

# Eco-terrorists Facing Armageddon: The Defence of Necessity and Legal Normativity in the Context of Environmental Crisis

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Résumé de l'article

L'invocation de la nécessité comme défense excusant des actes de désobéissance civile soulève des questions portant sur la primauté du droit et la sécurité juridique. L'émergence de l'activisme environnemental radical dans un contexte de réchauffement planétaire justifie de s'interroger quant à la portée et aux limites de la défense de nécessité au Canada. Cet article argumente que la défense accroît significativement la flexibilité du droit canadien en matière de gestion des ressources naturelles et de protection de l'environnement. La résilience du droit face aux changements socio-écologiques en est *a priori* renforcée. Toutefois, la défense peut aussi rendre la loi flexible à un point tel que des règles contraignantes perdent leur valeur normative dans certaines circonstances. Ainsi, la démonstration d'un lien entre l'activité humaine, les changements climatiques et les dommages qui en découlent peut augmenter les chances d'invoquer la nécessité avec succès pour défendre des actes illégaux qui visent à empêcher la dégradation de l'environnement. En d'autres termes, la nécessité pourrait offrir une défense permettant de contrer l'application de cadres légaux qui autorisent de facto la destruction catastrophique de l'environnement. Si tel était le cas, la valeur normative du droit de l'environnement serait fortement réduite, et sa résilience comme cadre normatif serait menacée.

## ECO-TERRORISTS FACING ARMAGEDDON: THE DEFENCE OF NECESSITY AND LEGAL NORMATIVITY IN THE CONTEXT OF ENVIRONMENTAL CRISIS

*Hugo Tremblay\**

The invocation of necessity as a defence for acts of civil disobedience has raised questions about the rule of law and legal certainty. The rise of radical environmental activism in the context of climate change warrants an inquiry into the scope and limitations of the defence in Canada. This paper argues that the defence of necessity significantly increases legal flexibility in Canadian environmental law. To some extent, the defence may thus enhance the law's resilience to socio-ecological changes. However, the defence could also render the law flexible to such an extent that positive norms might lose their prescriptive value in certain circumstances. In particular, as the link connecting human activity, climate change, and consequent damage to the environment becomes clearer, there is a greater likelihood of environmental activists successfully invoking necessity to defend illegal acts aimed at curbing environmental degradation. In other words, necessity may offer a defence against the enforcement of legal frameworks *de facto* authorizing catastrophic environmental destruction. The prescriptive value of those legal frameworks could be critically diminished, and the resilience of the law as a normative framework may be threatened.

L'invocation de la nécessité comme défense excusant des actes de désobéissance civile soulève des questions portant sur la primauté du droit et la sécurité juridique. L'émergence de l'activisme environnemental radical dans un contexte de réchauffement planétaire justifie de s'interroger quant à la portée et aux limites de la défense de nécessité au Canada. Cet article argumente que la défense accroît significativement la flexibilité du droit canadien en matière de gestion des ressources naturelles et de protection de l'environnement. La résilience du droit face aux changements socio-écologiques en est *a priori* renforcée. Toutefois, la défense peut aussi rendre la loi flexible à un point tel que des règles contraignantes perdent leur valeur normative dans certaines circonstances. Ainsi, la démonstration d'un lien entre l'activité humaine, les changements climatiques et les dommages qui en découlent peut augmenter les chances d'invoquer la nécessité avec succès pour défendre des actes illégaux qui visent à empêcher la dégradation de l'environnement. En d'autres termes, la nécessité pourrait offrir une défense permettant de contrer l'application de cadres légaux qui autorisent *de facto* la destruction catastrophique de l'environnement. Si tel était le cas, la valeur normative du droit de l'environnement serait fortement réduite, et sa résilience comme cadre normatif serait menacée.

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*No system of positive law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value.<sup>1</sup>*

*Civil disobedience has an honourable history, and when the urgency and moral clarity cross a certain threshold, then I think that civil disobedience is quite understandable, and it has a role to play.<sup>2</sup>*

## Introduction

Consider this: Next year, the Intergovernmental Panel on Climate Change (IPCC) releases a new assessment report. The report, reflecting the work of thousands of scientists from all over the world, confirms that humanity causes global warming. It also considers “virtually certain” the probability that business-as-usual trends in anthropogenic greenhouse-gas (GHG) emissions over the following two years will increase the average global temperature by at least 6 °C.<sup>3</sup> After two years, abrupt and irreversible changes in the global climate will become unavoidable over the medium or long term. Ecological processes will cross various thresholds, thereby triggering feedback loops, runaway global warming, and tip the planetary ecosystem into a new, fundamentally different state. On the publication of the report, civil unrest erupts in various countries. International leaders meet but fail to agree on a common action plan amid growing international tensions. In Canada, public demonstrations organized by environmental groups take place in major cities. A small number of organizations, dubbed “eco-terrorists” by the mainstream media, adopt civil-disobedience tactics to take direct action against GHG sources.<sup>4</sup> One of

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<sup>1</sup> *Morgentaler v R*, [1976] 1 SCR 616 at 678, 53 DLR (3d) 161, Dickson J [*Morgentaler*].

<sup>2</sup> A quote from Al Gore, 2007 Nobel Peace Prize Laureate, in Oliver Burkeman, “Civil Disobedience Has a Role to Play”, *The Guardian* (7 November 2009), online: The Guardian <<http://www.guardian.co.uk>>.

<sup>3</sup> The notion of “virtual certainty” is borrowed from the terminology used by the IPCC: see Core Writing Team, Rajendra Pachauri & Andy Reisinger, eds, *Climate Change 2007: Synthesis Report; Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Geneva: Intergovernmental Panel on Climate Change, 2008) at 27. “Virtually certain” refers to a probability above 99 per cent where uncertainty is assessed using expert judgment and statistical analysis of a body of evidence. IPCC terminology dealing with uncertainty is varied. With respect to uncertainties inappropriately expressed through the likelihood scale that applies the “virtually certain” terminology, see Rob Swart et al, “Agreeing to Disagree: Uncertainty Management in Assessing Climate Change, Impacts and Responses by the IPCC” (2009) 92:1-2 *Climatic Change* 1 at 12-14. See also JA Curry & PJ Webster, “Climate Science and the Uncertainty Monster” (2011) 92:12 *Bulletin of the American Meteorological Society* 1667.

<sup>4</sup> In Canada, some environmental activists are already considered terrorist threats: see Canada, *Building Resilience Against Terrorism: Canada’s Counter-Terrorism Strategy*

these groups decides to wage a campaign of vandalism to immobilize motor vehicles based on the fact that the transport sector is a major source of GHG.<sup>5</sup> The police arrest a number of activists suspected of systematically puncturing car tires, obstructing exhaust systems, and adding sugar to gasoline in fuel tanks. At trial, the activists raise the defence of necessity. The activists plead that concern about global warming is the only motive for their actions. Invoking the IPCC report, they argue that continued GHG emissions constitute an imminent peril to humanity's survival, that immediate action against GHG emissions is an absolute imperative, and that the damage they caused is minute compared to the harm that they are attempting to avert. Should the court convict or acquit the activists?<sup>6</sup>

This apocalyptic scenario could be worthy of a science-fiction movie. It is also not far from the current reality of global warming, according to some reports.<sup>7</sup> In 2007, the *IPCC Fourth Assessment Report* examined a range of scenarios and concluded that they would lead to an increase in global mean temperatures between 1.6 °C and 6.9 °C by the end of the twenty-first century.<sup>8</sup> However, actual anthropogenic GHG emissions exceed even the highest IPCC forecasts.<sup>9</sup> More recent climate projections

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(Ottawa: Government of Canada, 2012) at 9; "Des écologistes sous surveillance", *Le Devoir [of Montreal]* (17 February 2012) A5.

<sup>5</sup> According to Vicky Leblond and Julie Paradis (*Inventaire québécois des émissions de gaz à effet de serre en 2008 et leur évolution depuis 1990* (Quebec: Ministère du Développement durable, de l'Environnement et des Parcs, 2010) at 6), the transport sector is the main source of greenhouse gases in Quebec, and road transport is responsible for 77.8 per cent of the sector's emissions. Louis-Gilles Francoeur ("GES : Québec roule dans le mauvais sens", *Le Devoir [of Montreal]* (11 January 2012) A1) notes that current trends in GHG emissions from road transport in Quebec belie emission-reduction targets. The relative importance of the transport sector's emissions varies from one jurisdiction to another and depends on a number of factors, including the extent of the reliance on fossil fuels for energy production.

<sup>6</sup> A similar question is raised in American law by JC Oleson, "Drown the World: Imperfect Necessity and Total Cultural Revolution", online: (2007) 3 *Unbound* 19 at 71ff <<http://www.legaleleft.org/>>.

<sup>7</sup> According to Joeri Rogelj et al. ("Emission Pathways Consistent with a 2°C Global Temperature Limit" (2011) 1 *Nature: Climate Change* 413), GHG emissions must peak around 44 Gt Co<sub>2</sub> in 2020 to keep global temperature warming around +2 °C, a level considered safe by scientists. The +2 °C safety threshold is recognized internationally: see *Copenhagen Accord*, Draft Dec -/CP.15, UNFCCC, 15th Sess, UN Doc FCCC/CP/2009/L.7 (2009) at para 1 [mimeo limited]. See also Fiona Harvey, "World Headed for Irreversible Climate Change in Five Years, IEA Warns", *The Guardian* (9 November 2011), online: *The Guardian* <<http://www.guardian.co.uk>>.

<sup>8</sup> See Richard A Betts et al, "When Could Global Warming Reach 4°C?" (2011) 369:1934 *Phil Trans R Soc A* 67 at 67.

<sup>9</sup> According to the United Nations Environment Program (*Climate Change Science Compendium, 2009*, ed by Catherine P McMullen & Jason Jabbour (Nairobi: United Nations Environment Programme, 2009) at 8), "[a]nthropogenic emissions from fossil fuels in-

show that the IPCC's scenarios are very optimistic; they establish a median probable surface warming of 5.3 °C by 2100, with a 90 per cent confidence interval of 3.5 °C to 7.4 °C.<sup>10</sup> A rise of 5 °C or more in the average global temperature could lead to a nightmare scenario, with possible consequences such as these:

Most of the tropics, sub-tropics and even lower mid-latitudes are too hot to be inhabitable. The sea level rise is now sufficiently rapid that coastal cities across the world are largely abandoned. Above 6[°]C, there would be a danger of "runaway warming", perhaps spurred by release of oceanic methane hydrates. Could the surface of the Earth become like Venus, entirely uninhabitable? Human population would be drastically reduced.<sup>11</sup>

Some prominent scientists argue that disaster in the near future may already be unavoidable, with billions to starve and ecosystems to collapse.<sup>12</sup> The global system is already irreversibly headed for ocean warm-

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creased by 38 per cent from the reference year 1990. The growth rate of emissions was 3.5 per cent per year for the period 2000-2007, an almost four-fold increase from 0.9 per cent per year in 1990-1999. The actual emissions growth rate for 2000-2007 exceeded the highest forecast growth rates for the decade 2000-2010 in the emissions scenarios of the IPCC Special Report on Emissions Scenarios (SRES). This makes current trends in emissions higher than the worst case (IPCC-SRES scenario." See also Fiona Harvey, "Worst Ever Carbon Emissions Leave Climate on the Brink", *The Guardian* (29 May 2011), online: The Guardian <<http://www.guardian.co.uk>>.

<sup>10</sup> See AP Sokolov et al, "Probabilistic Forecast for Twenty-First-Century Climate Based on Uncertainties in Emissions (Without Policy) and Climate Parameters" (2009) 22:19 *Journal of Climate* 5175 at 5201; AP Sokolov et al, "Corrigendum" (2010) 23:8 *Journal of Climate* 2230.

<sup>11</sup> Alok Jha, "Copenhagen Climate Summit: Five Possible Scenarios for Our Future Climate", *The Guardian* (18 December 2009), online: The Guardian <<http://www.guardian.co.uk>>. Heat stress imposes a proximate limit on human adaptation to global warming. According to Steven C Sherwood and Matthew Huber ("An Adaptability Limit to Climate Change Due to Heat Stress" (2010) 107:21 *Proceedings of the National Academy of Sciences of the United States of America* 9552 at 9552), "[a]ny exceed[ance] of 35 °C for extended periods should induce hyperthermia in humans and other mammals, as dissipation of metabolic heat becomes impossible. While this never happens now, it would begin to occur with global-mean warming of about 7 °C, calling the habitability of some regions into question."

<sup>12</sup> See James Hansen et al, "Target Atmospheric CO<sub>2</sub>: Where Should Humanity Aim?", online: (2008) 2 *The Open Atmospheric Science Journal* 217 <<http://www.benthamscience.com/open/toascj>>; James E Hansen & Makiko Sato, "Paleoclimate Implications for Human-Made Climate Change" in A Berger, F Mesinger & D Šijači, eds, *Climate Change at the Eve of the Second Decade of the Century: Inferences from Paleoclimate and Regional Aspects: Proceedings of Milutin Milankovitch 130<sup>th</sup> Anniversary Symposium*, Springer [forthcoming]; James Lovelock, *The Vanishing Face of Gaia: A Final Warning* (New York: Allen Lane, 2009) at 46-63; Clive Hamilton, "Is It Too Late to Prevent Catastrophic Climate Change?" (Paper delivered at the Meeting of the Royal Society of the Arts in Sydney, 21 October 2009), [unpublished]; Potsdam Institute for Climate Impact Research and Climate Analytics, *Turn Down the Heat: Why a 4°C Warmer World Must*

ing and acidification, massive biodiversity reduction, destruction of local ecosystems, and increasingly frequent and severe extreme weather events.<sup>13</sup> Estimates suggest that global warming already causes 350,000 deaths per year, a figure that will rise to one million by 2030 if decisive action is not taken.<sup>14</sup> Plans prepared by armed forces posit that the catastrophic consequences of climate change will require “full scale stability operations.”<sup>15</sup> Yet governments around the world appear to have abandoned efforts to achieve an international treaty to curb GHG emissions.<sup>16</sup>

Whatever the anticipated effects of climate change, the question raised by the fictive scenario about the use of the defence of necessity is not purely hypothetical. On the contrary, it reflects issues that have already appeared before the courts. Firstly, civil-disobedience movements spurred by the perceived threat of irreversible tipping points and catastrophic environmental changes have already materialized in some coun-

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*Be Avoided* (A Report for the World Bank) (Washington, DC: International Bank for Reconstruction and Development / The World Bank, 2012) at ix, xviii; Ann Bartuska, Mark R Walbridge & Steven R Shafer, “Long-Term Agro-ecosystem Research (LTAR) and the Global Challenges to Food and Agriculture” (2012) 14:5 *Water Resources: Impact* 8; John Vidal, “Climate Change Will Mean More Malnourished Children, Experts Warn”, *The Guardian* (5 December 2012), online: The Guardian <<http://www.guardian.co.uk>>.

- <sup>13</sup> See Simon K Allen et al, “IPCC, 2012: Summary for Policymakers” in CB Field et al, eds, *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation* (Cambridge, UK: Cambridge University Press, 2012); Peter Good et al, “A Review of Recent Developments in Climate Change Science: Part I; Understanding of Future Change in the Large-Scale Climate System” (2011) 35:3 *Progress in Physical Geography* 281; Daniel G Boyce, Marlon R Lewis & Boris Worm, “Global Phytoplankton Decline Over the Past Century”, *Nature* 466:7306 (29 July 2010) 591; Derek P Tittensor et al, “Global Patterns and Predictors of Marine Biodiversity Across Taxa”, *Nature* 466:7310 (26 August 2010) 1098; Ove Hoegh-Guldberg & John F Bruno, “The Impact of Climate Change on the World’s Marine Ecosystems”, *Science* 328:5985 (18 June 2010) 1523; Ian Allison et al, *The Copenhagen Diagnosis: Updating the World on the Latest Climate Science* (Sydney: UNSW Climate Change Research Centre, 2009); Timothy M Lenton et al, “Tipping Elements in the Earth’s Climate System” (2008) 105:6 *Proceedings of the National Academy of Sciences of the United States of America* 1786; Thomas R Karl et al, eds, *Weather and Climate Extremes in a Changing Climate* (Regions of Focus: North America, Hawaii, Caribbean, and US Pacific Islands) (Washington, DC: Department of Commerce, 2008); Stephen H Schneider, “Abrupt Non-linear Climate Change, Irreversibility and Surprise” (2004) 14:3 *Global Environmental Change* 245.
- <sup>14</sup> See Ross Mountain et al, *Climate Vulnerability Monitor 2010: The State of the Climate Crisis* (Madrid: DARA, 2010) at 15.
- <sup>15</sup> Canada, Chief of Force Development of the Department of National Defence, *The Future Security Environment, 2008-2030: Part 1; Current and Emerging Trends* (Ottawa: Department of National Defence, 2009) at 37.
- <sup>16</sup> See Fiona Harvey, “Rich Nations ‘Give Up’ on New Climate Treaty Until 2020”, *The Guardian* (20 November 2011), online: The Guardian <<http://www.guardian.co.uk>>.

tries.<sup>17</sup> Secondly, environmental activists engaged in civil-disobedience campaigns and faced with criminal charges have invoked the defence of necessity.

In England, three cases have recently attracted attention. In 2008, six Greenpeace activists who had attempted to shut down a coal-fired power station by climbing its chimney were cleared of criminal charges, as it was held that they were trying to prevent climate change from causing greater property damage.<sup>18</sup> In 2009, a court rejected the defence of necessity raised by twenty-two activists who hijacked a coal train to stop emissions from another power station in order to fend off imminent devastation due to global warming.<sup>19</sup> In 2010, an interlocutory judgement confirmed the availability of the defence of necessity to twenty activists charged for conspiracy to occupy and shut down yet another coal-fired power plant.<sup>20</sup>

Environmental activists in the United States have also pleaded the defence.<sup>21</sup> In 2009, an activist placed winning bids for oil and gas exploita-

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<sup>17</sup> See Bibi van der Zee, "Is 'Ecoterrorism' Really a Threat?", *The Guardian* (10 November 2008), online: The Guardian <<http://www.guardian.co.uk>>. According to Stefan Skrimshire ("Approaching the Tipping Point: Climate Risks, Faith and Political Action" (2008) 4:2 *European Journal of Science and Theology* 9 at 13):

Of the more significant recent trends in social movement responding to 'abrupt climate change' has been, in Europe, the US and Australia, of a network of climate change activists. The specific interest for this study comes from their dual intentions of a) disrupting 'business as usual' for the fossil fuel industry and b) the promotion of alternative social and political strategies for living in independence of a carbon economy. Coordinated by groups such as Rising Tide, the Camp for Climate Action, Earth First! and Plane Stupid, typical events in the UK have been: 2 week[-]long 'climate camps' taking direct action at Drax power station and Heathrow Airport and coordinated 'days of action' in which groups have used non-violent direct action to disrupt the working of prominent fossil fuel industry infrastructure.

For a list of direct actions against GHG emissions, see "Nonviolent Direct Actions Against Coal" (6 June 2012), online: SourceWatch <<http://www.sourcewatch.org>>.

<sup>18</sup> See John Vidal, "Not Guilty: The Greenpeace Activists Who Used Climate Change as a Legal Defence", *The Guardian* (11 September 2008), online: The Guardian <<http://www.guardian.co.uk>>. The defence raised is not necessity per se.

<sup>19</sup> See Martin Wainwright, "Drax 22 Guilty of Coal Train Ambush After Judge Rejects Justification Claim", *The Guardian* (4 July 2009) 4; Helen Carter, "Drax Coal Train Hijackers Sentenced", *The Guardian* (4 September 2009), online: The Guardian <<http://www.guardian.co.uk>>.

<sup>20</sup> See *R v Barkshire*, [2011] EWCA Crim 1885, [2012] 6 Crim LR 453. The activists were convicted at trial. The court of appeal quashed the convictions because of material non-disclosure by the prosecution. The court declined to rule on the availability of the defence of necessity but noted serious doubts about whether it should have been made available (*ibid* at paras 7-8, 32).

<sup>21</sup> See Laura J Schulkind, "Applying the Necessity Defense to Civil Disobedience Cases", Note, (1989) 64:1 *NYUL Rev* 79 at 99.



tion leases on federal lands at an auction in order to protest against global warming.<sup>22</sup> The activist faced criminal charges for interfering with the auction and making false statements on bidding forms.<sup>23</sup> The court rejected his defence based on necessity and sentenced him to two years in prison.<sup>24</sup> This case could be portrayed as a case of political imprisonment, since no adverse consequences resulted from the activist's actions.<sup>25</sup>

The invocation of necessity by environmental activists is not theoretical in Canada either. The defence was raised in British Columbia by protesters who hindered logging operations in order to protect unique forest ecosystems and in Quebec by protesters who obstructed the opening of a plant that would emit highly carcinogenic organic pollutants.<sup>26</sup> Necessity is also relevant in the context of the national drive for greater fossil-fuel extraction despite public opposition and accumulating evidence of global warming due to GHG emissions. For example, citizen groups whose opposition to shale-gas exploration in Quebec has been ignored by the provincial government have announced that they may resort to hindering energy companies' equipment to stop gas exploration in the St. Lawrence Valley.<sup>27</sup>

Beyond circumstantial justifications, a study of the defence of necessity in times of environmental crisis sheds light on more fundamental questions raised by the dialectical tension between certainty and flexibility

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<sup>22</sup> See Kirk Johnson, "Legal Cost for Throwing a Monkey Wrench", *The New York Times* (9 October 2009), online: The New York Times <<http://www.nytimes.com>>.

<sup>23</sup> See Holly Doremus, "Civil Disobedience and Climate Change" (13 October 2009), online: Legal Planet <<http://legalplanet.wordpress.com>>.

<sup>24</sup> See Robert Gehrke, "Bogus Bidder Loses Shot at Global-Warming Defense", *The Salt Lake Tribune* (16 November 2009), online: The Salt Lake Tribune <<http://www.sltrib.com>>; Suzanne Goldenberg, "US Eco-activist Jailed for Two Years", *The Guardian* (27 July 2011), online: The Guardian <<http://www.guardian.co.uk>>.

<sup>25</sup> According to the unofficial transcript of the plea on sentence, the activist disclosed his identity before making bids at the auction, he raised the down payment for the leases won, and the auction itself was later reversed on unrelated grounds because it was illegitimate in the first place: "Environmental Activist Tim DeChristopher Sentenced to Prison, Tells the Court, 'This Is What Hope Looks Like'" (27 July 2011), online: AlterNet <<http://www.alternet.org>> ["DeChristopher"].

<sup>26</sup> See *MacMillan Bloedel v Simpson* (1994), 113 DLR (4th) 368, (sub nom *MacMillan Bloedel Ltd v Simpson*) 90 BCLR (2d) 24 (CA) [*MacMillan Bloedel CA* cited to DLR]; *R c Lanthier*, 2002 CanLII 15475, 2002 CarswellQue 1542 (WL Can) (CQ crim & pén) [*Lanthier* cited to CanLII]. These cases are further discussed in Part III, below.

<sup>27</sup> See "Gaz de schiste : Les opposants menacent de bloquer les activités des gazières", *Le Devoir [of Montreal]* (30 May 2011), online: Le Devoir <<http://www.ledevoir.com>>; Marco Bélair-Cirino, "Gaz de schiste : Des opposants envisagent la désobéissance civile", *Le Devoir [of Montreal]* (19 September 2011), online: Le Devoir <<http://www.ledevoir.com>>.

within the legal order.<sup>28</sup> Certainty—or security, stability, consistency, predictability—and flexibility—or discretion—are two fundamental characteristics of legal frameworks.<sup>29</sup> On the one hand, certainty appears inherently tied to the law’s normative role.<sup>30</sup> In order to regulate conduct and order social interactions, the law must provide clear standards prospectively guiding the behaviour of those subject to it.<sup>31</sup> The pre-eminence of certainty and predictability may relate to law’s constitutive mechanisms. The law operates through general rules that are applicable to sets of situations. It relies on a process of abstraction that fits discrete and complex realities into pre-existing categories.<sup>32</sup> The law appears ill-equipped to deal with essentially unique events that cannot be reduced to standardized components and common patterns. However, including unforeseeable accidents, disasters without precedent, or unpredictable climatologic events within the ambit of the law via the defence of necessity allows for the normative processing of situations that are a priori ignored by legal regimes. In other words, the defence of necessity normalizes cases

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<sup>28</sup> Many questions raised by this dialectical tension are examined by John T Parry, “The Virtue of Necessity: Reshaping Culpability and the Rule of Law” (1999) 36:2 *Hous L Rev* 397. On the issue of legal certainty in the context of environmental crisis, see e.g. Jonas Ebbesson, “The Rule of Law in Governance of Complex Socio-ecological Changes” (2010) 20:3 *Global Environmental Change* 414 at 415-16. An in-depth debate on certainty versus flexibility within legal frameworks has recently taken place in the context of torture against terror suspects: see David Dyzenhaus, “The Compulsion of Legality” in Victor V Ramraj, ed, *Emergencies and the Limits of Legality* (Cambridge, UK: Cambridge University Press, 2008) 33.

<sup>29</sup> See Michel van de Kerchove & François Ost, *Legal System Between Order and Disorder*, translated by Iain Stewart (Oxford: Oxford University Press, 1994); David Dyzenhaus, “The State of Emergency in Legal Theory” in Victor V Ramraj, Michael Hor & Kent Roach, eds, *Global Anti-terrorism Law and Policy* (Cambridge, UK: Cambridge University Press, 2005) 65.

<sup>30</sup> See AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London, UK: Macmillan and Co, 1915) at 179-201.

<sup>31</sup> See Tom Bingham, *The Rule of Law* (London, UK: Allen Lane, 2010) at 37-54. See also Steven J Burton, “Law as Practical Reason” (1989) 62:3-4 *S Cal L Rev* 747 at 751, 758ff.

<sup>32</sup> See François Blanchard, “Vers une théorie de la qualification juridique : Les socles épistémiques de la catégorisation” in Danièle Bourcier & Pierre MacKay, eds, *Lire le droit : Langue, texte, cognition* (Paris: Librairie Générale de Droit et de Jurisprudence, 1992) 223; Christopher Hutton, *Language, Meaning and the Law* (Edinburgh: Edinburgh University Press, 2009), ch 2, 6-7.

outside the law's usual remit.<sup>33</sup> This extension of the law's domain corresponds to an increase in legal stability.<sup>34</sup>

On the other hand, flexibility is essential to ensure that the law adapts to all possible situations and covers evolving social realities. Firstly, law does not provide absolute certainty. Legal decisions are never entirely predetermined; they rely on discretion.<sup>35</sup> The interpretation and application of rules inevitably involve substantive judgments that imply the particularized implementation of general norms on a case-by-case basis.<sup>36</sup> Secondly, legal regimes often have specific rules designed to deal with exceptional events on a prospective basis. Such mechanisms suspend the application of general norms in particular situations. For example, the doctrines of *force majeure* and frustration in contract law grant flexibility to legal interactions in unforeseen circumstances.<sup>37</sup> Similarly, necessity

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<sup>33</sup> See Alon Harel & Assaf Sharon, "Necessity Knows No Law': On Extreme Cases and Un-codifiable Necessities" (Paper delivered at the Constitutionalism and the Criminal Law Workshop, University of Toronto, 12 September 2009) [unpublished] at 11 (writing that incorporating the exception into the law normalizes the exception).

<sup>34</sup> This positivist perspective assumes that rule by law corresponds to the rule of law. For a discussion on this point, see David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge, UK: Cambridge University Press, 2006). Irrespective of Dyzenhaus's arguments in favour of a substantive version of the rule of law, it can be argued that the rule of law presupposes a commitment to maintaining legality, formal or principled, even in times of crisis. For a critical view on Dyzenhaus's arguments, see NC Lazar, "The Everyday Problem of Emergencies", Book Review of *The Constitution of Law: Legality in a Time of Emergency* by David Dyzenhaus and *Law in Times of Crisis* by Oren Gross & Fionnuala Ní Aoláin, (2009) 59:2 UTLJ 237 at 242-44.

<sup>35</sup> According to Susan L Gratton:

Conceptually, law and discretion lie at opposite extremes of a broad spectrum of government activity. However, these outer extremes are purely hypothetical. Complete statutory certainty is impossible since language necessarily admits of some ambiguity. Plenary discretion is also impossible since discretion is always conferred in some context that must be taken into account in defining the scope of the discretion. It might even be said that law and discretion need each other. Law becomes meaningful in its application to real situations. And discretion without a legal foundation is tyranny ("Standing at the Divide: The Relationship Between Administrative Law and the Charter Post-*Multani*" (2008) 53:3 McGill LJ 477 at 481).

<sup>36</sup> See Cass R Sunstein, "Problems with Rules" (1995) 83:4 Cal L Rev 953 at 984-89.

<sup>37</sup> With respect to *force majeure*, see Michel Bélanger, "Lorsque la catastrophe environnementale n'est plus un cas fortuit" in Service de la formation permanente, Barreau du Québec, ed, *Les catastrophes naturelles et l'état du droit*, vol 114 (Cowansville, Que: Yvon Blais, 1998) 39. On the doctrine of frustration in contract law, see Julie Bédard, "Réflexions sur la théorie de l'imprévision en droit québécois" (1997) 42:4 McGill LJ 761. See also Frédéric Pérodeau, "La force majeure comme mécanisme contractuel d'allocation des risques" in Service de la formation continue, Barreau du Québec, ed, *Développements récents en droit de la construction*, vol 336 (Cowansville, Que: Yvon Blais, 2011) 111.

justifies a departure from penal norms in exceptional cases when adherence to the law would produce undesirable results. The defence of necessity thus increases the law's flexibility by processing unique situations. However, if the exceptional becomes common, the application domain of mechanisms that deal with anomalous situations expands at the expense of legal frameworks applicable in normal circumstances. Necessity may encroach significantly on the normative structure that governs usual legal interactions if normality disappears as a result of climate change.<sup>38</sup>

In light of the foregoing, flexibility and certainty appear locked in a zero-sum game within the legal order, whereby the increased presence of one of these principles necessarily corresponds to a reduction of the other:

A significant part of the life of law has been attempts to balance the competing values of stability and flexibility. In some areas greater weight may be accorded to flexibility while in others stability is particularly valued. ...

... Despite lack of consensus as to its precise content and scope, the rule of law has been connected to notions of generality, clarity, certainty, predictability and stability of rules. At the same time, general legal rules must also be flexible enough to adapt to unforeseen circumstances and developments. When such developments take place over time there may be a sufficient lag to allow for changing the rules so as to accommodate the new realities. ... [T]he tension between the demands of stability and flexibility becomes almost unbearable when there is not enough time to adapt the laws to the changing circumstances and when immediate 'specific' action is deemed necessary.<sup>39</sup>

Hence the question introducing this article leads to an inquiry about the dialectical process between these two fundamental principles in the law. The law's normative role requires minimal rigidity. Legal norms inevitably rely on abstract generalizations. Unique and unforeseeable events constitute an inherent challenge for the law. Specific mechanisms provide flexibility in exceptional cases. The application domain of these mechanisms may expand critically in times of crisis and emergency. The resulting increase in legal flexibility may threaten the law's role as a framework of normative rules.<sup>40</sup>

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<sup>38</sup> On the disappearance of normality, see e.g. PCD Milly et al, "Stationarity Is Dead: Whither Water Management?", *Science* 319:5863 (1 February 2008) 573.

<sup>39</sup> Oren Gross, "Stability and Flexibility: A Dicey Business" in Ramraj, Hor & Roach, *supra* note 29, 90 at 90.

<sup>40</sup> On the risks of blurring the distinction between rules applicable in normal circumstances and exceptional measures, see Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?" (2003) 112:5 *Yale LJ* 1011 at 1070-73, 1089-96.

In a context where the exceptional become commonplace, it is necessary to examine whether mechanisms that increase legal flexibility might diminish the certainty and stability of the law enough to damage its resilience. The aim of this article is to determine whether this risk is material with respect to necessity. Part I of the article provides a general presentation of the defence of necessity. Part II examines the definition of the defence in Canadian law and reviews cases where it has been raised in relation to environmental issues. Finally, Part III assesses the likelihood of successfully invoking necessity to defend illegal actions aimed at protecting the environment.

## I. Contextualizing Necessity

This part provides a contextual overview of the origins and development of necessity. In its early philosophical articulation, necessity mediated between formal positivist legal frameworks and morality in exceptional circumstances (Part I.A). The defence's later incarnation in international law shows that necessity is invoked by states committing wrongful acts to protect the environment, while scientific uncertainty generates irreducible ambiguity in the legal qualification of ecological perils (Part I.B). Finally, the more recent hesitations surrounding the reception of necessity in Canadian law also illustrate the law's need for flexibility due to its inability to provide prospective guidance for all possible situations through general rules (Part I.C).

### *A. Philosophical Origins*

A review of necessity's underlying rationale immediately situates the defence at a breaking point of legal certainty and uncovers moral considerations behind the law's positivist neutrality. Necessity relates to a situation in which an offence is committed to avoid a greater evil that would result from danger in exceptional circumstances.<sup>41</sup> Necessity dictates that "it is justifiable in an emergency to break the letter of the law if breaking the law will avoid a greater harm than obeying it" and that "it is excusable ... to break the law if compliance would impose an intolerable burden."<sup>42</sup> Necessity thus aims at "avoidance of greater harm or the pursuit of some greater good" and recognizes "the difficulty of compliance with the

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<sup>41</sup> See Michael J Allen, *Textbook on Criminal Law*, 10th ed (Oxford: Oxford University Press, 2009) at 191.

<sup>42</sup> Canada, Law Reform Commission, *Criminal Law: The General Part; Liability and Defences* (Working Paper 29) (Ottawa: Minister of Supply and Services Canada, 1982) at 93 [*Law Reform Commission Working Paper*].

law in emergencies.”<sup>43</sup> Succinctly stated, necessity condones the pursuit of the greater good rather than conformity with the letter of the law.<sup>44</sup>

Necessity’s role in increasing legal flexibility through departures from the law’s systematic application is readily apparent from the doctrine’s history. The defence’s intellectual roots can be traced to Greek antiquity. Aristotle indicated that a necessary action is involuntary because it is compelled by the circumstances and involves damages sustained to avoid greater harm.<sup>45</sup> During the Middle Ages, St. Thomas Aquinas commented on the observance of the law when an individual is faced with sudden peril needing instant remedy:

Since ... the lawgiver cannot have in view every single case, he shapes the law according to what happens more frequently, by directing his attention to the common good. Wherefore, if a case arise wherein the observance of that law would be hurtful to the general welfare, it should not be observed.<sup>46</sup>

These perspectives reveal characteristics that guide the doctrinal development of necessity in the law: the involuntariness of the action, the commission of a lesser harm to avoid a greater one, the law’s moral subjectivity, and the law’s inherent limitations when dealing with unique events. These cardinal ideas inform the reflection on necessity throughout the article.

### ***B. International Advances***

Following its earlier philosophical articulations, necessity materialized in international law during the seventeenth century, under the influence of Roman law. Grotius is credited with formalizing the doctrine as a right to self-preservation that could be invoked to justify actions otherwise “outside the pale of the law.”<sup>47</sup> Necessity evolved through interstate disputes to emerge as a distinct circumstance that precludes the wrongfulness of an act. It was formally articulated in the International Law Com-

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<sup>43</sup> *Ibid.*

<sup>44</sup> See AP Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine*, 4th ed (Oxford: Hart, 2010) at 781-82.

<sup>45</sup> Aristotle, *Magna Moralia*, translated by St George Stock, in WD Ross, ed, *The Works of Aristotle* (Oxford: Clarendon Press, 1915) book I.14-16.

<sup>46</sup> Saint Thomas Aquinas, *On Law, Morality, and Politics*, ed by William P Baumgarth & Richard J Regan (Indianapolis: Hackett, 1988) at 75.

<sup>47</sup> Burleigh Cushing Rodick, *The Defence of Necessity in International Law* (New York: Columbia University Press, 1928) at 3; Roman Boed, “State of Necessity as a Justification for Internationally Wrongful Conduct” (2000) 3:1 Yale Human Rts & Dev LJ 1 at 4-6.

mission's (ILC) draft articles on state responsibility.<sup>48</sup> First codified under article 33, and later under article 25, necessity can essentially be invoked if a state establishes that a series of cumulative conditions is satisfied.<sup>49</sup> Under the doctrine, a state can act in violation of its obligations if (i) it "is the only way for the State" (ii) "to safeguard an essential interest" (iii) "against a grave and imminent peril," and (iv) the act will "not seriously impair an essential interest of [another state] ... or of the international community as a whole."<sup>50</sup>

This definition prompts further considerations. Firstly, the condition that the course of action chosen by the state be the "only way" to safeguard its essential interest is ambiguous because necessity implies a choice between options. The act of the state is voluntary, distinguishing necessity from *force majeure*, which is defined as an irresistible force rendering compliance with the obligation materially impossible for the state.<sup>51</sup> Alternatives are always available, and a strict interpretation of this condition would negate the possibility of ever raising the defence suc-

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<sup>48</sup> For an overview of the ILC's work on this subject, see Andrea K Bjorklund, "Emergency Exceptions: State of Necessity and *Force Majeure*" in Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 459 at 464-71.

<sup>49</sup> See Roberto Ago, "Addendum to the Eighth Report on State Responsibility: The Internationally Wrongful Act of the State, Source of International Responsibility (Part 1) (Concluded)" (UN Doc A/CN.4/318/Add.5-7) in *Yearbook of the International Law Commission 1980*, vol II, part 1 (New York: UN, 1982) 13 at 51 (UN Doc A/CN.4/SER.A/1980/Add.1) ["1980 Draft Articles on State Responsibility"]; "Text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts" in *Report of the International Law Commission on the Work of its Fifty-Third Session*, UNGAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) chapter IV.E at 49 ["2001 Draft Articles on State Responsibility"]. Case law confirms that the ILC's drafts reflect international customary law: see *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7 [*Gabčíkovo-Nagymaros*].

<sup>50</sup> "2001 Draft Articles on State Responsibility", *supra* note 49 at 49. Articles 25(2) and 26 exclude situations from necessity's scope (*ibid* at 49-50). For a critique of the exclusion based on contributory action from the state invoking necessity, see Matthew Parish, "On Necessity" (2010) 11:2 *The Journal of World Investment & Trade* 169 at 181-82.

<sup>51</sup> According to the "1980 Draft Articles on State Responsibility", "in cases where the excuse for the State's action or omission is a state of necessity, the 'voluntary' nature of the action or omission and the 'intentional' aspect of the failure to conform with the international obligation are not only undeniable, but also a logical and inherent part of the excuse given" (*supra* note 49 at 14). According to Roberto Ago, "anyone invoking a state of necessity is perfectly aware of having deliberately chosen to act in a manner not in conformity with an international obligation" ("Eighth Report on State Responsibility: The Internationally Wrongful Act of the State, Source of International Responsibility (Continued)" (UN Doc A/CN.4/318 & Add.1-4) in *Yearbook of the International Law Commission 1979*, vol II, part 1 (New York: UN, 1981) 3 at 48 (UN Doc A/CN.4/SER.A/1979/Add.1)).

cessfully.<sup>52</sup> Secondly, both an “essential interest” and a “grave and imminent peril” may relate to environmental matters; thus a state may be able to violate international obligations to avert an impending ecological catastrophe.<sup>53</sup> However, environmental damage must be extremely urgent and sufficiently certain to be imminent, which entails much more than a risk or a possibility of harm.<sup>54</sup> A peril is considered imminent enough if it is remote in time but its realization is inevitable:

[A] “peril” appearing in the long term might be held to be “imminent” as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.<sup>55</sup>

To illustrate this point with the example provided in the Introduction, the gradual nature of climate change does not preclude the invocation of necessity in international law insofar as the catastrophic consequences of global warming, however remote in time, are inevitable beyond a certain point. Nevertheless, the “grave and imminent peril” element requires a very high degree of certainty and constitutes a significant hurdle to ecological necessity in international law.<sup>56</sup> Scientific evidence is crucial to satisfy the condition of imminent peril,<sup>57</sup> yet environmental degradation is often progressive and difficult to demonstrate due to scientific debate and uncertainty.<sup>58</sup> This difficulty is amplified by the fact that ecological necessity is either about future events or events that did not happen as expected—arguably due to the very breach for which the defence is in-

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<sup>52</sup> See Bjorklund, *supra* note 48 at 485.

<sup>53</sup> “2001 Draft Articles on State Responsibility”, *supra* note 49 at 201-202; “1980 Draft Articles on State Responsibility”, *supra* note 49 at 14; *Gabčíkovo-Nagymaros*, *supra* note 49 at paras 40, 53. See also Malgosia Fitzmaurice, “Necessity in International Environmental Law” (2010) 41 *Nethl YB Int’l L* 159.

<sup>54</sup> In *Gabčíkovo-Nagymaros* (*supra* note 49 at para 56), the International Court of Justice referred to the notions of definite and authenticated perils that might be certain.

<sup>55</sup> *Ibid* at para 54.

<sup>56</sup> See Caroline Foster, “Necessity and Precaution in International Law: Responding to Oblique Forms of Urgency” (2008) 23:2 *NZUL Rev* 265.

<sup>57</sup> See James Crawford, “Second Report on State Responsibility: Addendum” (UN Doc A/CN.4/498/Add.2) in *Yearbook of the International Law Commission 1999*, vol II, part 1 (New York: UN, 2008) 3 at 31-32 (A/CN.4/SER.A/1999/Add.1 (Part 1)).

<sup>58</sup> See Daniel Dobos, “The Necessity of Precaution: The Future of Ecological Necessity and the Precautionary Principle” (2002) 13:2 *Fordham Envtl LJ* 375 at 397. Dobos notes that the International Court of Justice in *Gabčíkovo-Nagymaros* does not distinguish between the probability of environmental peril and the uncertainty in scientific evidence (*ibid* at 380-82).



voked.<sup>59</sup> Events that are certain to happen render a breach of obligations pointless. Uncertainty about the future is thus implicit in the concept of necessity. This certainty-uncertainty dialectic is especially evident in the case of ecological necessity due to the inconclusive nature of scientific evidence

### *C. Canadian Lineage*

By comparison to its philosophical origins and its recognition in international law, the reception of the defence of necessity in Canadian law is relatively recent. The initial reticence towards the defence's formal acceptance, which derives from legal developments in England, manifests the difficulty in applying the law to unique or unforeseeable events due to the law's function as normative framework relying on general, prospective rules.<sup>60</sup> Although clearly defined by Blackstone in the latter half of the eighteenth century, the defence of necessity was later marginalized as a consequence of the English drive to codify criminal law during the nineteenth century.<sup>61</sup> The authors of the *English Draft Code* of 1879<sup>62</sup> decided against codifying the defence, arguing that some excuses and justifications against indictment should remain a priori undetermined because legal certainty stemming from exhaustive codification might otherwise entail undesirable condemnations in circumstances so unusual that they were impossible to foresee:

[W]e desire to state that in our opinion it is, if not absolutely impossible, at least not practicable, to foresee all the various combinations of circumstances which may happen, but which are of so unfrequent [*sic*] occurrence that they have not hitherto been the subject of judicial consideration, although they might constitute a justification or excuse, and to use language at once so precise and clear and com-

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<sup>59</sup> For a concrete illustration of scientific uncertainty about an impending environmental disaster, see Jason A Lowe & Jonathan M Gregory, "A Sea of Uncertainty" [2010] 4 *Nature Reports: Climate Change* 42.

<sup>60</sup> Reticence toward necessity in English law endured until recently: see e.g. *Buckoke v Greater London Council*, [1971] 1 Ch 655, 2 All ER 254 CA (a decision of Lord Denning, who stated that a fire-engine driver crossing a red light to reach a fire and save a life should be congratulated rather than prosecuted, yet denied the defence of necessity).

<sup>61</sup> A historical perspective on the defence is provided in Benjamin L Berger, "A Choice Among Values: Theoretical and Historical Perspectives on the Defence of Necessity" (2002) 39:4 *Alta L Rev* 848 at 852-56.

<sup>62</sup> *Criminal Code (Indictable Offences), 1879* in UK, HC, "Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences: With an Appendix Containing a Draft Code Embodying the Suggestions of the Commissioners", C 2345, in *Sessional Papers*, vol XX (1878-79) 169, appendix [*English Draft Code*; "Report of Royal Commission on Indictable Offences"].

prehensive as to include all cases that ought to be included, and not to include any case that ought to be excluded.<sup>63</sup>

Thus the tension between the defence of necessity and prospective legal certainty is apparent in two primary ways: firstly, in the recognition that general legal norms cannot prescribe behaviour for all possible situations; and secondly, in the desire to render the law flexible by preserving judicial discretion with respect to exceptional or unforeseeable cases.

The initial basis for the English reticence toward the defence exerted a determining influence on Canadian law. The first Canadian criminal code, of 1892, was largely founded on the *English Draft Code* of 1879.<sup>64</sup> As a result, necessity was preserved as a residual and unarticulated common law defence to justify or excuse an otherwise illegal act.<sup>65</sup> As late as 1976, the Supreme Court of Canada remained hesitant to categorically recognize its existence following a review of case law and doctrine in American, Canadian, and English law:

On the authorities it is manifestly difficult to be categorical and state that there is a law of necessity, paramount over other laws, relieving obedience from the letter of the law. If it does exist it can go no further than to justify non-compliance in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible.<sup>66</sup>

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<sup>63</sup> “Report of the Royal Commission on Indictable Offences”, *supra* note 62 at 10. The report follows up on this discussion in a subsequent note (*ibid* at 43-44). Moreover, the report contains interesting considerations on the relation between legal flexibility (or “elasticity”) and uncertainty, as well as the relation between codification and judicial discretion (*ibid* at 6-10).

<sup>64</sup> Don Stuart, *Canadian Criminal Law: A Treatise*, 6th ed (Scarborough, Ont: Carswell, 2011) at 2.

<sup>65</sup> See *Criminal Code*, RSC 1985, c C-46, s 8 [*Criminal Code*] (which was carried over from *The Criminal Code*, SC 1892, c 29, s 7 and *Criminal Code*, SC 1953-54, c 51, s 7):

(2) The criminal law of England that was in force in a province immediately before April 1, 1955 continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.

(3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.

In addition, some provisions refer to the concept of necessity: see *Criminal Code*, *supra* note 65, ss 216, 238(2), 285.

<sup>66</sup> *Morgentaler*, *supra* note 1 at 678. Chief Justice Laskin, writing for the minority, was ready to recognize the defence, noting that “necessity must arise out of danger to life or

This timid opening to a formal acceptance of the defence of necessity was solidified by subsequent case law that assumed the defence's existence.<sup>67</sup> The Law Reform Commission of Canada further reinforced the drive to recognize the defence, in 1982, by recommending its codification.<sup>68</sup> In doing so, the commission nevertheless noted that necessity is a dangerous doctrine because it "allows personal assessment of conflicting evils and licenses individual choice between opposing values," thus usurping the role of the legislatures and courts in resolving such conflict, and contradicting the legal framework of the criminal law that "imposes public standards ... [and] sets objective requirements."<sup>69</sup> Necessity is "invoked equally by despots and rebels"<sup>70</sup> because it opens a space for moral judgements contesting the systematic application of the law. Hence the commission's draft article made the defence available only to avoid harm to person or property to the explicit exclusion of harm of a political, economic, or social nature, in order to close the door on "claims to know better than society and its elected lawmakers."<sup>71</sup> In line with the comments on the *English Draft Code*, the commission also reiterated that the codification of necessity would address problems caused by the incapacity to foresee—and so to specifically provide for by the law—the infinite variety of circumstances in which general, prospective rules may be applied. The doubts surrounding the defence were finally extinguished in 1984, when it was formally recognized by the Supreme Court of Canada in *Perka*.<sup>72</sup>

## II. Increasing Legal Flexibility

In Part I, I attempted to bear out the features of necessity identified in the Introduction. Firstly, necessity may be raised in order to defend breaches of the law committed to protect the environment. Secondly, ne-

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health and not merely out of economic circumstances, although the latter may have an effect in producing the danger to life or health" (*ibid* at 654).

<sup>67</sup> See *R v Morgentaler*, [1976] CA 172, 64 DLR (3d) 718 (Que CA).

<sup>68</sup> *Law Reform Commission Working Paper*, *supra* note 42 at 96.

<sup>69</sup> *Ibid* at 95. On the moral values underpinning criminal prohibitions, see Marie-Élaine Guilbault, "Les valeurs de la communauté et la justification de l'action gouvernementale en matière criminelle et pénale" (2009) 68 R du B 1; Dennis J Baker, "The Impossibility of a Critically Objective Criminal Law" (2011) 56:2 McGill LJ 349.

<sup>70</sup> *Law Reform Commission Working Paper*, *supra* note 42 at 95.

<sup>71</sup> *Ibid* at 97. By including property, the commission disagrees with Chief Justice Laskin's opinion in *Morgentaler*, *supra* note 1 at 654, n 66 and accompanying text. Why property should be included in the scope of the defence while economic harm in general should be excluded remains unexplained. In prioritizing the protection of property over other economic concerns, the commission hints at the political choices behind the law's neutral facade of formal rules.

<sup>72</sup> *Perka v R*, [1984] 2 SCR 232, 13 DLR (4th) 1 [*Perka* cited to SCR].

cessity increases flexibility in legal frameworks by providing a mechanism for dealing with unforeseen circumstances. Thirdly, necessity threatens the positive legal order by prioritizing individuals' discrete value judgments in particular situations over the judgments of legislatures, courts, and society at large. In Part II, I examine the defence of necessity as defined in Canadian law and, in particular, as applied to environmental matters, in order to determine whether the general features of necessity outlined above are relevant in the Canadian context.

### *A. The Definition of Necessity*

Justice Dickson, writing for the majority of the Supreme Court in *Perka*, formally recognized necessity as a "residual" common law defence in Canada, but he emphasized that it must be strictly controlled and scrupulously limited because it would otherwise threaten to engulf large portions of the criminal law.<sup>73</sup> Relying on the rationale that involuntary conduct cannot be deterred and that punishment of involuntary actions is pointless, the Supreme Court restricted the defence—as it did in *Morgentaler*—to "urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible."<sup>74</sup> To identify such situations where the "choice" to break the law is in fact a compulsion borne from "moral or normative involuntariness", the Court established three cumulative tests that determine whether a wrongful act can be excused by necessity.<sup>75</sup>

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<sup>73</sup> *Ibid* at 247, 250.

<sup>74</sup> *Ibid* at 251.

<sup>75</sup> *Ibid* at 249, 251-52. The Supreme Court recognized that someone placed in a situation of necessity acts voluntarily in the sense that the person is physically capable of abstaining from the illegal act. This notion of physical voluntariness is conceptually linked to the requirement that criminal liability is engaged when the actions constituting the actus reus of an offence are voluntary. However, where normal human instincts compel action, moral involuntariness negates the voluntary aspect of acts in situations of necessity. Further exploring the notion of moral involuntariness in a case where the defence of duress (which is considered a particular application of necessity when uncodified) was raised, the Supreme Court held that imposing criminal liability on persons whose actions were morally involuntary violates the fundamental principles of justice protected under section 7 of the *Charter*, which requires that only voluntary conduct is punished: see *R v Ruzic*, 2001 SCC 24 at para 47, [2001] 1 SCR 687 [*Ruzic*]. In *Ruzic*, the Court stated that moral involuntariness "recognizes that there was *indeed* an alternative to breaking the law, although in the case of duress that choice may be even more unpalatable—to be killed or physically harmed" (*ibid* at para 39). On duress and necessity, see also *R v Hibbert*, [1995] 2 SCR 973, 184 NR 165; Jeremy Horder, "Self-Defence, Necessity and Duress: Understanding the Relationship" (1998) 11:1 Can JL & Jur 143. The considerations of the Supreme Court of Canada can be compared to the conditions applicable to necessity in international law whereby the wrongful act, though physically voluntary, is the "only way" to protect essential interests. The Supreme Court later re-

The first test requires the existence of a peril, danger, or harm that must be imminent, or unavoidable and near. This test establishes whether the action taken by the person invoking necessity was indeed unavoidable. The peril must be such that normal human instincts cry out for action and make counsels of patience unreasonable.<sup>76</sup> The peril is imminent if it is “on the verge of transpiring and virtually certain to occur” rather than only foreseeable or likely.<sup>77</sup> However, when the danger clearly should have been foreseen and avoided, the accused cannot reasonably claim the existence of an immediate peril.<sup>78</sup> To determine whether the peril is imminent, the courts use a modified objective standard whereby “[t]he accused person must, at the time of the act, honestly believe, on reasonable grounds, that he faces a situation of imminent peril.”<sup>79</sup>

Inferences can be drawn from the indications given by the Supreme Court about the first test and, in particular, about the foreseeable and avoidable character of a peril. The foreseeable character of an imminent peril is essential for the emergence of a situation of necessity. The Court stated that the danger must be virtually certain; that is to say, it must be more than foreseeable. Moreover, the use of the modified objective standard (containing a subjective component) implies that the peril must be perceived by the accused before he or she breaks the law. Therefore, a peril that motivates illegal actions that are subsequently excused by necessity is always foreseeable from the accused’s perspective. As a result, when the Court mentioned that necessity cannot be raised when a peril is foreseeable and avoidable, it is actually only the avoidable character of the peril that can preclude the defence of necessity. At the same time, if a peril is foreseeable and unavoidable, any action to elude it becomes pointless, including illegal acts. The peril must be avoidable to some extent, and the accused must have some form of power to affect events leading to the peril.<sup>80</sup>

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visited and further defined the three tests for the application of the doctrine of necessity in *R v Latimer*, 2001 SCC 1, [2001] 1 SCR 3 [*Latimer*].

<sup>76</sup> Justice Dickson referred to shipwreck victims who must wait until hopes of survival disappear to disobey the literal terms of the law: *Perka*, *supra* note 72 at 251.

<sup>77</sup> *Latimer*, *supra* note 75 at para 29.

<sup>78</sup> See *ibid.*

<sup>79</sup> *Ibid* at para 33. The Court added that “[t]here must be a reasonable basis for the accused’s beliefs and actions, but it would be proper to take into account circumstances that legitimately affect the accused person’s ability to evaluate his situation” (*ibid.*).

<sup>80</sup> Justice Dickson’s rationale on contributory fault provides additional reflections on the capacity to act in relation to a foreseeable peril. In *Perka*, Justice Dickson stated that “[i]f the necessitous situation was clearly foreseeable to a reasonable observer, if the actor contemplated or ought to have contemplated that his actions would likely give rise to an emergency requiring the breaking of the law, then I doubt whether what confronted the accused was in the relevant sense an emergency” (*supra* note 72 at 256).

It follows that necessity requires perils to be avoidable, but some avoidable perils are not compatible with the defence. The main issue is to identify and delineate the ensemble of avoidable perils where necessity may be successful. Perils avoidable purely through legal means are not relevant. Only perils that may be avoided either by legal as well as illegal means or else solely through illegal means must be examined. With respect to the former, courts obviously cannot condone illegal acts committed to evade impending danger if the accused a priori had the choice of either a legal or illegal course of action to avoid the peril. By holding that necessity cannot succeed if the peril clearly should have been foreseen and avoided, the Supreme Court therefore implied that, in a situation where the defence can succeed, the accused has no significant capacity to perform legal acts to avert the danger, but he retains the capacity to perform illegal acts that may do so. These inferences from the Court's statements about the first test directly lead to the second test.

The second test requires the absence of a reasonable legal alternative to the course of action undertaken. The question to ask is whether the accused could realistically have acted to avoid the peril without breaking the law, or more succinctly, whether there was a legal way out.<sup>81</sup> If there was a reasonable alternative to breaking the law, there is no necessity. The Supreme Court added that this test involves a realistic appreciation of the alternatives open to a person, indicating that "the accused need not be placed in the last resort imaginable" such that the act committed does not necessarily have to be the only possible response to the situation.<sup>82</sup> The modified objective standard also applies to the second test so that "[t]he accused person must, at the time of the act, honestly believe, on reasonable grounds, that he faces a situation of imminent peril that leaves no reasonable legal alternative open."<sup>83</sup>

The third test requires proportionality between the harm inflicted and the harm avoided. In *Perka*, the Supreme Court stated that no rational criminal justice system could excuse the infliction of a greater harm to avert a lesser evil, and therefore, in such circumstances, the individual is

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<sup>81</sup> See *Perka*, *supra* note 72 at 251-52.

<sup>82</sup> *Latimer*, *supra* note 75 at para 30. *Perka* established that a situation of necessity does not require the total absence of alternative options but only the absence of reasonable alternative options: "the existence of a reasonable legal alternative ... disentitles [the accused to the defence of necessity]; to be involuntary the 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" (*supra* note 72 at 259).

<sup>83</sup> *Latimer*, *supra* note 75 at para 33.

expected to bear the lesser harm and refrain from acting illegally.<sup>84</sup> However, the Court specified in *Latimer* that

most situations fall into a grey area that requires a difficult balancing of harms. In this regard, it should be noted that the requirement is not that one harm (the harm avoided) must always clearly outweigh the other (the harm inflicted). Rather, the two harms must, at a minimum, be of a comparable gravity. That is, the harm avoided must be either comparable to, or clearly greater than, the harm inflicted. ...

...

The evaluation of the seriousness of the harms must be objective. A subjective evaluation of the competing harms would, by definition, look at the matter from the perspective of the accused person who seeks to avoid harm, usually to himself. The proper perspective, however, is an objective one, since evaluating the gravity of the act is a matter of community standards.<sup>85</sup>

The three tests defined by the Court can elicit some reservations. As shown above, the first two tests are tautologically interdependent since the conditions required to meet the first test inevitably imply that the second test is passed, and vice versa. In fact, both tests, imminent peril and the absence of a reasonable legal alternative, demand that the illegal act be unavoidable.<sup>86</sup> As a result, the first two tests can hardly be differentiated and have limited usefulness because they do not add independent criteria to the general requirement that compliance with the law be demonstrably impossible.

Secondly, some aspects of the proportionality test are questionable. The consideration of alternate harms connotes a choice between interests or values that cohabits uneasily with the requirement of normative involuntariness.<sup>87</sup> Moreover, the defence is not confined to situations where the

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<sup>84</sup> *Supra* note 72 at 252. The Court also specified that “the harm inflicted must be less than the harm sought to be avoided” (*ibid* at 253).

<sup>85</sup> *Supra* note 75 at paras 31, 34.

<sup>86</sup> See *Perka*, *supra* note 72 at 251-52.

<sup>87</sup> According to Jerome E Bickenbach:

[O]n the classical view, for the defence to succeed, the agent was required to prove that he had no choice, that the necessitous circumstances literally forced him to do what he did. Ironically, even [in] the first recorded case where the defence succeeded the classical requirement of involuntariness was not in evidence. ...

...

... But this cannot be the essence of the defence of necessity if it is to exist as a distinct and distinguishable defence. ...

...

harm caused by the illegal act is less than the harm that would have resulted from compliance with the law. Notably, it also extends to situations where the harms caused and avoided are comparable. Hence a person placed in a situation of necessity has some latitude to favour a personal conception of the greater good over the values expressed through general legislative rules.

In addition, the proportionality test fails to impose a requirement that the harm caused be minimized. If many different illegal actions offer potential responses to a situation of necessity, the person breaking the law can decide to act in the most harmful way as long as the harm caused is comparable to or less than the harm avoided. To a certain extent, the person breaking the law may choose to act in a manner that maximizes personal benefit or reduces personal harm to the detriment of other interests. This risk would be avoided if the person breaking the law had to minimize the harm caused. Such a requirement is not foreign to the law. For example, the requirement to minimize the harm caused in situations akin to necessity is codified in an exception to a statutory prohibition on the disposal of substances altering the environment in Canadian waters.<sup>88</sup> The exceptional disposal must be “carried out in a manner that minimizes, as far as possible, danger to human life and damage to the marine environment.”<sup>89</sup>

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... The intuition behind the defence is rather this: one is never required, when there is a[n] unavoidable contest between one’s interest and another’s, to treat another’s interests as inviolable. ... [I]f one ignores the elements of choice, the defence of necessity vanishes. Acting under necessity must be *deciding* to preserve an interest in a manner which sacrifices the interests of another (“The Defence of Necessity” (1983) 13:1 Can J Phil 79 at 85-86).

This view corresponds to the understanding of necessity in international law: see “1980 Draft Articles on State Responsibility”, *supra* note 49.

<sup>88</sup> According to the *Canadian Environmental Protection Act 1999* (SC 1999, c 33 [*Canadian EPA*]):

130. (1) Despite the other provisions of this Division, a person may dispose of a substance if

(a) it is necessary to avert a danger to human life or to a ship, an aircraft, a platform or another structure at sea in situations caused by stress of weather or in any other case that constitutes a danger to human life or threat to a ship, an aircraft, a platform or another structure at sea;

(b) the disposal appears to be the only way of averting the danger or threat; and

(c) it is probable that the damage caused by the disposal would be less than would otherwise occur.

<sup>89</sup> *Ibid.*, s 130(2).



Finally, the balancing of harms required by the proportionality test imbues the law with subjectivity by allowing the courts to second-guess the legislature and assess the relative merits of social policies underlying legislative prohibitions in the particular cases brought before them. In *Perka*, Justice Dickson stated that a defence of necessity relying on a utilitarian balancing between the benefits of obeying the law and the advantages of disobeying it would grant to the courts a role unfit for the judicial function, but he nevertheless proceeded to integrate the proportionality test into the defence.<sup>90</sup> Hence it can be argued that necessity allows violation of the law when courts exercise their moral judgement to the effect that the illegal action reflects society's values.<sup>91</sup>

In fact, this last reservation about necessity challenges the conceptual foundations of the defence, whether it is defined as an excuse or as a justification.<sup>92</sup> The majority of the Supreme Court in *Perka* decided to categorize necessity as an excuse rather than a justification in order to prevent the courts from making moral judgements about an illegal act.<sup>93</sup> According to the Court, if necessity was a justification, tribunals would have the capacity to decide that an illegal act is not wrongful, implying that non-conformity with the law would be right in certain situations. Necessity, conceived as a justification, was rejected because tribunals must not make choices between evils by exculpating persons who disobey statutory norms on the basis that contravention of the law is more useful or beneficial according to some higher social value.<sup>94</sup>

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<sup>90</sup> *Supra* note 72 at 247-48, 252.

<sup>91</sup> This was recognized by the Supreme Court in *Latimer*, *supra* note 75 at para 34. The quote from George Fletcher is also referred to in *Perka*, *supra* note 72 at 252.

<sup>92</sup> According to *Perka*:

Criminal theory recognizes a distinction between “justifications” and “excuses”. A “justification” challenges the wrongfulness of an action which technically constitutes a crime. ...

In contrast, an “excuse” concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not to be attributed to the actor (*supra* note 72 at 246).

On the distinction between justification and excuse, see Miriam Gur-Arye, “Should a Criminal Code Distinguish Between Justification and Excuse?” (1992) 5:2 Can JL & Jur 215; Berger, *supra* note 61.

<sup>93</sup> For legal policy considerations that support defining necessity as an excuse, see Khalid Ghanayim, “Excused Necessity in Western Legal Philosophy” (2006) 19:1 Can JL & Jur 31.

<sup>94</sup> See *Perka*, *supra* note 72 at 247-48. Despite the strong emphasis on the distinction between justification and excuse as a foundation for necessity, it is interesting to note that the appeal of a trial decision in which necessity was mistaken for a justification has been rejected on the grounds that the distinction made no difference on the facts of that

Yet the proportionality test functions exactly in this way since prevention of an evil greater than or comparable to that resulting from the violation of the law is absolved of criminal liability.<sup>95</sup> Justice Wilson's dissenting opinion in *Perka* emphasized that the maximization of social benefits implied in the utilitarian balancing of harms is a goal of legislative policy that does not properly belong to the judicial function.<sup>96</sup> Moreover, this balancing confuses the purpose of individual sentencing with standards of criminal liability, which must remain general.<sup>97</sup> The majority of the Court countered that categorizing necessity as an excuse preserves the objectivity of criminal law; necessary acts remain wrongful, but they are excusable in certain circumstances.<sup>98</sup> However, Justice Wilson pointed out that the normative involuntariness of a necessary action is assessed in the particular context of the accused's personal situation, thus undermining the principle of the "universality of rights", which requires "that all individuals whose actions are subjected to legal evaluation must be considered equal in standing."<sup>99</sup>

In summary, whether characterized as an excuse or a justification, necessity might reduce the criminal law's normative objectivity and increase legal flexibility in situations of imminent peril.<sup>100</sup> Necessity may also have the same effect with respect to the application of legal frameworks for the management of environmental crises and civil emergencies, since the defence can be raised against statutory or regulatory violations.<sup>101</sup> In particular, the proportionality test

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case: *Québec (Commission de la santé et de la sécurité du travail) c St-Jean-Baptiste (Municipalité de)*, 2007 QCCS 4953 at paras 9-13, [2007] RJDT 1501.

<sup>95</sup> See Paul B Schabas, "Justification, Excuse and the Defence of Necessity: A Comment on *Perka v. The Queen*" (1985) 27:3 Crim LQ 278 at 286 (writing that the test fashioned by Justice Dickson asks that courts in fact examine whether the accused's actions are justified in "an even broader way" than what Justice Wilson contemplated in her opinion).

<sup>96</sup> *Supra* note 72 at 274-75.

<sup>97</sup> See *ibid* at 272-73.

<sup>98</sup> See *ibid* at 248.

<sup>99</sup> *Ibid* at 270-71.

<sup>100</sup> For further reflections on this point, see Edward M Morgan, "The Defence of Necessity: Justification or Excuse?" (1984) 42:2 UT Fac L Rev 165.

<sup>101</sup> The common law defence of necessity applies to federal and provincial statutory offences: see *Criminal Code*, *supra* note 65, s 8(3); *Code of Penal Procedure*, RSQ c C-25.1, s 60; Edward L Greenspan, The Honourable Mr Justice Marc Rosenberg & Marie Henen, *Martin's Annual Criminal Code, 2012* (Aurora, Ont: Canada Law Book, 2011) at 37-38; John Swaigen, *Regulatory Offences In Canada: Liability and Defences* (Toronto: Carswell, 1992) at 196-98. The defence is applicable to strict and absolute liability offences: see Gisèle Côté-Harper, Pierre Rainville & Jean Turgeon, *Traité de droit pénal*

would seem to favour greater availability of the defence of necessity for violations of regulatory offences than for criminal offences. Since by definition public welfare offences are generally less serious than true crimes—both in the sense of being less clearly wrong morally, and in terms of the foreseeability of harm from committing an offence—there may more often be circumstances in which the harm to society resulting from excusing a breach of a regulation would be less than the harm the offender or others would suffer from compliance with the letter of the law.<sup>102</sup>

Doctrinal sources also suggest that a reduction in the normativity of the law due to the availability of the defence might hamper the application of legal frameworks for environmental protection.<sup>103</sup> More specifically, it is argued that the defence could weaken the environmental obligations of polluters because the proportionality test favours the avoidance of harms to persons and property that usually appear more definite and substantial than damage to the environment.<sup>104</sup>

### *B. The Application of Necessity*

A review of case law in matters related to environmental protection and natural resources management confirms the impact of the defence of necessity. Although instances where the defence is successful are rare, these cases demonstrate that necessity increases legal flexibility in the

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*canadien*, 4th ed (Cowansville, Que: Yvon Blais, 1998) at 1263. In *R. v. Accurate Industrial Waste Ltd* (1982), 11 CELR 172 (available on WL Can) (Ont Prov Ct) [*Accurate Industrial Waste*]), necessity is invoked against an absolute liability offence in an environmental matter. According to *R. v. Eckel*, “the defence of necessity has been found to excuse the commission of strict liability provincial statutory offences” (2007 SKPC 78 at para 16, 298 Sask R 197 [*Eckel*]).

<sup>102</sup> Swaigen, *supra* note 101 at 196.

<sup>103</sup> On necessity with respect to statutory offences in environmental law, see Jean Piette & Isabelle Fournier, “Le développement des moyens de défense en droit pénal de l’environnement” in Service de la formation permanente, Barreau du Québec, ed, *Développements récents en droit de l’environnement* (Cowansville, Que: Yvon Blais, 1994) 291 at 302-303; Marc-André Fabien, “Le droit pénal et réglementaire en matière environnementale” in Service de la formation permanente, Barreau du Québec, ed, *Développements récents en droit de l’environnement* (Cowansville, Que: Yvon Blais, 1991) 45 at 67-68; Elaine L Hughes, “The Actus Reus Defences” (1992) 2 J Envtl L & Prac 287.

<sup>104</sup> See Paule Halley, *Le droit pénal de l’environnement : L’interdiction de polluer* (Cowansville, Que: Yvon Blais, 2001) at 224-25. Necessity may further decrease the prescriptive character of prohibitions on altering the environment because polluters must only establish that there is an air of reality to the requirements of the defence being met, instead of the higher, due diligence burden of proof required for strict liability offences (*ibid* at 212-13).

application of statutory norms.<sup>105</sup> In *Boucher*, the accused cut a tree on her immovable property without the authorization required under munic-

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<sup>105</sup> One instance where the defence is successful in relation to environmental protection is discussed in Part III, below. Cases related to environmental matters where the defence is raised but is unsuccessful are more numerous: see *R v Superior Custom Trailers Ltd*, 2009 ONCJ 740 (available on WL Can) (where the accused conducted sandblasting operations without keeping the containment curtains of a blast hut closed as required by a certificate of approval issued under the *Environmental Protection Act* (RSO 1990, c E-19)); *R v Cote*, [2008] OJ No 1075 (QL) (Ct J) (where the accused was charged with unlawfully anchoring a structure to a lake bed owned by the Crown in contravention of the *Public Lands Act* (RSO 1990, c P-43) but argued that mooring was necessary to repair the structure and prevent it from sinking); *R v Coulter*, [2007] OJ No 2980 (QL) (Ct J) (where the defendant shot a bear cub on his property in order to protect his family from the cub's mother, thereby contravening a prohibition on hunting without a permit); *Eckel*, *supra* note 101 (where the accused hunted moose on private land without permission from the landowner, thereby committing an offence under a provincial wildlife regulation; the accused argued that the moose was initially shot and injured on public land but had to be dispatched on private land to comply with the statutory obligation to make all reasonable attempts to retrieve injured game); *R v Rhodes*, 2007 BCPC 1, 26 CELR (3d) 294 (where the defendant conducted earthworks in a riparian area and was charged with altering fish habitats in contravention of the *Fisheries Act* (RSC 1985, c F-14) but contended that the works were necessary to prevent risks related to bears and wildfires); *R v Tremblett* (2007), 281 Nfld & PEIR 282 (available on CanLII) (NL Prov Ct) (where the accused had not removed crab pots five months after closed time, thereby contravening the *Fisheries Act* (*supra* note 105), and argued that his vessel had become unseaworthy and that a combination of bad weather and high economic costs prevented compliance with the law); *Gasse c Québec (PG)*, 2006 QCCS 4624 (available on CanLII) (where the accused excavated a drainage ditch in order to protect his sugar shack from flooding damage due to melting snow, thereby contravening provisions for riparian area protection under the *Forest Act* (RSQ c F-4.1)); *Québec (PG) c Normandin (Ville de)*, 2004 CanLII 10162, 2004 CarswellQue 321 (WL Can) (CQ crim & pén) (where a municipality discharged snow at an unauthorized location, in contravention of the *Environment Quality Act* (RSQ c Q-2) and pleaded necessity based on its obligation to remove snow in order to ensure public safety and to avoid possible harm to citizens); *R v Pikowicz*, 2003 SKPC 120, 237 Sask R 191 (where the accused was charged with failure to remove untended fishing nets before closed time, thus leading to the destruction of trees in a provincial park, but pleaded necessity because the nets could not be removed before the water froze and a path to the nets had to be cleared later); *R v Churchbridge (Rural Municipality)*, 2001 CarswellSask 897 (WL Can), [2001] SJ No 826 (QL) (Prov Ct), *aff'd* on other grounds 2005 SKQB 524, 273 Sask R 29 (where the charges arose from ditching done to alleviate flooding problems due to beaver dams without the authorization required under *The Environmental Management and Protection Act*, 2002 (SS 2002, c E-10.21) and *The Critical Wildlife Habitat Protection Act* (SS 1983-84, c W-13.2, as amended by *The Critical Wildlife Habitat Protection Amendment Act*, 1992, SS 1992, c 66); the accused argued that the offences were necessary because of governmental passivity and long delays in the authorization process); *R v Broklebank* (2000), 336 AR 183 (available on CanLII) (Prov Ct) (where the accused was charged with shooting a cougar in a tree on his property without a hunting licence, in contravention of the *Wildlife Act* (RSA 2000, c W-10) and argued that he was motivated by the need to protect his daughter and his farm animals; this case can be compared to *R. v. Jones* ([1986] NWTR 263 (available on WL Can) (Sup Ct (TD))), where necessity would have been available to an accused sentenced for not affixing the hunting tag required by

ipal regulations.<sup>106</sup> The accused admitted to the offence, but she invoked necessity to excuse her actions in the circumstances. Specifically, given that a tree branch had fallen in front of her house, other branches were resting on the roof of the house, and the tree was heard creaking, she argued that the security of the her children was threatened. The court accepted the defence on the basis that the tree posed an imminent danger on account of the accused's situation, that the tree was cut on a Saturday when the municipality's offices were closed, and that damage to the accused's property as well as the threat to the security of her children outweighed any damage done to a tree. The court reached this conclusion despite the fact that the accused could have called the municipality at an emergency telephone number to obtain authorization to cut the tree without delay, could have pruned only the branches resting on the roof until authorization was obtained, and could have removed her children from the premises as her family did not yet reside at the house but would move in at a later date. In a similar decision rendered a year later by the same judge in *Nehme*, the defence was successful against charges of cutting four trees without municipal authorization, an action that was taken by the

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wildlife regulations on the hide of a bear that was shot when it attacked an unarmed person); *R v Canadian Pacific Ltd* (1994), 15 CELR (NS) 181 (available on WL Can) (Ont Ct J (Gen Div)) (where the accused was charged with managing toxic substances without a certificate of approval, in contravention of the *Environmental Protection Act* (*supra* note 105), but contended that the offence was necessary due to a conflict of laws between federal and provincial statutes); *R v Northwest Territories (Commissioner)*, [1994] NWTR 250, 15 CELR (NS) 85 (Sup Ct (TD)) (where necessity was unsuccessful against charges of unlawfully depositing a deleterious substance in water frequented by fish, in violation of the *Fisheries Act* (*supra* note 105), following the overflow of a town sewage lagoon into a river); *R v Aqua Clean Ships Ltd* (1994), 12 CELR (NS) 241 (available on WL Can) (BC Prov Ct) (where the accused argued that they were trying to avoid a health hazard when they contravened the *Canadian EPA* (*supra* note 88) by loading refuse into an incineration barge and dumping it at sea without the required permit); *R v Hall's Refrigeration Ltd* (1987), 4 FPR 247 (Nfld Prov Ct) (where ammonia was discharged in a river through sewers in contravention of the *Fisheries Act* (*supra* note 105), following a mechanical malfunction, and necessity might have been successful if the accused had been diligent in stopping the discharge); *Québec (PG) c Ferme du clan Gagnon Inc*, 1988 CarswellQue 1458 (WL Can), [1988] JQ No 2758 (QL) (CP) (where the accused spread manure over his fields during winter in contravention of regulations adopted under the *Environment Quality Act* (*supra* note 105), because the pump of his manure storage facility was broken and manure would have spilled from the storage facility before spring); *Accurate Industrial Waste*, *supra* note 101 (where a company transported industrial waste without the authorization required under the *Environmental Protection Act* (*supra* note 105) because it felt compelled to follow its principal's instructions).

<sup>106</sup> *Bois-des-Filions (Ville de) c Boucher*, 2008 CanLII 1474, 2008 CarswellQue 3209 (WL Can) (CM) [*Boucher* cited to CanLII].

accused after a branch fell from one of the trees on the fence enclosing the accused's immovable property.<sup>107</sup>

In *Skinner*, the accused faced charges of fishing at sea in a prohibited area and refusing to allow boarding of the fishing vessel by a fisheries officer in contravention of the *Fisheries Act*.<sup>108</sup> The charge of fishing in a prohibited area was dismissed on the grounds that the accused's activities were not covered by the definition of "fishing". The defence of necessity was successfully invoked in relation to the charge of obstructing the fisheries officer. The accused argued that the vessel could not stop because the nets were in tow and would have tangled with the propellers, thus threatening the vessel's integrity. The trial judge considered that entanglement of the nets in the propellers was a peril sufficient to accept the defence of necessity. However, a number of facts render the court's finding problematic. To begin with, the nets had been left in the water because the volume of fish caught exceeded the vessel's storage capacity. The accused should also have expected a request to stop from an inspection officer since this had already occurred on the same morning. Furthermore, cutting the nets adrift would arguably have allowed the vessel to comply with the orders.

In *Saint-Cajetan D'Armagh*, a municipality dredged a river without conducting the environmental impact assessment and obtaining the authorization certificate required under the *Environment Quality Act (EQA)*.<sup>109</sup> The river was dredged in 1986 to clear the bed of debris from a dike that broke in 1979 and caused yearly flooding in the spring. Various discussions between the municipality's mayor and governmental authorities from 1980 to 1986 failed to provide a definitive solution to the problem. However, significant damage to riparian properties caused by serious flooding in the spring of 1986 impelled the municipality to address the issue in order to avoid similar flooding in 1987. The court found that the municipality was faced with an emergency and had to act to avoid further damage to property in riparian areas. It also took into account public officials' duties to ensure public security and adequate watercourse maintenance. The court concluded that government authorities failed to act with diligence and thereby placed the municipality in an urgent situation that required action. This finding was made in spite of the fact that the munic-

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<sup>107</sup> See *Bois-des-Filions (Ville de) c Nehme*, [2009] RDI 749 (available on CanLII) (CM) [*Nehme*].

<sup>108</sup> See *R v Skinner* (1997), 147 Nfld & PEIR 350 (available on CanLII) (Nfld CA) [*Skinner*]; *Fisheries Act*, *supra* note 105.

<sup>109</sup> *R c Saint-Cajetan D'Armagh (Corporation municipale de la paroisse de)* (16 February 1990), Montmagny 300-27-001103-875 (CQ) [*Saint-Cajetan D'Armagh*]; *Environment Quality Act*, *supra* note 105.

ipality did not submit an application to obtain the authorization required under the *EQA* between 1979 and 1986 when flooding was a yearly occurrence, known and foreseeable to both the municipality and the riparian residents.

*Western Forest Industries* involved charges of emitting deleterious substances in a fish habitat in contravention of the *Fisheries Act*.<sup>110</sup> A dam reservoir was dredged annually, and its residue was usually dumped in the river downstream from the dam. In the events giving rise to the charges, however, a new dredging procedure had been implemented under the direct supervision of a fisheries officer: the dredged material was loaded onto trucks and disposed of at another location in order to protect fish habitats downstream. The discharge of deleterious substances occurred when a dump truck positioned precariously on the bank of the river had to have its contents off-loaded to prevent it from plunging into the river along with its driver. The court accepted that the discharge was necessary to preserve the security and health of the truck driver, but it mentioned that an experienced driver would not have attempted the manoeuvre that led to the discharge.<sup>111</sup>

Finally, in *Pootlass*, the accused were charged with fishing at sea a few hours after close time in violation of the *Fisheries Act*.<sup>112</sup> The court accepted the defence of necessity on the basis that the accused worked to the point of fatigue in order to retrieve their nets but were unable to do so in time, owing to inclement weather. The court recognized that the accused could have cut their nets adrift to avoid committing the offence, but it found that the general close time was set arbitrarily with respect to the particular circumstances of the accused. The court added that there was no general harm from the breach of the close time since retrieval of the fish and nets was considered to be in the public interest and did not derogate from the provision's primary purpose of preventing overfishing.

In summary, a study of the principles and criteria defining necessity in Canadian law suggests that the defence increases flexibility in the enforcement of statutory regimes for environmental protection and natural resources management. Cases where the defence has been used successfully point to an inventive reading of elements of the defence of necessity. Firstly, options other than breaking the law seem available in all cases

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<sup>110</sup> *R v Western Forest Industries Ltd* (1978), 9 CELR 57 (available on WL Can) (BC Prov Ct) [*Western Forest Industries*]; *Fisheries Act*, *supra* note 105.

<sup>111</sup> See *Western Forest Industries*, *supra* note 110 at 61. In his reasons, Justice Giles expressed his personal opinion in extraordinary terms on the values underpinning the relevant provisions for the protection of the aquatic environment (*ibid* at 62-63).

<sup>112</sup> See *R v Pootlass* (1977), 1 CR (3d) 378 (available on WL Can) (BC Prov Ct) [*Pootlass*]; *Fisheries Act*, *supra* note 105.

other than when the life or health of an individual is threatened.<sup>113</sup> Secondly, the situations of necessity are foreseeable and easily avoidable—or at least not imminently urgent—in many cases.<sup>114</sup> Thirdly, the harms avoided are generally of an economic nature.<sup>115</sup> Fourthly, the defence prompts judicial assessments of the values and rationales underpinning legislative provisions in light of the facts brought before the courts.<sup>116</sup> Given these conclusions, it appears that necessity tends to be successfully invoked beyond the strict boundaries of its scope as defined by the Supreme Court. This, in turn, reduces the law’s normative power more than one would expect on a narrower application of the doctrine.

### III. Dissolving the Law’s Normativity

The remaining issue is to determine whether the reduction in legal normativity as a result of the application of necessity critically affects the law’s functioning as a prescriptive framework for social interactions in the context of an environmental crisis or emergency. Part III thus examines the factors that may increase the impact of necessity during such crises or emergencies. It also assesses the likelihood of environmental activists successfully raising the defence.

#### *A. Necessity and Environmental Crisis*

Three factors may render the law flexible to such an extent that positive norms could lose their prescriptive value for all practical purposes in a situation of environmental emergency or crisis. Firstly, the increased unpredictability of climatic variations could multiply the occasions in which the defence may be invoked to excuse violations of statutory regimes. For example, extreme rainfall is expected to become more violent and frequent than in the past, leading to the emergence of new flood pat-

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<sup>113</sup> The exception being *Western Forest Industries*, *supra* note 110.

<sup>114</sup> See e.g. *Skinner*, *supra* note 108; *Saint-Cajetan D’Armagh*, *supra* note 109; *Québec (PG) c St-Séverin (Municipalité de)*, 2005 CanLII 32092, 2005 CarswellQue 9274 (WL Can) (CQ) [*St-Séverin* cited to CanLII].

<sup>115</sup> See *Boucher*, *supra* note 106; *Nehme*, *supra* note 107; *Skinner*, *supra* note 108; *Saint-Cajetan D’Armagh*, *supra* note 109; *Pootlass*, *supra* note 112; *St-Séverin*, *supra* note 114. In this respect, a comment on the “defence of ‘impossibility or necessity’” in *R. v. Toronto Refiners & Smelters Ltd* ((1976), 6 Can Envtl LN (4th) 83 at 93 (available on WL Can) (Ont Prov Ct (Crim Div))) appears singularly relevant: “the case would appear to fall within the general rule that where it is impossible to carry on an undertaking in accordance with the law the undertaking must be abandoned rather than the law be violated. ... Purely economic difficulties involved in complying with the law have never been accepted as an excuse for non-compliance.”

<sup>116</sup> See *Pootlass*, *supra* note 112; *St-Séverin*, *supra* note 114.



terns as well as higher risks of flooding damage.<sup>117</sup> For populations located in flood areas, unprecedented measures at odds with existing laws may be required in order to cope with unforeseen dangers and risks to security or life. In other words, the heightened prevalence of extreme weather events such as floods, ice storms, and hurricanes may increase the likelihood that individuals or communities will face imminent perils, resulting in more instances where the defence of necessity could be invoked.

Secondly, the defence may be applied more widely, owing to a tendency toward greater regulation of civil emergencies and crises. For example, following recommendations from two governmental commissions investigating the 1996 Saguenay floods and the 1998 ice storm, the *Civil Protection Act (CPA)* was adopted in 2001 in Quebec to provide a management framework for extreme weather events and civil emergencies.<sup>118</sup> The purpose of the *CPA* is protection “against disasters, through mitigation measures, emergency response planning, response operations ... and recovery operations” when “an event caused by a natural phenomenon, a technological failure or an accident, whether or not resulting from human intervention ... causes serious harm to persons or substantial damage to property and requires unusual action on the part of the affected community.”<sup>119</sup> Under the *CPA*, the occurrence of a disaster can trigger local or national states of emergency under which government authorities acquire the power to make requisition orders directing the conduct of citizens.<sup>120</sup> The *CPA* creates offences in order to penalize persons who do not follow emergency plans or orders.<sup>121</sup> New statutory provisions backed by penal sanctions, such as those found in the *CPA*, apply to previously unregulat-

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<sup>117</sup> See Allen et al, *supra* note 13 at 10-12; Donald S Lemmen et al, eds, *From Impacts to Adaptation: Canada in a Changing Climate, 2007* (Ottawa: Natural Resources Canada, 2008) at 77-78.

<sup>118</sup> *Civil Protection Act*, RSQ c S-2.3. See also Quebec, Ministère de la Sécurité publique, *La sécurité civile : Une responsabilité partagée* (Quebec: Gouvernement du Québec, 2002) at 4-7, 9; Quebec, *Rapport : Commission scientifique et technique sur la gestion des barrages* (Montreal: Publications du Québec, 1997); Quebec, Commission scientifique et technique chargée d'analyser les événements relatifs à la tempête de verglas survenue du 5 au 9 janvier 1998, *Pour affronter l'imprévisible : Les enseignements du verglas de 98* (Rapport de la Commission scientifique et technique chargée d'analyser les événements relatifs à la tempête de verglas survenue du 5 au 9 janvier 1998) (Quebec: Publications du Québec, 1999). The federal government enacted a law on emergency response in 2007: *Emergency Management Act*, SC 2007, c 15.

<sup>119</sup> *Civil Protection Act*, *supra* note 118, ss 1, 2(1). The disasters expressly mentioned are “flood, earthquake, ground movement, explosion, toxic emission or pandemic” (*ibid.*, s 2(1)).

<sup>120</sup> *Ibid.*, ss 42, 47, 54, 72, 83, 84, 88, 90, 93.

<sup>121</sup> *Ibid.*, s 128(2).

ed perilous situations where necessity is particularly relevant, creating more possibilities for the invocation of the defence.

Thirdly and most importantly, necessity may successfully be invoked to defend those who commit illegal acts of civil disobedience to protect the environment in the context of extreme climate events. The fact that necessity could excuse political acts directed against the social order that the law is meant to protect is particularly significant because it could indicate a threshold in the continuum between legal certainty and flexibility. Beyond that threshold, the law may become incapable of performing its function and ensuring its own normative power.

### *B. Necessity and Environmental Activism*

The notion that necessity may successfully be used to defend those who commit illegal acts of civil disobedience to protect the environment is based on two considerations. Firstly, the defence has already been successful in a case where the law was broken for the purpose of protecting the environment. In *St-Séverin*, a municipality committed an offence when it installed waterworks and sewers without the ministerial authorization required under the *EQA*.<sup>122</sup> The court found that the authorization process was delayed by the obstruction of a civil servant and accepted the defence of necessity on the basis that the municipality's aim was to stop contaminant discharges into the aquatic environment in conformity with the primary purpose of the *EQA*.<sup>123</sup>

In the court's view, the imminent peril arose from the urgency of completing the sewer works before winter because of the sensitivity of the particular aquatic environment, the impossibility of performing the work in cold temperatures, as well as a possible increase in costs and the potential loss of a significant portion of government funding if the works were delayed for a year. The urgency of the situation was compounded, in the opinion of the court, by unexpected delays in the authorization process and the need to extend the work over a longer period to avoid shutting all municipal roads at the same time. The court did not undertake a detailed analysis of whether there was an absence of a legal alternative, even though a mandatory injunction could have been filed to request that the administrative authority use its discretionary power to grant or refuse an authorization for the works. However, the judgment is clear on the municipality meeting the proportionality requirement. Indeed, the court found that the works caused no damage to the environment because they com-

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<sup>122</sup> *Supra* note 114; *Environment Quality Act*, *supra* note 105.

<sup>123</sup> *St-Séverin*, *supra* note 114 at para 18.

plied with the standards and specifications provided by the legislative framework for environmental protection established under the *EQA*.<sup>124</sup>

There is a second consideration that points to the possibility of environmental activists successfully invoking necessity for acts of civil disobedience: such acts, especially in situations of environmental emergency, can objectively correspond to the requirements of necessity defined by the Supreme Court.<sup>125</sup> For example, necessity could be invoked in the hypothetical climate change–crisis scenario described in the Introduction: catastrophic peril is imminent; reasonable alternatives do not exist in the current political context, given that past efforts have failed to curb global warming and that the Canadian government opposes attempts to constrain GES emissions; and the balance of harms favours the destruction of road vehicles to avoid the collapse of the earth’s ecosystem and the suffering of billions.

However, an adequate correspondence between the requirements of the defence and specific factual situations of civil disobedience does not guarantee that courts would exculpate so-called eco-terrorists. The defence’s success in *St-Séverin*, despite the absence of imminent peril and the presence of legal alternatives, is likely due in part to the fact that the accused was a municipal authority conducting public interest works in a manner corresponding to the court’s conception of the greater good. The issue becomes more delicate when private citizens engage in civil disobedience and necessity is raised to defend illegal actions undertaken to protect the environment against legally authorized destructive activities that ultimately cause ecocide but that are socially accepted because they create jobs and generate prosperity for shareholders in the short term.<sup>126</sup>

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<sup>124</sup> *Ibid* at paras 20-21.

<sup>125</sup> Doctrinal sources in other jurisdictions note the reluctance of courts to allow the defence but present the same argument whereby a consistent application of the elements of the defence would allow many of those who commit civil disobedience to invoke it: see Steven M Bauer & Peter J Eckerstom, “The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience” (1987) 39:5 *Stan L Rev* 1173.

<sup>126</sup> See *Slocan Forest Products Ltd. v. Doe* (2000 BCSC 150 at para 34 (available on CanLII)), in which Justice McEwan cited the following submission from counsel for the Attorney General of British Columbia:

*Civil disobedience* presents a unique challenge for the justice system, as it involves the actions of normally law-abiding citizens seeking to change public policy by illegal means or interfere with the lawful interests of other citizens. Widespread reporting of acts of civil disobedience makes these actions increasingly attractive for a small minority who choose not to respect the normal democratic process. It is the role of the Attorney General to ensure the rule of law is preserved and the will of the majority prevails against the illegal acts of a few.

Canadian courts have traditionally been averse to arguments related to civil disobedience and generally consider that civic-minded citizens trying to bring about social change by disobeying the law must be sanctioned, however commendable their goals and peaceful their actions may be.<sup>127</sup> The case law indicates that civil disobedience is not recognized as a defence at law but that necessity may be invoked to excuse acts of civil disobedience.<sup>128</sup> Although the possibility of successfully raising the defence in cases of civil disobedience by environmental activists exists in principle, the actual acceptance of necessity by courts as a defence for illegal acts motivated by political aims faces significant hurdles.

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<sup>127</sup> In *R. v. Pratt and Stevenson* ([1990] 3 CNLR 120 at 126 (available on WL Can) (Sask Prov Ct)), the court stated that “[t]he adoption of civil disobedience methods in the promotion of a just cause does not transform illegal actions into legal ones. Certainly, the motives and idealism of those who commit an act of civil disobedience are to be weighed in the balance in regard to any penal sanctions; however, no honourable purpose or just cause justifies the breaking of an acceptable and reasonable law.” To the same effect, see *Hamilton (City of) v Loucks* (2003), 232 DLR (4th) 362 at para 55, 40 CPC (5th) 368 (Ont Sup Ct). See also *Montréal (Ville de) c Caron*, 1992 CarswellQue 2024 (WL Can) at paras 15-27, [1992] JQ No 2370 (QL) (CM).

<sup>128</sup> See *MacMillan Bloedel Ltd v Simpson*, 1993 CanLII 2529 at 11, 1993 CarswellBC 2868 (WL Can) (BC Sup Ct) [*MacMillan Bloedel 1993*]. In *MacMillan Bloedel Ltd. v Simpson* ([1994] 7 WWR 259 at para 6, 92 BCLR (2nd) 1 (BCCA)). Chief Justice McEachern stated: “Recently, public protest has sometimes been self-dignified as ‘civil disobedience,’ which has never prevailed as a lawful defence against proven breaches of the law.” He then went on to quote approvingly one of the sentencing judges at the court below: “everyone, anywhere, who commits an act of civil disobedience should know that for every act of civil disobedience there is a potential penalty at law, and, presumably, if you commit the act of civil disobedience, you are prepared to take the penalty” (*ibid* at para 17). Finally, he wrote:

[T]he political principle of civil disobedience ... contemplates that a public and, as far as possible, passive act of resistance to a law that is perceived to be unjust, coupled with an embracing of the appropriate punishment for the offence, is consistent with the procedures for bringing about democratic change, and when properly understood indicates the highest respect for the rule of law as a benign and necessary part of the structure of a just and democratic society. Acting in accordance with the principle of civil disobedience is not a defence in law. But surely it must be a relevant factor in assessing moral culpability for the offences. It will not always be a mitigating factor. Particularly in the case of repeat offenders, it may be an aggravating factor. But the fact that the act is motivated, not by self-interest, but by a desire on the part of the offenders to promote their perception of the public good, however inappropriately insistent, must affect the assessment of moral culpability (*ibid* at para 126).

In *R c Bouchard*, [1999] RJQ 2165 at 2179 (available on WL Can) (CM) [*Bouchard*], civil disobedience is likened to a justification in terms of a greater good and dismissed, among other reasons, on the grounds that the Supreme Court in *Perka* understood necessity as an excuse.

A review of the case law shows no instance where the defence of necessity has been successful in matters related to environmental activism in Canada. Furthermore, in one case, a court placed an additional restriction on the application of the defence. In *MacMillan Bloedel*, environmental activists protesting logging activities on Vancouver Island disobeyed a court order restraining them from continuing to hinder logging operations.<sup>129</sup> The activists invoked necessity because they believed that their actions would “break the chain of ecological destruction that would eventually ravage and destroy the planet.”<sup>130</sup> Following *Perka*, the British Columbia Court of Appeal found that necessity was not available because the accused had a reasonable legal alternative since they could have applied to have the order set aside by the courts. However, the judge added: “I do not believe the defence of necessity can ever operate to avoid a peril that is lawfully authorized by the law.”<sup>131</sup> The court therefore decided that necessity could not excuse illegal acts committed against the logging company because the company had an existing legal right to log the areas in question.

The basis for this additional restriction on the defence of necessity is debatable. It appears to be at odds with the Supreme Court’s reasoning in *Perka*, which directs the entire focus of judicial analysis to the involuntary nature of the necessary act to the exclusion of the legal context in which it is committed.<sup>132</sup> Moreover, the additional restriction may preclude invocation of the defence in cases where the defence should be successful. One

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<sup>129</sup> *MacMillan Bloedel CA*, *supra* note 26.

<sup>130</sup> *MacMillan Bloedel v Simpson*, 1994 CanLII 738 at 30, 1994 CarswellBC 2281 (WL Can) (Sup Ct).

<sup>131</sup> *MacMillan Bloedel CA*, *supra* note 26 at 385.

<sup>132</sup> In *Perka*, Justice Dickson stated:

The question, as I have said, is never whether what the accused has done is wrongful. It is always and by definition, wrongful. The question is whether what he has done is voluntary. Except in the limited sense I intend to discuss below, I do not see the relevance of the legality or even the morality of what the accused was doing at the time the emergency arose to this question of the voluntariness of the subsequent conduct.

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... Insofar as the accused’s “fault” reflects on the moral quality of the action taken to meet the emergency, it is irrelevant to the issue of the availability of the defence on the same basis as the illegality or immorality of the actions preceding the emergency are irrelevant. If this fault is capable of attracting criminal or civil liability in its own right, the culprit should be appropriately sanctioned. I see no basis, however, for “transferring” such liability to the actions taken in response to the emergency, especially where to do so would result in attaching criminal consequences on the basis of negligence to actions which would otherwise be excused (*supra* note 72 at 254-55).

can imagine a situation where the operation of an industrial process authorized under a number of statutory regimes, including environmental legislation, poses a sudden and lethal threat to a human life following an accidental malfunction or mistake, and the only way to prevent a tragedy is to halt the industrial process by causing some damage to the machinery. Here the additional requirement imposed by the court in *MacMillan Bloedel* would render necessity unavailable against charges of mischief in a situation falling squarely within the defence's intended scope of application. The requirement would even invalidate the defence in cases where it has been accepted by the courts. In *Skinner*, the perilous situation was entirely covered by a statutory regime. Each of the three elements generating the peril independently or in conjunction was positively authorized by the law, including the casting of nets, the operation of a fishing vessel, and the fisheries officer's power to make an order to stop fishing vessels.<sup>133</sup> According to the principle established in *MacMillan Bloedel*, necessity would not be available to defend the refusal to stop the vessel, because the peril was authorized by the law. In this context, the additional requirement imposed by the court in *MacMillan Bloedel* for a successful defence may not be considered a substantial obstacle to the application of the defence in cases of civil disobedience.

A more significant difficulty concerning the use of necessity by environmental activists is the notion that the democratic process is a form of legal alternative that can serve to alter policies, laws, and administrative decisions detrimental to the environment.<sup>134</sup> An essential premise behind this idea is that Canadian democracy grants all citizens the capacity to influence political decisions and administrative processes in meaningful ways, thereby precluding the materialization of a situation of emergency where there is no legal way out.<sup>135</sup> The courts recognize that democratic

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<sup>133</sup> See *Skinner*, *supra* note 108; *Atlantic Fishery Regulations, 1985*, SOR/86-21, ss 13ff (on the requirements for registration and licences for fishing vessels); *Fishery (General) Regulations*, SOR/93-53, ss 41, 43 (1993) (on the power to stop fishing vessels).

<sup>134</sup> This is a difficulty with necessity also noted in other jurisdictions: see Shaun P Martin, "The Radical Necessity Defense" (2005) 73:4 U Cin L Rev 1527 at 1566-67 (which notes that the legal system in the United States has demonstrated extreme and escalating antipathy towards the common law doctrine of necessity due to the its "radical nature" and especially its "potential for transformative social change").

<sup>135</sup> In *MacMillan Bloedel 1993*, civil disobedience is regarded as unjustified in the context of Canadian democracy:

Some contend the defendants are following a time-honoured path of so-called civil disobedience. They use the non-violent behaviour of Mahatma Gandhi as one of their models. It is not an apt comparison. In the first place, Mr. Gandhi lived in a colonial state. He had no opportunity to change the laws democratically. British rulers controlled the levers of power. Disobedi-

policy-making may sometimes exclude public participation, that the democratic process requires compromises, and that no single view can prevail unadulterated in the political arena.<sup>136</sup> Yet the failure of a group to persuade others of the rightness of its cause or to impose particular governmental or administrative decisions in specific cases implies the success of another equally valid viewpoint. Democracy preserves the rights of minorities to refine their unsuccessful political proposals and to try again to gather the support of a majority, adhesion, or conformity through various channels at different levels.

Setting up these arguments in opposition to civil disobedience implies that the Canadian democratic system is preferable to any other political system, is truly responsive to all inputs, and that participants in the democratic process make thoughtful decisions based on rational considerations.<sup>137</sup> Ultimately, this conception of democracy has an important procedural aspect that relies heavily on the rule of law as its central principle. In *Drainville*, Justice Fournier, quoting a speech given by one of his colleagues, linked the rule of law and civil disobedience as follows:

It is one of the fundamental principles of our democratic society that no one is above the law, and everyone is equal before the law. The rule of law is based on the fact that our current laws represent the will of the majority of the people. If a law no longer represents the will of the majority, then it should be changed but until it is changed by lawful means, it must be obeyed. Defiance of the law is not the answer.

He then went on in his own words:

Is “civil disobedience” or even “passive resistance” such a small infraction, or such a minimal use of force, that the “actus reus” ought to be overlooked? Should such activity as obstructing a road be justified by some sort of approval by the courts on the grounds that the

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ence of colonial-made laws was the last and only resort for Mr. Ghandi [*sic*] and his followers.

But here, the elected representatives of the people of this province made the law allowing MacMillan Bloedel Ltd. to log the timber in Clayoquot Sound. It was not decreed by some colonial administrator. Unlike Mr. Ghandi [*sic*], the defendants have the right to be involved in the political process. In Canada the people control the levers of power. Democracy allows anyone to try and persuade others as to the rightness of their cause. If they succeed, the law can be changed (*supra* note 128 at 12).

<sup>136</sup> See generally *ibid* (for the political principles that underlie the courts’ reticence with civil disobedience).

<sup>137</sup> See *ibid* at 3, 5. The only political alternatives to democracy are generally portrayed by the courts as various types of discredited autocratic regimes or anarchy (see e.g. *ibid* at 3). To similar effect, see *R v Bridges* (1989), 61 DLR (4th) 154 at 156-57, 48 CCC (3d) 545 (BC Sup Ct).

motives are good and noble, or that the situation is really a “political” one? In light of the existing circumstances of this case, where it seems a just and appropriate political solution appears to have been found, this might be a tempting proposition. But certainly that would be tantamount to a declaration that, in some instances, at the discretion of some judge, and irrespective of the “rule of law,” there are times when “the ends justify the means.” Even in this case, where it appears that the government of Ontario may be about to change its policies and perhaps admit to a previous error in judgment, where it appears that a memorandum of agreement termed a viable “political solution” is now in place and that those protesters may have been morally right, surely, the process of legitimizing previously unlawful acts after the fact is an inherently dangerous concept which is simply not acceptable as an alternative to the “rule of law.”<sup>138</sup>

Civil disobedience thus identifies the point in the interplay between legal certainty and flexibility beyond which any compromise in the strict adherence to the rule of law is unacceptable. However, strict adherence to the rule of law also imposes the objective and correct application of the requirements of necessity defined by the Supreme Court, even if this results in excusing acts of civil disobedience.<sup>139</sup> The use of necessity to defend illegal acts that have a political dimension and are committed to avoid an imminent peril cannot be systematically rejected irrespective of their particular factual context simply because of the general availability of political alternatives in a democracy.<sup>140</sup> In a situation where a political

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<sup>138</sup> *R v Drainville* (1991), [1992] 3 CNLR 44 at 55-56, 5 CR (4th) 38 (Ont Ct J (Prov Div)) [*Drainville*].

<sup>139</sup> The fact that necessity can, in principle, authorize, within a system, acts directed against that system is at the heart of the defence’s subversive nature. Martin writes:

[T]he necessity defense, notwithstanding its seemingly innocuous nature, articulates a profoundly revolutionary principle, both as a jurisprudential doctrine and as a vehicle for social change. Indeed, in a variety of respects, the necessity defense attacks the very foundation of American capitalist and democratic structures. The radical nature of this legal principle is not merely doctrinal. The necessity defense also provides a practical means of radical change; moreover, it does so within the confines of existing political institutions (*supra* note 134 at 1529).

See also *ibid* at 1545-48.

<sup>140</sup> The finding that necessity is unavailable would breach the stare decisis rule if the only way to avoid a sudden and immediate peril corresponding to the criteria established by the Supreme Court is to vote in a national election although the next national election cannot actually take place before the peril materializes. For an overview of the rules that determine when precedents can be overturned (themselves an integral part of the rule of law), see *Ontario (AG) v Fraser*, 2011 SCC 20 at paras 52-60, 129-51, [2011] 2 SCR 3. The Court’s comments about striking a balance between correcting errors, on the one hand, and certainty and consistency, on the other hand, are particularly inter-



or administrative decision taken in accordance with the law creates or provokes an imminent peril that corresponds to the criteria established by the Supreme Court, the courts will be called on to objectively assess whether the individual who broke the law to avert the peril had a reasonable opportunity of achieving the same result through legal means, including participation in a decision-making process such as public consultation or voting.<sup>141</sup> If an act of civil disobedience is contrary to the law but avoids a greater harm in the face of an imminent peril, the act must be excused in the absence of reasonable legal alternatives.

The case law provides examples of political alternatives pursued by groups engaged in civil disobedience in instances where necessity is raised.<sup>142</sup> *Lanthier* is particularly relevant as it concerns environmental

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esting in the context of the dialectical relationship between legal flexibility and certainty during an environmental crisis:

The values of certainty and consistency, which are served by adherence to precedent, are important to the orderly administration of justice in a system based upon the rule of law. Therefore, judges must proceed with caution when deciding to overrule a prior decision. ...

What the courts are doing when deciding whether to overrule a precedent is a balancing exercise between two important values: correctness and certainty. A court must ask whether it is preferable to adhere to an incorrect precedent to maintain certainty or to correct the error (*ibid* at paras 132-33).

Overturing *Perka* (*supra* note 72) and *Latimer* (*supra* note 75) to reject the defence in the fictive example given in the Introduction without following the rules on overturning might also be considered a step towards the dissolution of the law's normativity in times of environmental crisis.

<sup>141</sup> In *Western Forest Industries* (*supra* note 110), the operations to remove dredging material from the dam site were conducted under direct instructions from a fisheries officer; the peril thus arose as a result of an administrative decision. With respect to political decisions constituting perils, *MacMillan Bloedel 1993* (*supra* note 128 at 8) mentions that at times, "democratic governments pursue long term policies that do much harm" and that are "later ... found to be misguided." On the accused's capacity to avoid a peril, see, above, the text accompanying note 80.

<sup>142</sup> In *Bouchard* (*supra* note 128 at 2168, 2178), activists were charged with obstruction of police officers in the course of a demonstration protesting secret international negotiations surrounding the *Multilateral Agreement on Investment* in Montreal. They raised necessity on the basis that the agreement posed an extreme threat to democracy in Canada and was scheduled to come into force within six months. The accused used a wide array of legal means to turn public opinion and political processes against the agreement at the national and international levels, including distributing leaflets, publishing books and articles in newspapers and journals, participating in and organizing public debates, organizing peaceful and legal demonstrations, and engaging directly in discussions with governments and elected representatives. These acts were to no avail, and therefore, the activists decided to adopt illegal methods. The principal motive for the court's rejection of necessity was the voluntary nature of the illegal acts. However, the court also mentioned that the peril was not immediate since the negotiations, which had started three years before the illegal demonstration, would have gone on for six

activism. In that case, environmental activists were charged with obstructing peace officers during a protest to prevent the opening of a magnesium production plant that would discharge organochloride compounds into the environment, and at trial, they invoked necessity as a defence.<sup>143</sup> Prior to the protest where the illegal acts took place, the activists had attempted to block the plant through a variety of means, including public information meetings, peaceful demonstrations, and meetings with representatives of the company and the provincial government.<sup>144</sup> Despite the activists' attempts to dissuade the government, a decree was issued authorizing the construction and operation of the production plant. The administrative process had been rushed so that the authorization would be granted before an international treaty banning organochlorides was signed by Canada.<sup>145</sup> Furthermore, the decree was issued before background assessments designed to inform the government's decision were finalized. Moreover, the conditions and specifications imposed by the decree for the regulation of the plant's release of organochlorides ignored official recommendations from a consulting government body that had urged caution.

Because injunctive recourses were too onerous for them, the activists decided to organize a protest as a measure of last resort in order to obstruct the workers' access to the plant on the day of its opening. The activists considered the protest a success since it drew heavy media coverage and was relatively peaceful. However, a few protesters resisted arrest by the police and faced obstruction charges. Necessity was invoked to excuse the illegal acts committed to avoid the acute danger to human life and health generated by the release of organochlorides. The court rejected the defence on the basis that, since the act of resisting arrest does not address a peril, the accused obviously had the alternative not to break the law.<sup>146</sup> The court mentioned that its findings might have been different if the offence had been related to the hindering of the plant's operations.<sup>147</sup> In such a case, in the court's view, a reasonable doubt might have been

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more months before the agreement's eventual coming into force. The court also found that nothing supported the belief that the agreement would be illegally adopted and irregularly passed into national law. Finally, it held that courts could always be called upon to compel respect for the accused's rights.

<sup>143</sup> *Lanthier, supra* note 26. Organochlorides, which include dioxins and biphenyls, are persistent organic pollutants linked to toxic effects on humans.

<sup>144</sup> *Ibid* at paras 19-20.

<sup>145</sup> The treaty in question is the *Stockholm Convention on Persistent Organic Pollutants*, 22 May 2001, 2256 UNTS 119, 40 ILM 532 (entered into force 17 May 2004, accession by Canada 23 May 2001).

<sup>146</sup> *Lanthier, supra* note 26 at paras 46, 49.

<sup>147</sup> *Ibid* at para 42.

raised as to commission of the offence, at least in respect of the imminent peril and proportionality requirements of the defence.<sup>148</sup> Indeed, the court appeared convinced that organochlorides are acutely toxic to humans and the environment, describing in detail the international scientific consensus recommending a zero-tolerance policy toward them.<sup>149</sup> However, the court gave no clue as to what its finding would have been on the “absence of legal alternatives” requirement in a factual context in which the activists had exhausted all options to influence the government’s decision.

In summary, necessity may excuse illegal acts committed by environmental activists if the situation corresponds to the applicable requirements, although such a defence would face significant hurdles. Despite these hurdles, necessity as defined in Canadian law may be easier to invoke for this purpose than in other jurisdictions where the requirements of the defence are more stringent. For instance, many jurisdictions have a causality requirement, whereby necessity is available only if the accused’s illegal action could reasonably be expected to avert the harm.<sup>150</sup> The absence of such a requirement in Canada significantly lightens the accused’s burden, especially in environmental matters, where connections between causes and effects are often difficult to prove because of long time lapses and the myriad variables affecting environmental processes.<sup>151</sup> In a jurisdiction where the additional requirement of causality exists, it may be almost impossible to raise necessity to defend the actions described in the example in the Introduction because such acts cannot be expected to negate the harm of global warming from GHG emissions from innumerable sources on a planetary scale. In Canada, the defence simply demands that the accused place evidence sufficient to raise the issue that the situation created by external forces was so emergent that failure to act could endanger life or health and that compliance with the law was impossible up-

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<sup>148</sup> *Ibid* at para 44.

<sup>149</sup> *Ibid* at paras 26-31, 33, 36.

<sup>150</sup> Martin (*supra* note 134 at 1579, n 233) lists all the American jurisdictions that have adopted the causality requirement. Interestingly, the Supreme Court in *Perka* (*supra* note 72 at 255) examined the defence’s various limitations in American criminal law but did not include the causality requirement in the defence’s Canadian incarnation. It has been suggested that there may be a “personal limitation” whereby an individual would be unable to invoke the defence of necessity if acting on behalf of a third party who was facing clear and imminent danger: Paul Guy, “*R. v. Latimer* and the Defence of Necessity: One Step Forward, Two Steps Back” (2003) 66 Sask L Rev 485 at 501. However, the case law does not seem to take into account this possible limitation. For example, a threat to the security of the accused’s children can motivate an illegal act exculpated by necessity: *Boucher*, *supra* note 106; *Nehme*, *supra* note 107.

<sup>151</sup> Nevertheless, implicit in the court’s reasoning in *Lanthier* (*supra* note 26) is the idea that the normative involuntariness requirement of the defence dictates that there be some causal link between the illegal act, the perilous situation, and the evaded harm.

on a reasonable view of the facts.<sup>152</sup> Given that there is no onus of proof on the accused, and given the application of the modified objective standard of proof, the relation between scientific causality and imminence may be considered a minor issue that does not warrant much attention in Canada, contrary to the international law context.<sup>153</sup>

## Conclusion

Necessity knows no law. This proverb encapsulates the fundamental tension between legal frameworks that seek to normalize social behaviour and urgent action in response to unpredictable events. The defence of necessity provides a mechanism to accommodate this tension and fosters the law's adaptation to unforeseen circumstances. In this article, necessity has served as the fulcrum for a reflection on legal flexibility and resilience in the context of climate change and environmental crisis.

A study of the conceptual foundations and requirements of the defence indicates that necessity increases the discretion of judges to make subjective assessments in the application of the law. Case law also shows that necessity augments legal flexibility. In cases involving charges related to environmental protection and natural resource management, courts have applied the defence beyond its intended scope of application, for example, where the accused has broken the law to protect an economic interest. As a result, the law's resilience to socio-ecological changes is enhanced.

However, in the context of environmental crisis, several factors that create conditions favourable to the successful invocation of the defence could also render the law flexible to such an extent that positive norms might lose their prescriptive value. The law's extension to previously unregulated civil emergencies through statutory frameworks backed by penal sanctions, as well as the increased unpredictability and violence of extreme weather events, multiplies the occasions in which the defence could be raised.

Yet the availability of necessity to environmental activists is the principal factor that could critically diminish the law's prescriptive value and the resilience of normative frameworks. As science progresses in its ability to demonstrate that continued trends in environmental degradation push ecosystems to the brink of destruction, statutory frameworks for the sustainable management and protection of natural resources appear in-

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<sup>152</sup> *Perka*, *supra* note 72 at 257. If there is no air of reality to the three requirements of necessity, the trial judge will not leave the defence with the jury: see *Latimer*, *supra* note 75 at para 36.

<sup>153</sup> See text accompanying notes 56-59, above.

creasingly futile, and circumstances conform evermore closely to factual situations where the objective application of necessity's requirements could result in the successful defence of illegal acts of civil disobedience committed against polluters. In other words, necessity may ultimately offer a defence against the application and enforcement of legal frameworks that, de facto, authorize catastrophic environmental destruction.

The possibility that necessity could exculpate political acts directed against the social order that the law should protect marks a point where the law becomes ineffective and loses the capacity to perform its function: this is the point where the application of legal rules undermines conformity with legal rules. Hence, a study of necessity in a context of environmental crisis lays bare the fundamental tension between a positivist conception of the rule of law and socio-political values, revealing subjective notions of the social good often veiled behind the neutral facade of legal regimes. From the perspective of environmental activists, insistence on the preservation of increasingly discredited legal frameworks for environmental management, despite their apparent failure, evidences the rule of law's subordination to power structures serving particular interests.<sup>154</sup> If the rule of law becomes an instrument of political power, necessity evens the battlefield by sheathing political opposition in countervailing legalism.

In this context, a tribunal trying "eco-terrorists" for illegal acts committed to protect the environment in circumstances conforming to the defence of necessity will always uphold the rule of law, whatever its decision is: rejecting the defence protects the existing legal order, while accepting the defence fosters the objective implementation of legal rules. Equally, the court's verdict will inevitably manifest a political choice: siding with values that are generally accepted by society and that underpin the existing legal order, or fostering a conception of the rule of law where the judiciary acts as a neutral arbiter that applies formal rules to resolve a conflict between divergent but equal interests by accepting the defence of necessity when its requirements are met.

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<sup>154</sup> See "DeChristopher", *supra* note 25.