

The 2020 Wilson Moot Problem
Claire Plainview v. Ontario (Minister of the Environment)

Claire Plainview is a 34-year-old Indigenous woman who lives on Turtle Creek Reserve No. 3. The reserve is situated near the village of Spragge, in the North Shore Township of Algoma District, Ontario. In October 2018, Claire challenged a decision of the Ministry of the Environment that authorized emissions of the pollutant benzene above the usual regulatory standard, on the basis that the decision infringed her rights to life, liberty, security of the person, and equality under sections 7 and 15 of the Canadian *Charter of Rights and Freedoms*.

On October 10, 2018, the Director of the Ministry of the Environment (the “Director”) exercised her discretion to approve a site-specific emissions standard for a rubber and latex products facility operated by VulCAN Corporation (“VulCAN”). The Ministry’s decision was made pursuant to section 35 of the *Air Pollution – Local Air Quality Regulations*¹ (“Regulations”) under the Ontario *Environmental Protection Act*² (“EPA”). Section 35 of the Regulations provides in part:³

35(1) The Director may approve a request under section 32 and set a site-specific standard for the contaminant that is the subject of the request if,

(a) the person making the request has complied with sections 32 to 34.1; and

(b) the Director is of the opinion that,

(i) the person making the request cannot comply with section 20 with respect to the standard set out in Schedule 3 for the contaminant for the averaging period specified under paragraph 0.1 of subsection 33 (1) because,

(A) it is not technically feasible for the person to comply, in the case of a person who is relying on any paragraph of subsection 32 (1), or

(B) it is not economically feasible for the person to comply, in the case of a person who is relying on a paragraph of subsection 32 (1) other than paragraph 4,

(ii) the difference between the standard set out in Schedule 3 for the contaminant for the averaging period specified in paragraph 0.1 of subsection 33 (1) and the site-specific standard set by the Director for the

¹ O. Reg. 419/05.

² R.S.O. 1990, c. E.19.

³ For the purposes of the Wilson Moot, the application of the Ontario *Environmental Bill of Rights*, 1993, S.O. 1993, c. 28 should be ignored.

contaminant is the minimum difference necessary to enable the person to comply with section 20 with respect to the contaminant, and

(iii) there is no public interest reason sufficient to require the denial of the request.

The Director provided the following written reasons for her decision (the “Decision”):

The Ministry received a request dated July 9, 2018 for site-specific standards for benzene emissions under section 32 of O. Reg. 419/05 from VulCAN Corporation’s Spragge facility. If VulCAN’s request is approved, VulCAN will be required to meet the site-specific standards by implementing its action plan. Once implemented, the company expects to achieve a 63 per cent reduction of benzene concentrations from the facility to the surrounding community.

As of July 1, 2016, the benzene air standard in Schedule 3 of O. Reg. 419/05 is 0.45 micrograms per cubic metre ($\mu\text{g}/\text{m}^3$) (annual average).

Based on the information provided, the current maximum level of benzene at VulCAN is up to $3.0 \mu\text{g}/\text{m}^3$. The Ministry has determined that it is feasible for VulCAN to achieve a maximum of $1.9 \mu\text{g}/\text{m}^3$ for benzene by the end of 2018. This site-specific standard will expire after 5 years (on October 9, 2023). As a result, the site-specific standard for benzene is set as follows: (i) $3.0 \mu\text{g}/\text{m}^3$ from the date of the approval to December 31, 2018, and (ii) $1.9 \mu\text{g}/\text{m}^3$ from January 1, 2019 to October 9, 2023.

The Ministry acknowledges the concerns raised by other stakeholders about the impact on local communities and allowing VulCAN to exceed the regulatory standards given the cumulative effect of emissions from other facilities in the area. However, the approval of the site-specific standard is for a limited timeframe, during which the company is taking actions to reduce air emissions as much as possible with technology-based solutions and best practices. This approach ensures industries are improving their performance to remain economically viable, and at the same time decreasing emissions to better protect the environment.

No administrative appeal exists from the Director’s decision pertaining to this instrument.

Shortly after the Decision was issued, Claire brought a judicial review application before the Divisional Court branch of the Ontario Superior Court of Justice, seeking:

- (a) a declaration that the Director’s Decision infringes her rights to life, liberty and security of the person under section 7 of the Canadian *Charter of Rights and Freedoms* (the “*Charter*”);
- (b) a declaration that the Director’s Decision infringes her equality rights under section 15 of the *Charter*;

- (c) a declaration that the infringements of sections 7 and 15 of the *Charter* do not represent reasonable limitations on these rights; and
- (d) orders under section 24(1) of the *Charter* setting aside the Director's Decision and awarding damages to vindicate her *Charter* rights.

Claire's application was heard before a panel of three judges of the Divisional Court in September 2018. The Court accepted the following facts:

1. Since 1974, a large-scale rubber and latex products factory, operated by VulCAN, has operated in the village of Spragge, on a property less than 5 km from the Turtle Creek Reserve.
2. In 1994, a second rubber factory, owned by Galvanex Industries, also began production in Spragge.
3. The production of rubber involves the use of benzene as a base chemical and industrial solvent, and each of the facilities releases amounts of benzene as an airborne contaminant. Residents of Spragge and the Turtle Creek Reserve have long expressed concerns about the contaminants released by these twin facilities.
4. Claire is a member of the Turtle Creek First Nation, a signatory to the Robinson Huron Treaty of 1850, and was born on the Turtle Creek Reserve.
5. There are approximately 8,000 members of the Turtle Creek First Nation, approximately 5,800 of whom reside on the Reserve.
6. Claire was diagnosed with asthma as a child and has experienced frequent respiratory issues throughout her lifetime, though she characterizes her symptoms as "mild".
7. In 2003 Claire left the Reserve to pursue a degree in nursing at Laurentian University in Sudbury, Ontario. After completing her degree, Claire returned to the reserve and took a job at a local health centre. Apart from her four years of post-secondary studies, Claire has lived her whole life on the Reserve.
8. In December 2006, during her fourth year of university, Claire's mother, Anne Plainview, was diagnosed with acute myeloid leukaemia. Claire's mother passed away as a result of her battle with leukaemia in March 2009 at the age of 57.
9. Although she continues to live an active life and work full time, Claire experiences frequent unexplained migraines and spells of dizziness.
10. In October 2014, VulCAN commenced construction of extensive upgrades to its factory to modernize its facilities and increase its production volume by 35%. Environmental Compliance Approval was granted under the EPA for the construction of these upgrades on the basis that technological improvements and upgrades would allow VulCAN to greatly increase productivity with a minimal increase in benzene emissions.

11. In March 2018, the upgrades to the VulCAN facility were completed, and production of rubber began at the VulCAN facility's new increased capacity. Shortly thereafter, VulCAN determined that the vapour collection and air pollution control installed as part of its facility upgrades were not functioning as anticipated, causing excess benzene emissions.

12. In July 2018, VulCAN requested a site-specific standard for benzene emission at its facility, in order to meet its production demands, under s. 32 of the Regulations.

13. VulCAN held a public meeting in order to consult directly with interested parties within the local community. The Ministry also provided open public consultation on the request for 60 days, from July 31, 2018 to September 30, 2018, during which period it held in-person meetings with stakeholders and accepted written submissions.

14. Through these processes, Claire and other members of the Turtle Creek First Nation and local community voiced their concerns, including that the cumulative effect of the emissions from VulCAN and Galvanex Industries' facilities should be considered in the assessment, together with the health impact thereof on nearby communities.

15. The site-specific standard to be reached by VulCAN by January 1, 2019 permits volumes of emissions in excess of 4 times greater than the Schedule 3 Standard for benzene in the Regulations.

16. Members of the Turtle Creek First Nation have a life expectancy well below the national average of 79.8 years for men, and 83.9 years for women, at 69.3 years for men and 75.8 years for women.

17. In her affidavit in support of her application, Claire stated in part:

Turtle Creek is my identity. To others the solution might seem simple: pack up and leave. They might say there is nothing here for us except hardship. I once thought the same way, and wanted to leave the place where I was born and everything it represented behind. It did not take long to realize that this land is my home. It is the home of my ancestors and our community. It has always been our home, and it always will be. My people have a strong connection to our land, our community, and our environment. Our culture and heritage are here. So is what's left of our way of life.

And despite our connection to our lands and our nationhood, we are refused control over our lands and over our health and well-being. Instead of meeting us nation to nation, the government only receives our input as so-called "stakeholders". The government then decides what it wants to do and tells us that it is a reasonable result. And meanwhile the pollution continues to seep into every aspect of our lives.

I cannot and should not be expected to rely upon the word of companies when they say they are doing their best to limit how much they poison us. I cannot and

should not be expected to rely on the word of the government, which claims to act in the public interest, yet grants these companies permission to make the pollution worse.

18. Brian Alder, the elected chief of the Turtle Creek Nation, also swore an affidavit in support of Claire's application. Chief Alder stated in part:

I admire what Claire is trying to do. Her concerns and experiences are similar to that of so many other of our people. My wife and I had two children who were stillborn before our beautiful son was born. He is seven years old now. For seven years I have feared every day that he too will bear the burden of growing up in a poisoned land. It is a fear that many of us know.

I have counselled many members of our community who feel depressed and anxious about this pollution; it is difficult to express just how much those concerns and fears affect our everyday lives on this land. We deserve better. Our children deserve better.

19. Expert opinion evidence from Dr. Maya Satyajit, a professor at the University of British Columbia's School of Population and Public Health, was accepted by the Court, as follows:

(a) Communities living within a 10 km radius of heavily industrialized areas are subject to an increased risk of adverse mental and physical health consequences; within this radius, risk of adverse effects continues to increase with proximity.

(b) Additionally, communities that are subjected to heavy pollution often face disproportionate economic impacts, including through reduced human welfare, lost activities (e.g. recreation), lost production and consumption of market goods and services. These come in the form of reduced revenue for businesses, increased costs for producers and increased costs for consumers.

(c) Disparities in social determinants of health (which include average income, education levels, and housing quality) are recognized in Canada as having had significant adverse effects on both on- and off-reserve Indigenous populations.

(d) A database maintained by Indigenous and Northern Affairs Canada identifies 1,090 active contaminated sites on 335 First Nation reserves – over half of the First Nations in Canada – which are largely the results of industrial pollution.

(e) Community health surveys of the Turtle Creek First Nation show that its residents suffer higher rates of asthma, birth defects, miscarriages and stillbirths, skin rashes, chronic headaches, high blood pressure, and cancer, compared to the general population.

(f) Data also indicates that the Turtle Creek First Nation has experienced a skewed birth ratio, with a 2:1 ratio of female to male births over the past 30 years.

(g) In its 2019 report on Canadian cancer statistics, the Canadian Cancer society projected baseline rates of new cases of leukaemia, non-Hodgkin's lymphoma, and multiple myeloma for 2019 at 16.4, 24.2, and 7.7 per 100,000 Canadians, respectively. By contrast, the rates of these illnesses among residents of the Turtle Creek over the last decade extrapolate to 20, 25.8, and 9.1 per 100,000 people, respectively.

20. Dr. Satyajit opined that Claire and other members of the Turtle Creek First Nation have suffered long-standing physical and psychological effects of the pollution by the nearby VulCAN and Galvanex Industries plants. In Dr. Satyajit's opinion, the cumulative pollutant impact of those plants has severely impacted quality of life on the Turtle Creek Reserve.

21. On cross-examination, Dr. Satyajit acknowledged that she could not say with certainty that benzene is responsible for all of the observed impacts upon the Turtle Creek First Nation, and that there were other environmental and demographic factors that could account, in part, for some of these effects. However, she maintained that "the constellation of physical and psychosocial health effects on this community is striking."

22. Anton Block, an environmental scientist with expertise in industrial pollutants at the University of New Brunswick, also swore an affidavit in support of Claire's application. Block's evidence included that:

(a) Benzene is a simple cyclic organic compound. It is a volatile, clear, flammable, colourless liquid at room temperature, and has an aromatic odour.

(b) Health Canada considers benzene to be a "non-threshold toxicant," i.e., a substance for which there is believed to be some chance of adverse effects at any level of exposure.

(c) Similarly, exposure to benzene is considered a major public health concern by the World Health Organization, which released a report in 2010 on exposure to benzene and its health impacts (the "WHO Report"). The WHO Report notes that benzene is carcinogenic to humans, and no safe level of exposure can be recommended.

(d) Benzene is known to cause acute myeloid leukaemia (acute non-lymphocytic leukaemia), and there is limited evidence that benzene may also cause acute and chronic lymphocytic leukaemia, non-Hodgkin's lymphoma and multiple myeloma. This risk increases exponentially with greater exposure.

(e) Benzene is also known to be fetotoxic in some organisms and to cause specific chromosomal aberrations in humans who experience occupational exposure.

23. On cross examination, Dr. Block conceded that due to its volatility, benzene degrades rapidly, and concentrations of benzene do not remain in the environment in air, soil, or water for long periods of time. He also acknowledged that many manufacturing activities involve some degree of benzene emissions, and that it would not be realistic to completely eliminate benzene emissions in many industrial applications.

24. Block also admitted that the likelihood that VulCAN's site-specific standard would increase the risk of cancer in an individual (using the standard published in the Regulations as a baseline) was extremely low.

25. Cindy Poitier, Director of the Ministry of the Environment, filed an affidavit on behalf of the Ministry. Ms. Poitier provided evidence that:

(a) The Ministry regulates air contaminants to protect communities who live close to these sources. It aims to limit substances released into air that can affect human health and the environment and requires industries to operate responsibly under a set of rules that are publicly transparent.

(b) The entire scheme of the EPA and the Regulations recognizes that many economically productive activities have environmental impacts and that it may be impossible to absolutely eliminate pollution without crippling industries that are critical to Ontario's economy, particularly in the manufacturing sector.

(c) Ontario's regulatory approach to improving local air quality starts with setting science-based standards to protect human health and the environment. While these standards may not always be achievable due to limitations in technology or economic factors, the goal is to reduce emissions through continuous improvement and best available technologies and practices over time.

(d) Facilities that are not able to meet an air standard may request a site-specific standard or apply to register a technical standard, if published. If granted a site-specific standard, the facility is required to invest in the best available technologies and practices to reduce air emissions and improve air quality over time. A facility that meets its site-specific standard complies with the regulation.

(e) These standards encourage new investments in modern air pollution controls with the goal of minimizing air pollution over time. The Ministry closely oversees the progress of facilities with site-specific standards to ensure they are achieving the desired results.

(f) Economic issues may also form part of the basis for granting a request for a site-specific air standard. Attracting and maintaining investment in Ontario is an underlying policy goal of the provincial government, which should be considered in Ministry decisions if reconcilable with the other objectives of the EPA. Ms. Poitier is aware of at least three instances in the last three decades in which companies, faced with what they considered to be unduly restrictive environmental regulation, have relocated production facilities from Canada to other jurisdictions.

(g) VulCAN employs approximately 900 people at its Spragge factory, 275 of whom are residents of the Turtle Creek Reserve.

(h) Ms. Poitier was satisfied, based on the evidence put forward by VulCAN with its application, that VulCAN would have eliminated at least 50 jobs at its Spragge facility, had

the Ministry declined to grant a site-specific standard and VulCAN been forced to decrease its production to meet the standard in the Regulations.

(i) When a request for a site-specific standard is made, the Ministry conducts broad public consultations, including with local communities and other stakeholders. This includes stakeholders being provided with information about the nature of the request, the technical and economic reasons for the request, and an opportunity for stakeholders to make submissions to the Director.

(j) The comments provided by the applicant and other members of the Turtle Creek First Nation about the impact of pollution on their daily lives were received and duly considered in the process of reaching the Ministry's decision. Ms. Poitier noted that a small number of members of the Turtle Creek First Nation supported VulCAN's request, citing the economic benefits to the area.

(k) A decision to impose a site-specific standard that required the gradual reduction of emissions over time, and emissions in excess of the Schedule 3 Standard for a finite period, was determined to be the best means of balancing all parties' competing interests.

The Divisional Court granted Claire's application in January 2019. Writing for the panel, Justice Florés de Aguirre held in part:

While I am satisfied that the EPA and its Regulations are capable of being applied in a manner consistent with respect for *Charter* rights, I am less convinced that the Director's discretion was in fact exercised in this manner in this case. The essential question I must consider is whether the Director reasonably considered and balanced the applicant's *Charter* rights against the goals of the legislative scheme. Further, the *Charter* and the rights it enshrines should be interpreted consistently with Canada's international obligations.

Indigenous people have disproportionately borne the environmental brunt of Canada's industrial activity over the last 100 years. In this case a vulnerable and historically marginalized community, subjected to decades of contamination, has been put to further harm through the issuance of a site-specific standard to allow yet more pollution. I conclude that the Director's decision violates Ms. Plainview's right to equality under s. 15 of the *Charter* on the basis of her Indigenous status. I therefore need not consider her alternative argument that residence on-reserve should be recognized as an analogous ground.

The Ministry argues that the applicant is seeking a positive right under s. 7 of the *Charter*. While there is no positive obligation on the government to provide a clean environment, once it has decided to legislate in this area it must comply with the *Charter*. The Director's decision fails to account for the cumulative physical and psychological effects of pollutants on the applicant and exposes her to harm that in my view qualifies as grossly disproportionate.

I accept that the Ministry's stated purposes are pressing and substantial. Nevertheless, I cannot agree that the infringements of the applicant's *Charter* rights represent a reasonable and proportionate balance in light of the applicable statutory objectives. Based on the evidence before the Court, the decision of the Director represents an unreasonable limitation of the applicant's rights under ss. 7 and 15 of the *Charter*.

The Ministry appealed the Divisional Court's decision, and in September 2019, a majority of the Court of Appeal for Ontario allowed the Ministry's appeal. Writing for himself and Justice Joseph Keaton, Justice Oh Dae-su held:

While I agree with the court below that Ms. Plainview is a member of a vulnerable and historically disadvantaged group, the applicant has failed to demonstrate that the Director's Decision is discriminatory. Similarly, Ms. Plainview has failed to show that the Director's Decision infringes her rights to life, liberty, or security of the person. While the presence of pollution in the Spragge area, from various sources, might cumulatively have such effects, it is an error to attribute that impact to the Director's Decision.

The Decision does not permit VulCAN to increase its pollutant emissions *ad infinitum*. Nor was the Director in a position to end pollution of the Turtle Creek First Nation in the context of VulCAN's application under the EPA. Instead, the Decision represents a tailored solution recognizing the technological and economic limitations of the VulCAN facility. Regardless of the Director's decision, VulCAN was permitted to continue production at its facility and emit benzene at the rate prescribed by Regulations. The *Charter* cannot be invoked against the actions of private polluters, and that in my view is the true thrust of Ms. Plainview's litigation.

Even if I had found that the Decision unjustifiably infringed Ms. Plainview's *Charter* rights, this is not an instance in which damages should be awarded under s. 24(1) of the *Charter* and I would have declined to do so. Ms. Plainview has not suffered any injury or other personal harm as a result of the Decision that is properly compensated with money.

Justice Cléo Victoire dissented, largely adopting the reasons of Justice de Aguirre, and adding:

I agree with the court below that the Decision perpetuates discrimination against Ms. Plainview as an Indigenous person. Had it been necessary to do so, I would be prepared to accept that on-reserve status constitutes an analogous ground, as it is an immutable characteristic of the applicant which could only be changed at great personal cost. For Ms. Plainview, the choice to live off-reserve to avoid the environmental contamination of her ancestral homeland is inconsistent with her cultural and personal identity and no choice at all.

I find the infringement of Ms. Plainview's s. 15 right is not saved by section 1. Further, I believe that simply overturning the Director's decision is not enough. The *Charter* rights of the applicant demand to be vindicated. Accordingly, and while recognizing damages cannot hope to compensate for the losses she has suffered, I would award Ms. Plainview *Charter* damages in the amount of \$15,000.

While it is unnecessary to consider s. 7 in light of my findings above, I do not share the Ministry's concern about the so-called "positive right" being sought by the applicant. The courts of Canada have never entirely foreclosed the possibility that s. 7 may encompass positive rights. Given the exceptional public importance of a clean environment, this strikes me as a case in which it may be appropriate to recognize such a right.

Claire has been granted leave to appeal the Court of Appeal's judgment to the High Court of the Dominion of Canada on the following issues:

- a) Does the Director's Decision infringe Claire Plainview's equality rights under section 15 of the *Charter*?
- b) Does the Director's Decision infringe Claire Plainview's rights to life, liberty and security of the person under section 7 of the *Charter*?
- c) If the answer to either of questions 1 or 2 is "yes", is the infringement a reasonable limitation on these rights?
- d) If an infringement is found and cannot be upheld as a reasonable limitation on Claire Plainview's *Charter* rights, is this an appropriate case for an award of damages pursuant to section 24(1) of the *Charter*?⁴

⁴ Note that the High Court of the Dominion of Canada will not consider any legislative or adjudicative facts other than those found by Justice de Aguirre.