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 RESPONDENT

TEAM 12

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PART I - OVERVIEW

[1] This appeal is about an administrative decision made in good faith and in an attempt to reconcile competing interests both within and outside an Indigenous community. The Director of the Ministry of the Environment (the "Director") granted VulCAN a site-specific emission standard as a pragmatic solution to further long-term environmental sustainability in the face of short-term technological challenges. The Decision is the best solution to balance the competing interests of the Appellant, the Turtle Creek First Nation (the "TCFN"), and other stakeholders.

Official Problem, Wilson Moot 2020 at 1, 7, 8 [Official Problem].

[2] The evidentiary record before the High Court of the Dominion of Canada (the "Court") is insufficient to establish the purported effects upon which the Appellant's *Canadian Charter of Rights and Freedoms* claims are founded. The Appellant cannot rely on her failure to adduce sufficient evidence as reason to lower standards of causation and make unsupported inferences.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, *1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[3] The Director is owed significant deference on the Decision. Environmental regulation is a highly complex policy exercise. Where competing interests are at stake, the Director has expertise in balancing those interests and making policy decisions to further the statutory objectives in light of those interests. The Court should accord deference to the Director and not engage in re-weighing the "tailored solution".

Official Problem, *supra* para 1, at 9.

PART II - STATEMENT OF FACTS

[4] Ontario's *Environmental Protection Act* promotes long-term environmental sustainability by regulating the release of air contaminants. The *Air Pollution – Local Air Quality* regulations

set science-based standards to limit emissions of air contaminants set out in Schedule 3. Under section 35 of the *Regulations*, the Director may grant temporary site-specific emissions standards in circumstances where it may not be technically or economically feasible for an emitter to meet the regulated standard. This promotes the health of communities by limiting air pollution while recognizing that many economically productive activities have environmental impacts that are impossible to eliminate without crippling industry. In granting such site-specific standards, the *EPA* encourages technological innovation to reduce pollution over time while maintaining economic prosperity for many Canadians who are employed by such industries.

> *Environmental Protection Act*, RSO 1990, c E19 [*EPA*].
> *Air Pollution - Local Air Quality*, O Reg 419/05 [*Regulations*].
> Official Problem, *supra* para 1, at 1-2, 5, 7.

[5] The VulCAN and Galvanex factories in Spragge both release airborne emissions of benzene, which are subject to the standards in Schedule 3 of the *Regulations*. Benzene is volatile, degrades rapidly, and does not remain in the air or the environment for long periods of time. While benzene is a non-threshold toxicant that is associated with certain cancers and health problems, benzene emissions are expressly allowed under the *EPA*. Anton Block, an expert in industrial pollutants, testified on cross examination that it would be unrealistic to completely eliminate benzene emissions in many industrial applications.

> Official Problem, *supra* para 1, at 3, 6, 7.
> Clarifications, Wilson Moot 2020 at para 7 [Clarifications].

[6] Approximately 5km outside of Spragge is the TCFN Reserve (the "Reserve") which is home to many members of the TCFN. Studies have indicated that the TCFN has a lower life expectancy than the national average, higher rates of certain health conditions compared to the general population, and higher rates of certain cancers than other Canadians. No evidence is

adduced to demonstrate any changes to health upon VulCAN and Galvanex commencing production nor upon grant of the site-specific standard.

Official Problem, *supra* para 1, at 3-6.

[7] In October 2014, VulCAN invested in modern pollution control technology to reduce its benzene emission rates while increasing production by 35%. Shortly after completion of the upgrades in March 2018, the technology was not functioning as anticipated, causing excess benzene emissions above those prescribed by Schedule 3. In July 2018, VulCAN requested a site-specific standard under section 32 of the *Regulations* so that it may maintain its current level of production while working to achieve compliance with the standards.

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

[8] Without a site-specific standard, VulCAN would have to decrease production and thereby eliminate at least 50 jobs. The VulCAN factory employs approximately 900 people, 275 of whom are residents of the Reserve. While some members of the TCFN expressed concern about the cumulative effect of VulCAN and Galvanex's emissions, others expressed support for the site-specific standard because of the factory's economic importance to them.

Official Problem, *supra* para 1, at 4, 7-8.

[9] In balancing the interests of multiple stakeholders, the Director was alive to the need for pragmatic decision-making when dealing with industry. Over the last three decades, there have been a number of instances where industries have relocated their facilities outside of Canada in the face of unduly restrictive environmental regimes. The Director's discretion under section 35 of the *Regulations* allows for the kind of flexibility required to account for the practical realities of industry while balancing public interests.

Official Problem, *supra* para 1, at 1, 7.

[10] The Ministry of the Environment provided open public consultation for 60 days, during which time it held in-person meetings with stakeholders and accepted written submissions. VulCAN also held public meetings to consult directly with interested parties within the local community. The Ministry consulted with and considered the concerns of the Appellant and other members of the TCFN.

Official Problem, *supra* para 1, at 4, 8.

[11] On October 10, 2019, the Director granted a site-specific standard to VulCAN. The Decision requires that VulCAN immediately begin reducing its benzene emissions in order to achieve a 63% decrease in emissions within the first three months. It then sets out a site-specific standard of 1.9 mg/m^3, which expires October 9, 2023. The Decision "was determined [by the Director] to be the best means of balancing all parties' competing interests".

Official Problem, *supra* para 1, at 1-2, 8.

PART III - STATEMENTS OF POINTS IN ISSUE

[12] This appeal raises four issues:

Issue 1. **Does the Decision infringe the Appellant's equality rights under section 15 of the *Charter*?**

The Decision does not infringe the Appellant's section 15 *Charter* rights.

Issue 2. **Does the Decision infringe the Appellant's rights to life, liberty and security of the person under section 7 of the *Charter*?**

The Decision does not infringe the Appellant's section 7 *Charter* rights.

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

If the Decision infringes sections 15 or 7, the Decision is a reasonable limitation on these rights.

Issue 4. **If an infringement is found and cannot be upheld as a reasonable limitation on the Appellant's *Charter* rights, is this an appropriate case for an award for damages pursuant to section 24(1) of the *Charter*?**

If an infringement is found and cannot be upheld as a reasonable limitation on the Appellant's *Charter* rights, this is not an appropriate case to award damages pursuant to section 24(1) of the *Charter*.

PART IV – ARGUMENT

Issue 1: The Decision does not infringe the Appellant's section 15 *Charter* rights

[9] The Decision does not infringe the Appellant's section 15 rights because it does not, in its effects, create a distinction based on the enumerated ground of race and/or the analogous ground of residence on-reserve. Even if the Decision is found to create such a distinction, it does not infringe the Appellant's section 15 rights because it is not discriminatory within the meaning articulated most recently by the Supreme Court of Canada (SCC) in *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux* and *Centrale des syndicats du Québec v Quebec (Attorney General)*.

> *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 [*Alliance*].
> *Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18 [*CSQ*].

[10] The Appellant must establish the following two elements in order to demonstrate that the Decision is in violation of section 15 of the *Charter* (*Taypotat*, *Alliance*, *CSQ*):

a. The Decision, in its effect, creates a distinction based on an enumerated or analogous ground; and,

b. The Decision is discriminatory in that it imposes a burden or denies a benefit that has the effect of reinforcing, perpetuating or exacerbating disadvantage.

Kahkewistahaw First Nation v Taypotat, 2015 SCC 30 [*Taypotat*].
Alliance, *supra* para 13, at para 25.
CSQ, *supra* para 13, at para 22.

[11] The evidence required to prove a section 15 violation must amount to "more than a web of instinct" (*Taypotat*). Intuition of a disparate discriminatory impact is not enough to impose a burden on the state of justifying a breach of section 15 (*Taypotat*). Moreover, in adverse effects discrimination cases, the "claimant will have more work to do" at the distinction stage, as the focus should be on linking the adverse effect of the impugned law or state action to the claimant's protected characteristic (*Withler*).

Taypotat, *supra* para 14, at para 34.
Withler v Canada (Attorney General), 2011 SCC 12, at para 64 [*Withler*].

1. The Decision does not draw a distinction in effects on the enumerated ground of race and/or the analogous ground of residence on reserve

[12] The Decision does not draw a distinction in effects. At the first stage of the *Taypotat* test, a claimant must establish "that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group" (*Taypotat*). The Appellant has failed to adduce sufficient evidence that the Decision has any adverse effects, let alone *disproportionate* effects based on her race or on-reserve status. While the Appellant may perceive symbolic differential treatment (Official Problem), this perception is purely subjective. Subjective perception of symbolic differential treatment is insufficient to demonstrate distinction (*Fraser*). As the SCC articulated in *Symes*, "[i]f the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved."

Taypotat, *supra* para 14, at para 21.
Fraser v Canada, 2018 FCA 223 [*Fraser*].

Symes v Canada, [1993] 4 SCR 695 at 764-765, 110 DLR (4th) 470 [*Symes*].
Official Problem, supra para 1, at 4-5.

[17] The Appellant has failed to adduce sufficient evidence of adverse effects. The evidence purporting to link benzene exposure to the adverse physical, mental, and economic outcomes in the TCFN is too general. Dr. Satyajit's submission speaks generally to the negative effects of living near heavily industrialized areas (Official Problem), but provides no specific evidence linking benzene exposure to any adverse effects in the TCFN community. In *Taypotat*, the SCC was unwilling to infer a relationship between age, education level, and residence on reserve in the Kahkewistahaw First Nation from general data related to First Nations in the province as a whole. In light of this, this Court should refrain from inferring a relationship between benzene exposure and the conditions in the TCFN from general data related to communities living near heavily industrialized areas. Moreover, there is virtually no evidence demonstrating that the Decision exacerbates the negative outcomes reported in the TCFN community. All the evidence relevant to the conditions of the community pre-dates the Decision. For example, the data pointing to higher rates of cancer in the TCFN comes from a 2018 report and is based on extrapolations from the past decade (Official Problem, Clarifications).

Taypotat, *supra* para 14, at para 32.
Official Problem, *supra* para 1, at 5, 6.
Clarifications, *supra* para 5, at para 9.

[13] The Appellant's perception of symbolic differential treatment is purely subjective and insufficient to demonstrate distinction. In *Fraser*, the claimants perceived that the job-sharing pension policy denied them a benefit. They believed that this denial reflected the RCMP's lack of appreciation for their female employees with children. The Federal Court of Appeal held that this was a purely subjective belief, in part because the claimants had not demonstrated that the job-sharing pension policy actually denied them a financial benefit (*Fraser*). The claimants'

subjective perception that the job-sharing pension policy was symbolic of the RCMP's lack of appreciation for their female employees with children was insufficient to demonstrate a distinction (*Fraser*). In this case, the Appellant perceives that the Decision imposes a burden on her as an Indigenous person living on reserve. She believes that this burden is symbolic of a pattern of the state's disregard for the health and well-being of Indigenous communities (Official Problem). However, as previously discussed, the Appellant has not demonstrated that the Decision actually imposes that burden. A subjective belief that the state's action is symbolic of a pattern of discriminatory behaviour is insufficient to demonstrate differential treatment.

Fraser, supra para 16, at paras 15, 48-50.

2. The Decision is not discriminatory

[19] The Decision is not discriminatory because it corresponds to the actual needs, circumstances, and capacities of the Appellant and the TCFN community. In *Alliance and CSQ*, the SCC moved away from a mechanical step-by-step application of the *Law* factors and focused instead on whether the law or state action has a discriminatory impact in the sense that it reinforces, exacerbates or perpetuates pre-existing disadvantage. Despite this, the Ontario Court of Appeal in *G v Ontario* – a post- *Alliance* and *CSQ* case which is presently under consideration by the SCC – recognized the utility of continuing to use the correspondence *Law* factor to assess whether the law perpetuates pre-existing disadvantage. This appeal is an appropriate case for the continued use of the correspondence *Law* factor because there were competing interests within the TCFN community. Along the lines of the strong dissent in *Alliance*, use of the correspondence *Law* factor would help this Court assess the actual needs and circumstances of the Appellant and the TCFN community and determine the potential of the Decision to perpetuate their pre-existing disadvantage, or ameliorate it.

Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at para 9, 170 DLR (4th) 1 [*Law*].
Alliance, *supra* para 13, at para 28.
CSQ, *supra* para 13, at para 22.
G v Ontario (Attorney General), 2019 ONCA 264 [*G v Ontario*].

[20] The Decision was aimed at corresponding to the competing short-term economic needs and long-term environmental needs of the TCFN community (Official Problem). Because of this correspondence, the Decision cannot be perpetuating pre-existing disadvantage. In *Gosselin*, the Quebec government's welfare scheme corresponded to the needs of individuals under thirty. It simultaneously addressed their short-term needs of getting into work programs and their long-term need to develop self-sufficiency. The SCC held that the welfare scheme did not discriminate on the basis of age. In *CFCYL*, the assault exemption provision which allowed parents and teachers to use reasonable corrective force corresponded to the needs of children. The exemption simultaneously protected children from physical harm of unreasonable corrective force while ensuring that children's familial and educational relationships were not regularly disrupted by the criminal law. The SCC held that the assault exemption did not discriminate on the basis of age. Similarly, the Decision here corresponds to the multiple needs of the Appellant and other members of the TCFN. In that sense, the Decision does not perpetuate pre-existing disadvantage and, therefore, does not discriminate on the basis of race and residence on-reserve.

Official Problem, *supra* para 1, at p 25.
Gosselin v Québec (Attorney General), 2002 SCC 84 [*Gosselin*].
Canadian Foundation for Children, Youth and the Law v Canada (Attorney General), 2004 SCC 4 [*CFCYL*].

[21] The correspondence *Law* factor does not require perfect correspondence. In *Gosselin*, the SCC recognized that some vulnerable individuals under 30 might "fall through the cracks" of the short-term goals of the welfare scheme. Nonetheless, the SCC did not find that the welfare scheme was discriminatory because perfect correspondence is not required. Similarly, some

members of the TCFN might perceive that the short-term economic goal of Decision does not correspond to their needs. Nonetheless, this Court should not find the Decision discriminatory because perfect correspondence with the perceived needs of all members of the TCFN community is not required.

Gosselin, supra para 20, at paras 55, 72.

Issue 2: The Decision does not infringe the Appellant's section 7 *Charter* rights

[22] The harms claimed by the Appellant do not engage her right to life, liberty and security of the person under section 7 of the *Charter*. The Appellant has adduced an incomplete evidentiary foundation which is insufficient to meet the requisite threshold for legal causation under section 7. Even if the Appellant were to demonstrate an infringement, any such infringement is in accordance with the principles of fundamental justice.

1. The Appellant has not demonstrated a sufficient causal connection between the Decision and the purported harms

[23] The Appellant bears the burden of establishing that the Decision has deprived her of life, liberty or security of the person and that the deprivation is not in accordance with the principles of fundamental justice (*Carter*). She is unable to discharge this burden because she has adduced insufficient evidence that is comprised of generalized statistics and self-reported claims of harm. The impact of the impugned action is not to be generalized, but rather closely tailored to the impact on this specific claimant (*Bedford*). The Appellant must prove "sufficient causal connection" between the Decision and the harms claimed (*Bedford*). While this standard is flexible to context, the causal link must be "real" and not "speculative" (*Bedford*).

Carter v Canada (Attorney General), 2015 SCC 5 at para 55, [2015] 1 SCR 331 [*Carter*].
Canada (Attorney General) v Bedford, 2013 SCC 72 at paras 74-76, 78, 123, 127, [2013] 3 SCR 1101 [*Bedford*].

a. The Appellant conflates concerns about the Decision with the regulatory regime

[14] Ms. Plainview cannot cloak her challenge to the Decision in evidence that speaks to the whole of the benzene regulatory regime. If the evidence adduced can be linked to environmental harm, it can only be those harms resulting from the release of benzene across industry generally. As held by Justice Oh Dae-su in the Ontario Court of Appeal, "[r]egardless of the Director's decision, VulCAN was permitted to continue production at its facility and emit benzene at the rate prescribed by the *Regulations*. The *Charter* cannot be invoked against the actions of private polluters, and that in my view is the thrust of Ms. Plainview's litigation." The *EPA* and the *Regulations* comprise a complex environmental policy scheme which recognize that benzene regulation represents the best balancing of interests. The Decision simply allows for a marginal increase in legally sanctioned benzene emissions.

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

b. There is not a sufficient causal connection between the Decision and the purported harms

[25] The evidence adduced by the Appellant does not establish causation between the Decision and the alleged infringements of life, liberty or security of the person. The evidence is speculative with regards to any causal link between benzene and the harms claimed and, further, is virtually silent with regards to the Decision (*Bedford*). While the standard is contextual, stretching the sufficient causal connection to accommodate the Appellant's claim based on this tenuous evidence would result in complete distortion of the standard.

Official Problem, *supra* para 1, at 5-6.
Bedford, *supra* para 23, at para 76.

[26] In *Domke*, the Alberta Court of Appeal cautioned against making inferences of causation where evidence is "lacking" or "speculative". Where an inference of causation is made out of an evidentiary vacuum, the court risks that causation would have been disproven had the claimant

been made to discharge her evidentiary burden. The Appellant has not adduced evidence that is sufficient to establish causation between the Decision and the harms claimed. An inference of causation on the evidence adduced is inappropriate on the lack of evidence.

> *Domke v Alberta (Energy Resources Conservation Board)*, 2008 ABCA 232 at para 29, 432 AR 376 [*Domke*].

[27] Highly generalized evidence is insufficient to establish the specific harms claimed by the Appellant. In *PCRM*, the claimants failed to discharge the evidentiary burden for causation because they only adduced general evidence about potential harms, wait times, and the capacity of healthcare infrastructure, but not specific evidence that any person had to wait for services in a way that violated section 7. The Appellant has adduced general evidence, but the claim must fail because she has not demonstrated that she has been impacted by the Decision in a way that violates her right to life, liberty and security of the person (*PCRM*).

> *Pacific Centre for Reproductive Medicine v Medical Services Commission*, 2019 BCCA 315 at para 91, 56 Admin. L.R. (6th) 293 [*PCRM*].
> Official Problem, *supra* para 1, at 3, 5-6.

d. The administrative context heightens the importance of sufficient evidence

[28] This Court should refrain from intervention because the Appellant has not provided a sufficient evidentiary basis. “The courts have always been reluctant to decide constitutional questions in a factual vacuum”, as evidenced by how all the leading section 7 cases have been decided on full and substantial evidentiary records (*Allen*). Due to its highly contextual and factually specific nature, “providing a sufficient evidentiary basis is especially significant in the administrative law context” (*PCRM*). The Decision was made pursuant to a careful balancing of competing interests by the Director. Where the Appellant has not adduced a sufficient evidentiary record, the Court is left unable to properly evaluate the claim in its full context.

Allen v Alberta, 2015 ABCA 277 at para 22, 24, 389 DLR (4th) 422 with all other judges concurring on the point and in result at paras 55-56; leave to appeal refused 2016 CarswellAlta 203, 2016 CarswellAlta 204 (SCC) [*Allen*].
PCRM, *supra* para 27, at para 95.
Official Problem, *supra* para 1, at 8.

[29] "Flexibility" in the sufficient causal connection threshold should not result in a softening of the causation standard in the environmental context (*Bedford*). The complex polycentric nature of environmental issues is incongruent with the straightforward inferences that may be drawn in narrow social contexts. It is not a stretch to say a risk of harm is increased if a sex worker cannot hire a bodyguard or if a person who uses drugs cannot access a safe injection site (*Bedford*, *PHS*). However, the Reserve's environmental surrounding is subject to unknowable inputs that could come from any distance. Whether it be winds carrying contaminants, toxins present in food, or any number of other possible inputs, it is not practicable to point to a marginal increase in benzene emissions and assign to it a world of harms simply out of speculation.

Bedford, *supra* para 23, at paras 74-76.
PHS Community Services Society v Canada (Attorney General), 2011 SCC 44, [2011] 3 SCR 134 [*PHS*].
Official Problem, *supra* para 1, at 6-7.

2. The Appellant has not demonstrated an infringement of her life interest

[30] The Appellant has not established a sufficient causal connection between the Decision and the imposition of death or an increased risk of death (*Carter*). The only evidence relating to life is the stand-alone statistic that TCFN exhibit lower life expectancies than the national averages. The leading cases demonstrate that to discharge the evidentiary burden, the Appellant must adduce evidence of discrete events of loss of life supported by medical expert evidence or established science. *Carter* adduced evidence of instances where the prohibition on physician-assisted dying had caused individuals to prematurely end their lives. *Chaoulli* adduced medical expert evidence about discrete events of individual deaths caused by extended surgery wait

times. *PHS* adduced uncontroversial scientific evidence that the risk of death associated with drug use is reduced when done in the presence of health professionals. In comparison, the life expectancy evidence does nothing to indicate the causes of the lower life expectancies nor whether the community-level life expectancies can be extrapolated to apply to the Appellant.

> Official Problem, *supra* para 1, at 4.
> *Carter*, supra para 23, at paras 57, 62.
> *Chaoulli v Québec (Procureur general)*, 2005 SCC 35 at paras 38, 50, 112-114, 123, [2005] 1 SCR 791 [*Chaoulli*].
> *PHS*, *supra* para 29, at para 91.

[31] The Appellant's claim alleging future risk of death is too tenuous, both in terms of the risk of that harm materializing and whether the Decision would cause that harm. Violations of the life interested have been established in international jurisprudence in the context of sudden and catastrophic harms, such as a methane explosion at a landfill in Turkey that killed 39 people (*Oneryildiz*). Unlike the immediately fatal nature of the incident in *Oneryildiz*, any reduction of the Appellant's life expectancy is simply a possibility in the distant future. The life expectancy evidence is insufficient to demonstrate a violation of the Appellant's life interest; it is general in nature and the Appellant provides no evidence that the Decision has negatively impacted the life expectancy of any specific individual (*PCRM*).

> *Oneryildiz v Turkey*, [GC], No 48939/99, [2004] XII ECHR 79, [2005] 41 EHRR 20 [*Oneryildiz*].
> Official Problem, *supra* para 1, at 4.
> *PCRM*, *supra* para 27, at para 91.

3. The Appellant has not demonstrated an infringement of her liberty interest

[32] The Appellant's liberty interest is not engaged by the Decision. The scope of the right to liberty is limited to those matters "fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence" (*Godbout*). While the Appellant may contend that she is deprived of

"control over our lands and over our health and well-being", these broad claims run contrary to the jurisprudence and would open the floodgates to litigation if recognized.

> *Godbout v Longueuil (Ville)*, [1997] 3 SCR 844 at para 66, 152 DLR (4th) 577 [*Godbout*].
> Official Problem, *supra* para 1, at 4.

[33] The Decision does not deprive the Appellant of the liberty to control her health and wellbeing. In *Smith*, the claimant's liberty interest was infringed because cannabis legislation left him with two unacceptable options: either a "legal but inadequate treatment" or an "illegal but more effective choice". The Appellant's circumstances are distinct from *Smith*. The environment is a complex of processes, cycles, and is subject to both direct and indirect inputs. The Appellant does not ask to access a single treatment; the Appellant seeks an open-ended control over the interaction between the environment and her health but provides no evidence that such control has any causal link to her health and wellbeing.

> *R v Smith*, 2015 SCC 34 at para 18, [2015] 2 SCR 602 [*Smith*].

[34] A recognition of control over environmental inputs to health and wellbeing would open the floodgates to litigation. *Smith* is confined to a single prohibition, but the environment is an open system that does not readily lend itself to division of space and construction of boundaries. If the *Charter* protected the liberty to control environmental inputs to health and wellbeing, those interests would cripple government action and spawn litigation from an indeterminate class. If the Appellant were granted liberty to control the environmental inputs to her health and wellbeing, it would necessitate the liberty to make environmental policy choices for others.

> *Smith*, *supra* para 33.

[35] The Decision also does not deprive the Appellant of liberty to control the land. The TCFN is a signatory to the Robinson Huron Treaty of 1850, thus a desire to exercise sovereignty

over "our lands" is better suited to claim of treaty rights under section 35 of the *Constitution Act, 1982*. There is a need for analytical distinctiveness between section 35 and provisions of the *Charter*, as was demonstrated in *Ktunaxa* where the analyses of alleged infringements to the claimant's section 2(a) right to freedom of religion and section 35 duty of consultation and accommodation were analyzed separately. It would be inappropriate to bootstrap the principles of section 35 into section 7, thereby circumventing the tests for those rights and claims established in the jurisprudence.

> *Godbout*, *supra* para 32, at paras 11, 17.
> Official Problem, *supra* para 1, at 4.
> *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 58, [2017] 2 SCR 386 [*Ktunaxa*].

4. The Appellant has not demonstrated an infringement of her security of the person interest

[36] Security of the person is premised on "state interference with bodily integrity and serious state-imposed psychological stress" (*Morgentaler*). To establish a violation on the basis of psychological harm, the harm must be "sufficiently severe" and rise above ordinary stresses or anxiety (*Blencoe*, *G(J)*). The sufficient causal connection between the state action and the harm cannot be "uncertain, speculative and hypothetical" (*Operation Dismantle, Blencoe*).

> *R v Morgentaler*, [1988] 1 SCR 30 at 56, 44 DLR (4th) 385 [*Morgentaler*].
> *Blencoe v British Columbia*, 2000 SCC 44 at paras 57, 60, [2000] 2 S.C.R. 307 [*Blencoe*].
> *New Brunswick (Minister of Health & Community Services) v G (J)*, [1999] 3 SCR 46 at paras 59-60, 177 DLR (4th) 124 [*G(J)*].
> *Operation Dismantle Inc v R*, [1985] 1 SCR 441 at 447, 18 DLR (4th) 481 [*Operation Dismantle*].

[37] In *Dixon*, local homeowners claimed physical and psychological harm resulting from a decision granting approval for construction of wind turbines adjacent to their homes. The evidence was composed of self-reported health problems and anecdotes of others that live near wind turbines. This evidence was found to be insufficient to demonstrate a sufficient causal

connection between the decision and the alleged harms, particularly because a medical doctor would be unable to make a diagnosis and causal assessment based on the information provided. Reliance on such evidence would be "scientifically speculative and likely misleading" (*Dixon*).

> *Dixon v Director, Ministry of the Environment*, 2014 ONSC 7404 at para 101, 325 CRR (2d) 226 [*Dixon*].

[38] None of the Appellant's claimed physical harms have a sufficient causal connection with the Decision. Of the claimed harms, only the Appellant's childhood asthma has ever been subject to medical diagnosis and no evidence is provided to demonstrate whether this diagnosis is still current. Additionally, the diagnosis pre-dates the Decision. The claims of respiratory issues, migraines and dizziness are self-reported and lack medical diagnosis. While community health surveys indicate that the TCFN experience higher rates of certain medical conditions, including asthma and chronic headaches, these data are not linked to benzene emissions, the period that the factories have been operating, nor the site-specific standard in the Decision. This evidence parallels that in *Dixon* – it relies on one out-of-date diagnosis and self-reported health problems backed by generalized community evidence on which a medical doctor would be unable to establish causation.

> Official Problem, *supra* para 1, at 3, 5.
> *Dixon*, *supra* para 37, at para 101.

[39] The evidence also does not support a claim for future physical harm. In *Chaoulli*, an infringement of security of the person was established because there was unchallenged evidence that, in serious cases, people die on the wait lists for surgery. Where in *Chaoulli* the assertions of future harm were grounded in the evidence of multiple experts who were able to refer to specific incidences where individuals died, had an increased risk of death, or suffered increased rates of

pain from long surgery wait lists, the Appellant has not adduced similar evidence of discrete uncontested harms in which a claim of future harm may be grounded.

Chaoulli, *supra* para 30, at paras 112-114, 123.

[40] A report of the Canadian Cancer society indicates that the TCFN experience rates of certain cancers at a rate 0.0014 to 0.0036 % higher than the general population. However, these statistics are general in nature, divorced from any causal relationship with the Decision, and represent a minute difference. Anton Block suggests that benzene is known to cause acute myeloid leukaemia and there is limited evidence that benzene may cause some other cancers. No evidence is adduced to address other possible causes of the cancers present among the TCFN. However, Dr. Block admits that "the likelihood that VulCAN's site-specific standard would increase the risk of cancer in an individual […] was extremely low". This uncertain evidence is unlike the uncontested expert evidence in *Chaoulli*. Finally, the Appellant shares that her mother passed away from acute myeloid leukaemia in 2009. There is no medical opinion adduced linking her cancer to benzene exposure. This discrete instance of cancer occurred long before the Decision and thus cannot be attributable to the site-specific standard.

Chaoulli, *supra* para 30, at paras 112-114, 123.
Official Problem, *supra* para 1, at 3, 6-7.

[41] The threshold to establish psychological harm is high and the Appellant's evidence does not meet it. In *Chaoulli*, psychological stress was established where lack of timely access to healthcare was shown to result in death. In *Carter*, the evidence clearly established that the claimant suffered serious psychological harm because, due to lack of control over her death, she would be subject to intolerable pain as her irremediable medical conditions deteriorated. In both cases, the psychological harm was serious because it was linked to an established risk of death or

extreme pain and suffering. Further, these cases established clear causation through expert evidence that addressed the specific harm to specific individuals.

Chaoulli, *supra* para 30, at para 116.
Carter, *supra* para 23, at para 65.

[42] Some of the Appellant's claimed psychological harms are not sufficiently serious (*Blencoe*). Chief Brian Adler reported that some community members have disclosed to him that they feel "anxious about this pollution". He also fears that his child will bear the burden in the future of present-day pollution. These psychological harms are a drastic contrast to the severity of those identified in *Chaoulli* and *Carter* above. They do not rise above the threshold of ordinary stresses or anxieties (*G(J)*).

Blencoe, *supra* para 36, at para 57.
Official Problem, *supra* para 1, at 5.
G(J), *supra* para 36, at para 59.

[43] The Appellant has not adduced evidence to establish a sufficient causal connection between the Decision and the psychological harms claimed. The Appellant's evidence is all either self-reported or general in nature. Without more, such evidence is insufficient to establish causation of psychological harm (*Dixon*, *PCRM*). Chief Adler reported that members of the community had feelings of depression, anxiety, and fear for future generations. Without medical diagnosis and expert evidence on the cause of those psychological states, these self-reports cannot be established as harms resulting from the Decision (*Dixon*).

Dixon, *supra* para 37, at para 101.
PCRM, *supra* para 27, at para 91.
Official Problem, *supra* para 1, at 5.

[44] Additionally, Dr. Satyajit gave evidence that communities living near to "heavily industrialized areas" have an increased risk of mental health effects. Dr. Satyajit also shared the opinion that the Appellant and the TCFN have suffered "long-standing […] psychological

effects", which she attributes to the cumulative impact of the VulCAN and Galvanex factories but concedes that other environmental and demographic factors may have caused. This evidence is too general to establish the Decision caused psychological harm (*PCRM*). No evidence was adduced to indicate whether the Reserve is a "heavily industrialized area". The evidence lacks in its ability to delineate VulCAN's emissions from those of Galvanex and furthermore lacks any reference to the Decision itself. It does not give causal evidence that the Appellant has been subjected to such psychological harms in violation of her right to security of the person (*PCRM*).

> Official Problem, *supra* para 1, at 6.
> *PCRM*, *supra* para 27, at para 91.

5. The Decision is in accordance with the principles of fundamental justice

[45] The Appellant has not established a violation of section 7 of the *Charter* with regards to her interests in life, liberty or security of the person due to lack of a sufficient causal connection between the Decision and the claimed harms. In the alternative, the section 7 claim fails because it is in accordance with the principles of fundamental justice.

a. The Decision is not arbitrary

[46] The Appellant cannot establish that the Decision is arbitrary. To establish arbitrariness, the Appellant must demonstrate that there is no connection between the impugned effects of the Decision and its purpose. "This standard is not easily met" (*Bedford*). The Decision acts to further the objectives of the *EPA* and the *Regulations*, namely long-term environmental sustainability and economic prosperity. To demonstrate arbitrariness, the Appellant may establish a lack of connection by showing that the Decision either contradicts the objective (*PHS*) or is not necessary for the purpose of the statutory regime (*Chaoulli*). In *PHS*, the revocation of the exemption for Insite was arbitrary because it barred services that would improve public health and safety. The Decision is not arbitrary in the way contemplated by *PHS*

because there is evidence that the Decision has helped the pursuit of long-term sustainability. The Decision allows a short-term increase of pollution so that VulCAN may reduce its benzene emission rate in the long term. It recognized that VulCAN took positive steps to incorporate more sustainable technologies into its production and was faced with an unanticipated malfunction. Such actions can be seen as incremental steps to encourage the improved sustainability of practices across industry over time.

> *Bedford*, *supra* para 23, at para 111.
> *PHS*, *supra* para 29, at 108-109.
> Official Problem, *supra* para 1, at 3, 5, 7.

[47] The Decision is also not arbitrary in the way contemplated by *Chaoulli*. In *Chaoulli*, the prohibitions on private healthcare were arbitrary because they were not necessary to achieve the desired healthcare regime. Where the evidence could rest solely on competing theories about the composition of healthcare systems, concrete evidence that other countries could achieve the desired purposes without a prohibition on private healthcare rendered the prohibition arbitrary. The context of this appeal is distinct from *Chaoulli* because, while it is theoretical that this discretion furthers long-term sustainability, there is no evidence adduced by the Appellant to indicate that a choice to deny the site-specific standard would have furthered long-term environmental sustainability. Moreover, there is evidence that a failure to be flexible in environmental decision-making has driven industry to other jurisdictions in the past. By allowing the site-specific standard, the Director ensured that 50 jobs at VulCAN were maintained and deterred the loss of the industry from the region altogether.

> *Chaoulli*, *supra* para 30, at 138-139.
> Official Problem, *supra* para 1, at 7.

b. The Decision is not overbroad

[48] Overbreadth occurs where the law causes some impacts that have no rational connection to its purpose. The Decision is not overbroad because any of its effects on the Appellant are in line with its purpose. The focus of the impacts is on the individual impacts on the claimant (*Bedford*, *Carter*). In *Carter*, where the government objective was to protect vulnerable people, the law was overbroad in that it had the effect of preventing a non-vulnerable individual from making the rational and informed choice to end his life. In *Bedford*, where the government objective was to prevent individuals from profiting from the avails of prostitution, the law was overbroad in that it did nothing to distinguish those who protect sex workers from those who exploit them. The Decision cannot be overbroad because any impacts on the Appellant were specifically accounted for in the Director's balancing of interests to further the statutory objective.

> *Bedford*, *supra* para 23, at paras 101, 112-113, 142.
> *Carter*, *supra* para 23, at paras 85-86.
> Official Problem, *supra* para 1, at 8.

[49] The Decision is not overbroad in its alleged impact on the Appellant's health. Where *Bedford* and *Carter* related to laws of general application, which did not contemplate the overbroad implications the law would result in for some, this appeal concerns a narrow discretionary decision made following extensive public consultation and an explicit "balancing [of] all parties' competing interests". A component of the Ministry's objective is to regulate and limit air contaminants to protect the health of nearby communities. As a resident of the Reserve that is 5 km away from the VulCAN factory in Spragge, the Appellant may feel that the Decision has an arbitrary impact on her health. However, the Decision is not overbroad because the Director "received and duly considered" the interests expressed by the Appellant through the public consultations. To address health concerns of local communities, a balance was reached by

mandating that VulCAN reduce its benzene emissions by 63% within the first few months, followed by site-specific emissions regulation standard.

Bedford, *supra* para 23.
Carter, *supra* para 23.
Official Problem, *supra* para 1, at 2, 7, 8.

[50] The Appellant may instead feel that the Decision was overbroad because she is not employed by VulCAN, so she bears the alleged health risk but does not enjoy the economic benefit. On the contrary, the Decision prevents the elimination of at least 50 jobs, thereby promoting the economic interests of Reserve residents, and thus likely promoting the social determinants of health on the Reserve enjoyed by all residents. Unlike in *Bedford* and *Carter*, where the laws were broad prohibitions aimed at preventing bad actors from carrying out evils while incidentally and unintentionally also catching some good actors, the Decision resulted from a careful balancing of interests. The balance achieved by the Decision yields a closely tailored solution that furthers the objectives of long-term environmental and economic sustainability in light of the interests of the Appellant and her community.

Bedford, *supra* para 23, at para 142.
Carter, *supra* para 23, at para 86.

c. The Decision is not grossly disproportionate

[51] Gross disproportionality places a high burden on the claimant to indicate that "the seriousness of the deprivation is totally out of sync with the objective of the measure" (*Bedford*; *Carter*). An analysis of gross disproportionality proceeds by way of a balancing between the weight of the government objective against the infringement on the claimant (*Bedford*). However, gross disproportionality will only be met for environmental harms in "the most egregious cases, for example where there is a clear deprivation of the right to life" (Wu). This is

not such a case. If any infringement of life, liberty or security of the person were to be established, it would be tenuous at best given the limited nature of the evidence.

> *Bedford*, *supra* para 23, at paras 120, 299-304.
> *Carter*, *supra* para 23, at para 89.
> David Wu, "Embedding Environmental Rights in Section 7 of the Canadian Charter: Resolving Tension Between the Need for Precaution and the Need for Harm" (2014) 33:2 National Journal of Constitutional Law 191 at 220 [Wu].

[52] The Appellant has not established gross disproportionality because the importance of the government objective heavily outweighs the alleged infringements. The *EPA* and the *Regulations* aim to further long-term environmental and economic sustainability by allowing the Director discretion to make decisions informed by balancing competing interests. The Decision recognized that VulCAN had taken steps to improve the environmental sustainability of its technologies and so granted a temporary site-specific standard so that they could work to come back into compliance while preserving jobs in the community. In contrast, if an infringement of the Appellant's right to life is established, it would not be a "clear" and "egregious" infringement, but rather a speculative infringement based on tenuous evidence (Wu).

> Official Problem, *supra* para 1, at 3-4, 7-8.
> Wu, *supra* para 51, at 220.

[53] For a future harm to be considered, the deprivation must be an imminent deprivation (*White*). Where the Appellant alleges risk of future harm, the evidence is insufficient to establish what that harm may be, how it may occur, or when it would come about. This possibility of some future harm is too speculative (*Bedford*). If the gross disproportionality principle were to abandon the approach in the jurisprudence in order to consider speculative future interests, it would open the floodgates to litigation to a point where possible future interests would always outweigh the current-day policy objectives and balancing of interests performed by government.

R v White, [1999] 2 SCR 417 at para 38, 174 DLR (4th) 111 [*White*], this threshold affirmed in *CFCYL*, *supra* para 20, at para 175.
Bedford, *supra* para 23, at paras 123, 127.

6. This is not the appropriate context to establish a new principle of fundamental justice

[54] The threshold to establish a new principle of fundamental justice is high. International principles cannot simply be made principles of fundamental justice without satisfying the above framework (*Kazemi*). "The rule or principle must be (1) a legal principle, (2) about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and (3) it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person" (*Malmo-Levine*, *CFCYL*, *DB*). No new principle of fundamental justice should be established in this appeal.

Kazemi Estate v Islamic Republic of Iran, 2014 SCC 62 at paras 150-151, 157-159, [2014] 3 SCR 176 [*Kazemi*].
R v Malmo-Levine, 2003 SCC 74 at paras 113, 130 [2003] 3 SCR 571 [*Malmo-Levine*].
CFCYL, *supra* para 20, at paras 8, 9-11
R v DB, 2008 SCC 25 at para 46, [2008] 2 SCR 3 [*DB*].

Issue 3: The Decision is reasonable

[55] The Appellant lacks the evidentiary basis to establish any breach of sections 7 or 15 of the *Charter*. In the alternative, any breaches that may be found would be justified.

1. Any Charter infringement is justified under the Doré framework

[56] Any infringement of *Charter* values by the Decision is reasonable and justified (*Doré*, *TWU*). The Decision will be reasonable where there is proportionality between the statutory objectives and the severity of any infringements on the *Charter* values engaged (*Doré*, *TWU*). The decision-maker is to be accorded a significant measure of deference in having made a determination with regards to the interests at stake on the specific facts of the case (*Doré*).

Doré v Québec (Tribunal des professions), 2012 SCC 12 at paras 7, 54, 55-57, [2012] 1 SCR 395 [*Doré*].
Trinity Western University v Law Society of Upper Canada, 2018 SCC 33 at paras 30, 35, 80, 82, [2018] 2 SCR 453 [*TWU*].

[57] The Decision furthered important statutory objectives. The regulatory scheme aims to improve local air quality and protect human health and the environment as part of a long-term trajectory to reduce air emissions over time through continuous improvements in technology and industry. The *EPA* and the *Regulations* recognize the practical realities of industry and its importance to the economy. The combination of these objectives serves to protect human health and the environment in a manner that is sustainable in light of a complex balancing of social, economic, and environmental interests. The SCC has recognized the importance of statutory objectives such as civility in the legal profession, that basic educational standards, and equal access to the legal profession (*Doré*, *Loyola*, *TWU*). In contrast, the statutory objective furthered by the Decision is even more pressing in that it is inextricably linked to complex of fundamental interests such as economic prosperity, environmental sustainability, and human health.

Official Problem, *supra* para 1, at 7.
Doré, *supra* para 56, at para 66.
Loyola High School v Quebec (Attorney General), 2015 SCC 12 at para 53 [*Loyola*].
TWU, *supra* para 56, at para 24.

[58] Any infringements of the Appellant's *Charter* values are minimal. In *Loyola*, the infringement is severe because denial of the program equivalency went to the core of the religious freedom: it prescribed how the school could describe its own faith. In contrast, if the Appellant can prove an infringement of her health, it is likely that the Director has already factored health considerations for the Appellant and the TCFN into the Decision. Thus, in balancing the interests of the community of which the Appellant is part, the Director minimally impaired any *Charter* rights that the Appellant is able to establish.

Loyola, *supra* para 57, at para 62.
Official Problem, *supra* para 1, at 1, 4, 8.

[59] The Decision is reasonable because it reflects a proportionate balancing of the Appellant's *Charter* interests with the statutory objectives (*TWU*, *Loyola*, *Doré*). In *Hutterian Brethren*, the importance of establishing a driver's licensing regime was considered to be so important that it justified a serious infringement of the group's core religious beliefs. By analogy, making decisions to further the trajectory of long-term environmental sustainability must be of even greater importance due to the purpose's complex emergent nature. In *TWU*, the proportionality analysis acknowledged that "[l]imits on religious freedom are often an unavoidable reality of a decision-maker's pursuit of its statutory mandate in a multicultural and democratic society". Similarly, limits on equality or life, liberty and security of the person interests are equally unavoidable in the pursuit of the Director's statutory mandate, particularly in light of the amorphous, multivariant, boundless context that is the environment. Thus, the pressing statutory objective of the *EPA* outweighs the Appellant's alleged infringements.

TWU, *supra* para 56, at paras 35, 40.
Loyola, *supra* para 57, at para 32.
Doré, *supra* para 56, at para 7.
Official Problem, *supra* para 1, at 3, 4, 7.
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 at paras 101-102 [*Hutterian Brethern*].

[60] The Director is owed significant deference on the Decision. Central to the *Doré* analysis is the principle that when exercising discretion, an administrative decision-maker is best positioned to weigh the interests at stake and the impact on *Charter* values (*Doré*). The Director has particular expertise in "balancing the values and objectives at stake on the particular facts" (*Loyola*). In her determination of the Decision, the Director conducted a careful balancing of the

diverse and competing interests of the community, the TCFN, and the Appellant. The Decision represented her best determination of the issue given the interests at stake.

Doré, *supra* para 56, at paras 47, 54, 57.
Loyola, *supra* para 57, at para 42.
Official Problem, *supra* para 1, at 2, 4.

[61] The Decision is a reasonable outcome of the careful balancing conducted by the Director. The Decision furthers long-term environmental sustainability while providing economic opportunities for the residents of Spragge and the TCFN. The Appellant has experienced minimal, if any, infringement of her *Charter* rights and thus proportionality establishes that the Decision is justified under as a reasonable decision in all of the circumstances.

Issue 4: The Appellant should not be awarded *Charter* damages

[62] The Appellant's case is not appropriate for an award of damages because such a remedy would not be "appropriate and just" (*Ward*). In the alternative, if the Court finds that this is an appropriate case for an award of damages, the quantum of damages awarded should be minimal.

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

1. There is no functional justification for damages

a. The Appellant has not suffered personal losses requiring compensation

[63] The Appellant has not demonstrated any *personal* losses linked to the Decision. The Appellant's "claim for compensatory damages must be supported by evidence of the loss suffered" (*Ward*). The Appellant's health problems pre-date the Decision and there is no evidence that the Decision has worsened them. Additionally, evidence of the distress, mental health, and economic consequences in the TCFN relate to the community as a whole but does not speak to any specific personal loss experienced by the Appellant. Lastly, unlike in *Ward* where compensatory damages were awarded for the humiliation and embarrassment arising out of the

strip-search, the Decision did not subject the Appellant to any state conduct that is inherently humiliating or embarrassing.

> *Ward*, *supra* para 62, at paras 27, 48, 64.
> Official Problem, *supra* para 1, at 3, 5.

b. Damages are not required for vindication or deterrence

[64] The Decision is not the kind of state action which must be remedied with damages to ensure that the public remains confident in their constitutional protections or to ensure that the state complies with the *Charter* in the future (*Ward*). In *Ward*, damages were justified on account of the objectives of vindication and deterrence, because the officers' conduct which caused the *Charter* breach was serious and lacked a minimum sensitivity to *Charter* concerns (*Ward*). The Director's actions in this case do not reflect the same seriousness and lack of sensitivity to *Charter* concerns. The Decision reflected a challenging exercise of discretion which required the balancing of various competing interests. The Director's decision came after consultations with members of the TCFN and after she had duly considered the impact of pollution on their daily lives. She turned her mind to potential *Charter* concerns and, in good faith, made the determination that the Decision was a constitutionally valid exercise of her discretionary power.

> *Ward*, *supra* para 62, at paras 28, 29, 65.
> Official Problem, *supra* para 1, at 2, 4, 8.

2. Concerns relating to good governance defeat any functional justification for damages

[65] The Decision should be afforded immunity from liability in *Charter* damages. The SCC has recognized that the state should be afforded some immunity from liability in *Charter* damages where it is exercising its legislative and policy-making functions (*Ward*). Where this qualified immunity applies, state conduct found in breach of the *Charter* will not be subject to

Charter damages unless it is "clearly wrong, in bad faith or an abuse of power" (*Ward*). The SCC's application of the *Mackin v New Brunswick* principle in *Ward* need not narrow its application to state actions exercised pursuant to *statutes* that are subsequently found invalid (*Conseil scolaire, Henry)*. The Decision was an exercise in the state's policy-making functions, which had as its objectives the multiple underlying policy-goals of promoting environmental compliance, protecting human health, and attracting and maintaining investment in Ontario. Further, there is nothing in the record which indicates that it was "clearly wrong, in bad faith, or an abuse of power". As such, it should be afforded immunity from liability in *Charter* damages.

> *Ward*, supra para 62, at paras 39, 40.
> *Mackin v New Brunswick (Minister of Justice)*, 2002 SCC 13 [*Mackin*].
> *Conseil scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, 2018 BCCA 305 at paras 288-292 [*Conseil scolaire*].
> *Henry v British Columbia*, 2015 SCC 24 [*Henry*].
> Official Problem, *supra* para 1, at 7.

3. The quantum of damages should be minimal

[66] In the alternative, the quantum of damages awarded should be minimal and proportional to that awarded in *Ward*. In *Ward*, the state's conduct was not intentional, malicious, or high-handed but resulted in a strip search that was "inherently degrading". In comparison, the Decision was similarly not intentional, malicious, or high-handed, and yet did not result in any "inherently degrading" consequences. The quantum of damages in *Ward* was limited to $5000 despite a direct and severe infringement of the claimant's section 8 rights. If the determinations of *Charter* damages are ultimately to be guided by precedent (*Ward*), this Court should hesitate to uphold the trial judge's award of $30,000.

> *Ward*, *supra* para 62, at para 51.

PART V - ORDER SOUGHT

[67] The Respondent respectfully requests that the Appeal be dismissed.

PART VI – LIST OF STATUTES AND AUTHORITIES

Jurisprudence
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37.
Allen v Alberta, 2015 ABCA 277.
Blencoe v British Columbia, 2000 SCC 44, [2000] 2 SCR 307.
Canada (Attorney General) v Bedford, 2013 SCC 72, [2013] 3 SCR 1101.
Canadian Foundation for Children, Youth and the Law v Canada (Attorney General), 2004 SCC 4.
Carter v Canada (Attorney General), 2015 SCC 5, [2015] 1 SCR 331.
Centrale des syndicats du Québec v Quebec (Attorney General), 2018 SCC 18.
Chaoulli v Québec (Procureur general), 2005 SCC 35, [2005] 1 SCR 791.
Conseil scolaire francophone de la Colombie-Britannique v British Columbia (Education), 2018 BCCA 305.
Dixon v Director, Ministry of the Environment, 2014 ONSC 7404, 325 CRR (2d) 226.
Domke v Alberta (Energy Resources Conservation Board), 2008 ABCA 232, 432 AR 376.
Doré v Québec (Tribunal des professions), 2012 SCC 12, [2012] 1 SCR 395.
Fraser v Canada, 2018 FCA 223.
G v Ontario (Attorney General), 2019 ONCA 264.
Godbout v Longueuil (Ville), [1997] 3 SCR 844, 152 DLR (4th) 577.
Gosselin v Québec (Attorney General), 2002 SCC 84.
Henry v British Columbia, 2015 SCC 24.
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30.
Kazemi Estate v Islamic Republic of Iran, 2014 SCC 62, [2014] 3 SCR 176.
Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations), 2017 SCC 54, [2017] 2 SCR 386.
Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at para 9, 170 DLR (4th) 1.
Loyola High School v Quebec (Attorney General), 2015 SCC 12, [2015] 1 SCR 613.
Mackin v New Brunswick (Minister of Justice), 2002 SCC 13.
New Brunswick (Minister of Health & Community Services) v G (J), [1999] 3 SCR 46, 177 DLR (4th) 124.
Oneryildiz v Turkey, [GC], No 48939/99, [2004] XII ECHR 79, [2005] 41 EHRR 20.
Operation Dismantle Inc v R, [1985] 1 SCR 441, 18 DLR (4th) 481.
Pacific Centre for Reproductive Medicine v Medical Services Commission, 2019 BCCA 315, 56 Admin. L.R. (6th) 293.
PHS Community Services Society v Canada (Attorney General), 2011 SCC 44, [2011] 3 SCR 134.
Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux, 2018 SCC 17.
R v DB, 2008 SCC 25, [2008] 2 SCR 3.
R v Malmo-Levine, 2003 SCC 74, 130 [2003] 3 SCR 571.
R v Morgentaler, [1988] 1 SCR 30, 44 DLR (4th) 385.
R v Smith, 2015 SCC 34, [2015] 2 SCR 602.
R v White, [1999] 2 SCR 417, 174 DLR (4th) 111.

Symes v Canada, [1993] 4 SCR 695 at 764-765, 110 DLR (4th) 470.
Trinity Western University v Law Society of Upper Canada, 2018 SCC 33, [2018] 2 SCR 453.
Vancouver (City) v Ward, 2010 SCC 27.
Withler v Canada (Attorney General), 2011 SCC 12.

Legislation
Air Pollution - Local Air Quality, O Reg 419/05.
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, *1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
Environmental Protection Act, RSO 1990, c E19.

Secondary Material
David Wu, "Embedding Environmental Rights in Section 7 of the Canadian Charter: Resolving Tension Between the Need for Precaution and the Need for Harm" (2014) 33:2 National Journal of Constitutional Law 191 at 220.

Official Wilson Moot Sources
Clarifications, Wilson Moot 2020
Official Problem, Wilson Moot 2020