IN THE HIGH COURT OF THE DOMINION OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N

CLAIRE PLAINVIEW

Appellant

- AND-

ONTARIO (MINISTER OF THE ENVIRONMENT)

Respondent

FACTUM OF THE RESPONDENT

Counsel for the Respondent

Team 11

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PART I – OVERVIEW

[1] The Ministry of the Environment (the "Ministry") is committed to long-term environmental protection. The Ontario *Environmental Protection Act* (the "EPA") sets out general science-based standards to regulate air pollution and protect communities. Section 35 of the *Air Pollution – Local Air Quality Regulations* (the "Regulations") creates a site-specific exemption for benzene emissions. This exemption recognizes that it is not always feasible for growing industries to immediately comply with hard and fast rules. The Director of the Ministry (the "Director") is entrusted with exercising discretion under s. 35 to advance the dual purpose of maximally preserving the environment while promoting economic development. The Director approved VulCAN Corporation's ("VulCAN") site-specific standard under s. 35 (the "Decision").

[2] The Director's Decision is expected to reduce VulCAN's benzene emissions by 63 percent in five years. This Decision followed a two-month public consultation where concerns raised by the Turtle Creek First Nation ("TCFN") were duly considered. The Decision requires VulCAN to invest in the best available technologies and actively work towards reducing emissions.

[3] The Director's Decision does not infringe the Appellant's ss. 7 or 15 rights under the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). Health consequences faced by the TCFN stem not from the Decision itself, but from a number of environmental and demographic factors. Therefore, they do not engage the Appellant's s. 7 rights. Furthermore, the Decision does not discriminate under s. 15 of the *Charter.* The Decision's tailored nature and positive long-term effects mean it does not perpetuate or exacerbate arbitrary disadvantage.

[4] If the Director's Decision infringes *Charter* rights, these infringements are reasonable and proportionate under the *Doré* framework in light of the Decision's dual purpose. This appeal should therefore be dismissed.

PART II – STATEMENT OF FACTS

1. Factual Background

a. VulCAN required a site-specific standard

[5] VulCAN is a rubber and latex factory that has operated in the village of Spragge since 1974. A second rubber factory, Galvanex Industries ("Galvanex"), began production in the same area in 1994.

The 2020 Wilson Moot Problem, at 1-2 [Official Problem].

[6] VulCAN is located near Turtle Creek Reserve No. 3 (the "Reserve") and employs roughly 900 people, 275 of whom live on the Reserve. As of July 2016, Schedule 3 of the Regulations has required companies to limit their benzene emissions to 0.45 micrograms per cubic metre ($\mu g/m^3$). After 44 years of complying with the Regulations, VulCAN was unexpectedly unable to meet the regulatory standard for benzene emissions. Shortly after completing VulCAN's facility upgrades, VulCAN determined that the recently installed air pollution control technology was malfunctioning. In 2018, VulCAN applied for a site-specific exemption under s. 35 of the Regulations.

Official Problem, *supra* para 5 at paras 10-12, 25(g).
O Reg 419/05, Schedule 3 [Regulations].
Clarifications to the 2020 Wilson Moot Problem at para 7 [Clarifications].

[7] Under s. 35 of the Regulations, the Director can only approve a site-specific exemption if she is satisfied that it is not technically or economically feasible for the company to comply with the regulatory standards. Any approved site-specific standard must be the minimum difference necessary to comply with the Regulations. The Director must also be satisfied that there are no public interest reasons sufficient to deny the request.

Regulations, *supra* para 6 at s 35.

b. The Decision reduces benzene emissions while promoting economic growth

[8] The Director approved VulCAN's request on October 10, 2018 after a 60-day consultation process. The Ministry held in-person meetings where submissions from the Appellant, members of the TCFN, and other stakeholders were heard and received. After several days of deliberation following the consultation period, the Director decided that granting a time-restricted site-specific standard was the best way to address competing local interests. This standard protects at least 50 local jobs and requires VulCAN to reduce benzene emissions by investing in the latest air pollution control technologies.

Official Problem, *supra* para 5 at 1, paras 14, 25(e)(j)(h).

[9] The Director's Decision is aimed at ameliorating the negative effects of pollution in the long run. The Decision requires VulCAN to reduce its benzene emissions from 3.0 $\mu g/m^3$ to 1.9 $\mu g/m^3$ by the end of 2018. While VulCAN is permitted to emit a *maximum* of 1.9 $\mu g/m^3$ from 2019 to 2023, VulCAN is incentivized to gradually reduce emissions to meet the 0.45 $\mu g/m^3$ standard once the site-specific exemption expires in October 2023. The implementation of VulCAN's action plan is expected to decrease benzene emissions by 63 percent. The Ministry will closely oversee VulCAN's progress in meeting these objectives.

Official Problem, *supra* para 5 at 2, para 25(d)(e).

[10] In deciding to grant VulCAN's site-specific exemption, the Director considered local health concerns relating to the cumulative effects of benzene emissions along with important economic factors, including the loss of local jobs and the need to encourage investment in Ontario. If the Director denied the application, VulCAN would have eliminated at least 50 positions. This would place the job stability of 275 residents on the Reserve at risk. Over the past few decades, at

least three companies relocated their production facilities to other jurisdictions with less restrictive regulations.

Official Problem, *supra* para 5 at para 25(f)(h).

[11] Rubber factories like VulCAN and Galvanex emit benzene, a compound that degenerates quickly and does not remain in the environment for long after being emitted. Dr. Maya Satyajit, a professor at the University of British Columbia, opined that pollution from VulCAN and Galvanex has severely impacted the quality of life on the Reserve. The TCFN face many health concerns, including diseases such as skin rashes, asthma, higher blood pressure, chronic headaches and chromosomal aberrations. On cross-examination, Dr. Satyajit stated that she was not certain whether benzene emissions were responsible for all the detrimental health effects observed among the TCFN, and that other environmental and demographic factors could be responsible for some of these health concerns.

Official Problem, *supra* para 5 at paras 20-21, 23.

[12] Dr. Anton Block, an environmental scientist, noted that many manufacturing activities inevitably emit benzene. Benzene carries the risk of adverse health consequences at any level of exposure. While benzene is also known to cause acute myeloid leukaemia, Dr. Block stated that there was an extremely low likelihood that VulCAN's site-specific standard would increase the risk of this type of cancer in any particular individual. Dr. Block also stated that entirely eliminating benzene emissions is unrealistic in an industrialized society.

Official Problem, *supra* para 5 at paras 22-23.

2. Procedural History

a. Divisional Court

[13] The Appellant, Ms. Plainview, is a member of the TCFN and lives on the Reserve. The Appellant brought an application before the Divisional Court for a declaration that the Decision

violated her ss. 7 and 15 rights and that the infringements were not reasonable under s. 1 of the *Charter*. The Appellant also sought damages under s. 24(1) of the *Charter*.

Official Problem, *supra* para 5 at 2.
Canadian Charter of Rights and Freedoms, ss 1, 7, 15, 24(1), Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].

[14] Justice Florés de Aguirre held that the Decision violated the Appellant's equality rights under s. 15 by drawing a discriminatory distinction based on the Appellant's Indigenous status and violated the Appellant's s. 7 rights in a manner that was grossly disproportionate. The Divisional Court held that these limitations were unreasonable under s.1 because the Director failed to proportionately balance competing interests. Justice de Aguirre awarded the Appellant $30,000 in damages without providing detailed reasons.

Official Problem, *supra* para 5 at 8.
Clarifications, *supra* para 6 at para 8.

b. Court of Appeal for Ontario

[15] Justice Oh Dae-su, writing for majority of the Court of Appeal for Ontario, reversed the Divisional Court's decision. The majority held that the Decision did not violate the Appellant's s. 15 equality rights as she failed to demonstrate that the Decision was discriminatory. The majority further held that there was an insufficient causal connection for a s. 7 infringement. It was an error to attribute the cumulative effects of pollution in Spragge to the Director's tailored and time-limited Decision. Even if the Decision unjustifiably infringed the Appellant's *Charter* rights, Justice Dae-su would not have awarded individual damages under s. 24(1) because the Appellant did not suffer compensable harm due to the Decision.

Official Problem, *supra* para 5 at 9.

PART III – STATEMENT OF POINTS IN ISSUE

[16] The present appeal raises the following constitutional questions:

Issue 1: Does the Decision infringe the Appellant's rights under s. 7 of the *Charter*?

No. The Decision does not engage the Appellant's right to life, liberty, and security of the person. There is an insufficient causal connection to ground a s. 7 claim in this case. Even if Ms. Plainview's s. 7 rights are engaged, the Director's Decision was made in accordance with the principles of fundamental justice.

Issue 2: Does the Decision infringe the Appellant's equality rights under s. 15 of the *Charter*?

No. The Decision does not infringe the Appellant's s. 15 rights. It does not create a distinction based on an enumerated or analogous ground. Even if it does, the impact of the Decision is not discriminatory. The Appellant has not adduced sufficient evidence to show that any adverse effects of the Decision perpetuate or exacerbate arbitrary disadvantage against her.

Issue 3: If the answer to either questions 1 or 2 is "yes", is the infringement a reasonable limitation on these rights?

Yes. The infringement is a reasonable limit under the *Doré* framework. The Director proportionately balanced the ss. 7 and 15 interests engaged by the Decision with the dual purpose of environmental protection and economic development under the *EPA*.

Issue 4: If an unreasonable infringement is found, is this an appropriate case for a damages award under s. 24(1) of the *Charter*?

No. If an infringement is found, the proper remedy in this case is a declaration of a *Charter* violation. The Appellant is not entitled to an additional damages remedy under s. 24(1) of the *Charter* as damages are not functionally justified for the purposes of compensation, vindication, and deterrence. Good governance concerns further preclude awarding damages in this case.

PART IV – ARGUMENT

Issue 1: The Decision does not infringe the Appellant's rights under s. 7 of the *Charter*

[17] The Director's Decision does not deprive the Appellant of her right to life, liberty, or security of the person under s. 7. First, the Decision does not result in an increased risk of death that violates the Appellant's right to life. Second, the Decision does not violate the Appellant's right to liberty because it does not hinder her capacity to make fundamental life choices. Third, the Appellant is not deprived of her right to security of the person because there is an insufficient causal connection between the Decision and any heightened risk of harm. Section 7 does not place a positive obligation on the Director to reject site-specific exemption applications where the potential risk of future harm is minimal (*Kuczerpa*; *Domke*).

> *Charter*, *supra* para 13 at s 7.
> *Kuczerpa v R*, [1993] FCJ 217 at para 7, 14 CRR (2d) 307 [*Kuczerpa*].
> *Domke v Alberta (Energy Resources Conservation Board),* 2008 ABCA 232 at para 23 [*Domke*].

1. The Decision does not engage the Appellant's right to life

[18] The Appellant's right to life is not engaged because the Decision does not "[impose] death or an increased risk of death on a person" (*Carter*). The Appellant has failed to show that an increased risk of death is attributable to the Director's Decision. The benzene emissions authorized by the Decision do not place the Appellant's life at increased risk.

> *Carter v Canada*, 2015 SCC 5 at para 62 [*Carter*].

[19] According to Dr. Block, there is an extremely low likelihood that the Director's Decision would increase the risk of cancer in any particular individual. The Supreme Court of Canada in *Burns* did not find that being extradited to face the death penalty engaged the right to life, despite clearly placing one's life at risk, because the potential imposition of capital punishment was not sufficiently certain (Stewart). The causal connection between the Decision, contracting cancer, and

the likelihood of death in this case is even more tenuous than facing the death penalty. As the right to life was not triggered in *Burns*, it is surely not triggered here.

Official Problem, *supra* para 5 at paras 8, 22(d), 24.
United States v Burns, 2001 SCC 7 at paras 57, 59 [*Burns*].
Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, 2nd ed (Toronto: Irwin Law, 2019) at 63.

2. The Decision does not engage the Appellant's right to liberty

[20] The Director's Decision does not deprive the Appellant of a fundamental choice guaranteed by the liberty interest. The liberty interest under s. 7 may be engaged where state compulsions or prohibitions affect a person's capacity to make "fundamental life choices" (*Blencoe*). First, place of residence is not a protected liberty interest under s. 7 (*Cunningham*). Second, the Director's Decision does not compel or prohibit the Appellant's decisions about her place of residence.

Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44 at para 49. [*Blencoe*].
Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37 at paras 93-94 [*Cunningham*].

[21] The jurisprudence on the right to liberty should not be expanded to include a liberty interest in the place of residence. If that were the case, every zoning by-law would have the effect of constraining the ability of individuals to choose where to live, thereby engaging s. 7 (*Godbout*). Liberty interests under s. 7 protect a *narrow* sphere of personal autonomy to make private choices without undue state interference (*Godbout*). Section 7 cannot be construed so broadly as to shield one's place of residence from any external disturbances permitted by the government.

Godbout v Longueuil (City), [1997] 3 SCC 844 at paras 15, 47 CRR (2d) 1 [*Godbout*].

[22] Even if one's place of residence is a fundamental life choice, the narrow sphere of personal autonomy protected under s. 7 is not violated in this case. The Director's Decision does not prohibit the Appellant from residing on the Reserve. The Director's Decision also does not compel the

Appellant to leave the Reserve. The Decision is unlikely to impact the health of the community beyond the pre-existing levels of pollution, given Dr. Block's expert evidence and the constrained nature of the exemption.

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

[23] The Appellant's argument about her liberty interest to reside on the Reserve is tantamount to the assertion of a *sui generis* property interest which is not protected under s. 7 (*Irwin Toy*). Aboriginal title is a *sui generis* property interest that is held communally (*Delgamuukw*). Section 7 is fundamentally individualistic and should not be broadened to guarantee communally held property interests.

Irwin Toy Ltd v Quebec Attorney General, [1989] 1 SCR 927 at para 96, 58 DLR (4th) 577 [*Irwin Toy*].
Delgamuukw v British Columbia, [1997] 3 SCR 1010 at para 31, DLR (4th) 193 [*Delgamuukw*].

3. The Decision does not engage the Appellant's right to security of the person

[24] The Appellant has failed to demonstrate a sufficient causal connection between the Director's Decision and physical or psychological harm suffered by the Appellant. A sufficient causal connection requires a real non-speculative, link between state action and harm suffered by the claimant (*Bedford*). The heightened risk of harm associated with benzene emissions does not stem from the Director's Decision, but from the pre-existing pollution from the factories in the area.

Canada (AG) v Bedford, 2013 SCC 72 at paras 75-76 [*Bedford*].

[25] The Decision does not cause severe psychological harm to the Appellant. To violate a person's psychological security of the person, state action must have a "serious and profound effect on the person's psychological integrity" (*G(J)*). The Appellant does not meet this high, objective threshold (*G(J)*). In *Donnelly*, the Court of Appeal for Ontario held that the delayed provision of

medication while being held in custody did not cause "serious state-imposed psychological stress". Despite Mr. Donnelly's subjective susceptibility to anxiety and stress due to OCD, s. 7 was not engaged because psychological harm must be assessed objectively (*Donnelly*). Ms. Plainview's subjective connection to the land would similarly not trigger s. 7 under this objective test.

> *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at paras 60, 63, 177 DLR (4th) 124 *[G(J)]*.
> *R v Donnelly*, 2016 ONCA 988 at paras 120-121 [*Donnelly*].

[26] The Director's Decision is not likely to further impair the Appellant's physical health. The Reserve is located in an industrialized area. TCFN residents have been exposed to benzene emissions from nearby factories for years. Dr. Block testified that the likelihood of the Decision increasing the risk of contracting cancer in any particular individual is "extremely low". The Supreme Court in *Operation Dismantle* held that security of the person interests under s. 7 are only engaged where those harms are *proven to result* from the impugned government act. The Appellant has not shown that the Decision creates a heightened risk of harm beyond that which already existed at the Reserve given the pre-Decision levels of pollution. The causal chain between increased benzene emissions due to the Director's Decision and the associated health concerns is further weakened by the fact that benzene degrades rapidly in the environment.

> Official Problem, *supra* para 5 at paras 19, 21, 22.
> *Operation Dismantle v R*, [1985] 1 SCR 441 at 456, 18 DLR (4th) 481 [*Operation Dismantle*].

[27] In the alternative, not every state action that imposes an increased risk of physical harm will trigger s. 7 (*Trang*). In *Trang*, the Court of Appeal of Alberta held that s. 7 is not engaged simply because there is a greater risk of personal injury from riding in prison vans than in other vehicles. Cases where the increased risk to personal health triggered the right to security of the person (*Morgentaler*; *PHS*) concerned statutorily imposed restrictions on the availability of health

care or harm reduction services, respectively. The Director's Decision does not deprive the Appellant of any potentially lifesaving medical care, unlike the facts in *PHS,* that would similarly engage the right to security of the person in this case.

> *Trang v Alberta (Edmonton Remand Centre),* 2007 ABCA 263 at para 29 [*Trang*].
> *R v Morgentaler,* [1988] 1 SCR 30, 44 DLR (4th) 385 [*Morgentaler*].
> *Canada (AG) v PHS Community Services Society,* 2011 SCC 44 at para 91 [*PHS*].

a. There is no positive right to a clean environment

[28] The Appellant is effectively asserting a positive right to a clean environment. According to the World Health Organization, there is no safe level of benzene emissions and the Schedule 3 Standard of benzene emissions is known to cause negative health consequences on the Reserve. Based on the Appellant's submissions, any site-specific exemption under s. 35 would result in an increased risk of harm that could trigger s. 7. As such, the Appellant is indirectly challenging the statutory exemption under s. 35 for benzene emissions sanctioned by the Regulations.

> Official Problem, *supra* para 5 at para 22(c).

[29] While the Director's Decision constitutes state action, as opposed to a failure to act, there may be no state action under s. 7 where the law grants a benefit that would not otherwise be available (*Flora*). In *Tanudjaja*, the Ontario Superior Court of Justice rejected the argument that the government infringed s. 7 by instituting inadequate measures for subsidized housing. The Court held that there is no positive *Charter* obligation for the government to provide "affordable, adequate, accessible housing" (*Tanudjaja*). In this case, there is similarly no positive obligation on the government to provide a clean environment (*Kuczerpa*). The Federal Court of Appeal in *Kuczerpa* held that s. 7 does not place an obligation on the Minister of Agriculture to refuse registrations under the *Pest Control Products Act* where the validity of the law conferring discretion is not challenged. In this case, the Director is similarly under no obligation to refuse

site-specific exemptions unless the Appellant challenges the constitutionality of the Minister's discretionary powers conferred under s. 35 of the Regulations.

> *Flora v Ontario (Health Insurance Plan, General Manager),* 2008 ONCA 538 at para 101 [*Flora*].
> *Tanudjaja v Canada (Attorney General),* 2013 ONSC 5410 at para 59, aff'd 2014 ONCA 852 [*Tanudjaja*].
> *Kuczerpa, supra* para 17 at para 7.

[30] The Supreme Court in *Gosselin* left the door open for the recognition of positive rights under s. 7 only under special circumstances. The Ministry's best efforts to significantly decrease levels of pollution over time and protect the environment without stifling economic development do not give rise to a deprivation that warrants a countervailing positive obligation in this case (*Scott*).

> *Gosselin v Quebec (AG)*, 2002 SCC 84 at para 83 [*Gosselin*].
> *Scott v Canada (AG)*, 2017 BCCA 422 at paras 88-89 [*Scott*].

4. Any deprivation of the Appellant's s. 7 rights is in accordance with the principles of fundamental justice

[31] Even if the Director's Decision triggers the Appellant's s. 7 rights, the Appellant has not met her burden of demonstrating that the deprivation is arbitrary, grossly disproportionate, or overbroad. The exercise of the Director's discretion under s. 35 of the Regulations was made in accordance with the principles of fundamental justice. The first step in the arbitrariness, gross disproportionality, and overbreadth analysis is to ascertain the purpose of the impugned government action (*Bedford*). In this case, the state action at issue is the Director's Decision.

> *Bedford*, *supra* para 24 at para 125.

a. The Decision serves a dual purpose

[32] The Director's Decision serves the dual purpose of protecting the environment and fostering economic growth in Spragge. To determine the purpose of the Decision, the court must

look to the express legislative purpose, the legislative scheme, and other extrinsic evidence including the Minister's statements of purpose (*Safarzadeh-Markhali*). The express legislative purpose of the *EPA* is to "provide for the protection and conservation of the natural environment". The entire legislative scheme consists of categorical prohibitions with statutory exemptions where certain requirements are met. These statutory exemptions implicitly recognize that rigid standards are not always feasible nor compatible with an underlying policy goal of encouraging economic development in Ontario. Section 35 is an example of one such exemption that can be granted where it is economically or technologically infeasible for a company to comply with the regulatory standard. The Director's statements also acknowledge the need to balance competing economic and environmental interests in exercising discretion under s. 35 of the Regulations.

R. v. Safarzadeh-Markhali, 2016 SCC 14 at para 31 [*Safarzadeh-Markhali*].
Environmental Protection Act, RSO 1990 c E 19 s 3 [*EPA*].
Official Problem, *supra* para 5 at para 25(f)(k).

b. The Decision is not arbitrary

[33] VulCAN's site-specific standard is rationally connected to the dual purpose underlying the Director's Decision and therefore not arbitrary. State action is arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind the [state action]" (*Rodriguez*; *Bedford*).

Rodriguez v British Columbia (AG), [1993] 3 SCR 519 at 595, 620-21, 107 DLR (4th) 342 [*Rodriguez*].
Bedford, *supra* para 24 at para 111.

[34] The Director's Decision has positive effects on environmental protection in the long run. The Decision requires VulCAN to achieve a 63 percent reduction of benzene emissions and invest in innovative environmentally friendly technology. The Decision simultaneously advances the underlying policy goal of fostering economic growth by preserving at least 50 local jobs.

[35] In cases where state action was held to be arbitrary, there was some glaring inconsistency between the state interference and the purported legislative goal. In *PHS*, the Supreme Court held that the deprivation was arbitrary because it "undermin[ed] the very purposes of the [*Controlled Drugs and Substances Act*]". The purpose of the legislation in that case was the protection of public health and safety. The Minister's refusal to authorise a safe injection site frustrated those goals because safe injection sites were shown to decrease the risk of death and disease (*PHS*). Here, it is reasonable to believe that this site-specific standard will have a beneficial effect as VulCAN is mandated to find solutions that better protect the environment before the exemption expires. Therefore, the Decision does not frustrate the broader goal of environmental protection under the *EPA* because it requires VulCAN to achieve a drastic reduction of benzene emissions over time. The Decision also allows VulCAN to remain operational and preserve livelihoods in the community.

PHS, supra para 27 at paras 131, 136.

c. The Decision is not grossly disproportionate

[36] The Director's Decision is not grossly disproportionate in its effects. State action is "grossly disproportionate" only in extreme cases where "the seriousness of the deprivation is *totally out of sync* with the objective of the measure" (*Bedford*). The effects of the Director's Decision, namely the extremely low increase in health risks, are not so extreme that they cannot be justified by the objective of improving air quality over time without stifling economic growth.

Bedford, *supra* para 24 at paras 34, 120.

[37] While VulCAN's site-specific standard is initially set to be higher than the Schedule 3 Standard for benzene emissions, the Decision is focused on mandating VulCAN to gradually reduce their emissions in a feasible way to promote sustainable, long-term environmental

protection. VulCAN has already significantly reduced their emissions from 3.0 ug/m^3 to 1.9 ug/m^3 and is required to continue making efforts to reduce their emissions to 0.45 ug/m^3 by the end of 2023. The Ministry will closely oversee VulCAN's progress to ensure they are working towards reducing emissions and meeting these goals. Furthermore, benzene degrades rapidly and there will not be long-lasting repercussions on the environment resulting from this limited site-specific exemption. Any short-term repercussions are not "totally out of sync" with the dual purposes of the exemption (*Bedford*).

> Official Problem, *supra* para 5 at 2, para 23.
> *Bedford*, *supra* para 24 at paras 34, 120.

d. The Decision is not overbroad

[38] The Decision is not overbroad because the means chosen by the state are "reasonably necessary" to achieve the intended purpose of the exemption (*Safarzadeh-Markhali*). The overbreadth analysis requires identifying the purposes of the impugned state action and determining whether the state action is a necessary means for achieving those purposes (*Heywood*). State interference is overbroad where the adverse effects of government action on individuals are grossly disproportionate to the interest that the government action is intended to protect (*Clay*).

> *Safarzadeh-Markhali, supra* para 32 at para 50.
> *R v Heywood*, [1994] 3 SCR 761 at 792, 120 DLR (4th) 348 [*Heywood*].
> *R v Clay*, 2003 SCC 75 at paras 34-40.

[39] The dual purpose of the Decision cannot be achieved by a more narrowly drafted site-specific exemption. In order to approve a site-specific application under s. 35, the standard set must be the *minimum difference necessary* to comply with the Regulations. The Director in this case determined that allowing VulCAN to emit a maximum of 1.9 ug/m^3 from January 2019 to October 2023 was the greatest emission reduction possible for VulCAN to continue operating. Furthermore, the Director was statutorily mandated to consider any public interest reason to deny

the request. The grant of an exemption requires the consideration and balancing of the wellbeing of the TCFN with broader competing public interests. In this case, the balancing was informed by numerous public consultations with the TCFN.

Regulations, *supra* para 6 at s 35(1)(b)(ii)(iii).
Official Problem, *supra* para 5 at para 13.

Issue 2: The Decision does not infringe the Appellant's rights under s. 15 of the *Charter*

[40] To establish an infringement under s. 15 of the *Charter*, a claimant must demonstrate that:

1) the law creates a distinction based on an enumerated or analogous ground; and,

2) that the distinction imposes "arbitrary—or discriminatory—disadvantage" (*Taypotat*; *Alliance*).

Québec (Procureure générale) c Alliance du personnel professionnel et technique de la santé et des services sociaux, 2018 SCC 17 at para 25 [*Alliance*].
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30 at paras 19, 20 [*Taypotat*].

1. The Decision does not create a distinction based on an enumerated or analogous ground

[41] The Respondent concedes that on reserve residence and Indigenous status are analogous and enumerated grounds respectively (*Corbiere*). However, the Respondent maintains that Ms. Plainview has failed to adduce evidence that a distinction has been created on these grounds.

Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203 at para 6, 173 DLR (4th) 1 [*Corbiere*].

[42] In *Taypotat*, the Supreme Court required "specific evidence" of the "relationship between age, residency on a reserve, and education levels" to establish the disproportionate effect of the *Kahkewistahaw Election Act*'s high school qualification requirement on the claimant. Similarly, evidence was required on the disproportionate impact of the Decision on the Appellant in the "specific context" of the Village of Spragge, which has 150 residents (*Taypotat*). Comparison of the TCFN's health indicators with the national averages is evidence that "captures a vastly larger,

more diverse population than the community" affected by the Decision and does not "meaningfully illuminate" the disproportionate impact that the TCFN face (*Taypotat*).

Taypotat, *supra* para 40 at paras 21, 32.

2. The effects pleaded by the Appellant do not flow from the Director's Decision

[43] Ms. Plainview has failed to demonstrate that any distinction created by the Decision causes the adverse health effects experienced by her or her community. In an adverse effects discrimination claim, the onus is on the claimant to demonstrate that the discriminatory impact flows from a distinction created by the law (*Taypotat*). "[T]he applicant must adduce evidence showing that the impugned provision is responsible for the [adverse] effects, not the other circumstances" (*Fraser; Micelli-Riggins*). Here, Ms. Plainview has not adduced sufficient evidence to show that on a balance of probabilities, the Decision, and not "other circumstances", is responsible for the adverse health effects experienced by her or her community.

Taypotat, *supra* para 40 at para 21.
Fraser v Canada (Attorney General), 2018 FCA 223 at para 54 [*Fraser*].
Miceli-Riggins v Canada (Attorney General), 2013 FCA 158 at para 76 [*Miceli-Riggins*].

[44] First, benzene itself is likely not responsible for all of the adverse health effects—other "environmental and demographic" factors may also be responsible. Disparities in "social determinants of health"—such as average income, education levels, and housing quality— may also explain some of the adverse health effects. Hence, evidence of a higher vulnerability to diseases such as skin rashes, asthma, higher blood pressure, and chronic headaches is inconclusive on the discrete impact that benzene or this Decision has on the members of the TCFN. This is problematic for the Appellant's s. 15 argument, as Justice Iacobucci noted for the majority in *Symes*:

> "If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. *We must take care to distinguish*

between effects which are wholly caused, or contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision" (emphasis added).

Official Problem, *supra* para 5 at paras 16, 19(c)(e), 21.
Symes v R, [1993] 4 SCR 695 at para 134, 110 DLR (4th) 470 [*Symes*].

[45] Second, Dr. Block's evidence is that even though benzene is carcinogenic, there is an "extremely low" likelihood that the increase in benzene authorized by the Decision will cause an increased risk of cancer in any individual. Any remaining causal link between the increase in benzene production allowed by the Decision and the vulnerability of the TCFN to various kinds of cancers or chromosomal disorders is removed by the fact that, as Dr. Block admitted, benzene degrades rapidly and does not remain in air, soil, or water for long periods of time.

Official Problem, *supra* para 5 at paras 19(g), 23, 24.

[46] The evidence, when considered in its totality, does not show on a balance of probabilities that the adverse effects complained of are caused by the Decision (*Nur*). The Appellant has failed to meet her burden.

R v Nur, 2011 ONSC 4874 at para 79 [*Nur*].

3. The Decision does not discriminate against the TCFN

a. The Decision does not perpetuate arbitrary disadvantage

[47] Any burden that the Decision imposes on the Appellant or her community is not arbitrary. Arbitrary disadvantage is imposed when the law "fails to respond to the capacities and needs of the members of the group" (*Taypotat*). The Decision does not impose arbitrary disadvantage because it balances the competing needs of the community. The information provided to the Director came through a publicly accessible process. The Decision came after a 60-day consultation and public meetings in which the TCFN participated. The comments submitted by the

TCFN through these processes were not unanimous—some members of the community supported the exemption.

> *Taypotat*, *supra* para 40 at para 21.
> Official Problem, *supra* para 5 at para 13.

[48] The Decision balances the needs of the TCFN community appropriately when the broader scheme and purpose of the *EPA* are considered. When adverse impact discrimination is alleged under a complex legislative scheme, one of the factors to consider is "whether the lines drawn are generally appropriate" having regard to the purpose of the scheme (*Withler*). Drawing distinctions is "essential to the effective operation of our governments" (*CSQ*). The benefits that the *EPA* aims to confer include not just environmental protection, but also economic and technological progress. The Decision provides economic security to the 275 members of the TCFN who are employed by VulCAN as well as their families who depend on them. It also requires VulCAN to invest in technology that will lead to a cleaner environment in the future for the TCFN. These are concrete advantages that the Decision makes available to Ms. Plainview under the scheme of the *EPA*.

> *Centrale des syndicats du Québec v Quebec*, 2018 SCC 18 at para 134 [*CSQ*].
> *Withler v Canada*, 2011 SCC 12 at para 71 [*Withler*].
> Official Problem, *supra* para 5 at 2, para 25(g).

b. The Decision does not make already existing disadvantage worse

[49] The potential for the increased benzene emissions to reinforce the disadvantage faced by the Appellant is remote (*CSQ*). There is no direct evidence on the increase in detrimental health effects resulting from the incremental increase in benzene production that the Decision contemplates. One would have to infer these effects from Dr. Block's evidence that benzene is carcinogenic and that *in general*, the risk of cancer rises with increased exposure to benzene. However, Dr. Block admits that benzene degrades in the environment rapidly and that there is an

"extremely low" chance that the contemplated increase in benzene production would lead to an increased risk of cancer in an individual.

CSQ, *supra* para 48 at para 30.
Official Problem, *supra* para 5 at paras 22-24.

[50] The facts of *CSQ* do not help the Appellant in her claim that the Decision deepens already existing disadvantage. In *CSQ*, a six-year delay in the enforcement of pay equity for women in workplaces without male dominated job classes was found to be discriminatory. In the interim period, the Legislature or the Pay Equity Commission had provided for no means—such as monetary compensation—to remedy the inequitable situation for the women who were being denied equal pay for work of equal value (*CSQ*). In this case, however, the Director has already required VulCAN to lower its emissions from 3.0 $\mu g/m^3$ to 1.9 $\mu g/m^3$ by 2019. This measure will remain in place until VulCAN is able to gradually reduce its emissions by 63 percent through a closely monitored process. The limit on VulCAN's benzene emissions to 1.9 $\mu g/m^3$ is a more sophisticated approach than the Quebec Legislature's in *CSQ*.

CSQ, *supra* para 48 at paras 31-32.
Official Problem, *supra* para 5 at 2.

Issue 3: Any infringement of the Appellant's rights under ss. 7 or 15 is reasonable under the *Doré* framework

[51] Section 1 of the *Charter* requires that any limitation on *Charter* rights be reasonable and demonstrably justified in a free and democratic society. When an administrative decision engages *Charter* values or interests, the *Doré* framework is used to determine whether the limitations are reasonable (*Doré*). In contrast, the *Oakes* framework applies when laws of general application limit *Charter* rights (*Doré*). Regardless of which framework is used, the justificatory requirement remains the same: is the rights' limitation proportionate in light of the state's objective (Barak, *Oakes*)?

Charter, *supra* para 13, s 1.
Doré v. Barreau du Québec, 2012 SCC 12 at para 36 [*Doré*].
Aharon Barak, "Proportionality: Constitutional Rights and Their Limitations" (Cambridge: Cambridge University Press, 2012) at 26-7.
R v Oakes, [1986] 1 SCR 103 at 139 [*Oakes*].

1. The court must inquire into the Director's reasons to look for justification

[52] The reasons of the Director are the primary justification for any infringements of *Charter* rights in this case (*Vavilov*). "Reasons" include not just the explicit explanation offered by the Director, but also the record and the outcome of the case (*Newfoundland Nurses; Vavilov*). At the stage of judicial review, the onus is on the challenger to show that the decision is unreasonable (*Vavilov*). If they show that a *Charter* right has been infringed, then this raises an "apprehension of unreasonableness" (*Delios*). The quality of the decision-maker's reasons *must* overcome this concern in order for the decision to be reasonable (*Vavilov*). Hence, any inquiry into the justification of the infringement must begin from the reasons offered by the Director (*Vavilov*).

Canada (Minister of Citizenship and Immigration) *v Vavilov*, 2019 SCC 65 at paras 84, 91, 100, 133 [*Vavilov*].
Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62 at paras 14, 15 [*Newfoundland Nurses*].
Delios v Canada, 2015 FCA 117 at para 26 [*Delios*].

2. Laying out the Doré framework

[53] The *Doré* framework requires the decision-maker to exercise the same "justificatory muscles" as the last two stages of the *Oakes* test: minimal impairment and balancing (*Loyola*). It requires two conditions to be met. First, the Director must balance the *Charter* values engaged by the Decision with her statutory objectives (*Doré*). Second, the result of the balancing exercise has to be proportionate (*Doré*; *TWU*). The Decision must fall within a range of reasonable outcomes (*Doré*; *TWU*).

Loyola High School v Quebec Attorney General, 2015 SCC 12 at para 40 [*Loyola*].
Doré, *supra* para 51 at paras 47, 55, 56, 57.

Law Society of British Columbia v Trinity Western University, 2018 SCC 32 at para 79 [*TWU*].

[54] Proportionality at the second step entails resolving two issues. First, that the *Charter* protections be limited "no more than necessary" i.e. minimal impairment. (*Loyola*). If reasonably available alternative means allow the decision-maker to "reduce the impact on the protected right while still permitting him or her to *sufficiently* further the relevant statutory objectives", (emphasis in the original) then the decision-maker's choice of means is disproportionate (*TWU*).

Loyola, *supra* para 53 at para 4.
TWU, *supra* para 53 at para 81.

[55] Another question that needs to be answered is whether the final outcome is strictly proportionate, which requires a comparison of "how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives" (*TWU*). The issue is "whether the negative impacts on the *Charter* rights are proportionate to the positive benefits flowing from the impugned decision" (*TWU*). If the answer to that question is "no", then the outcome is not proportionate (*TWU*).

TWU, *supra* para 53 at paras 82, 127.

3. The Director engages in balancing under the statutory scheme

[56] Step one of the *Doré* test is satisfied in this case. The Director proportionately balanced the interests of the TCFN with the statutory objectives under the Regulations.

[57] In assessing whether there was a public interest reason "sufficient" to require the denial of the exemption, the Director decided that granting an exemption was a proportionate limitation on the TCFN's rights. "Public interest" is wide enough to incorporate the values of life, liberty, and security of the person under s. 7 and equality under s. 15 of the *Charter* (*Doré*). Moreover, "public interest" also contemplates a consideration of the historical and social place that the Appellant and

the TCFN occupy in Canadian society because of their Indigeneity (*Carrier Sekani*). This part of the Regulations imports into the Director's analysis the doctrine of proportionality. If the negative public interest effects of the exemption outweigh the benefits accrued, the Regulations mandate that the Director deny the exemption.

> Regulations, *supra* para 6, s 35.
> *Doré*, *supra* para 51 at para 24.
> *Rio Tinto Alcan Inc. v Carrier Sekani Tribal*, 2010 SCC at para 43 (*Carrier Sekani*).

4. The outcome of the balancing was proportionate under step two of the *Doré* analysis

a. The Director chose means that are minimally impairing

[58] Other less infringing means available to the Director would not have allowed her to sufficiently fulfill her statutory objectives. Theoretically, there were two alternative options available to the Director: 1) reject the exemption entirely; or, 2) allow the exemption at a lower level and/or for a shorter time period. The Decision falls within a range of reasonable outcomes and should be afforded deference (*TWU*).

> *TWU*, *supra* para 53 at para 79.

[59] The Director could have simply rejected the request for the site-specific exemption. However, the absolute denial of VulCAN's request would not have allowed her to sufficiently fulfill her statutory objectives. It would have been against the spirit of the *EPA*, which aims to protect the environment while allowing for economically productive activity. It is true that the stated objective of the *EPA* is simply the "protection and conservation of the natural environment." However, the stated purpose is not exhaustive when it comes to the statutory purpose; the statutory scheme and context also matter (*Vavilov*; *Safarzadeh-Markhali*). The statutory scheme and the Director's statements indicate that the *EPA* serves the dual purpose of environmental protection and economic development.

EPA, *supra* para 32, s 3.
Regulations, *supra* para 6, s 35.
Vavilov, *supra* para 52 at para 108.
Safarzadeh-Markhali, *supra* para 32 at para 31.
Official Problem, *supra* para 5 at para 25(f).

[60] While an absolute denial of the exemption would have restricted benzene emissions by VulCAN to 0.45 µg/m^3, this would have meant a loss of jobs for at least 50 people and a reduction in VulCAN's production activities. At least three companies have ceased operations in Ontario in the past because of what they considered to be unduly restrictive environmental regulations. Allowing environmental protection to absolutely trump economic concerns would be against the dual purpose of the *EPA*.

Official Problem, *supra* para 5 at para 25(a)-(k).

[61] The Director may also have set the site-specific standard at a level lower than 1.9 µg/m^3. Or she could have adjusted the duration of the exemption to expire earlier than October 2023. The Regulations require the Director to allow the site-specific exemption only at the "minimum difference necessary to enable the person to comply" with the Regulations. On the evidence available, the Director decided that these alternatives would not have allowed her to sufficiently fulfill her statutory objectives under s. 35. Deference is owed to such a policy choice made pursuant to the Director's discretion (*Doré*). The Director must be given a margin of appreciation in deciding which means to choose when she is pursuing her statutory objectives (*Doré*). The exemption to allow 1.9 µg/m^3 of benzene emissions until October 2023 fell within a range of reasonable outcomes.

TWU, *supra* para 53 at para 81.
Doré, *supra* para 51 at para 56.
Regulations, *supra* para 6, s 35(1)(b)(ii).

b. The benefits of the Decision outweigh its harms

[62] There was no public interest reason sufficient to deny the exemption because the benefits gained outweigh any negative effects accrued (*TWU*). Hence, the Decision was strictly proportionate. A strict proportionality analysis requires the decision-maker to "balance at the margins" (Stacey). What is being weighed in this case is not the *absolute* value of the TCFN's environmental and health interests against the *absolute* value of the benzene emissions. Instead, what is being balanced are the marginal (i.e. additional over the ones that already exist) detrimental effects of the increase in emissions against the benefits created by the exemption (*TWU*).

Richard Stacey, "The Magnetism of Moral Reasoning and the Principle of Proportionality in Comparative Constitutional Adjudication" (2018) 67:2 AJCL 453 at 475-475.
Regulations, *supra* para 6, s 35.
TWU, *supra* para 53 at para 127.

[63] The benefits gained by the Decision are certain. They include the retention of at least 50 jobs and investment in environmentally friendly technology which is expected to result in a decrease of 63 percent in benzene emissions in the surrounding area. It provides financial security to 275 members of the TCFN who work at VulCAN and their families. Given that at least 3 other companies in the past have ceased operations in Ontario because of unduly restrictive environmental regulations, the Decision also decreases the chance that VulCAN will do the same.

Official Problem, *supra* para 5 at para 25(a)-(k).

[64] The negative effects of the decision are limited. They are limited because the level of benzene emissions allowed is not at the maximum of 3.0 $\mu g/m^3$ possible for VulCAN, but at 1.9 $\mu g/m^3$ and only until 2023. Lastly, the decision contemplates a long-term reduction in the levels of benzene produced. This offsets any possible negative effects of the Decision.

Official Problem, *supra* para 5 at 2, paras 22-25.

[65] Substantive equality under s. 15 gives the TCFN a claim to environmental protection at the same level or perhaps on a level even greater than a non-Indigenous group. In accommodating

interests, the decision-maker is entitled to balance the interests of an Indigenous group with economic interests (*Chippewas*). VulCAN employs 275 members of the TCFN; some members of the TCFN expressed their support for the Decision during the consultation process. If the factory laid off employees, that would jeopardize the jobs of the members of the TCFN. The Decision also requires a decrease in benzene emissions in the long run. Hence, the Decision reasonably balances equality interests with the interests of the TCFN and the wider community, as well as the long-term improvement of the environment.

Official Problem, *supra* para 5 at para 25(j).
Chippewas of the Thames First Nation v Enbridge Pipelines, 2017 SCC 41 at para 59 [*Chippewas*].

[66] The beneficial effects of the Decision outweigh the negative effects that accrue as a result of any rights infringements. Hence, the limitation of rights is reasonable under the *Doré* framework.

Issue 4: The Appellant is not entitled to damages under s. 24(1) of the *Charter*

1. The appropriate remedy is a declaration

[67] If the Director's Decision unreasonably violates ss. 7 and/or 15*,* the only appropriate remedy that is fair to both the parties is a declaration of a *Charter* violation under s. 24(1). Section 24(1) authorizes "appropriate and just" individual remedies for *Charter* violations resulting from discretionary actions authorized by constitutional legislation (*PHS*).

Charter, supra para 13, s 24(1).
PHS, *supra* para 27 at para 144.

2. Damages are not functionally justified

[68] The Appellant is not entitled to damages under s. 24(1). Individual damages under s. 24(1) do not automatically follow every *Charter* violation. The burden is on the Appellant to show that damages are functionally justified and necessary to compensate the claimant, vindicate the right

and/or deter future *Charter* breaches *(Ward*). Compensation is generally the most important object, with vindication and deterrence playing supporting roles (*Ward*). The Supreme Court in *Henry* cautioned "against extending the availability of *Charter* damages too far". Even if the Appellant can show that damages are functionally required to fulfil one or more of these purposes, the available alternative remedy of judicial review and effective governance concerns render s. 24(1) damages inappropriate and unjust in this case (*Ward*).

> *Vancouver (City) v Ward*, 2010 SCC 27 at paras 25, 33, 47 [*Ward*].
> *Henry v British Columbia (Attorney General),* 2015 SCC 24 at para 91 [*Henry*].

a. Damages are not necessary for compensation

[69] The object of compensation, the most prominent of the three functions, is not engaged (*Ward*). The Appellant must prove causation in order to be entitled to personal damages and she has failed to do so. The Appellant has not adduced any evidence of personal physical, psychological or pecuniary loss as a result of the Director's Decision that is properly compensated with monetary damages.

> *Ward*, *supra* para 68 at para 27.
> Official Problem, *supra* para 5 at 3.

b. Damages are not necessary to vindicate rights or deter future Charter breaches

[70] Damages are not required to vindicate *Charter* rights and affirm constitutional values in this case. The *Charter* breach did not cause detrimental harm to the relationship between the state and society (*Ward*). The Decision did not diminish public faith in the efficacy of constitutional protection (*Fose*). The Ministry made reasonable efforts in good faith to accommodate competing interests by holding public consultations for 60 days before approving the site-specific standard.

> *Ward*, *supra* para 68 at paras 27, 31.
> *Fose v Minister of Safety and Security*, 1997 (3) SA 786 (CC) at para 82, 1997 (7) BCLR 851 (CC) [*Fose*].

Official Problem, *supra* para 5 at para 13.

[71] The gravity of the breach is not severe enough to warrant damages to vindicate Charter rights. The limited timeframe for the site-specific standard will not have long lasting impact on the environment or the well-being of the TCFN as benzene degrades rapidly.

Official Problem, *supra* para 5 at 2, 6.

[72] Damages are also not required to deter state actors from committing future *Charter* breaches of this nature (*Ward*). The Ministry will be sufficiently deterred from committing similar *Charter* violations in the future through a declaration. Declaratory relief is an effective and sufficient remedy in this case because there is a tradition in Canada of state actors taking *Charter* declarations seriously (*Association des parents*).

Ward, *supra* para 68 at para 25.
Association des parents de l'école Rose-des-vents v British Columbia (Éducation), 2015 SCC 21 at para 62 [*Association des parents*].

c. Judicial review is an effective alternative remedy

[73] The alternative remedy of judicial review of the Director's Decision makes damages inappropriate and unjust in this case. The Supreme Court in *Ernst* held that judicial review of administrative decisions can provide prompt vindication of the claimant's *Charter* rights and provide legal guidance to deter future *Charter* breaches.

Ernst v Alberta Energy Regulator, 2017 SCC 1 at para 30 [*Ernst*].

d. Awarding damages would raise good governance concerns

[74] Good governance concerns render damages inappropriate and unjust in this case. Awarding *Charter* damages in this case would have a chilling effect on the exercise of ministerial discretion in approving future site-specific standard applications (*Ward*). The Supreme Court in *Ernst* held that "forcing the [decision-maker] to consider the extent to which it must balance the interests of

specific individuals while attempting to regulate in the overall public interest would be unworkable in fact and bad policy in law."

Ward, *supra* para 68 at para 43.
Ernst, *supra* para 73 at para 46.

[75] Where the state establishes that s. 24(1) damages raise good governance concerns, the claimant must show that state conduct met "a minimum threshold, such as clear disregard for the claimant's *Charter* rights" to warrant damages (*Ward*). The Director held lengthy public consultations and did not disregard the Appellant's *Charter* rights. Awarding damages despite the Director's efforts to balance competing interests will unduly hamper the future exercise of ministerial discretion in approving any other site-specific applications. The Appellant should not be permitted to do indirectly what she cannot do directly by paralyzing the Director's exercise of discretion and rendering s. 35 of the Regulations of no force or effect in practice.

Ward, *supra* para 68 at para 39.

[76] Declaratory relief would indeed provide a more equitable remedy in this case than individual damages. A declaration would have widespread benefits for the entire community, while only awarding Ms. Plainview damages would not. Allowing all those personally affected by the Decision to seek damages would deplete the Ministry's resources and detract from other environmental protection initiatives. Furthermore, the Ministry's responsibility to balance public and private interests is inconsistent with being liable to individual claimants for damages (*Ernst*).

Ernst, *supra* para 73 at 47.

PART V – ORDER SOUGHT

[77] For all these reasons, the Respondent respectfully submits that the appeal should be dismissed and the decision of the Court of Appeal for Ontario be upheld.

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

Team 11
Counsel for the Respondent

PART VI – LIST OF AUTHORITIES AND STATUTES

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