IN THE HIGH COURT OF THE DOMINION OF CANADA
(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)

BETWEEN:

CLAIRE PLAINVIEW

APPELLANT

-AND-

ONTARIO (MINISTER OF THE ENVIRONMENT)

RESPONDENT

FACTUM OF THE APPELLANT

COUNSEL FOR THE APPELLANT
TEAM 12

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PART I – OVERVIEW

[1] This appeal is about the reality that contemporary environmental harm is not limited to discrete one-off events but, more often, takes the form of chronic, low-dose pollution that accumulates from multiple sources and poses serious risks to human health. This appeal is also about the reality that environmental harms are unevenly distributed across Canadian society. It is consistently the most marginalized and vulnerable communities who are forced to bear a disproportionate degree of the risk and harms arising from Canada's industrial activity.

[2] The claimant, Claire Plainview ("Ms. Plainview"), lives in one such marginalized and vulnerable community. Ms. Plainview's home and traditional territory—Turtle Creek Reserve No. 3 ("Turtle Creek")—is located next to two factories that have been permitted to pollute the air for over 40 years (Official Problem). In 2018, the Director of the Ontario Ministry of the Environment (the "Director") approved a site-specific emissions standard (the "exemption"), permitting one of these factories to emit benzene—a dangerous, carcinogenic chemical—at four times the regulatory emissions standard for at least five years (Official Problem).

Official Problem, Wilson Moot 2020 at 1, 3, 4 [Official Problem].

[3] The Director's Decision ("the Decision") violates Ms. Plainview's rights under ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The Decision infringes Ms. Plainview's rights to liberty and security of the person and has a disproportionate discriminatory impact on her because she is Indigenous. The Decision is unreasonable in the circumstances because its marginal and speculative benefits are vastly out of proportion with the harms to Ms. Plainview and her Indigenous community. Therefore, Ms. Plainview seeks orders under s. 24(1) of the *Charter* to set aside the Decision and award her damages (Official Problem).

Official Problem, *supra* para 2 at 3.

[4] Notably, the harm at issue in this case presents unique causation and evidentiary challenges under the current *Charter* framework. However, the Decision clearly contributes to a pattern of discrimination and physical and psychological harm that is antithetical to the *Charter*'s purpose and the goal of reconciliation with Indigenous peoples. Where the current *Charter* framework overlooks cumulative effects or allows scientific uncertainty to inoculate state action from *Charter* scrutiny, the framework must evolve to achieve justice in the face of modern industrial pollution. This case is an ideal opportunity for the High Court of the Dominion of Canada to articulate a more precautionary approach that provides Canadians, especially the most vulnerable among us, with robust *Charter* protections in light of contemporary environmental harms.

PART II – STATEMENT OF FACTS

1. Factual Background

[5] Ms. Plainview is a 34-year-old Indigenous woman who has been exposed to pollution her entire life.

Official Problem, *supra* para 2 at 1, 3.

[6] VulCAN is a rubber factory that emits benzene—a toxicant known to have adverse health effects at any level of exposure. The World Health Organization considers this exposure a major public health issue, as benzene is known to be carcinogenic and potentially fetotoxic.

Official Problem, *supra* para 2 at 6.

[7] On October 10, 2018, The Director approved an exemption allowing VulCAN to emit benzene at four times the regulatory standard for a period of five years (until October 9, 2023). This exemption was the second of two concessions given to VulCAN, pursuant to s. 35 of the *Air Pollution – Local Air Quality Regulations* ("*Regulatioans*") under the Ontario *Environmental Protection Ac*t ("*EPA*"). The first concession permitted VulCAN to expand production and install

upgrades on the basis that there would be minimal increase in benzene emissions. VulCAN failed to meet the conditions of this first concession when its facility upgrades failed, causing excessive benzene emissions.

Official Problem, *supra* para 2 at 1, 2, 3, 4.

[8] Ms. Plainview and members of her community expressed their opposition to granting a second concession to VulCAN during public consultations, given the cumulative effects of emissions in Turtle Creek. Ms. Plainview has suffered from asthma since childhood, and experiences frequent respiratory issues, migraines, and dizziness. Ms. Plainview has lived in Turtle Creek for most of her life. In December 2006, Ms. Plainview's mother was diagnosed with myeloid leukemia and died in March 2009 at age 57. The life expectancy in Ms. Plainview's community is significantly lower than that of the average population and the community has significantly higher rates of cancer, fertility issues, and other negative health effects associated with benzene exposure, including a skewed birth rate (2:1 ratio of female to male births over the past 30 years).

Official Problem, *supra* para 2 at 3, 4, 5.

2. Procedural History

[9] Ms. Plainview brought a judicial review to the Ontario Superior Court of Justice (ONSC), challenging the Decision on the basis that it infringed her right to equality and rights to life, liberty, and security of the person, pursuant to ss. 7 and 15 of the *Charter*.

Official Problem, *supra* para 2 at 1, 2.

[10] The ONSC held that the Decision infringed Ms. Plainview's ss. 7 and 15 *Charter* rights, noting that Indigenous people "have disproportionately borne the environmental brunt of Canada's industrial activity over the past 100 years" and Ms. Plainview suffered cumulative physical and

psychological harms as a result of the Decision (Official Problem). The ONSC awarded Ms. Plainview $30,000 in *Charter* damages (Clarifications).

Official Problem, *supra* para 2 at 8, 9.
Clarifications to the Official Problem, Wilson Moot 2020 at para 8 [Clarifications].

[11] The Ministry appealed the ONSC decision to the Ontario Court of Appeal where the majority overturned the trial judgment and held that the cumulative effects were not caused by the Decision. The dissent agreed with the ONSC that the Decision violated Ms. Plainview's equality right as an Indigenous person and that this *Charter* infringement warranted $15,000 in damages.

Official Problem *supra* para 2 at 9, 10.

PART III – STATEMENT OF POINTS IN ISSUE

[12] This appeal raises the following issues:

1. Does the Decision infringe Ms. Plainview's equality rights under s. 15 of the *Charter*?
2. Does the Decision infringe Ms. Plainview's rights to life, liberty, and security of the person under s. 7 of the *Charter*?
3. Are the ss. 7 and 15 *Charter* infringements reasonable limitations on these rights?
4. Should Ms. Plainview be awarded damages under s. 24(1) of the *Charter*?

PART IV – ARGUMENT

[13] The parties agree that the standard of review is reasonableness (Clarifications). Discretionary administrative decisions that engage the *Charter* are reviewed under the two-stage *Doré* framework (*TWU*). The preliminary question is "whether the administrative engages the *Charter* by limiting *Charter* protections — both rights and values" (*TWU*). If this is established, the question becomes "whether, in assessing the impact of the relevant *Charter* protection given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play" (*TWU*).

Clarifications, *supra* para 11 at para 4.
Law Society of British Columbia v Trinity Western University, 2018 SCC 32 at paras 57–58 [*TWU*].

[14] In this appeal, two *Charter* rights are implicated – ss. 7 and 15. The Decision does not reflect a proportionate balancing between these *Charter* protections and the relevant statutory mandate. Consequently, the Decision is unreasonable and should be set aside. Ms. Plainview is also entitled to *Charter* damages to fully remedy these infringements.

[15] Two overarching principles should inform all stages of this analysis. The first is the principle of reconciliation, defined in *Daniels* as the "[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship" (*Daniels*). Reconciliation arises from s. 35 of the *Constitution*, but it underpins both the application of the *Charter* and the review of administrative decisions where fundamental Indigenous interests are engaged (*CCAS*; *Kainaiwa*). The Decision affects Indigenous lands and the ability of an Indigenous community to remain on their lands. These are fundamental interests. Therefore, the Court must consider the role of this Decision in either advancing or impairing the process of reconciliation (*Kainaiwa*).

Daniels v Canada (Indian Affairs and Northern Development), 2016 SCC 12 at para 34 [*Daniels*].
Catholic Children's Aid Society of Hamilton v GH, TV and Eastern Woodlands Métis of Nova Scotia, 2016 ONSC 6287 at para 92 [*CCAS*].
Kainaiwa/Blood Tribe v Alberta (Energy), 2017 ABQB 107 at para 129 [*Kainaiwa*].

[16] Second, the SCC has recognized the precautionary principle as a binding customary international law (*Spraytech*; *Castonguay*). Legislation is presumed to be in accordance with customary international law and "must be interpreted in a manner that reflects" these principles (*Vavilov*; *Hape*). Therefore, the scope of the *Charter* should be interpreted in accordance with customary international law (*Hape*). The precautionary principle recognizes that a lack of scientific certainty should not be used to justify avoiding or postponing protecting the environment,

recognizing the "inherent limits in being able to determine and predict environmental impacts with scientific certainty" and requiring the government to "anticipate and prevent environmental degradation" (*Castonguay*). The precautionary principle is consistent with the *EPA,* as the SCC previously found that the *EPA* advances preventative and protective purposes (*Castonguay*). Given the scientific uncertainty in this appeal and the implicit endorsement of the precautionary principle in the *EPA*, the precautionary principle grounds Ms. Plainview's *Charter* infringement.

> *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at paras 31–32 [*Spraytech*].
> *Castonguay Blasting Ltd. v Ontario (Environment)*, 2013 SCC 52 at paras 20-21 [*Castonguay*].
> *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 182 [*Vavilov*].
> *R v Hape*, 2007 SCC 23 at para 35, 56 [*Hape*].

Issue 1: The Decision infringes Ms. Plainview's S. 15 *Charter* Rights

[17] The Decision violates Ms. Plainview's equality rights. A s. 15 infringement occurs where (1) the challenged law or decision draws a distinction on an enumerated or analogous ground; and (2) the distinction is discriminatory in that it has the effect of reinforcing, perpetuating or exacerbating disadvantage (*Taypotat*; *CSQ; APP*). The Decision creates a distinction in effect, in that it imposes a unique burden on Ms. Plainview as an Indigenous person. This distinction is discriminatory because it exacerbates the Turtle Creek First Nation's pre-existing vulnerability and perpetuates a history of forced displacement and assimilation of Indigenous peoples.

> *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 19–20 [*Taypotat*].
> *Centrale des syndicats du Québec v Quebec* (Attorney General), 2018 SCC 18 at paras 22, 25 [*CSQ*].
> *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 25 [*APP*].

[18] The goal of s. 15 is *substantive*, as opposed to formal, equality (*CSQ*). The SCC has long recognized that government action that appears neutral on its face can perpetuate gross inequality

in its effects (*Eldridge*). Thus, the s. 15 test considers the "actual impact" of a government action, "taking full account of the social, political, economic and historical factors concerning the [affected] group" (*Withler*). Here, the discriminatory nature of the Decision is evident in light of the history of the Turtle Creek First Nation. The Director had the opportunity to end a cycle of harm that threatens the continued existence of the community. Instead, she added to the long-standing burden of pollution on the community and further undermined the ability of residents to maintain their way of life on their traditional territory.

> *CSQ*, *supra* para 17 at para 25.
> *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 64, 151 DLR (4th) 577 [*Eldridge*].
> *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 39 [*Withler*].

*1. **The Decision draws a distinction in effects on the enumerated ground of race***

[19] The Decision makes a distinction in effects on the basis of Indigeneity—a characteristic encompassed in the enumerated ground of race (*Kapp*; *FCS*). A distinction in effects exists where a law or decision denies a benefit or imposes a burden based on membership in an enumerated or analogous group (*Withler*). *Taypotat* affirms that the evidentiary burden at this stage "need not be onerous" but evidence "must amount to more than a web of instinct" (*Taypotat*).

> *R v Kapp*, 2008 SCC 41 at para 56 [*Kapp*].
> *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para 395 [*FCS*].
> *Withler*, *supra* para 18 at para 64.
> *Taypotat*, *supra* para 17 at para 34.

[20] The Decision imposes a unique burden on Ms. Plainview because she is Indigenous: it forces her into an impossible choice between maintaining her cultural identity and protecting her physical safety. While other Canadians may choose to move when exposed to heightened levels of toxic pollution, this choice has different significance for Indigenous Canadians residing on their

traditional territories. In *Corbiere*, the SCC recognized the significance of land to the cultural identities of Indigenous peoples and the constructive immutability of an Indigenous person's reserve status. The SCC also noted that Indigenous people living off reserve often have "difficulty maintaining their identity in particular and serious ways" (*Corbiere*). According to Ms. Plainview, Turtle Creek *is* her identity and leaving would mean abandoning deep-seated attachments to her culture and community (Official Problem). However, in choosing to stay, she is forced to absorb heightened levels of a dangerous, carcinogenic chemical (Official Problem).

> *Corbiere v Canada (Minister of Northern Affairs)*, [1999] 2 SCR 203 at paras 15, 17, 72, 173 DLR (4th) 1 [*Corbiere*].
> Official Problem, *supra* para 2 at 4, 6.

[21] In the context of s. 2(a), the SCC has long recognized "indirect coercive burdens" as a form of differential treatment that may unacceptably interfere with religious liberty (*Edwards Books*). In *Hutterian Brethren*, the SCC held that Photo ID laws that, in effect, forced claimants to choose between their religious beliefs and rural communal way of life violated their right to freedom of religion. S. 15, like s. 2(a), protects against state interference with "fundamental choices" that go to the heart of a protected ground (*Egan*). It follows that the Decision, which effectively penalizes Ms. Plainview for her choice to retain an essential aspect of her Indigenous identity, constitutes differential treatment within the meaning of s. 15.

> *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at para 96, 35 DLR (4th) 1 [*Edwards Books*].
> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 34 [*Hutterian Brethren*].
> *Egan v Canada*, [1995] 2 SCR 513 at 518, 124 DLR (4th) 609 [*Egan*].

[22] In *Corbiere*, the SCC recognized the intersection of Indigeneity and residence as an analogous ground (*Corbiere*). The fact that not all Indigenous peoples live on their traditional territories does not preclude a finding of differential treatment on the basis of Indigeneity. The

SCC has "long recognized that differential treatment can occur on the basis of an enumerated ground despite the fact that not all persons belonging to the relevant group are equally mistreated" (*Martin*). However, in the alternative, the Court may also find adverse effects discrimination on the basis of Ms. Plainview's on-reserve status.

> *Corbiere*, *supra* para 20 at para 10.
> *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54 at para 76 [*Martin*].

2. <u>The Decision is discriminatory</u>

[23] A law or decision is discriminatory if it perpetuates disadvantage (*CSQ*). At the second stage of the *Taypotat* test, the focus is on the actual impact of the impugned state action, not the motives behind it (*CSQ*). The Decision has two discriminatory impacts on Ms. Plainview and the Turtle Creek First Nation. First, it has the *direct* impact of exposing the community to more pollution. Second, it has an *indirect* impact: by making it more physically and psychologically difficult for members of the Turtle Creek First Nation to remain on their traditional territory, the Decision threatens the continued survival of the community.

> *CSQ*, *supra* para 17 at paras 30, 35.

[24] In *APP*, the SCC clarified that it is no longer "necessary or desirable" to perform a "step-by-step consideration" of the four contextual factors set out in *Law* (*APP*). Instead, in both *APP* and *CSQ*, the majority took a "broad and generous" approach to the discrimination analysis, "focusing on historic disadvantage" (Hamilton & Koshan). Here, as in *CSQ* and *APP*, the claimant group's historic disadvantage is central to the claim of discrimination. The Decision is discriminatory because it exacerbates the Turtle Creek First Nation's pre-existing vulnerability and perpetuates a history of assimilatory pressure on Indigenous communities. Moreover, the effects of the Decision do not correspond to the actual needs of Turtle Creek residents.

> *APP*, *supra* para 17 at para 28.

Jonnette Watson Hamilton & Jennifer Koshan, "Equality Rights and Pay Equity: Déjà vu in the Supreme Court of Canada" (2019) 15 JL & Equality 1 at 28 [Hamilton & Koshan].

a. The Turtle Creek First Nation suffers from pre-existing disadvantage

[25] In *Law*, the SCC recognized "pre-existing disadvantage" as "probably the most compelling factor" in establishing that an impugned law or decision is discriminatory (*Law*). As an Indigenous person, Ms. Plainview is part of a group that faces "indisputable" pre-existing disadvantage in Canadian society (*Kapp*). The SCC has acknowledged the legacy of "displacement and assimilation" of Indigenous peoples, and that "Aboriginal peoples experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health and housing" (*Corbiere*; *Lovelace*). Moreover, as noted by the Divisional Court, "Indigenous people have disproportionately borne the environmental brunt of Canada's industrial activity over the last 100 years" (Official Problem). This trend of unequally distributed environmental harm continues in the present day; according to Indigenous and Northern Affairs Canada, over half of all First Nations reserves contain at least one active contaminated site (Official Problem).

Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at para 63, 170 DLR (4th) 1 [*Law*].
Kapp, *supra* para 19 at para 59.
Corbiere, *supra* para 20 at para 83.
Lovelace v Ontario, 2000 SCC 37 at para 69 [*Lovelace*].
Official Problem, *supra* para 2 at 5, 8.

[26] Many of these disadvantages are evident in the Turtle Creek First Nation. Turtle Creek has suffered the effects of benzene pollution for over four decades despite longstanding community opposition to contamination (Official Problem). Residents report higher rates of asthma, cancer, and fertility issues compared to the general population and have a life expectancy "well-below" the national average (Official Problem). Ms. Plainview describes her community as holding onto "what's left of [their] way of life" (Official Problem).

Official Problem, *supra* para 2 at 3, 4, 5.

b. The Decision exacerbates the physical and socio-economic vulnerability of the Turtle Creek First Nation

[27] State conduct is discriminatory if it "widens the gap" between a historically disadvantaged group and the rest of the society (*Quebec v A*). The Decision widens the gap between the Turtle Creek First Nation and the rest of society by exacerbating the community's disadvantage in the domains of health and socio-economic status. The Decision increases the community's exposure to a benzene, a toxic chemical (Official Problem). Benzene is known to cause leukemia, the risk of which "increases exponentially with greater exposure" (Official Problem). Moreover, expert evidence shows that communities subjected to heavy pollution often suffer disproportionate economic impacts, including reduced business revenues and increased costs for consumers (Official Problem). The effect of the Decision is to worsen the conditions of a vulnerable community already suffering immensely from health problems and socio-economic disadvantage.

> *Quebec (Attorney General) v A*, 2013 SCC 5 at para 332 [*Quebec v A*].
> Official Problem, *supra* para 2 at 5, 6.

[28] It is no defence that government action is not responsible for all or most of the pollution in Turtle Creek. The SCC rejected this line of argument in *APP*, holding that, "when [government action] perpetuates historic disadvantage for protected groups, regardless of who caused their disadvantage, the action is subject to review for s. 15 compliance" (*APP*). Moreover, in *CSQ*, the SCC held that it was "irrelevant" that the impugned legislation "did not *create* pay discrimination" and was in fact intended to offset the disadvantage of women in the workforce (*CSQ*). To find a discriminatory impact, it was sufficient to show that systemic discrimination *existed* and the impugned state action *reinforced* rather than attenuated this wider societal trend (*CSQ*).

> *APP*, *supra* para 17 at para 41.
> *CSQ*, *supra* para 17 at paras 32–33.

[29] Here, the Turtle Creek First Nation has been subject to dangerous levels of toxic pollution for decades, in line with a wider trend of environmental discrimination against Indigenous communities (Official Problem). The Director could have exercised her discretion to prevent further harm to an already marginalized and vulnerable community. Instead, she chose to allow more pollution, thereby perpetuating a discriminatory trend. The fact that there was already toxic pollution in Turtle Creek does not inoculate the Decision from s. 15 scrutiny. To the contrary, the case for discrimination is stronger in light of the existing pollution and the cumulative burden on the Turtle Creek First Nation.

Official Problem, *supra* para 2 at 8.

c. The Decision undermines the social and cultural survival of the Turtle Creek First Nation

[30] The Decision also perpetuates disadvantage by exacerbating the social and cultural vulnerability of the Turtle Creek First Nation. The exemption makes it more physically and psychologically burdensome to live in Turtle Creek. Not only does it impose a physical burden on residents, it increases the perceived risk of harm to oneself and one's family. As Chief Alder explains, many members of the Turtle Creek First Nation "feel depressed and anxious about [the] pollution" and fear that their children "will bear the burden of growing up in a poisoned land" (Official Problem). While Ms. Plainview is determined to remain on her traditional territory, other residents may be forced to leave if they find these conditions unsafe or intolerable. Evidence linking benzene exposure to fertility issues and chromosomal aberrations suggests that pregnant women in particular may feel compelled to move to start a family elsewhere (Official Problem). Given disproportionate rates of birth defects, miscarriages, and stillbirths in Turtle Creek, the loss of community members, and particularly those of childbearing age, poses a credible threat to the intergenerational survival of the Turtle Creek First Nation (Official Problem).

Official Problem, supra para 2 at 5, 6.

[31] In *Cunningham*, the SCC recognized collective survival as an important interest for Indigenous Canadians that falls within the scope of s. 15 (*Cunningham*). The ONSC has also held that, given the "effects of Canada's wrongdoing on the strength and sustainability of Canada's Aboriginal communities and cultures," interference with collective survival can violate s. 15 (*CCAS*). The Decision, by threatening Ms. Plainview's community, compounds a long and painful legacy of government policies aimed to eliminate Indigenous peoples as "distinct legal, social, cultural, and religious entities in Canada" (*Servatius*). This impact is not only discriminatory within the context of s. 15, but also inimical to the principle of reconciliation.

Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37 at paras 75, 80 [*Cunningham*].
CCAS, *supra* para 15 at paras 73, 91.
Servatius v Alberni School District No. 70, 2020 BCSC 15 at para 20.

d. The Decision does not correspond to the needs of the Turtle Creek First Nation

[32] The Decision does not correspond to the actual needs of Turtle Creek residents. While the exemption requires VulCAN to reduce emissions back to the regulatory standard in the long run, it provides no incentive for VulCAN to ever go *below* the regulatory standard (Official Problem). Thus, it cannot be said to have long term environmental benefits for the Turtle Creek First Nation. It merely suspends the operation of a regulatory standard that would otherwise provide a modicum of protection to a community burdened by excessive pollution.

Official Problem, *supra* para 2 at 2.

[33] The alleged economic benefits for Turtle Creek are also negligible and speculative. According to the Director, the Decision preserves a mere 50 out of 900 jobs at the VulCAN facility (Official Problem). There is no indication that all or many of the preserved jobs are those of Turtle Creek residents. Moreover, the fact that a small number of Turtle Creek residents may see some

benefit from the Decision is no full answer to Ms. Plainview's claim. The SCC has held that "heterogeneity within a claimant group does not defeat a claim of discrimination" (*Quebec v A*). To hold otherwise would allow the state to justify enumerable kinds of discriminatory treatment by cherry picking one or two members of the claimant group who feel less aggrieved.

> Official Problem, *supra* para 2 at 5.
> *Quebec v A*, *supra* para 27 at para 354.

[34] At the heart of Ms. Plainview's s. 15 claim is the fact that the Decision impacts a vulnerable community by compounding one of the central factors causing their vulnerability in the first place. The Crown cannot claim to fix the effects of pollution by permitting more pollution.

Issue 2: The Decision infringes Ms. Plainview's s. 7 *Charter* rights

[35] A s. 7 infringement occurs where, (1) state action deprives a claimant of their rights to life, liberty, or security of the person; and (2) this deprivation is not in accordance with the principles of fundamental justice (*Carter*). The Decision violates Ms. Plainview's rights to liberty and security of the person and is not in accordance with the principles of fundamental justice, as it is arbitrary and grossly disproportionate.

> *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 54-55 [*Carter*].

[36] While each *Charter* provision has its own analysis, the SCC has stated that s. 15 equality rights are broad, and applicable to every other *Charter* right (*Andrews*). In *G(J)*, L'Heureux Dubé J stated that "the principles of equality...are a significant influence on interpreting the scope of protection" of s. 7. In *G(J)*, the minority interpreted the protections offered by s. 7 substantively, recognizing that women are disproportionately affected by child protection proceedings (*G(J)*). Equality analyses should also be "carried out with an eye to the historical and ongoing wrongs" that affect Indigenous peoples (*CCAS*). In this appeal, the scope of Ms. Plainview's s. 7 rights must be interpreted in light of the disproportionate burden of environmental harm on Indigenous

peoples, and members of the Turtle Creek First Nation in particular. As an Indigenous person, Ms. Plainview is subject to this disproportionate burden, which causes psychological stress unique to Indigenous peoples, and rises above the level of normal everyday stressors (Official Problem).

> *Carter*, *supra* para 35 at paras 54-55.
> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at para 185, 56 DLR (4th) 1 [*Andrews*].
> *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at paras 112, 113, 177 DLR (4th) 124, L'Heureux Dubé J [*G(J)*].
> *CCAS*, *supra* para 15 at para 73.
> Official Problem, *supra* para 2 at paras 4–5, 8.

1. The Decision engages s. 7 of the Charter

[37] Executive decisions are subject to *Charter* scrutiny (*PHS*). Moreover, s. 7 is engaged where state action removes a protection or actively increases an individual's risk of harm (*PHS*). In *PHS*, s. 7 was engaged by an executive decision to revoke an exemption that enabled a safe-injection site (a medical service that reduces harms for people who inject drugs) to operate in a vulnerable community. Similarly, the Director has sanctioned an exemption to benzene emission standards in a vulnerable community. This exemption was given with knowledge that increasing benzene exposure could increase the risk of serious adverse health effects for Turtle Creek residents (Official Problem).

> *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at paras 1–3 [*PHS*].
> Official Problem, *supra* para 2 at 1, 2.

2. There is a sufficient causal connection

[38] There is a "sufficient causal connection" between Ms. Plainview's harms and the Decision (*Bedford*). The s. 7 causation standard is meant to be flexible, representing a "fair and workable threshold for engaging s. 7" (*Bedford*). While prior environmental rights cases have failed to meet the causation threshold in s. 7, Nathalie J. Chalifour and Jessica Earle clarify that these cases

predate *Bedford*. Furthermore, where the nature of the harm involves environmental claims that are inherently prospective and scientifically uncertain, and the claimant is a member of a vulnerable community, this fair and workable causation standard should draw on the precautionary principle (*Castonguay*).

> *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 75, 78 [*Bedford*].
> Nathalie J. Chalifour & Jessica Earle, "Feeling the Heat: Climate Litigation Under the Charter's Right to Life, Liberty and Security of the Person" (2018) 42 Vermont Law Review 689 at 745 [Chalifour & Earle].
> *Castonguay*, *supra* para 16 at paras 20–21.

[39] The precautionary principle is a logical progression from the sufficient causal standard, which envisioned the protection of prospective and cumulative future harms. In *Bedford*, claimants did not have to prove actual violence on themselves, or that the laws were the sole cause of violence. Instead, statistical data and expert evidence was successfully used to show that the laws created an increased probability of violence against sex workers (*Bedford*). Similarly, expert testimony and evidence on the disproportionate environmental harms and prospective risks that Indigenous people face, including in Turtle Creek, ground Ms. Plainview's s. 7 claim.

> *Bedford*, *supra* para 38.
> Official Problem, *supra* para 2 at 5–6.

[40] Incorporating the precautionary principle in the causation standard also avoids unjustly barring cases for Indigenous claimants, thereby impairing reconciliation. In *Bedford*, the SCC stated that the sufficient causal standard was intended to enable meritorious lawsuits to clear this procedural hurdle (*Bedford*). Requiring claimants to prove cause and effect with scientific certainty in environmental *Charter* cases would require significant resources (Chalifour & Earle). Ms. Plainview is a member of a vulnerable community with limited resources (Official Problem). Incorporating the precautionary principle allows claimants to assert their prospective future harms and the psychological harm that flows from this. A weaker causation standard otherwise forces

vulnerable people like Ms. Plainview to wait for the development of serious and permanent pollution-related harms, such as cancer, before accessing s. 7 protection. This passage of time presents its own causation challenges, as intervening events may obscure the casual connection. Overall, a causation standard that incorporates the precautionary principle is a more equitable standard for claimants with limited resources (Chalifour & Earle).

Bedford, *supra* para 38 at para 78.
Chalifour & Earle, *supra* para 38 at 744–746.
Official problem *supra* para 2 at 5.

3. The Decision infringes Ms. Plainview's rights to security of the person and liberty

[41] The Decision infringes Ms. Plainview's rights to security of the person and liberty because (1) it interferes with her physical and psychological integrity by exacerbating pre-existing harms and increasing her risk of future harm; and (2) it forces her to choose between two options that would equally infringe her liberty interest. Namely, Ms. Plainview is forced into the impossible position of being deprived of her ability to make fundamental choices about her body and health or being deprived of her right to live on her ancestral territory.

a. The Decision interferes with Ms. Plainview's physical and psychological integrity

[42] Security of the person protects claimants from state interference with one's personal autonomy and bodily integrity. Here, the Decision imposes profound physical and psychological harms on Ms. Plainview.

[43] The Decision interferes with Ms. Plainview's physical integrity by exacerbating pre-existing health issues caused by pollution in Turtle Creek and increasing her risk of future harm. The SCC has recognized that security of the person encompasses the right to be free from prospective harm (*Chaoulli*). In *Chaoulli*, the claimant's security of the person was infringed by a prohibition on private insurance, which increased wait-times, thereby risking exacerbating pre-

existing health issues and causing premature death. Similarly, the Decision risks exacerbating Ms. Plainview's pre-existing health problems associated with benzene exposure. As well, the Decision increases her risk of premature death, given that the risk of getting cancer increases "exponentially" with greater benzene exposure (Official Problem).

> *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at paras 111, 116–124 [*Chaoulli*].
> Official Problem *supra* para 2 at 3, 5, 6.

[44] The Decision also interferes with Ms. Plainview's psychological integrity, as the threat of unknown future harm has severe psychological effects. The SCC has recognized that present-day psychological harm can occur where government action increases the risk of future harm to a claimant (*Chaoulli*). Infringements of psychological integrity must be "greater than ordinary stress and anxiety" but need not rise to the level of "nervous shock" or "illness" (*G(J)*). In *Chaoulli*, security of the person was infringed by a prohibition on private health insurance, which contributed to long wait-times that caused patients "psychological and emotional stress and a loss of control… over [their] health" (*Chaoulli*). Similarly, according to Chief Alder, members of the Turtle Creek First Nations suffer from depression and anxiety due to the fear of future harm associated with benzene pollution. This fear also affects Ms. Plainview's psychological integrity and is exacerbated by the loss of control over her long-term health (Official Problem).

> *G(J), supra* para 36 at para 60.
> *Chaoulli, supra* para 43 at paras 111, 116–124.
> Official problem, *supra* para 2 at 4, 5.

b. The Decision interferes with Ms. Plainview's liberty interests

[45] The liberty interest protects the right to make fundamental personal choices without state interference, including choices about one's body and health and the choice of where to establish one's home (*Carter*; *Smith*; *Godbout*). In *Smith*, the claimant's liberty and security of the person interests were infringed by a law that forced him to choose between "a legal but inadequate

treatment" or "an illegal but more effective choice". The infringement was not trivial, as the legal option increased his risk of cancer and infections while the illegal option could lead to criminal sanction (*Smith*). The SCC has also recognized the extreme importance of land to Indigenous identity (*Corbiere*). Recently, the Superior Court of Quebec recognized that a law that forced a claimant to choose between marrying a non-Indigenous man or being deprived of her right to live on her reserve violated her s. 7 liberty interest (*Miller*).

> *Carter*, *supra* para 35 at paras 64, 67.
> *R v Smith*, 2015 SCC 34 at para 18 [*Smith*].
> *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 66, 152 DLR (4th) 577 [*Godbout*].
> *Corbiere*, *supra* para 20 at para 15.
> *Miller c Mohawk Council of Kahnawà:ke*, 2018 QCCS 1784 at paras 231, 237 [*Miller*].

[46] The Decision infringes Ms. Plainview's liberty interest by interfering with her ability to make fundamental choices about her health, interfering with her right to live on her reserve, and forcing her to choose between these two fundamental interests. These liberty deprivations are not trivial. Ms. Plainview did not consent to absorbing higher levels of pollution that increase her risk of cancer, exacerbate pre-existing harms, and cause profound psychological distress. By forcing her to absorb more benzene, the Decision interferes with her ability to make fundamental choices about her health and body. Alternatively, the increased pollution interferes with her ability to choose to live on her reserve and maintain a fundamental part of her Indigenous identity (Official Problem). As *Miller* shows, government action that forces individuals to make a binary choice between two liberty infringing situations contravenes s. 7 (*Miller*).

> Official Problem, *supra* para 2 at 4–6.
> *Miller*, supra para 45 at para 237.

4. <u>The Decision is not in accordance with the principles of fundamental justice</u>

[47] The Decision is not in accordance with the principles of fundamental justice because it is arbitrary and grossly disproportionate. The principles of fundamental justice ensure that the means

the state uses to pursue an objective are not fundamentally flawed in that they are arbitrary, overbroad, or grossly disproportionate to the legislative goal (*Bedford*).

Bedford, *supra* para 38 at para 105.

[48] According to the Director's affidavit, the objective of the *EPA* and associated regulations is to minimize pollution "without crippling industries that are critical to Ontario's economy" (Official Problem). This objective implicitly requires a degree of balancing—while the ultimate goal is to limit pollution, environmental regulations should be tailored to avoid paralyzing industry and severely damaging Ontario's economy. This does not mean that environmental regulation should *never* adversely affect economic interests. To the contrary, any attempt to limit industrial pollution is likely to inhibit industry to some degree. It is in circumstances when the economic impacts are particularly severe—when environmental standards threaten to "cripple" industry—that economic considerations may outweigh the overarching objective of reducing emissions "to protect human health and the environment" (Official Problem).

Official Problem, *supra* para 2 at 7.

a. The Decision is arbitrary

[49] The Decision is arbitrary because granting an exemption to VulCAN is unnecessary to achieve the legislative objective. Arbitrariness occurs where there is no connection between a law's effect and its purpose, in that the effect is "inconsistent" with or "unnecessary" to achieve the statutory objective (*Bedford*). In *Chaoulli*, the SCC found a prohibition on private health insurance arbitrary because the government could provide only speculative evidence that it was necessary to protect the integrity of the public health system (*Chaoulli*). Similarly, the Director has speculated that granting an exemption will lead to a long-term reduction in emissions, without providing adequate evidence. Even if one accepts the Director's unsubstantiated assertion that the

exemption will encourage investment in environmentally friendly technologies and that this, in turn, will reduce pollution in the long run, there is no reason to believe that forcing VulCAN to comply with the regulatory standard would not provide a similar incentive to make such investments (Official Problem). Moreover, there is no evidence that denying the exemption would have severe economic impacts. Thus, the government has not established that it is necessary to violate Ms. Plainview's rights to liberty and security of the person.

> *Bedford*, *supra* para 38 at para 119.
> *Chaoulli*, *supra* para 43 at paras 134–153.
> Official problem, *supra* para 2 at 2.

b. The Decision is grossly disproportionate

[50] The infringements on Ms. Plainview's liberty and security of the person are grossly disproportionate to the objective of the exemption (*Carter*). Gross disproportionality occurs "where the seriousness of the deprivation" on the claimant is "totally out of sync with the objective of the measure" (*Bedford*). In *Bedford*, the impugned provisions violated s. 7 because it created conditions that increased the risk of violence against sex workers, the effect of which was grossly disproportionate to the statutory objective. Similarly, the adverse effects of the Decision on Ms. Plainview's liberty and security of the person are grossly disproportionate to the speculative benefits of the exemption. Increasing benzene exposure is associated with physical harms and an increased risk of cancer. This prospective risk violates psychological integrity. In contrast, the benefits flowing from the Decision are marginal and no evidence has been provided to prove these benefits are achievable (Official Problem).

> *Carter*, *supra* para 35 at para 89.
> *Bedford*, *supra* para 38 at para 120.
> Official Problem, *supra* para 2 at 2, 5–6.

Issue 3: The Decision is unreasonable

[51] The Decision is unreasonable because it does not proportionately balance the statutory objective with the severe impacts on Ms. Plainview's *Charter* rights. An administrative decision is reasonable where "the decision maker has furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right" (*Doré*; *TWU*). The proportionality analysis has "analytical harmony" with the final stage of the *Oakes* test—specifically, the issues of minimal impairment and balancing—and is intended to provide equally robust protection of *Charter* rights (*TWU*).

> *TWU*, *supra* para 13 at paras 57, 80, 82.
> *Doré v Barreau du Québec*, 2012 SCC 12 at paras 56–57 [*Doré*].

[52] The Decision is neither minimally impairing nor proportionate in its balancing. There is meager evidence that the exemption is necessary to achieve the statutory objective, and the benefits, if any, are speculative and marginal. Conversely, the infringements of Ms. Plainview's *Charter* rights are manifest and severe. Had the Director properly balanced interests, taking into account the relevant contextual factors, she could not have reasonably decided to grant an exemption, let alone an exemption of this magnitude.

1. In the circumstances, the Director's discretion was constrained

[53] Under the *Doré* proportionality analysis "deference is warranted" (*TWU*). However, contextual factors may limit the range of reasonable alternatives open to the decision maker (*Vavilov*).

> *TWU*, *supra* para 13 at para 79.
> *Vavilov*, *supra* para 16 at para 106.

[54] Here, the Director's discretion was constrained because of the significant impact of her Decision on the land and well-being of an Indigenous community. The Alberta Court of Queen's

Bench has held that, where an administrative decision engages the interests of an Indigenous community, "the Constitution requires the [decision maker] to consider whether, and if so how, [their] decision may advance or impair the process of reconciliation" (*Kainaiwa*). This is consistent with the SCC's assertion that "in the Aboriginal context, reconciliation must weigh heavily in the balance" (*MMF*). In the circumstances, the Director was obligated to consider how her decision to approve or deny an exemption for a factory located less than 5km from a reserve community might affect the process of reconciliation. There is no indication she did so. The Director's written reasons do not even mention the Turtle Creek First Nation by name, let alone consider the role the Decision might play in advancing or impairing the process of reconciliation between the Crown and the community (Official Problem). Had the Director turned her mind to the goal of reconciliation, it ought to have been clear that sanctioning more pollution against the protests of the majority of Turtle Creek residents, including their elected chief, would not facilitate "[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship" (Official Problem; *Daniels*).

> *Kainaiwa*, *supra* para 15 at para 130.
> *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 141 [*MMF*].
> Official Problem, *supra* para 2 at 2, 5.
> *Daniels*, *supra* para 15 at para 34.

[55] The Director's discretion was also constrained because of the precautionary principle, which favours a measured approach in the face of inconclusive scientific evidence about the severity of long-term harms (*Castonguay*). The SCC has already interpreted the *EPA* as advancing the precautionary principle and recognized the precautionary principle as a binding customary international law (*Castonguay*; *Spraytech*). Government action and the *Charter* must be interpreted in accordance with customary international law (*Vavilov*; *Hape*). In balancing the

interests of all parties, the Director did not use a precautionary approach, instead favouring economic interests over the significant prospective health risks imposed on Turtle Creek residents (Official Problem).

Castonguay, *supra* para 16 at paras 20–21.
Spraytech, *supra* para 16 at paras 31–32.
Vavilov, supra para 16 at para 182.
Hape, supra para 16 at paras 35, 56.
Official Problem, *supra* para 2 at 2.

*2. **The Decision is not minimally impairing***

[56] For an administrative decision to be proportionate it must minimally impair the claimant's *Charter* rights (*TWU*; *Loyola*). The relevant question is "whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the [statutory] objectives" (*TWU*).

TWU, *supra* para 13 at paras 81, 82.
Loyola High School v Quebec (Attorney General), 2015 SCC 12 at para 88 [*Loyola*].

[57] In the Director's case, there was another reasonable possibility—she could have exercised her discretion to deny the exemption, thereby avoiding the infringements of Ms. Plainview's *Charter* rights altogether. As noted previously, the objective of the *EPA* is to minimize pollution without severely impacting economic interests. Denying VulCAN's exemption would have advanced this objective in the short term by forcing VulCAN to reduce its benzene emissions immediately. Moreover, it would have had the long-term benefit of signaling that industrial polluters will be held accountable for breaches of the regulatory standard, thereby encouraging more widespread compliance. These benefits would not have come at any severe cost to the economy. According to the Director's own estimates, VulCAN would have remained operational and would have continued to employ close to 95% of its current workforce (Official Problem).

Official Problem, *supra* para 2 at 7–8.

[58] In *TWU*, the SCC held that a decision not to accredit a law school was minimally impairing because the alternative decision would have frustrated the statutory objective (*TWU*). This appeal is distinguishable because the alternative decision to deny the exemption does not frustrate the statutory objective—it merely achieves a different, equally valid, balance between the environmental and economic interests at stake. It was fully within the Director's statutory mandate to reject VulCAN's request and avoid any infringement of Ms. Plainview's *Charter* rights. Her Decision to instead sanction increased pollution near a vulnerable community is unnecessary and unreasonable.

TWU, *supra* para 13 at para 81.

3. <u>The Decision does not represent a proportionate balancing</u>

[59] The Decision does not "reasonably [balance] the severity of the interference with the *Charter* protection against the benefits to its statutory objective" (*TWU*).

TWU, *supra* para 14 at para 85.

[60] The interference with Ms. Plainview's *Charter* rights is severe. The Decision imposes grave physical and psychological harm on Ms. Plainview and members of her community, compounding their existing vulnerability. Turtle Creek residents must not only suffer potentially lifelong physical consequences from breathing in heightened levels of benzene, but also live with the fear of the unknown effects of this pollution. As Chief Alder explains, "it is difficult to express just how much those concerns and fears affect our everyday life on this land" (Official Problem). While the exemption is limited to five years, many of the physical and psychological effects of the increased pollution are likely to be permanent (Official Problem). Notably, s. 7 violations are "difficult to justify" under s. 1 of the *Charter* because the rights to life, liberty, and security of the person are "basic to our conception of a free and democratic society" (*Carter*; *Charkaoui*). It

follows that the violations of these rights in the present appeal should be given significant weight under the *Doré* proportionality analysis.

Official Problem, *supra* para 2 at 5.
Carter, *supra* para 35 at para 66.
Charkaoui v Canada (Citizenship and Immigration), 2007 SCC 9 at para 66 [*Charkaoui*].

[61] The Decision also interferes with Ms. Plainview's ability to maintain her connection to her culture and community. It effectively penalizes her for making the fundamental choice to live on her ancestral territory and hold onto "what's left" of her way of life (Official Problem). In *Hutterian Brethren*, Abella J found a particularly severe violation of s. 2(a) where government action placed the claimant religious community in the "untenable position" of having to choose between compliance with their religious beliefs and maintenance of their communal way of life (*Hutterian Brethren*). The violation was egregious because it interfered with individual religious liberty and, through an indirect coercive burden, threatened the continued existence of a religious and cultural community (*Hutterian Brethren*). Similarly, in this appeal, the burden of increased pollution threatens the continued existence of Ms. Plainview's reserve community. This coercive burden is even more egregious in light of the history of forced "displacement and assimilation" of Indigenous Canadians (*Corbiere*).

Hutterian Brethren, *supra* para 21 at paras 167, 170.
Corbiere, *supra* para 20 at para 83.

[62] By contrast, the benefits of the Decision are marginal and highly speculative. The Director asserts that giving VulCAN more time to comply with the regulatory standard will lead to a greater reduction of emissions in the long term but provides neither evidence nor logical basis for this claim (Official Problem). Speculative benefits such as this have historically been given very little weight under the proportionality stage of the *Oakes* test (*APP*). The only concrete benefit that the respondents can point to is the preservation of a handful of jobs at the VulCAN facility (Official

Problem). This benefit alone is simply not enough to outweigh the serious and numerous harms to Ms. Plainview and her community.

Official Problem, *supra* para 2 at 7.
APP, *supra* para 17 at para 42.

Issue 4: Ms. Plainview should be awarded damages

[63] This Court should award Ms. Plainview *Charter* damages, a remedy available under s. 24(1) of the *Charter*, as it is "appropriate and just" (*Ward*). First, Ms. Plainview's ss. 7 and 15 *Charter* rights have been unreasonably infringed. Second, awarding damages serves three functions—compensation, vindication, and deterrence. Third, no countervailing factors militate against a damage award. Therefore, an award of $30,000 is an appropriate remedy.

Vancouver (City) v Ward, 2010 SCC 27 at para 4 [*Ward*].

1. Damages are an appropriate and just remedy

[64] Awarding damages will (1) compensate Ms. Plainview for physical, psychological, and economic harms; (2) vindicate her rights in light of the environmental racism that underpins the Decision; and (3) deter future harm.

a. Damages will compensate Ms. Plainview for personal loss

[65] In *Ward*, the SCC defined compensation broadly as compensation for physical, psychological, and pecuniary harm, and intangible interests including distress or anxiety (*Ward*). Here, Ms. Plainview has suffered distress and anxiety from an increase in pollution that physically harms her, increases her risk of cancer, and puts her in an impossible position of choosing between her health or her cultural identity.

Ward, *supra* para 63 at para 27.
Official problem, *supra* para 2 at 5.

b. Damages will vindicate ss. 15 and 7 rights and deter future environmental harms

[66] Damages will vindicate Ms. Plainview's rights, in light of the environmental racism underpinning the Decision, and deter the Government from repeating conduct that furthers this legacy. Vindication focuses on the harm to society, as *Charter* breaches erode public confidence in the *Constitution*. Deterrence also has a societal purpose, aimed at influencing future government behaviour to comply with the *Charter* (*Ward*). The Decision is part of a history of pollution imposed on Turtle Creek and part of a larger trend of "environmental racism" against Indigenous peoples (Official Problem; Mitchell & d'Onofrio). In an era of reconciliation, awarding damages serves the important function of vindicating the rights of claimants like Ms. Plainview and deterring the continuation of this racist legacy.

> *Ward, supra* para 63 at para 29.
> Official Problem, *supra* para 2 at 8.
> Kaitlyn Mitchell & Zachary d'Onofrio, "Environmental Injustice and Racism in Canada: The First Step Is Admitting We Have a Problem" (2016) 29 J Env L & Prac 305 at 320 [Mitchell & d'Onofrio].

2. <u>No countervailing factors indicate that damages would be inappropriate or unjust</u>

a. There are no meaningful alternative remedies

[67] There are no countervailing factors which would militate against awarding damages. Similar to *Ward*, *Charter* damages are the only feasible way for Ms. Plainview to be compensated for her losses given the higher tort causation standard. Ms. Plainview's claim also involves intangible losses, and deterrence and vindication functions, which are unique to *Charter* damages (*Ward*).

> *Ward*, supra para 63 at paras 27, 36, 51, 68.

[68] A declaration on its own is an inadequate remedy. A declaration is adequate where the claimant has not suffered personal damage and there is no need for deterrence (*Ward*). Here, Ms.

Plainview has personally suffered from the Decision and there is a need to deter future *Charter* infringements of this nature.

Ward, *supra* para 63 at para 37.

b. Damages will not interfere with good governance

[69] Awarding damages will enhance good governance, rather than interfere with it. In *Ward*, the SCC rejected concerns that awarding damages would have a chilling effect on government conduct and reduce good governance. Instead, deterring governments from *Charter* breaches *enhances* good governance (*Ward*). The "qualified immunity" standard is also not applicable (*Mackin*). In *Ward*, *Mackin* was distinguished because the situation did not involve "state action pursuant to a valid statute that was subsequently declared invalid." Similarly, this appeal is not concerned with the underlying validity of the statute that gives the Director the authority to grant exemptions. There may be circumstances where approving an exemption to the regulatory standard is necessary to achieve the statutory objective. However, this exemption was unnecessary and disproportionately impacted Ms. Plainview and her community.

Ward, *supra* para 63 at paras 38–39, 41.
Mackin v. New Brunswick (Minister of Finance), 2002 SCC 13 [*Mackin*].

3. Ms. Plainview should be awarded $30,000 in damages

[70] The quantum of damages awarded must be appropriate and just and adequately recognize, affirm, and vindicate the claimant's rights (*Ward*). In *Miller*, a claimant was awarded $25,000 to remedy ss. 7 and 15 infringements, where a law forced her to choose between marrying her partner or losing the right to live on her reserve land. While other claimants in *Miller* were awarded lower amounts, the higher award was granted because the impugned law also resulted in the denial of financial assistance to renovate the family home. This meant the claimant was forced to live in a dilapidated home (*Miller*). Here, the ss. 7 and 15 infringements involved serious physical and

psychological harms and cause damage to Ms. Plainview's home through ongoing pollution. The Decision also puts Ms. Plainview in an impossible position of choosing between two fundamental interests—the right to control her health or to live on her reserve (Official Problem).

> *Ward*, *supra* para 63 at paras 48–50.
> *Miller*, *supra* para 45.
> Official Problem, *supra* para 2 at 4.

[71] Given that the Decision is part of a history of environmental racism, a higher award is necessary for vindication and deterrence. In *Elmardy*, the claimant was awarded $50,000 in damages for being racially profiled in a police stop-and-search, which was found in violation of s. 15. The ONSC held that given the longstanding issue with racial profiling, a large damage award was necessary to effectively deter its future occurrence, and that a declaration was inadequate (*Elmardy*). Similarly, Ms. Plainview's ss. 7 and 15 rights were infringed by an act of environmental racism—a longstanding social issue (Mitchell & d'Onofrio). Therefore, a $30,000 award is an appropriate and just amount to deter environmental racism.

> *Elmardy v Toronto Police Services Board*, 2017 ONSC 2074 [*Elmardy*]
> Mitchell & d'Onofrio, *supra* para 66 at 307.

PART V – ORDER SOUGHT

[72] The Appellant requests that the trial decision be restored.

PART VI – TABLE OF STATUTES AND AUTHORITIES

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