COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Trans Mountain Pipeline ULC v. Mivasair,* 2020 BCCA 8

Date: 20200107
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 Madam Justice Fenlon
(In Chambers)

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

Counsel for the Appellants:	L.B. McGrady, Q.C.
Counsel for the Respondent:	L.A. Ruzicka
Counsel for the Proposed Intervenor Ecojustice Canada:	H.J. Wruck K.J. Pepper-Smith
Counsel for the Proposed Intervenor Greenpeace Canada:	D.W. Klaudt
Place and Date of Hearing:	Vancouver, British Columbia December 18, 2019
Place and Date of Judgment:	Vancouver, British Columbia January 7, 2020

Summary:

The applicants, Ecojustice Canada and Greenpeace Canada, apply for leave to intervene in the underlying appeal arising out of criminal contempt convictions in connection with protests against the expansion of the Trans Mountain Pipeline. Held: applications dismissed. The proposed intervenors do not have a unique and different perspective that will assist the Court in the resolution of the issues and would instead expand the scope of the appeal. The applicants share the perspective of the appellants that the defense of necessity should be available to protesters in the context of civil disobedience because of the imminent perils of climate change. The applicants propose to focus on the expansion of the defence of necessity as it has been applied in some foreign jurisdictions. That is not the issue on appeal. The applicants would not assist the Court with the narrow ground of appeal raised by the appellants relating to the procedure to be followed on a Vukelich application.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] Ecojustice Canada Society and Greenpeace Canada apply for intervenor status in these appeals under Rule 36(1) of the *Court of Appeal Rules*, B.C. Reg. 297/2001.

[2] An applicant seeking intervenor status must show either that it has a direct interest in the outcome of the proceeding or that it represents a public interest in a public law issue. Ecojustice and Greenpeace apply under the latter category. In allowing intervenors on the basis of public interest, the Court is attempting to ensure that important points of view are not overlooked: *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2012 BCCA 330 at para. 5.

[3] The following criteria must be considered on this application:

i. Does the proposed intervenor have a broad representative base?

ii. Does the case legitimately engage the proposed intervenor's interests in the public law issue raised on appeal?

iii. Does the proposed intervenor have a unique and different perspective that will assist the Court in the resolution of the issues?

iv. Does the proposed intervenor seek to expand the scope of the appeal by raising issues not raised by the parties?

British Columbia Civil Liberties Association v. Canada (Attorney General), 2018 BCCA 282 at para. 14.

These applications turn on the third and fourth criteria.

Analysis

[4] The underlying appeal arises out of criminal contempt convictions. David Anthony Gooderham and Jennifer Nathan were found to have intentionally breached a court order prohibiting interference with work on the expansion of the Trans Mountain Pipeline. They did so as part of a larger protest against the pipeline.

[5] At trial both appellants sought to rely on the defence of necessity. That defence is available to an accused who can establish:

i. An imminent peril or danger;

ii. No reasonable legal alternative to the course of action undertaken, i.e., compliance with the law was demonstrably impossible; and

iii. Proportionality between the harm inflicted and the harm avoided.

Perka v. The Queen, [1984] 2 S.C.R. 232 at 259; *R. v. Latimer*, 2001 SCC 1 at para. 28.

[6] The defence of necessity is not a novel one. It has been considered in the context of civil disobedience on a number of occasions including logging protests (*MacMillan Bloedel v. Simpson* (1994), 90 B.C.L.R. (2d) 24 (C.A.)) and abortion protests (*R. v. Watson* (1996), 106 C.C.C. (3d) 445 (B.C.C.A.)). It is a defence that must be "strictly controlled and scrupulously limited": *Perka* at 250, "restricted to those rare cases in which true 'involuntariness' is present": *Latimer* at para. 27. The Supreme Court has recognized that if the criteria for the defence are loosened or approached purely subjectively, "necessity would 'very easily become simply a mask for anarchy'": *Latimer* at para. 27.

[7] The judge in the present case heard a number of related contempt of court trials prior to hearing those of the appellants. In the earlier trials he had rejected the defence of necessity: *Trans Mountain Pipeline ULC v. Mivasair*, 2018 BCSC 874. The appellants therefore applied for leave to raise the defence and to lead evidence relating to that defence. They also sought leave to raise a s. 7 *Charter* breach which characterized the Trans Mountain Pipeline as imperiling the appellants' and all citizens' right to life, liberty and security of the person**.**

[8] The judge conducted a hearing to determine whether the necessity defence and the s. 7 challenge should be allowed to proceed. He did so in accordance with *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.), as described in *R. v. Cody*, 2017 SCC 31:

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

The judge dismissed the applications, finding there was no prospect of success. His reasons for judgment are indexed at 2019 BCSC 50.

[9] The within appeal is brought from the judge's refusal to allow the appellants to lead evidence on and assert the defence of necessity. The appellants raise one narrow ground of appeal which is

described in their factum at para. 58:

> In summarily ruling that the defence of necessity had no reasonable prospect of success, Affleck J. erred in law in failing to apply the *Vukelich* procedures to the Appellants' application for leave to lead defence evidence [footnotes omitted].

That error in procedure is said to be the judge's failure to assume the truth of the facts the appellants would seek to establish in support of the defence, which include:

- That the rapidly advancing warming of the earth and the resulting impacts on natural systems and human livelihoods constitute an imminent peril;
- That to have a chance to avoid these dire outcomes the annual level of global emissions would have to be reduced on a massive scale starting no later than 2020;
- That the expansion of Canada's oil sands production will materially contribute to global oil production and emissions; and
- That the pipeline will facilitate that increase in oil sands production.

[10] The appellants say that instead of assuming the truth of these facts in conducting the *Vukelich* assessment of whether the defence of necessity had an air of reality, the judge drew an inference unsupported by the evidence to conclude that the appellants would not be able to demonstrate that a clear and imminent peril exists. They point to the following passage in the judge's reasons:

> [55] On the evidence the applicants seek to offer, rising global temperatures, to a level that is catastrophic to life, is a process that has been happening over many decades. Despite a historical lack of initiative to curb emissions over these same decades, adaptive societal measures may be taken to prevent such a dire outcome. Whether government, private industry, and citizens take these measures is a contingency that takes these consequences outside of "virtual certainty" and into the realm of "foreseeable or likely" (*Latimer*, at para. 29). Thus, it cannot be said that the objective element of the modified objective test is satisfied.
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> [Emphasis added.]

[11] Ecojustice and Greenpeace wish to intervene to support the extension of the defence of necessity to cases of civil disobedience, and in particular environmental protests. At the hearing, they acknowledged that their applications contained duplication, so they tendered a letter setting out more precisely the particular areas each would focus on if granted intervenor status:

> **Ecojustice will advance the following unique and useful submissions that:**
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> 1. Judicial and public institution recognition of the perils caused by climate change, with a focus on international law and foreign jurisprudence; and
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> 2. The imminent peril element of the necessity defence in environmental harm cases as considered in foreign jurisdictions.
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> **Greenpeace will advanced the following unique and useful submissions that:**
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> 1. Foreign jurisprudence has recognized environmental necessity defences generally, including how denying defendants the ability to raise evidence and argument on these defences impacts the right to raise a defence;

> 2. Climate change harms recognized by Canadian and foreign jurisprudence should be considered when assessing the no reasonable legal alternatives and proportionality elements of a necessity defence; and
>
> 3. Foreign jurisprudence has recognized the efficacy of civil disobedience as a consideration in assessing necessity defences, particularly, when assessing reasonable legal alternatives.

[12] Despite the applicants' efforts to distinguish their proposed contributions, it is evident that they would both focus to a considerable extent on foreign jurisprudence on the defence of necessity in the context of civil disobedience. Both would also focus on the particular harms inherent in climate change. At one point counsel for Ecojustice said they would "supplement the record," although he subsequently clarified that they would rely on the existing record, but would put before the Court further foreign jurisprudence and secondary sources such as academic articles and U.N. reports on climate change.

[13] The appellants' factum does not rely on foreign jurisprudence. Present counsel informed the Court that he has not relied on it because in his assessment that jurisprudence is not persuasive. He also said it was not an area in which he had particular expertise. Ecojustice and Greenpeace submit that they would thus be presenting a unique and useful perspective. They emphasize that they have particular expertise with foreign law and the development of the defence of necessity and are uniquely qualified to explain that jurisprudence to the Court. They say this Court has permitted intervenors to argue foreign jurisprudence in cases such as *Araya v. Nevsun Resources Ltd.,* 2017 BCCA 402 (Chambers) and *Equustek Solutions Inc. v. Google Inc.*, 2014 BCCA 448 (Chambers).

[14] With respect, I am not persuaded by these submissions. The focus of the proposed intervenors is on the expansion of the defence of necessity as it has been applied in some foreign jurisdictions—but whether the defence should be extended to civil disobedience is not the issue on appeal. The issue is, rather, whether the judge erred in the *Vukelich* hearing by failing to assume that the facts asserted by the appellants could be established. If granted leave to intervene the applicants would therefore expand the scope of the appeal.

[15] Further, even if the applicants' broader submissions were relevant to an issue on appeal, they do not have a unique and different perspective. Their perspective is that the defence of necessity should be available to the appellants and other protesters because of the perils of climate change and the imminence of those perils. That perspective is exactly that of the appellants who, in the *Vukelich* application, described the type of evidence they would lead in support of the defence of necessity as follows:

> [10] …
>
> i. To call evidence concerning the growth of oil sands production in Canada to 2030 and the projected increase of CO2 and other greenhouse gas (GHG) emissions accompanying that growth; the significance of the Trans Mountain Expansion project in facilitating that growth; and related evidence about whether the resulting increase in oil sands emissions is consistent with Canada meeting its 2030 reduction target;
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> ii. Evidence concerning whether Canada's projected expansion of oil sands production to 2030 and 2040 is consistent with keeping global average surface warming below the 2°C

threshold;

iii. Evidence concerning the Trans Mountain Expansion approval process, including the (i) National Energy Board (NEB) inquiry report May 19, 2016 recommending approval of the project, (ii) the Trans Mountain upstream emissions assessment report dated November 25, 2016, and (iii) the Ministerial Panel report November 1, 2016, showing that prior to the Order in Council authorizing the project of November 29, 2016, no public inquiry process addressed or answered questions about whether the growth of oil sands emissions to 2030 can be consistent with meeting Canada's commitments under the Paris Agreement or whether the projected expansion of oil sands production to 2040 is consistent with keeping warming well below the 2°C threshold;

iv. Evidence concerning the current level and projected increase of global GHG emissions to 2030, the rising atmospheric carbon concentration level and the relationship between that increase and warming, the current rate of warming, and the impacts of warming and related changes in the earth's climate system, the severity of the impacts that have already occurred and are occurring, and the projected impacts to 2030 and after;

[16] The appellants further particularized that proposed evidence in 80 paragraphs quoted by the judge at para. 11 of his reasons. It suffices for the purpose of these intervenor applications to include only the headings under which the various categories of evidence were organized:

- Global emissions, atmospheric carbon, and warming
- Mitigation and the global emissions gap
- Impacts
- The National Energy Board (NEB)
- Upstream emissions review
- The Ministerial Panel
- Political activity to avoid the peril
- Political activity subsequent to November 29, 2016
- Belief on reasonable grounds

[17] In my opinion, the applicants have not "found the narrow niche to be occupied by an intervenor": *Squamish Nation v. British Columbia (Environment*), 2019 BCCA 65 at para. 28 (Chambers). Ecojustice and Greenpeace share the perspective of the appellants on climate change, the need for civil disobedience given the magnitude and imminence of the perils of climate change, and the applicability of the defence of necessity to this and other comparable cases. More importantly, they would not assist the Court with the narrow ground of appeal raised by the appellants relating to the procedure to be followed on a *Vukelich* application.

[18] I would accordingly dismiss the applications for leave to intervene.

“The Honourable Madam Justice Fenlon”