IN THE HIGH COURT OF THE DOMINION OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN

CLAIRE PLAINVIEW

Appellant

\- AND -

ONTARIO (MINISTER OF THE ENVIRONMENT)

Respondent

FACTUM OF THE APPELLANT

Team 11
Counsel for the Appellant

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PART I – OVERVIEW

[1] One hundred and seventy years ago, the Robinson Huron Treaty set aside Turtle Creek Reserve No. 3 [the "Reserve"] for the use and benefit of the Turtle Creek First Nation. This land has been the home of Claire Plainview's ancestors, it is now her home, and it will be the home of her future descendants.

[2] Less than 5km away, a rubber and latex plant owned by VulCAN Corporation ["VulCAN"] opened in 1974. The plant releases a dangerous chemical by-product called benzene into the air. As benzene is a known carcinogen, the Ministry of the Environment [the "Ministry"] limits benzene emission levels under the *Environmental Protection Act* [the "*EPA*"].

[3] In 2018, the Ministry's Director [the "Director"] granted VulCAN an exemption [the "Decision"] from the *EPA*, weighing economic considerations more heavily than the negative impacts on the Turtle Creek First Nation. The Decision permits the factory to emit over four times more benzene than the regulated limit over the next five years. Each breath Ms. Plainview now takes in her home territory contains more than four times the concentration of benzene, a known cause of the exact cancer that killed her mother.

[4] More than half of the First Nations reserves in Canada are contaminated by industrial pollution. The Decision Ms. Plainview is challenging must be viewed in light of the broader narrative of state decisions impacting Indigenous people, where economic interests have historically taken top priority. This pattern must not continue.

[5] The Decision breaches ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* [the "*Charter*"] by forcing Ms. Plainview to suffer adverse health effects in order to live on her treaty land. This Decision is unreasonable and must be set aside. The Divisional Court's award of *Charter* damages should be restored.

PART II – FACTS

The history of pollution and disadvantage on the Reserve

[6] In 1850, before the founding of Canada, the Reserve was created when the Crown and the Turtle Creek First Nation signed the Robinson Huron Treaty. The culture and heritage of the Turtle Creek First Nation are rooted in this land. The Appellant, Claire Plainview, is a member of the Turtle Creek First Nation and has called the Reserve home her entire life. This land is more than her place of residence, it is a core part of her identity.

Official Problem, Wilson Moot 2020 at paras 4, 7, 17 [Official Problem].

[7] Over 120 years later, VulCAN Corporation built a rubber factory in Spragge, Ontario. In 1994, Galvanex Industries [“Galvanex”] opened a second rubber factory in Spragge. Pursuant to the *EPA*, both companies require the government’s permission to operate. There are no other populated areas within 25km. Communities within a 10km radius of heavily-industrialized areas face higher risks of severe mental and physical health consequences. Within this radius, the risks increase with proximity. VulCAN sits less than 5km from the Reserve, making the Turtle Creek First Nation more vulnerable to these harms.

Official Problem, *supra* para 6 at paras 1-2, 19(a).
Clarifications to the 2020 Wilson Moot Problem at para 7 [Clarifications].
Environmental Protection Act, RSO 1990, c E19, s. 9(1) [*EPA*].

[8] The placement of heavy industry near the Turtle Creek First Nation’s reserve is part of a systemic problem. More than half of First Nations reserves contain active contaminated sites, for which industrial pollution can largely be blamed.

Official Problem, *supra* para 6 at para 19(d).

The Decision to authorize heightened benzene emissions

[9] To produce rubber, VulCAN and Galvanex emit a carcinogen called benzene. Both Health Canada and the World Health Organization [the "WHO"] consider benzene dangerous to humans at any level of exposure.

Official Problem, *supra* para 6 at paras 3, 22(b, c).

[10] The Ministry regulates benzene emissions under the *EPA*. The benzene air standard in Schedule 3 of the *Air Pollution – Local Air Quality Regulations* [the "Regulations"] limits annual emissions to 0.45 micrograms per cubic metre ($\mu g/m^3$). Until 2018, VulCAN and Galvanex complied with this standard.

Official Problem, *supra* para 6 at 1-2, at paras 10-12.
Clarifications, *supra* para 7 at para 7.
O Reg 419/05, Schedule 3 [*Regulations*].

[11] In October 2014, VulCAN decided to upgrade its facility to raise production by 35%. After completing the upgrades in March 2018, VulCAN began manufacturing at this increased capacity and discovered that the plant's newly-installed vapour collection and air pollution control did not function as anticipated. As a result, benzene emissions soared to 3.0 $\mu g/m^3$.

Official Problem, *supra* para 6 at 2, at paras 10-11.

[12] In July 2018, VulCAN requested an exemption from the Director. On October 10, 2018, the Director granted VulCAN's request, issuing an exemption under s. 35(1) of the Regulations. The Decision authorizes VulCAN to emit benzene at 3.0 $\mu g/m^3$ from the date of approval until December 31, 2018, and subsequently allows 1.9 $\mu g/m^3$ until October 9, 2023. For five years, the exemption allows VulCAN to release benzene at levels over four times greater than the standard set out in the Regulations.

Official Problem, *supra* para 6 at 2, at paras 12, 15.
Regulations, supra para 10 at s 35.

[13] In her reasons for the Decision, the Director highlighted that the exemption would result in a "63 per cent reduction of benzene concentrations from the facility to the surrounding community." This statement merely describes the reduction from 3.0 $\mu g/m^3$ to 1.9 $\mu g/m^3$. The benzene emission levels authorized by the Director are well above the regulated standard.

Official Problem, *supra* para 6 at 2.

[14] In her affidavit, the Director also explained that she considered economic issues in making her decision. She claimed that her decision "ensures industries are improving their performance to remain economically viable." However, the Director knew of only three companies in the last 30 years that relocated outside of Canada due to what they considered to be restrictive environmental regulation. She further noted that VulCAN would have needed to reduce its workforce by 5.5% in order to comply with the regulated standard.

Official Problem, *supra* para 6 at 2, at para 25(f-h).

[15] Moreover, there are known negative economic impacts flowing from industrial pollution. Dr. Maya Satyajit provided evidence that heavy industrial pollution subjects nearby communities to reduced revenue for businesses, increased costs for producers and consumers, and lost activities such as recreation.

Official Problem, *supra* para 7 at para 19(b).

[16] While the Decision refers to "concerns raised by other stakeholders," and general consultations did take place, the Director never mentioned the *Charter* rights at stake given the Turtle Creek First Nation's unique connection to their reserve land.

Official Problem, *supra* para 6 at 2, at paras 13-14, 25.
Canadian Charter of Rights and Freedoms, s 7, 15(1), being Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act, 1982* (UK), 1982, c.11, ss. 7, 15 [*Charter*].

The Decision increases benzene's negative effects on the Reserve

[17] The WHO considers benzene a "major public health concern" for good reason. Science has established that benzene causes acute myeloid leukaemia, the very cancer that claimed the life of Ms. Plainview's mother. It has also been linked to acute and chronic lymphocytic leukaemia, non-Hodgkin's lymphoma and multiple myeloma. The risk of developing these cancers increases exponentially with more exposure to benzene. Compared to people living elsewhere, Turtle Creek residents suffer approximately 22% more new cases of leukemia, 6.7% more new cases of non-Hodgkin's lymphoma, and 18.2% more new cases of multiple myeloma. The lives of Turtle Creek members end close to a decade earlier than their non-Indigenous counterparts.

Official Problem, *supra* para 6 at paras 8, 16, 19(g), 22(d).

[18] The magnitude of the risk of contracting cancer is not the same as the severity of that risk. Anton Block gave evidence that the probability of a specific individual contracting cancer as a direct result of the Director's decision is "extremely low." While the chance that any one individual will develop cancer is low, there are 5,800 people living on the Reserve and so the risks posed for this community as a whole remain severe.

Official Problem, *supra* para 6 at paras 5, 24.

[19] In addition to the cancer risk posed by benzene, industrial pollution produces a range of other negative health effects. Chief Brian Alder noted that many Turtle Creek residents feel depressed and anxious about the high levels of pollution and harbour fears that they and their children are being forced to inhabit a poisoned land. Community health surveys of the Reserve reveal 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 average

Canadian. Dr. Maya Satyajit said that "the constellation of physical and psychosocial health effects on this community is striking."

Official Problem, *supra* para 6 at paras 16, 18, 19(e), 21.

Procedural history

[20] Ms. Plainview challenged the Decision in October 2018. Justice Florés de Aguirre of the Divisional Court granted her application in January 2019. Justice de Aguirre held that the Decision infringed Ms. Plainview's s. 15 right to equality on the basis of Indigenous status and that the Director exposed her to grossly disproportionate harm in violation of s. 7. He concluded that the Decision failed to reasonably balance Ms. Plainview's ss. 7 and 15 rights against the goals of the legislative scheme and awarded Ms. Plainview $30,000 in *Charter* damages.

Official Problem, *supra* para 6 at 1, 8-9.
Clarifications, *supra* para 7 at para 8.

[21] The Court of Appeal for Ontario reversed the decision and removed the award of damages. Justice Oh Dae-su, writing for the majority, concluded that Ms. Plainview failed to show that the Decision infringed ss. 7 or 15. Justice Cléo Victoire dissented, holding that the Decision unreasonably limited ss. 7 and 15. She largely adopted Justice de Aguirre's reasons, but would have awarded $15,000 in *Charter* damages. Justice Victoire added that she would have accepted on-reserve status as an analogous ground.

Official Problem, *supra* para 6 at 9-10.

PART III – STATEMENT OF POINTS IN ISSUE

[22] This appeal raises the following constitutional issues, which the Appellant answers as summarized below:

1. Does the Decision infringe s. 7 of the *Charter*?

Yes. The Decision limits Ms. Plainview's right to life, liberty, and security of the person in a manner that is grossly disproportionate and overbroad. The Decision also fails to accord with the proposed principle of the Honour of the Crown.

2. Does the Decision infringe Ms. Plainview's right to equality under s. 15 of the *Charter*?

Yes. The Decision infringes Ms. Plainview's s. 15(1) rights by drawing a distinction that perpetuates disadvantage based on the enumerated ground of Aboriginal ethnicity and the analogous ground of Aboriginality-residence. Given the unique connection that the members of the Turtle Creek First Nation have to the reserve land, the increase in benzene pollution caused by the Director's decision perpetuates arbitrary disadvantage.

3. Does the Decision reasonably balance Ms. Plainview's ss. 7 and 15 rights against the statutory objectives?

No. The Director unreasonably balanced the violations of Ms. Plainview's ss. 7 and 15 *Charter* rights against the statutory objectives, resulting in an unreasonable decision.

4. Is this an appropriate case for an award of *Charter* damages under s. 24(1)?

Yes. An award of damages is appropriate in this case under s. 24(1) of the *Charter*. An award of damages would meet the purposes of compensation, vindication, and deterrence and the government cannot show that countervailing considerations defeat these functional considerations. The quantum of $30,000 awarded by the Divisional Court should be restored.

PART IV – ARGUMENT

Issue 1: The Director's decision infringes s. 7 of the *Charter*

[23] The Decision to authorize more than four times the regulated amount of benzene for half a decade interferes with Ms. Plainview's right to life and security of the person by exposing her to a higher risk of adverse health consequences. It also limits her liberty by interfering with her fundamental life choice to live on the Reserve. The deprivations are grossly disproportionate, overbroad, and fail to uphold the proposed principle of the Honour of the Crown.

The Decision is causally connected to the deprivation of Ms. Plainview's s. 7 rights

[24] The Director's decision to authorize a 400% spike in emissions triggers s. 7. Section 7 is infringed where there is "a sufficient causal connection" between the state action and the harm faced by the claimant (*Bedford*). A sufficient causal connection "does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities" (*Bedford*).

> *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 75-76, 89, [2011] 3 SCR 134 [*Bedford*].
> Official Problem, *supra* para 6 at 2.

[25] In *PHS*, the Supreme Court unanimously held that the Minister's decision to stop allowing the operation of a safe injection site engaged a drug user's rights to life and security of the person. In that case, the drug users were already at risk of harm given the dangers associated with drug injections. However, s. 7 guarded against the Minister's decision to make the situation even more dangerous. In the case at bar, the Director's decision makes the situation more dangerous for Ms. Plainview and her community. Thus, as in *PHS*, causation is established.

> *Canada (Attorney General) v PHS Community Services Society,* 2011 SCC 44 at paras 91-92, 126, [2011] 3 SCR 134 [*PHS*].

The Decision infringes Ms. Plainview's right to life

[26] In *Carter,* the Supreme Court unanimously held that when state action "imposes death or an increased risk of death on a person, either directly or indirectly," it engages the right to life. Benzene causes the exact cancer that ended the life of Ms. Plainview's mother. Science shows that the risk of benzene-related cancers surges exponentially with greater benzene exposure. By multiplying Ms. Plainview's exposure to this carcinogen, the Decision infringes her right to life.

> *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 62, [2015] 1 SCR 331 [*Carter*].
> Official Problem, *supra* para 6 at paras 8, 22(d).

[27] The fact that Turtle Creek residents have already been harmed by benzene-linked cancers strengthens Ms. Plainview's claim under s. 7. While there may be a low chance that a specific individual will contract cancer as a direct result of the exemption, the gravity of developing cancer makes even this risk severe.

> Official Problem, *supra* para 6 at paras 22(g), 24.

[28] Moreover, the scope Ms. Plainview's the right to life should be understood through the "interpretive lens" of equality interests (*G(J))*. Justice L'Heureux-Dubé explained that issues of inequality inform the scope and content of the rights guaranteed by s. 7 in order to ensure that the *Charter* "responds to the realities and needs of all members of society" (*G(J))*. Following this principle, Ms. Plainview's right to life is broadened by the history of disproportionate health risks imposed on her community. Thus, the risk created by the Decision falls within the scope of her right to life.

> *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at paras 112, 115, 177 DLR (4th) 124 [*G(J)*].
> Official Problem, *supra* para 6 at para 20.

The Decision contravenes Ms. Plainview's right to security of the person

[29] By approving a multifold benzene increase, the Decision intensifies the existing harm to Ms. Plainview's health. Security of the person shields an individual from "state interference with bodily integrity" (*Morgentaler*).

R v Morgentaler, [1988] 1 SCR 30 at 32, 44 DLR (4th) 385 [*Morgentaler*].

[30] It is more likely than not that the Decision magnifies existing health risks (*Bedford*). Before the government granted the exception, the total amount of benzene emissions from the two Spragge factories totalled 0.9 $\mu g/m^3$. Even at this level, Ms. Plainview and other members of the Reserve suffered adverse health effects. The exemption now permits VulCAN *alone* to release more than double the previous total until the end of 2023. Consequently, the Decision itself poses a greater risk of harm to Ms. Plainview and other Turtle Creek residents. As the Court of Appeal reasoned in *Energy Probe,* when there is a known risk associated with any level of exposure, it follows that there is an increased risk through a multiplication of exposure.

Bedford, supra para 24 at para 89.
Official Problem, *supra* para 6 at 2, at paras 19-20, 22.
Energy Probe v Canada (Attorney-General), [1989] OJ No 537 at para 46, 68 OR (2d) 449 [*Energy Probe*].

[31] To make concrete the health concerns exacerbated by the Director's decision, Turtle Creek members suffer from higher rates of cancer, asthma, birth defects, miscarriages, and stillbirths, rashes, and chronic headaches than the average Canadian. At present, Ms. Plainview suffers from asthma and frequent respiratory issues, as well as unexplained migraines. Neither she nor other Turtle Creek members should have to wait to discover how their health will deteriorate with higher benzene pollution. Although Dr. Satyajit could not be certain that benzene was solely responsible for all the observed impacts, the Decision does not need to be the sole or dominant cause to infringe the right to security of the person (*Bedford*).

Official Problem, *supra* para 6 at paras 6, 9, 19(e), 21.
Bedford, supra para 24, at para 76.

The Decision restricts Ms. Plainview's right to liberty

[32] The Decision also undercuts Ms. Plainview's fundamental life choice as an Indigenous woman to remain on the Reserve, the land she has called home her entire life. The liberty guarantee is engaged "where state compulsions or prohibitions affect important and fundamental life choices" (*Blencoe*). By sanctioning a major increase in industrial pollution less than 5km from the Reserve, the exemption interferes with a decision core to Ms. Plainview's identity. It forces her to choose between her health and living in her traditional territory. As Justice Victoire wrote: "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."

> *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 49, 2 SCR 307 [*Blencoe*].
> Official Problem, *supra* para 6 at 9.

[33] Justice La Forest in *Godbout* recognized that for any Canadian, "choosing where to establish one's home [goes] to the very heart of personal or individual autonomy." He held that the liberty interest prevents the government from interfering with such a fundamental decision. Courts have followed Justice La Forest's reasoning in *Vaugeois* and *Peavine Métis Settlement*, finding that government interference with residence choices engages the liberty guarantee. Extending this reasoning, there should be no hesitation to find a liberty infringement here. Ms. Plainview's decision to remain on the Reserve is even more fundamental than an ordinary choice of residence (*Corbiere*). This land has been home to generations of Turtle Creek members since the Robinson Huron Treaty of 1850. In Ms. Plainview's words, "this land has always been our home and it always will be."

> *Godbout v Longueuil*, [1997] 3 SCR 844 at paras 65-66, [1997] 3 SCR 844 [*Godbout*].

Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203 at paras 15, 62, 173 DLR (4th) 1 [*Corbiere*].
Official Problem, *supra* para 6 at paras 4, 17.
Vaugeois v Red Deer (City), 1999 ABQB 30 at para 14, 169 DLR (4th) 744 [*Vaugeois*].
Peavine Métis Settlement v Alberta (Minister of Aboriginal Affairs and Northern Development), 2007 ABQB 517 at paras 121-22, 81 Alta LR (4th) 28 [*Peavine Métis Settlement*].

[34] Asking the Ministry not to interfere with Ms. Plainview's home is not the same as a positive obligation on the government to provide a safe environment. Rather, Ms. Plainview seeks to constrain a state action that disturbs her decision to live on reserve. Discussions of positive obligations on the government typically arise in cases of inaction (*Gosselin; Tanudjaja*). This is not a case of inaction. Rather than maintaining the regulated standard, the Director stepped in to grant an exemption. This case is analogous to *PHS,* where the Minister's decision to discontinue a safe injection clinic infringed s. 7. It is also similar to *Bedford,* where the Supreme Court was asked not to grant a positive right to safe vocation, but to strike down laws aggravating the risk of disease and death.

Gosselin v Québec (Attorney General), 2002 SCC 84 at para 319, [2002] 4 SCR 429 [*Gosselin*].
Tanudjaja v Canada (Attorney General), [2014] OJ No 5689 at paras 9, 32, 123 OR (3d) 161 [*Tanudjaja*].
PHS, supra para 25 at paras 117, 128 [*PHS*].
Bedford, supra para 24 at para 88.

The infringements do not accord with the principles of fundamental justice

[35] The Decision's infringements on Ms. Plainview's life, liberty, and security of the person are grossly disproportionate and overbroad. The deprivations are also inconsistent with the Honour of the Crown, which should be recognized as a principle of fundamental justice.

a. The deprivations are grossly disproportionate

[36] A government action is grossly disproportionate if the seriousness of the deprivation is "totally out of sync with the objective of the measure" (*Bedford; PHS*). Gross disproportionality

"does *not* consider the beneficial effects of the law for society" (*Bedford*). Instead, it balances the negative effect on the individual against the action's purpose (*Bedford*).

> *Bedford*, *supra* para 24 at paras 120-21, 123 [emphasis in original].
> *PHS, supra* para 25 at para 133.

[37] The purpose of the relevant regulation is to safeguard the environment from polluting industries while allowing for their economic viability. Courts determine a law's objective by looking to the enabling legislation's stated purpose, as well as its scheme and context (*Safarzadeh-Markhali*). Here, the *EPA*'s sole and explicit purpose is laid out in s. 3: "to provide for the protection and conservation of the natural environment." In *Castonguay,* the Supreme Court stated the *EPA* "protects those who *use* the natural environment by protecting human health." Section 35(1) of the Regulations contemplate economic considerations only as an exception to the norm, and only if "there is no public interest reason sufficient to require the denial of the request." Insofar as economic considerations form part of s. 35(1)'s purpose, they must be considered secondary to the *EPA*'s overall goal.

> *EPA, supra* para 7, s 3.
> *R v Safarzadeh-Markhali*, 2016 SCC 14 at para 31, [2016] 1 SCR 180 [*Safarzadeh-Markhali*].
> *Castonguay Blasting Ltd. v Ontario (Environment)*, 2013 SCC 52 at para 10 [emphasis in the original], [2013] 3 SCR 323 [*Castonguay*].
> *Regulations, supra* para 10, s 35(1).

[38] In this case, the effects of the Decision on Ms. Plainview's health, as well as its interference with her fundamental life choice to live on Reserve are grossly disproportionate to the purposes of protecting the environment while considering economic viability. The only reason VulCAN required the Ministry's accommodation was because it chose to expand production by 35%. Prior to that, the company had no problem meeting the Regulations while remaining economically viable.

> Official Problem, *supra* para 6 at 2, at para 10.

Clarifications, *supra* para 7 at para 7.

b. The violations are overbroad

[39] Overbreadth protects against state actions where there is no rational connection between the law's objectives and some, but not all, of its effects (*Bedford; Safarzadeh-Markhali*). An overbroad effect on just one person is sufficient to establish a s. 7 breach (*Bedford*).

Bedford, *supra* para 24 at paras 112, 123.
Safarzadeh-Markhali, *supra* para 37 at para 51.

[40] The Decision is overbroad because the objective of economic viability bears no rational connection to its effect on Ms. Plainview's fundamental life choice to live on the Reserve. Furthermore, the Decision increases harms to the health of Ms. Plainview and her community, contrary to the overall purpose of the *EPA*. The Decision also goes too far in the name of economic interests by negatively impacting the health of every person living near the rubber plant. It should not be assumed that economic feasibility must always come at the cost of personal health.

c. The exemption violates the Honour of the Crown

[41] There are three requirements to establish a new principle of fundamental justice: (1) it must be a legal principle, (2) there must be societal agreement that it is crucial to the operation of Canada's legal system, and (3) the principle must be capable of being identified and applied (*Canadian Foundation*). The Honour of the Crown meets all three requirements.

Canadian Foundation for Children, Youth and the Law v Canada (Attorney General), 2004 SCC 4 at para 8, [2004] 1 SCR 76 [*Canadian Foundation*].

[42] The Honour of the Crown is the principle that "servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign" (*Manitoba Métis*). The principle's ultimate purpose is reconciliation (*Manitoba Métis*). Like the recognized principle of fairness, its

content varies with the context and the nature of the interest affected (*Lyons*; *Manitoba Métis*). As the Supreme Court wrote in *Beckman,* "The obligation of honourable dealing was recognized from the outset by the Crown itself in the Royal Proclamation of 1763." In *Beckman* and in *Manitoba Métis,* the Supreme Court confirmed that this legal principle has achieved constitutional status.

> *Manitoba Métis Federation Inc v Canada (Attorney General),* 2013 SCC 14 at paras 65, 67, 69, 74, [2013] 1 SCR 623 [*Manitoba Métis*].
> *R v Lyons,* [1987] 2 SCR 309 at 361, 44 DLR (4th) 193 [*Lyons*].
> *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42, [2010] 3 SCR 103 [*Beckman*].

[43] In this case, the Crown, in agreeing through treaty to create a reserve, cannot by its regulatory decisions transform that land into an uninhabitable environment, forcing First Nations people to suffer the consequences or be displaced. Tracing back to the early 1600s, courts have used the Honour of the Crown to ensure Crown grants achieved their intended purpose (*Marshall*). Canadian courts have since applied the principle to require the government to act in a way that gives meaning to a treaty's intended purposes (*Marshall; Manitoba Métis*). Here, the government undermined the Robinson Huron Treaty's stipulation that "reservations shall be held and occupied by the said Chiefs and their tribes in common for their own use and benefit." By authorizing pollution at levels far above the regulated standard, the Decision allows government-regulated factories to render the Reserve unsafe for the "use and benefit" of Turtle Creek members like Ms. Plainview.

> *R v Marshall*, [1999] 3 SCR *456* at paras 43-44, 177 DLR (4th) 513.
> *Manitoba Métis, supra* para 42 at para 73.
> *Robinson Huron Treaty*, 1850 [Robinson Huron Treaty].

Issue 2: The Decision infringes Ms. Plainview's right to equality under s. 15 of the *Charter*

[44] The Director's decision is discriminatory. The increase in benzene emissions is experienced differently by the members of the Turtle Creek First Nation than it is by other local residents. Therefore, the Decision creates an adverse distinction based on the enumerated ground

of Aboriginal ethnicity and the analogous ground of Aboriginality-residence. The Decision perpetuates arbitrary disadvantage by adding to the harms experienced by this "vulnerable and historically marginalized community, subjected to decades of contamination."

Official Problem, *supra* para 6 at 8.

The test for finding discrimination under s. 15

[45] The Supreme Court has repeatedly emphasized that the purpose of s. 15 is to promote substantive equality (*Withler*; *Kapp*; *Taypotat*). As Justice McIntyre explained in *Andrews*, the goal of substantive equality is to ensure that all individuals and groups receive the equal benefit and protection of the law (*Andrews*). The Supreme Court recently affirmed in *Alliance* that "the focus must remain on discriminatory impact."

Withler v Canada (Attorney General), 2011 SCC 12 at para 2, [2011] 1 SCR 396 [*Withler*].
R v Kapp, 2008 SCC 41 at para 14, [2008] 2 SCR 483 [*Kapp*].
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30 at para 17, [2015] 2 SCR 548 [*Taypotat*].
Law Society of British Columbia v Andrews, [1989] 1 SCR 143 at 165-71, 56 DLR (4th) 1 [*Andrews*].
Québec (AG) v Alliance du personnel professionnel et technique de la santé et des services sociaux, 2018 SCC 17 at para 60, 421 DLR (4th) 1 [*Alliance*].

[46] The two-stage test for infringements under s. 15(1) was most recently outlined by the Supreme Court in *Alliance*. The first stage of the test considers whether the decision creates a distinction based on an enumerated or an analogous ground. A law or decision can create a distinction at this stage even if it is neutral on its face, if it results in a disproportionate adverse effect for a group identified by an enumerated or an analogous ground (*Withler*; *Quebec*). This stage is not "an onerous hurdle designed to weed out claims on technical bases" (*Alliance*). The second stage of the test involves an inquiry into whether the distinction imposes burdens or denies benefits "in a manner that has the effect of reinforcing, perpetuating, or exacerbating… disadvantage" (*Alliance*).

Alliance, supra para 45 at paras 25-26.
Withler, supra para 45 at para 40.
Quebec (AG) v A, 2013 SCC 5 at para 198, [2013] 1 SCR 61 [*Quebec*].

The Decision distinguishes based on Aboriginal ethnicity and Aboriginality-residence

[47] The Decision creates an adverse distinction based on the enumerated ground of Aboriginal ethnicity. Ethnicity encompasses Ms. Plainview's culture, heritage, and ancestral connection to the Reserve (Grammond). By exposing Ms. Plainview and her community to heightened benzene emissions, the Decision forces them to suffer increased toxic effects in order to remain on the Reserve. Unlike other groups, the culture of the Turtle Creek First Nation is rooted in this land. As Ms. Plainview explained, her people's "culture and heritage are here" along with "what's left of [their] way of life." Ms. Plainview and her community cannot leave the Reserve without sacrificing a core element of their ethnic identity.

Sebastien Grammond, "Disentangling 'Race' and Indigenous Status: The Role of Ethnicity" (2008) 33:2 Queen's LJ 487 at 488-491, 495, 508.
Official Problem, *supra* para 6 at p. 4 at para 17.

[48] The Decision also creates a distinction on the basis of Aboriginality-residence, which the Supreme Court recognized as an analogous ground in *Corbiere*. Aboriginality-residence pertains to "whether an Aboriginal band member lives on or off the reserve" (*Corbiere*). The Supreme Court made a point of explaining that "ordinary 'residence' decisions faced by the average Canadians [sic] should not be confused with the profound decisions Aboriginal band members make to live on or off their reserves, assuming choice is possible. The reality of their situation is unique and complex."

Official Problem, *supra* para 6 at p. 9.
Corbiere, *supra* para 33 at paras 14-15.

[49] The Decision draws a distinction on the basis of Aboriginality-residence in the same manner that it draws a distinction on the basis of Aboriginal ethnicity. The Decision forces Ms.

Plainview and her community to suffer adverse health effects from heightened benzene emissions in order to maintain their on-reserve status. This burden is not borne by other groups.

[50] Ms. Plainview raises both the grounds of Aboriginal ethnicity and Aboriginality-residence to highlight the systemic discrimination in this case as this form of discrimination is hard to identify. As Justice Abella explained in *Quebec*, "rules that are seemingly neutral (because they do not draw obvious distinctions) may also treat certain individuals like second-class citizens," thereby creating a distinction. The Aboriginal ethnicity and Aboriginality-residence provide this Court with two paths to find an adverse effects distinction.

Quebec, supra para 46 at paras 198.

The distinctions created by the Decision perpetuate arbitrary disadvantage

[51] The distinctions created by the Decision are arbitrary because they fail to respond to the actual capacities and needs of the members of the claimant group (*Taypotat*). The Decision fails to respond to the historic disadvantage experienced by the Turtle Creek First Nation, instead imposing a burden that "widens the gap" between them and the rest of society (*Quebec*). As Justice De Aguirre stated, Indigenous people have "disproportionately borne the environmental brunt of Canada's industrial activity over the last 100 years" and the Director's decision puts this "vulnerable and historically marginalized community…to further harm through the issuance of a site-specific standard to allow yet more pollution."

Taypotat, supra para 45 at para 20.
Quebec, supra para 46 at para 332.
Official Problem, *supra* para 6 at 8-9.

[52] The inquiry into whether a distinction perpetuates arbitrary disadvantage is "flexible and contextual" (*Quebec*). A compelling contextual factor is whether pre-existing disadvantages have been recognized (*Taypotat*). The Supreme Court has repeatedly recognized that Indigenous

peoples in Canada have faced historic disadvantage (*Corbiere*; *Kapp*; *Daniels*). In *Kapp*, for example, the Supreme Court said "[t]he disadvantage of aboriginal people is indisputable." More recently, in *Daniels*, Justice Abella began the Supreme Court's unanimous judgment by stating: "As the curtain opens wider and wider on the history of Canada's relationship with its Indigenous peoples, inequities are increasingly revealed and remedies urgently sought…the list of disadvantages remains robust."

> *Taypotat, supra* para 45 at para 20.
> *Quebec, supra* para 46 at paras 331-332.
> *Kapp, supra* para 45 at para 59.
> *Corbiere, supra* para 33 at para 66.
> *Daniels v Canada (Indian Affairs and Northern Development),* 2016 SCC 12 at para 1, [2016] 1 SCR 99 [*Daniels*].

[53] The Turtle Creek First Nation's historic exposure to pollution reflects this recognized pattern where Indigenous people in Canada have disproportionately borne the impacts of industrial pollution. There are active contaminated sites on more than half of First Nation reserves in Canada. These sites are largely the result of industrial pollution. This pollution has not only negative health effects, but also severe economic consequences for these communities. Heavy pollution leads to disproportionate economic impacts including reduced human welfare, lost activities such as recreation and increased costs for producers and consumers.

> Official Problem, *supra* para 6 at para 19(b, d).

[54] The Turtle Creek First Nation experiences the harmful effects of industrial pollution firsthand. Communities living within a 10km radius of heavily industrialized areas face an increased risk of adverse mental and physical health consequences and this risk increases with proximity. The Turtle Creek Reserve is less than 5km from VulCAN and people who live there experience higher rates of negative health effects, including asthma, stillbirths, chronic headaches, and cancer. Ms. Plainview herself has suffered negative health effects. She was

diagnosed with asthma as a child and has experienced frequent respiratory issues, unexplained migraines and spells of dizziness. In addition, her mother died of acute myeloid leukaemia at only 57 years old. Benzene is a known cause of this form of cancer.

Official Problem, *supra* para 6 at paras 1, 6, 8-9, 19(a, e), 22(d).

[55] The Director's decision perpetuates the disadvantage experienced by Ms. Plainview and her community at the hands of industrial pollution. By permitting higher levels of benzene pollution on the Reserve, the Decision widens the gap between the Turtle Creek First Nation and the rest of society, denying them substantive equality. For these reasons, the Decision infringes Ms. Plainview's right to equality under s. 15.

Issue 3: The Decision does not reasonably balance Ms. Plainview's ss. 7 and 15 rights against the statutory objectives

[56] The *Doré* framework governs the reasonableness of administrative decisions that limit *Charter* rights. The Director's decision is unreasonable under this framework.

The *Doré* analysis

[57] *Doré* requires that the decision-maker consider "how the *Charter* value at issue will best be protected in view of the statutory objectives." The resulting decision must "balance the severity of the interference of the *Charter* protection with the statutory objectives" (*Doré; Loyola; TWU*). On judicial review, the question becomes whether the decision reflects a proportionate balance between the *Charter* rights and the statutory objectives (*Doré; Loyola*). A proportionate balance is "one that gives effect, as fully as possible, to the *Charter* protections at stake given the particular statutory mandate" (*Loyola*). A disproportionate balance will be found to be unreasonable (*Doré; Loyola*).

Doré v Barreau du Québec, 2012 SCC 12 at paras 56-58, [2012] 1 SCR 395 [*Doré*].
Loyola High School v Quebec (Attorney General), 2015 SCC 12 at paras 6, 37-39, [2015] 1 SCR 613 [*Loyola*].

Law Society of British Columbia v Trinity Western University, 2018 SCC 32 at paras 58, 91, [2018] 2 SCR 293 [*TWU*].

[58] The onus to justify a *Charter*-infringing decision should fall on the government. *Doré* remains silent on who bears the burden of proof (*TWU)*. However, this onus must remain on the state if the framework is to live up to Justice Abella's promise that it is just as "robust" as the *Oakes* test and not a "weak or watered-down version" (*TWU*).

TWU, supra para 56 at paras 80, 195.

The balance the Director struck was disproportionate

[59] It is difficult to see how a decision that neglects to contemplate the *Charter* rights in play could be considered proportionate. Neither the text of the Decision nor the Director's affidavit address the specific harms to Ms. Plainview or other Reserve residents flowing from their relationship to the land. The Decision only references "stakeholders," failing to consider the unique impact on Indigenous people like Ms. Plainview. The Director's affidavit states that comments by Ms. Plainview and other Turtle Creek members about "the impact of pollution on their daily lives were received and duly considered," but fails to identify the *Charter* rights at issue. The Director makes no mention of the existing disadvantages faced by Turtle Creek that the exemption exacerbates. A decision that overlooks the specific rights at play cannot be proportionate because it cannot give "effect, as fully as possible, to the *Charter* protections at stake" (*Loyola*).

Official Problem, *supra* para 6 at 2, at para 25.
Loyola, supra, para 56 at para 39.

[60] Even if the Court reads a consideration of *Charter* rights into the Decision, the balance would be disproportionate. The statutory objective of the relevant regulation is to protect the environment as much as possible without stifling the viability of polluting industries. The purpose of the *EPA* is to protect the environment, and this informs the purpose of s. 35(1) of the

Regulations. Section 35(1) permits the Director to grant exemptions only if the following conditions are met: (i) it is not technically or economically feasible for the polluter to comply with the regulated standard, (ii) the difference between the standard and the requested exemption is the minimum difference necessary to enable the polluter to comply, and (iii) there is no public interest reason sufficient to require the denial of the request. Therefore, the relevant statutory objective is to pursue maximum protection of the environment while maintaining economic interests where possible.

> *EPA, supra* para 7, s 3.
> *Regulations, supra* para 10, s 35(1).

[61] The balance the Director struck is disproportionate. The Director made a decision that placed the negative impacts of VulCAN's upgrade malfunctions on the members of the Turtle Creek First Nation. The exemption enabled VulCAN to maintain its level of production and emit over four times more benzene. Meanwhile, Ms. Plainview and her community were forced to suffer the severe impacts of this pollution in violation of their *Charter* rights.

[62] The Decision prioritizes economic interests instead of best protecting Ms. Plainview's *Charter* rights. The Director's reasons for doing so include preventing a 5.5% cut to VulCAN's workforce and a speculative fear that VulCAN may leave Ontario if subjected to the normal emissions standard. The Director placed undue weight on the loss of jobs. The risk of job loss is serious, but while jobs can be replaced, cancer is irreversible. The Director makes too much of the fact that three companies left Canada over the course of the past 30 years in response to environmental regulation. There is no evidence on the record that VulCAN considered leaving the province if its request was denied. Moreover, unlike a private company, Ms. Plainview cannot make her home anywhere. Her identity is fundamentally tied to the Reserve, which was set aside for the use and benefit of the Turtle Creek First Nation 170 years ago. The Director

chose to avoid a possible future economic loss and pass the costs on to a community that the evidence has established has long been plagued by contamination.

Official Problem, supra, para 6 at paras 4, 10, 25(f, h).

[63] The Director's decision also undervalues the environmental protection aspect of her statutory objective. In *Castonguay,* the Supreme Court held that protecting the environment also means protecting the health of the people who use it. Had the Director properly considered the environmental protection aspect of the statutory objective, she would have arrived at a decision that better protects Ms. Plainview's *Charter* rights. The Decision states that the exemption "decreases emissions to better protect the environment." In reality, the exemption permits emissions at more than four times the regulated standard for five years before VulCAN must return to the original standard. Not only does this compromise the health of those on the Reserve, but it also does not meaningfully protect the environment.

Official Problem, *supra* para 6 at 2.
Castonguay, surpra para 27 at para 10.

[64] The infringements of the *Charter* rights in this case should have been afforded particular weight given the historical context. The Robinson Huron Treaty of 1850 was originally necessitated because the government had permitted the economic interests of private actors to take precedence over commitments it had made to First Nations. In *Restoule,* the Ontario Superior Court extensively reviews the history of the Robinson Huron Treaty. The Superior Court found that the Crown had issued mining permits to private companies, interfering with the Indigenous peoples' ability to hunt on their land (*Restoule*). In light of this history, the Charter rights at stake should have been weighed more heavily.

Restoule v Canada (Attorney General), 2018 ONSC 7701 at paras 117-118, 186, 431 DLR (4th) 32 [*Restoule*].

[65] Only denying the exemption would have given "effect as fully as possible to the *Charter* protections at stake" (*Loyola*). In *Mowat,* a unanimous Supreme Court confirmed that even on a reasonableness standard of review, some cases permit only one reasonable decision. Economic interests constitute just one aspect of the statutory objectives to be considered in this case. The Director disproportionately weighed economic considerations over Ms. Plainview's *Charter* rights. The resulting Decision must, therefore, be considered unreasonable.

Dore, supra para 56 at para 57.
Loyola, supra para 56 at para 39.

Issue 4: This an appropriate case for an award of *Charter* damages under s. 24(1)

[66] The award of $30,000 in *Charter* damages awarded by the Divisional Court should be restored to Ms. Plainview.

[67] The Supreme Court outlined the test for *Charter* damages in *Ward*. First, the claimant must establish a *Charter* breach. Second, the claimant must show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of: compensation, vindication, or deterrence. Third, the onus shifts to the state, which has the chance to show that countervailing factors defeat the functional considerations supporting a damage award. Finally, the court assesses the quantum of the damages.

Vancouver (City) v Ward, 2010 SCC 27 at paras 4, 15, 35, [2010] 2 SCR 28 [*Ward*].

Damages fulfill the functions of compensation, vindication and deterrence

[68] *Charter* damages would compensate Ms. Plainview for her personal loss. For over a year, she has suffered from the negative effects of the higher benzene levels permitted by the Director's exemption. The decision increased Ms. Plainview's exposure to the carcinogen benzene and thus, her risk of cancer. The Director's decision has also likely exacerbated the anxiety and depression experienced by members of Ms. Plainview's community who fear the

negative effects of heavy pollution on the Reserve. Heavy pollution leads to disproportionate economic impacts including reduced human welfare, lost activities such as recreation and increased costs for producers and consumers. Thus, the increase in pollution has likely harmed Ms. Plainview's community, decreasing her quality of life on the Reserve. In light of the troubled relationship between the state and First Nations peoples, these harms are grave.

Official Problem, *supra* para 6 at paras 18, 19(b).

[69] In breaching her ss. 7 and 15 rights, the Director's decision injured Ms. Plainview's personhood and dignity. These harms demand compensation. Dignity is a fundamental value underlying both ss. 7 and 15. The Supreme Court in *Kapp* held that: "There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee." Similarly, in *Carter*, the Supreme Court held that "a concern for the protection of individual autonomy and dignity" underlies both the liberty and security of the person rights guaranteed by s. 7.

Kapp, supra para 45 at para 21.
Carter, supra para 26 at para 64.

[70] Non-pecuniary harms to dignity call for *Charter* damages. In *Ward*, for example, the Supreme Court awarded compensation for the degradation of a strip search, even though the state action was not "malicious, high-handed or oppressive." In *Elmardy*, the Ontario Divisional Court awarded damages for harms caused by racial profiling, an insidious form of systemic discrimination. The harms experienced by Ms. Plainview also call for damages as they occur within the context of the severe systemic disadvantage experienced by Indigenous peoples.

Ward, supra para 66 at paras 64, 72.
Elmardy v Toronto (City) Police Services Board, 2017 ONSC 2074 at para 34, 413 DLR (4th) 175 [*Elmardy*].

[71] The context of Ms. Plainview's claims calls for vindication and deterrence. In *Daniels*, the Supreme Court acknowledged the history of inequity in Canada's relationship with

Indigenous peoples, explaining that *Daniels* "represents another chapter in the pursuit of reconciliation and redress in that relationship." Ms. Plainview's case is another page in that chapter. However, rather than promoting reconciliation, the Director's Decision has the effect of undermining her confidence in the state's commitment to keeping its promises to Indigenous peoples. As Ms. Plainview said, she "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." This pattern dates back to the Robinson Huron Treaty, which was signed in response to the Crown unilaterally granting mining permits and adversely impacting the First Nations' use of their land (*Restoule*). There is a clear need for this Court to vindicate Ms. Plainview's rights and society's interest in reconciliation. There is also a clear need for the state to be deterred from continuing to breach the rights of Turtle Creek First Nation members.

> *Daniels, supra* para 52 at para 1.
> Official Problem, *supra* para 6 at para 17.
> *Restoule, supra* para 63 at paras 117-118, 186.

[72] Even if this Court finds that no personal losses were suffered, a *Charter* damages award is still appropriate and just in this case. The fact that a claimant has not suffered personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award (*Ward*). For all of the above reasons, vindication, and deterrence clearly call for damages in this case. Ms. Plainview's claims arise in the context of a pattern of systemic discrimination against Indigenous peoples. Leaving this pattern unchecked jeopardizes society's need for reconciliation.

> *Ward, supra* para 66 at para 30.

[73] Finally, the fact Ms. Plainview is one member of a larger group being adversely affected is no bar to her recovery of *Charter* damages. Systemic discrimination must be understood in

context. As the Ontario Superior Court case *Anoquot* makes clear, individual claims involving systemic discrimination are "inherently and necessarily tied to the treatment of the collective of which [the individual] is a member." Although the harms are experienced by the collective, they are also experienced personally by Ms. Plainview.

> *Anoquot v Toronto Police Services Board*, 2015 ONSC 553 at para 27, 124 OR (3d) 312 [*Anoquot*].

The state cannot demonstrate that countervailing factors defeat the functional considerations supporting a damages award

[74] The Supreme Court in *Ward* identified two countervailing factors that could defeat the functional considerations supporting a damages award: the existence of adequate alternative remedies and concerns for good governance. In this case, the state cannot demonstrate that either of these countervailing factors defeats the functional considerations supporting an award of *Charter* damages.

> *Ward, supra* para 66 at para 33.

[75] The government cannot show that there are adequate alternative remedies that defeat the functional considerations supporting a damages award in Ms. Plainview's case. The existence of private law remedies is no bar to recovering *Charter* damages so long as there is no double compensation (*Ward*). There is no such issue in this case.

> *Ward, supra* para 66 at para 36.

[76] In addition, the state cannot demonstrate that judicial review is an adequate alternative remedy because it would not meet the need for compensation, vindication and deterrence in this case. The harms flowing from the systemic discrimination experienced by Indigenous peoples and the public interest in reconciliation demand more than a declaration of invalidity. The recent case of *Ernst*, where the Supreme Court struck a claim for *Charter* damages, is distinguishable from the case at bar. Ms. Ernest claimed damages for an alleged breach of s. 2(b) and made no

allegation of systemic discrimination. *Ernst* was also a contentious decision, with four judges holding that it was not plain and obvious Ms. Ernst's claim for *Charter* damages would fail. The harms experienced by Ms. Plainview militate even more strongly in favour of *Charter* damages, given the insidious systemic discrimination experienced by Indigenous peoples and the public interest in reconciliation. These exceptional circumstances call for an exceptional remedy.

Ernst v Alberta Energy Regulator, [2017] 1 SCR 3 at para 167, [2017] 1 SCR 3 [*Ernst*].

[77] In addition, the state cannot show that good government concerns defeat the functional considerations supporting a damages award. Ms. Plainview's case is unique as it involves an exemption granted to a carcinogen-emitting factory located less than 5km from reserve land. For this reason, awarding *Charter* damages in her case will not have a chilling effect on the exercise of policy-making discretion to grant future site-specific exemptions (*Ward*). Given the unique circumstances of this case, awarding Ms. Plainview *Charter* damages will not set too far-reaching a precedent.

Ward, supra para 66 at paras 38-41.

[78] Finally, the $30,000 of *Charter* damages awarded by the Divisional Court should be restored. This quantum is fair to both parties and will not divert an inappropriately large sum of state funds to private interests (*Ward*). In *Elmardy*, the Ontario Divisional Court awarded *Charter* damages of $50,000, saying that this amount is "not so large as to make it inappropriate for the government to pay, but large enough to send a message about the seriousness of the conduct at issue." The Divisional Court said this amount was warranted because Mr. Elmardy's case involved racial profiling, a pervasive form of systemic discrimination. Similarly, the insidious systemic discrimination underlying the Director's Decision in Ms. Plainview's case makes an award of $30,000 both fair and appropriate. The Divisional Court found this quantum

to be supported by the evidence. This is a finding of fact for which the Divisional Court is owed deference and the award of $30,000 should be restored.

Ward, *supra* para 66 at para 53.
Elmardy, supra para 69 at paras 34, 37.

PART V – ORDER SOUGHT

[79] The Appellant requests that the appeal be allowed. The Appellant also seeks an order that the Divisional Court's award of $30,000 in *Charter* damages be restored.

All of which is respectfully submitted this 23rd day of January 2020.

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Team 11

PART VI – LIST OF AUTHORITIES AND STATUTES

LEGISLATION	**PARAGRAPHS**
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