's domestic emissions;
- increased oil sands production, and the resulting growth in emissions, is irreconcilable with Canada's commitment under the Paris Agreement to achieve a 30% reduction in its emissions by 2030; and,

· increased oil sands production is also irreconcilable with the "massive transition in energy use" that is required to ensure that, even with full implementation of the Paris Agreement, global emissions are further reduced to the extent necessary to stay within a 2°C warming threshold.

[86] The appellants also filed affidavits deposing to their personal reasons for defying the injunction. Their trial counsel explained that these affidavits, at least in part, addressed their subjective perception on the "existence of alternative courses of action":

turning to the mens rea for necessity, the first two elements of Perka, that is imminent peril and lack of reasonable legal alternatives, the court directs in Latimer that the modified objective standard should be applied which takes into account the particular circumstances of the accused, including his or her ability to perceive the existence of alternative courses of action.

And, My Lord, it is for this reason that the second affidavit of Mr. Gooderham and the first affidavit of Ms. Nathan were filed, in order to establish that subjective -- that part of the component, the subjective part of the component of the modified objective standard.

[Emphasis added.]

[87] Mr. Gooderham, a retired lawyer, deposed that before the NEB recommended approval of the Pipeline's expansion, he made multiple efforts to engage government in a scientifically informed dialogue about the emissions implications of increasing Canada's oil sands production, and the impact on the climate system.

[88] These efforts included raising the matter at public events and meetings attended by his Member of Parliament; submissions to Environment Canada on the inadequacy of an "upstream emissions assessment" completed on the Pipeline; submissions to a Ministerial Panel; directly engaging his Member of Parliament and other government officials on emissions; and attending public meetings and demonstrations to increase public awareness.

[89] Despite these efforts, from his perspective, the NEB recommended approval of the Pipeline's expansion without answering "fundamental questions" about the resultant increases to emissions, whether those increases are reconcilable with the Paris Agreement, and their impact on the environment. Mr. Gooderham considered these questions critical to government's decision on whether the expansion project should proceed.

[90] Ultimately, Mr. Gooderham lost confidence in the "likelihood and effectiveness of future mitigation efforts" that might prevent the earth's warming from far exceeding 2°C (appellants' factum at para. 72). He believes that climate-related plans released by government post-approval of the Pipeline offer no assurance that Canada can meet its commitments under the Paris Agreement, let alone effectively address increased emissions resulting from an expanded Pipeline. As explained by his counsel at trial, Mr. Gooderham is convinced that "extreme and unprecedented measures to cut emissions" were required to start before 2020; otherwise, the world will have committed itself to "irreversible loss" by 2030.

- [91] Mr. Gooderham's loss of confidence is said to have resulted from multiple factors, including the: failure of government to answer questions he has tried to raise; past and ongoing failures of emission-producing countries to meet reduction targets; growth in global emissions over the past 20 years; continued appetite for expanded oil production; and his belief that, even with a sudden change in policy intentions, it could take years to substantially impact emission levels.
- [92] At the time he defied the injunction, Mr. Gooderham saw "no realistic prospect that the government of Canada would be persuaded or induced to consider its decision to proceed with the construction of the Trans Mountain Pipeline", even after it purchased the Pipeline in 2018. He has deposed that by the summer of 2018, he could not "foresee any viable means to halt or delay the start of construction on the [Trans Mountain] project, either through legal process or any remaining lawful avenue of political activity". As such, "direct peaceful action" at the Trans Mountain work sites appeared "efficacious" to him:
- if sustained, and if sufficiently broadly based, it would signal to investors and others, in Canada and outside, that there is uncertainty about whether the project will ever proceed to completion in view of significant public resistance to it, evidenced in part by the action of the individuals at the site who are attempting to halt the work and in doing so are disobeying the law.
- [93] Ms. Nathan, a retired science teacher, deposed that she saw the approval of the expansion project as the "single greatest roadblock to any contribution that Canada could make to move the world away from climatic tipping points". Like Mr. Gooderham, she believes that the use of fossil fuels has led to increased warming that is substantial enough to "create an unprecedented rate of extinction of species, create extreme weather events at a faster rate, [has] led to near collapse of the coral reefs, and [has] sent glaciers, arctic sea ice and permafrost into unprecedented rates of decline". From her perspective, it is necessary to reduce global emissions "immediately if we are to have any hope".
- [94] After years of closely following the science of climate change, efforts made by industry and others to downplay the significance of that change, and government action and inaction, Ms. Nathan deposed that it "has become increasingly apparent that governments have not moved to respond to this crisis in time". She participated in blocking access to the Burnaby Terminal as a "last ditch gesture in despair and [tried] to minimize the degree of failure" of government to prioritize the climate emergency.
- [95] The question for the trial judge to answer, based on the appellants' evidence, was whether--if believed--that evidence "could permit a properly instructed jury acting reasonably to acquit" them of criminal contempt applying the defence of necessity: Cinous at para. 87. If so, he was obliged to allow the appellants an opportunity to advance the defence and to call their evidence.

- [96] As indicated, I am of the view that the proposed evidential foundation could not permit a jury to acquit based on the defence of necessity. It did not have the capacity to support a finding, or raise a reasonable doubt, that at the time they defied the injunction, the appellants reasonably believed they "face[d] a situation of imminent peril that [left] no reasonable legal alternative open," other than to defy the injunction: Latimer at para. 33 (emphasis added).
- [97] In reaching that determination, it is not necessary to decide whether the judge, relying on MacMillan Bloedel, wrongly considered himself bound by law to reject the defence merely because the conduct sought to be excused involved non-compliance with a court order (RFJ at para. 56). Or, if he rightly interpreted MacMillan Bloedel to stand for that proposition, whether it is a proposition that should be overturned on the basis of international jurisprudential trends, evolving common law principles, or otherwise. Those are questions best left to another day. The undisputed fact is that the appellants did not take steps to vary or challenge the injunction before their arrest. As I read paragraph 57 of the judge's reasons, that fact functioned as an independent basis from which he concluded there was no air of reality to the second element of the defence because it represented a reasonable legal alternative for the appellants.
- [98] On this point, I note that in a decision subsequent to the one under appeal, the trial judge was again asked to consider the defence of necessity in relation to Pipeline protests: *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 1246 [Mivasair 3]. He ruled that the defence was not available. In his reasons, he harkened back to his treatment of MacMillan Bloedel in this case, stating that his dismissal of the application to raise the defence was "dependent on the facts of [this] case and not simply on the proposition that [the judge] was bound by the language of Chief Justice McEachern at paras. 45 and 46 [of MacMillan Bloedel]" (at para. 28). Although the judge's post facto comments on his own reasons cannot determine this Court's interpretation of the decision, they are consistent with my own reading of the Vukelich ruling. To that extent only, I have found them informative.
- [99] The defence of necessity is "strictly controlled and limited to situations where the illegal conduct is based on human instincts of self-preservation or altruism that overpower voluntary action, i.e. where the wrongful conduct was the only effective choice open to the accused": *R. v. C.A.V.* (2003), 177 C.C.C. (3d) 332 (Ont. C.A.) at para. 13; Nwanebu at para. 63. According to Latimer, in order for wrongful conduct to meet this test:

30 there must be no reasonable legal alternative to disobeying the law. *Perka* proposed these questions, at pp. 251-52: "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?" (emphasis in original). If there was a reasonable legal alternative to breaking the law, there is no necessity. It may be noted that the 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 legal alternative. If an alternative to breaking the law exists, the defence of necessity on this aspect fails.

[*Italic emphasis in original; underline emphasis added.*]

- [100] In *Perka*, the trial judge instructed the jury that before non-compliance with the law may be excused for necessity, the jurors must "find facts which amount to 'an urgent situation of clear and imminent peril when compliance with the law is demonstrably impossible'" (at 260; *emphasis added*). The Supreme Court described this as a "correct" statement of the test (at 260). See also *R. v. Hibbert*, [1995] 2 S.C.R. 973 at para. 55.
- [101] At trial (reiterated on appeal), the Crown argued that the appellants had multiple legal alternatives open to them when they blocked access to the Trans Mountain sites.
- [102] They could have applied to vary or set aside the injunction (arguing, presumably, that in light of the stated peril, Trans Mountain does not meet the test for an injunction under *R.J.R.-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311). They could have continued to use the democratic process to voice opposition to the Pipeline, raising the emissions issue and placing pressure on government to withdraw its authorization for the project. They could have contemplated and potentially marshalled civil litigation as a possible route to challenging the expansion, on constitutional grounds or otherwise. They could have chosen to protest outside of the prohibited area, effectively sending the same message of "uncertainty about whether the project will ever proceed to completion in view of significant public resistance" that was spoken of in Mr. Gooderham's affidavit. They could have removed themselves from the enjoined area once informed of the injunction and given an opportunity to move aside. Finally, the Crown has suggested, the appellants could have chosen to do nothing and let the process unfold, as unpalatable as that may have seemed to them.
- [103] I note that in *Mivasair 3*, the trial judge considered one or more of these suggested alternatives in finding that the defence of necessity was unavailable. He concluded that the only reasonable inference a trier of fact could draw from the evidence in that case was that the accused made a morally voluntary "choice" to defy the Trans Mountain injunction. This was insufficient for purposes of the defence:
- [49] 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.

- [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.
- [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.

[Citations omitted; emphasis added.]

- [104] The appellants disagree that the alternatives cited by the Crown are reasonable, realistic or "true" choices. At trial, their counsel argued that making a direct attempt to delay the expansion project was the only "reasonable legal political alternative" open to them. They take that same position on appeal.
- [105] The appellants say that applying to set aside the injunction was not a realistic alternative because it would be unlikely to succeed. For one, it would be perceived as a collateral (and therefore, improper) attack on the order-in-council authorizing the expansion. More importantly, even if successful, a variation or quashing of the injunction would not stop construction of the Pipeline and its resultant increase in emissions. The injunction did not authorize the Pipeline's expansion; it simply holds people at bay while the work authorized by the order-in-council proceeds.
- [106] The appellants also contend that doing nothing, as the Crown has suggested, was not a realistic or "true" option in light of the "nature and magnitude of the climate peril" as shown by their evidence, and its imminence. A "person who is precluded from acting to avoid (or limit) unspeakable loss and harm to others has no true choice" (appellants' reply at paras. 10, 14).
- [107] In my view, for substantially the same reasons that the trial judge held the necessity defence was unavailable in *Mivasair 3*, there was no air of reality to the second requirement of the defence in the circumstances of this case. Instead, on the proposed evidence, the appellants made a considered choice to defy the injunction in response to a perceived harm

(an increase in emissions and their resultant impact), that would not take tangible form until completion of the expansion project. Their conduct was planned, purposeful and part of an organized group effort to demonstrate public disobedience. According to the evidence, videographers were present during Mr. Gooderham's defiance of the injunction, recording the activity.

- [108] The appellants sought to impede lawfully authorized activity in defiance of a court order because they disagree with government's approval of the expansion, and they have lost confidence in the ability and commitment of industry and government to effect the "massive" mitigation efforts they consider necessary to avoid the increase in the earth's surface temperature exceeding 2°C. As readily apparent from Mr. Gooderham's affidavit material, they wanted to send a message. The appellants were aware that there were other legally compliant avenues to demonstrating their opposition to the expansion project, but they had concluded--based on their previous efforts--that those avenues were unlikely to produce the results they desired within the timeframe they considered necessary. To them, blocking the Trans Mountain sites seemed the most "efficacious" solution.
- [109] To be "involuntary" within the meaning of the necessity defence, "the [wrongful] act must be inevitable, unavoidable and afford no reasonable opportunity for an alternative course of action that does not involve a breach of the law": *Perka* at 259. People act in a "morally involuntary fashion when, faced with perilous circumstances, [they are] deprived of a realistic choice whether to break the law": *R. v. Ruzic*, 2001 SCC 24 at para. 29 (emphasis added). Accordingly, to properly support a necessity defence, the appellants' evidence had to allow for a finding that they reasonably believed the Pipeline's contribution to rapid warming was "so emergent that failure to act could endanger life or health and upon any reasonable view of the facts, compliance with the law was impossible": *Perka* at 257 (emphasis added).
- [110] I do not see that here. I agree with the Crown that as difficult and futile as the lawful alternatives may have appeared to the appellants, those alternatives existed, and the fact of their existence informs the objective reasonableness of the appellants' subjective beliefs on the second element of the defence. I do not doubt the sincerity of the appellants' view that blocking the Trans Mountain sites was the most "efficacious" way to stop the Pipeline's expansion. Nor do I doubt the sincerity of their claim that defying the injunction was "a last ditch gesture in despair". However, a properly instructed jury, acting judicially, could not infer from the evidence, or have a reasonable doubt, that complying with the injunction was demonstrably impossible, particularly in light of the fact that the appellants were each given an opportunity to leave the enjoined area before arrest, and to continue their protest in close (but lawful) proximity to the site.
- [111] Even if a jury found the appellants subjectively believed that challenging the expansion of the Pipeline in other ways was not realistically open to them, the appellants were given a "chance to take action that would have allowed [them] to avoid committing an offence": *Hibbert* at para. 62. In those circumstances, their evidence could not reasonably support a

finding that they had "no real choice when deciding whether or not to break the law", consistent with the normative involuntariness that underpins the necessity defence: Hibbert at para. 62. Instead, this is a situation in which, like Mr. Latimer, the appellants were aware of alternatives to their wrongful conduct, but rejected them as ineffective in achieving their desired end result (at para. 39).

- [112] The appellants acknowledge, on the appeal, that at the time they defied the injunction, their capacity to "make a moral choice had [not] been crushed or impaired" (appellants' reply at para. 10). Instead, they sought to raise the necessity defence on the basis that a "liberal and humane society" would not find that the appellants had any "true" choice but to block the expansion project in defiance of the injunction, given the compelling science surrounding rapid warming and the Pipeline's exacerbation of an already dire situation (appellants' reply at para. 16).
- [113] In *Perka*, the Supreme Court emphasized that for the necessity defence to remain true to its underlying rationale, the "importance of [the] requirement that there be no reasonable legal alternative cannot be overstressed" (at 252). This is because the defence serves to excuse wrongful conduct on grounds of moral involuntariness, not to justify it. In my view, to allow the necessity defence to proceed in the circumstances of this case, even assuming the truth of the appellants' proposed evidence, would be to endorse a conceptualization of the defence that *Perka* rejected. It would invite the trier of fact to find the appellants excused from non-compliance with the law on the basis that the Pipeline conflicts with a higher social value and blocking it was the most "efficacious" and expedient way to avoid the subjectively perceived peril: *Perka* at 248, citing *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616 at 678. That is not an appropriate use of the defence, in light of its narrow construction as binding on this Court.
- [114] Given my conclusion that there was no air of reality to the second element of the defence, I do not consider it necessary to decide whether the judge erred in finding that the appellants could not show an objectively reasonable belief that at the time they defied the injunction, they faced a clear and imminent peril.
- [115] As stated, to advance the defence of necessity, there must be "evidence sufficient to give an air of reality to each of [its] three requirements": *Latimer* at para. 36. My determination that the judge was correct in his conclusion on the second element of the defence is therefore sufficient to dispose of these appeals.

Disposition

- [116] For the reasons provided, I would dismiss the appeals from conviction.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Mr. Justice Harris"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/20/02/2020BCCA0255.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/trans-mountain-pipeline-ulc-v-mivasair-2020-bcca-255>

Prepared on 28 October 2026 · Esheria