COURT OF APPEAL FOR ONTARIO

BETWEEN:

IDA ARCHIBALD

(Appellant)

- and -

ONTARIO (MINISTER OF THE ENVIRONMENT)

(Respondent)

APPELLANT'S FACTUM

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PART I:
INTRODUCTION

1. This case is about whether the decision made by the Director of the Ministry of Environment (hereinafter referred to as Director) to grant a site specific standard under O. Reg. 419/05 violated the rights of Ida Archibald, the appellant, under s.7 and s.15 of the Canadian Charter of Rights and Freedoms (hereinafter referred to as the *Charter*). The respondent claims that the appellant is seeking to read in a positive right to a clean environment under s.7 of the *Charter*. The respondent further claims that the Director's decision was not discriminatory, and that the impacts on the s.7 rights of the respondent cannot be attributed to the Director's decision. On behalf of the appellant, we hold that the violations did occur as a direct result of the Director's decision, and thus require no positive right to exist. We further submit that the Director's decision was in fact conducted in a discriminatory manner. In addition, we contend that these violations are not saved under s.1, and that the Director's decision should be struck down.

PART II:
SUMMARY OF THE FACTS

2. Ida Archibald is a member of the Deer River First Nation, a signatory to the Robinson Huron Treaty of 1850, and lives on the Deer River Reserve. Ida was diagnosed with asthma as a child and has experienced frequent respiratory issues throughout her lifetime, though she characterizes her symptoms as "mild". Apart from her four years of

post-secondary studies, Ida has lived her whole life on the Reserve. Although she continues to live an active life and work full time, Ida experiences frequent unexplained migraines and spells of dizziness.

3. There are approximately 8,000 members of the Deer River First Nation, approximately 5,800 of whom reside on the Reserve. Members of the Deer River First Nation have a life expectancy well below the national average of 79.8 years for men, and 83.9 years for women, at 69.3 years for men and 75.8 years for women.

4. Since 1974, a large-scale rubber and latex products factory, operated by RuCAN Corporation (RuCAN), has operated in the village of St. Pierre, on a property less than 5 km from the Deer River Reserve. A second company, Rio Ciervos Industries, opened a rubber factory near St. Pierre in 1985. The production of rubber involves the use of benzene as a base chemical and industrial solvent, and the facility releases amounts of benzene as an airborne contaminant.

5. In October 2014, RuCAN commenced construction of extensive upgrades to its factory to modernize its facilities and increase its production volume by 35%. In March 2018, the upgrades to the RuCAN facility were completed, and production of rubber began at the RuCAN facility's new increased capacity. Shortly thereafter, RuCAN determined that the vapour collection and air pollution control installed as part of its facility upgrades were not functioning as anticipated, causing excess benzene emissions.

6. On July 9, 2018, RuCAN requested site-specific standards for benzene emissions under section 32 of Ontario Regulation 419/05. Rio Ciervos Industries was not part of the application for this approval. RuCAN organized a public meeting in order to consult directly with interested parties within the local community. The Ministry also provided open public consultation on the request for 60 days, from July 31, 2018 to September 30, 2018. Through these processes, Ida and other members of the Deer River First Nation and local community voiced their concerns, including that the effect of the emissions associated with the production of rubber and latex should be considered in the assessment, together with the health impact thereof on nearby communities.

7. On October 10, 2018, the Director of the Ministry of the Environment approved a site-specific emissions standard for the facility operated by RuCAN. The decision was made pursuant to section 35 of the Air Pollution – Local Air Quality Regulations under the Ontario Environmental Protection Act (EPA). The site-specific standard for benzene is set as follows: (i) 3.0 µg/m3 from the date of the approval to December 31, 2018, and (ii) 1.9 µg/m3 from January 1, 2019 to October 9, 2023. The site-specific standard to be reached by RuCAN by January 1, 2019 permits volumes of emissions in excess of 4 times greater than the standard for benzene (0.45 µg/m3) in Schedule 3 of 0ntario Regulation 419/05.

8. In her affidavit in support of her application, Ida stated in part:

Deer River is my identity. To others the solution might seem simple: pack up and leave. They might say there is nothing here for us except hardship. I once thought the same way, and wanted to leave the place where I was born and everything it represented behind. It did not take long to realize that this land is my home. It is the home of my ancestors and our community. It has always been our home, and it always will be. My people have a strong connection to our land, our community, and our environment. Our culture and heritage are here. So is what's left of our way of life. And despite our connection to our lands and our nationhood, we are refused control over our lands and over our health and well-being. Instead of meeting us nation to nation, the government only receives our input as so-called "stakeholders". The government then decides what it wants to do and tells us that it is a reasonable result. And meanwhile the pollution continues to seep into every aspect of our lives. I cannot and should not be expected to rely upon the word of companies when they say they are doing their best to limit how much they poison us. I cannot and should not be expected to rely on the word of the government, which claims to act in the public interest, yet grants these companies permission to make the pollution worse.

9. Murray Cavan, the elected chief of the Deer River Nation, also swore an affidavit in support of Ida's application. Chief Cavan stated in part: I admire what Ida is trying to do. Her concerns and experiences are similar to that of so many other of our people. My wife and I had two children who were stillborn before our beautiful son was born.

He is seven years old now. For seven years I have feared every day that he too will bear the burden of growing up in a poisoned land. It is a fear that many of us know. I have counselled many members of our community who feel depressed and anxious about this pollution; it is difficult to express just how much those concerns and fears affect our everyday lives on this land. We deserve better. Our children deserve better.

10. According to Dr. Ashley Pagnutti, a professor at the University of British Columbia's School of Population and Public Health, communities living within a 10 km radius of heavily industrialized areas are subject to an increased risk of adverse mental and physical health consequences; within this radius, risk of adverse effects continues to increase with proximity. Additionally, communities that are subjected to heavy pollution often face disproportionate economic impacts, including through reduced human welfare, lost activities, lost production and consumption of market goods and services. These come in the form of reduced revenue for businesses, increased costs for producers and increased costs for consumers. A database maintained by Indigenous and Northern Affairs Canada identifies 1,090 active contaminated sites on 335 First Nation reserves - over half of the First Nations in Canada -which are largely the results of industrial pollution.

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

Data also indicates that the Deer River First Nation has experienced a skewed birth ratio, with a 2:1 ratio of female to male births over the past 30 years. In its 2019 report on Canadian cancer statistics, the Canadian Cancer society projected baseline rates of new cases of leukaemia, non-Hodgkin's lymphoma, and multiple myeloma for 2019 at 16.4, 24.2, and 7.7 per 100,000 Canadians, respectively. By contrast, the rates of these illnesses among residents of the Deer River over the last decade extrapolate to 20, 25.8, and 9.1 per 100,000 people, respectively.

12. Dr. Pagnutti opined that Ida and other members of the Deer River First Nation have suffered long-standing physical and psychological effects of the pollution by the nearby RuCAN plant. In Dr. Pagnutti's opinion, the cumulative pollutant impact of those plants has severely impacted quality of life on the Deer River Reserve. Dr. Pagnutti acknowledged that she could not say with certainty that benzene is responsible for all of the observed impacts upon the Deer River First Nation, and that there were other environmental and demographic factors that could account, in part, for some of these effects. However, she maintained that "the constellation of physical and psychosocial health effects on this community is striking."

13. According to Martin Bastarache, an environmental scientist with expertise in industrial pollutants at the University of New Brunswick, Health Canada considers benzene to be a “non-threshold toxicant”, i.e., a substance for which there is believed to be some chance of adverse effects at any level of exposure. Exposure to benzene is

considered to be a major public health concern by the World Health Organization. In 2010, the WHO released a report on benzene that noted it is carcinogenic to humans and no safe level of exposure can be recommended. Benzene is known to cause acute myeloid leukaemia and there is limited evidence that it may also cause acute and chronic lymphocytic leukaemia, non-Hodgkin's lymphoma and multiple myeloma. This risk increases exponentially with greater exposure. Benzene is known to be fetotoxic in some organisms and to cause specific chromosomal aberrations in humans who experience occupational exposure.

14. On cross examination, Dr. Bastarache conceded that due to its volatility, benzene degrades rapidly, and concentrations of benzene do not remain in the environment in air, soil, or water for long periods of time. He also acknowledged that many manufacturing activities involve some degree of benzene emissions, and that it would not be realistic to completely eliminate benzene emissions in many industrial applications. Dr. Bastarache also admitted that the likelihood that RuCAN's site-specific standard would increase the risk of cancer in an individual (using the standard published in the Regulations as a baseline) was extremely low.

15. Sunaina Azzahra, Director of the Ministry of the Environment, provided evidence that:

(a) The Ministry regulates air contaminants to protect communities who live close to these sources. It aims to limit substances released into air that can affect human

health and the environment and requires Industries to operate responsibly under a set of rules that are publicly transparent.

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

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

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

(e) These standards encourage new investments in modern air pollution controls with the goal of minimizing air pollution over time. The Ministry closely oversees the

progress of facilities with site-specific standards to ensure they are achieving the desired results.

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

(g) RuCAN employs approximately 900 people at its St. Pierre factory, 275 of whom are residents of the Deer River Reserve.

(h) Ms. Azzahra was satisfied, based on the evidence put forward by RuCAN with its application, that RuCAN would have eliminated at least 50 jobs at its St. Pierre facility, had the Ministry declined to grant a site-specific standard and RuCAN been forced to decrease its production to meet the standard in the Regulations

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

the technical and economic reasons for the request, and an opportunity for stakeholders to make submissions to the Director.

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

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

16. At trial, Ms. Archibald requested that the panel of judges:

a) declare that the Director's decision to authorize emissions of the pollutant benzene above the usual regulatory standard infringed her right life, liberty and security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms*;

b) declare that the same decision infringed her right to equality under s. 15 of the

Charter; and

c) declare that these infringements of ss.7 and 15 are not reasonable limitations on these rights.

17. The Ontario Superior Court of Justice ruled in the Ministry's favor to allow the new standards to go into effect as planned in a 2-1 decision. While they acknowledged that Canadian First Nations peoples are historically disadvantaged, Justices Carter and Sen found that Ms. Archibald failed to demonstrate how the Director decision specifically was discriminatory under s. 15. Pursuant to s. 7, they found that while cumulative health effects did exist as a result of the pollution in the St. Pierre area, Ms.Archibald also failed to demonstrate how the Director's decision helps contribute to those impacts. Furthermore, they found that even if these impacts could be attributed to the Director's decision, it would still not constitute a s.7 infringement on the grounds that:

> " the Ministry argues that Ms. Archibald is seeking a positive right to security of under s.7. I concur with this view and see no grounds upon which to confirm such a right given these facts."

Official Problem, Spring 2020 OJEN Charter Challenge, at para. 25

18. The majority did not consider s. 1 as no ss. 15 and 7 violation was found.

19. Writing the dissent, Justice Song found that, when considered in the context of historical injustice against indigenous people, the Director was discriminatory under s.15. In addition, Justice Song opined that the majority's concern regarding positive rights was unfounded, stating:

> "While it can be argued that there is no positive obligation on the government to provide a clean environment, once it has decided to legislate in this area it must comply with the Charter."
>
> **Official Problem**, Spring 2020 OJEN Charter Challenge, at para. 29

20. Justice Song found Ms. Archibald's rights to be infringed under both s. 7 and s.15 and that the infringements are not saved under section one due to them being unreasonable and disproportionate.

PART III

GROUNDS OF APPEAL

ISSUE ONE: DID THE DIRECTOR'S DECISION TO AUTHORIZE THE EMISSIONS OF THE POLLUTANT BENZENE ABOVE THE USUAL REGULATORY STANDARD INFRINGE MS. ARCHIBALD'S RIGHT TO EQUALITY UNDER S. 15 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS?

21. s. 15 of the *Canadian Charter of Rights and Freedoms* (hereinafter referred to as the "*Charter*") reads as follows:

> a) 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
> b) (2) Section (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> ***The Canadian Charter of Rights and Freedoms***, Schedule B, Constitution Act, 1982, s 15

22. Indigenous peoples and indigenous lands have been victims of environmental neglect and government discrimination since the founding of this country, and it is our belief

that the decision of the Director in this case, and the framework by which this decision was made, continues this pattern of environmental injustice and government discrimination, and thus violates s.15 of the Charter.

23. A full discussion of the adverse effects of the Ministry's site-specific Benzene threshold is laid out *infra* in the analysis for s. 7. For the purposes of addressing the adverse effect criteria laid out by *Andrews*, some points are reiterated here: As detailed *infra* (paragraph 60 and beyond), exposure to benzene contamination is linked to numerous adverse health effects including, but not limited to: birth defects, stunted childhood development, and the development of various cancers. The severity of this exposure, even in small amounts, is such that both the WHO and Health Canada hold that "no safe level of exposure can be recommended."

Official Problem, Spring 2020 OJEN Charter Challenge, at para. 18

Australia, Department of the Environment, Water, Heritage and the Arts, *National Pollutant Inventory: Benzene* (2009) <http://www.npi.gov.au/resource/benzene?fbclid=IwAR2kLoMNv4ntoEScf-gLILO30hMUxsQX87Wc9hTwQGU7RLEMp-OfUJT3g1E> accessed 28 April 2020 at para 14

24. For the Deer River First Nations specifically, the Director's decision does not exist in a vacuum, but as the continuation of 50 years of benzene pollution that has affected multiple generations. As such, consideration of the outlined health impacts must be taken in context: first, the Deer River Reservation is already the site of decades of benzene pollution by RuCAN and Rio Ciervos; second, that the Deer River First

Nations community already faces worse health outcomes relative to the general Canadian populace; third, that available evidence, although not to the standard of a randomized control trial, appears to suggest that these health outcomes are caused by continued benzene pollution. This means that any increase in benzene pollutants as allowed by the Ministry's site specific guidelines would -- at the very least -- create additional health burdens on an already marginalized group, and in all likelihood would risk worsening existing cumulative benzene exposure.

25. As laid out in *R v. Kapp*, the test for a s.15 violation is

> (1) Does the law create a distinction based on an enumerated or analogous ground?
> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?
>
> ***R. v. Kapp***, [2008] 2 S.C.R. 483, 2008 SCC 41 at para. 17

26. While the decision of the Director is neutral at face value, the court has recognized since the birth of the modern s.15 jurisprudence in both *Andrews v. Law Society of British Columbia* and more recently, *Québec (Procureure générale) c Alliance du Personnel Professionnel et Technique de la Santé et des Services Sociaux*, that a distinction can be created by adverse effects, or through exacerbated or reinforced disadvantage on a particular group. Under this doctrine, we submit that the Director's decision had both adverse impacts, as well as exacerbated and reinforced disadvantage on the members of the Deer River First Nation on grounds of ethnicity and identity.

27. To this effect, we submit two ways by which the Deer River First Nations represents a protected group, by enumerated and analogous grounds as follows:

28. First, as evidenced by the affidavits submitted by Ms. Archibald and Chief Cavan, connection and continued residence on the reserve for their perpetual use and benefit by the Crown forms an integral part of their identity as indigenous people, their conception of their ethnicity and their connection to their community, perhaps best summed up by the phrase:

> "Deer River is my identity".
>
> ***Official Problem***, Spring 2020 OJEN Charter Challenge, at para. 14

29. The essential closeness between tribal reserve land and conceptions of indigenous ethnicity has long historical precedent, even enumerated in the document establishing the modern reserve system:

> "18 (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band"
>
> ***Indian Act*** (R.S.C., 1985, c. I-5)

30. The connection is also made explicit by the effects of previous Canadian governmental decisions resulting in the removal of indigenous peoples from their land. Residential schools, forced migrations, and land confiscations have left generations of indigenous

peoples without meaningful connection to their traditions, their languages, and their ways of life. These decisions have had detrimental impacts on even the conception of indigenous self identity, echoing to the present.

31. The unique connection of ethnicity to residence means that they are particularly affected when decisions are made without considering temporal and spatial context. Moving off a reserve is a much harder choice, and a much less common one, for members of the Nation. Long term, uninterrupted residence is much more common, and so are the symptoms of chronic, multigenerational benzene exposure, spanning almost 50 years now. Though the effects may dissipate from the environment relatively quickly, they will not dissipate from the bodies of those people who have been exposed to elevated benzene production their entire lives, without respite. This decision thus creates an indirect distinction on the basis of Deer River First Nation ethnic origin by having an adverse effect on said population. It also serves to exacerbate and perpetuate disadvantage on an already marginalized group.

32. Second, we further submit that On-Reserve Indigenous status should be recognized as an analogous ground. We believe the court has left this option open as per its decisions in *Corbiere v. Canada (Director of Indian and Northern Affairs)* and *Kahkewistahaw First Nation v. Taypotat*. While those cases dealt with indigenous elections law where those with On-Reserve Status were not the targeted group, in this case they clearly are. As defined in Corbiere, an analogous ground is

> "… a personal characteristic that is immutable or changeable only at

unacceptable cost to personal identity"

Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203 at para. 13

33. In light of this concept, and the analysis *supra*, we hold that for many indigenous people, reserve status is constructively immutable, changeable only at unacceptable cost to personal identity, and should be recognized as such.

34. With regard to the question of creating, perpetuating, and exacerbating disadvantage as prescribed by *Kapp* and *Alliance du personnel professionnel et technique de la santé et des services sociaux*, we would submit the following framework for the analysis: Throughout its history of conducting s.15 analyses, the court has traditionally taken a contextual approach based on the underlying principle of avoiding distinctions that create disadvantage by perpetuating prejudice and stereotyping. This is laid out in *Québec (Attorney General) v. A:*

> " The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. The key is whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory."

Québec (Attorney General) v. A**,** [2013], 1 SCR 61 at para. 22

35. Under this principle, we must consider the broader history of environmental injustice against indigenous people, resulting in lower life expectancies, higher rates of infectious and chronic disease, and generational trauma.

36. We note that almost 20% of federal contaminated sites are located on indigenous lands based on the Federal Contaminated Sites registry, and that approximately 50% of indigenous communities face the effects of industrial pollution, according to a special report by VICE Canada. This manifests itself in many ways from the soil contamination that emits from the N'dilo Mine, to persistent boil water advisories, but perhaps the situation most relevant to the Deer River First Nation is that of the Aamjiwnaang First Nation of Sarnia, located in an area known as "Chemical Valley." Six refineries are located in the immediate vicinity of the reserve, accounting for 40% of the nation's chemical industry. For decades, the community has faced an indifferent government regulatory scheme that ignores persistent "flaring" violations of dangerous gases, and continues to offer regulatory exemptions for industry regardless of health impacts, offering Ms. Archibald and the rest of the Deer River community only one choice: the choice of staying healthy, happy, and connected to the land, or sacrificing their sense of self, land, and community.

Environmental Commissioner of Ontario,*Good Choices, Bad Choices. Environmental Rights and Environmental Protection in Ontario (*Toronto: Environmental Commissioner,2017) at 121.

Treasury Board of Canada Secretariat, *Federal Contaminated Sites Inventory: Reason For Federal Involvement* <https://www.tbs-sct.gc.ca/fcsi-rscf/rfi-rpf-eng.aspx> accessed 1 May 2020.

Hillary Beaumont, "More than half of First Nations communities in Canada are affected by industrial pollution" *VICE Canada* (6 September, 2017), online: VICE Canada<https://www.vice.com/en_ca>.

37. The direct proximity of the RuCAN facility to an indigenous commmunity, and the long history of pollution in this indigenous community, should bring this context to mind when considering a finding of discrimination. While we do not argue that the presence of systemic discrimination against First Nations communities means that the Director's desicion should be considered *prima faciae* discriminatory, we hold that the presence of structural harm should be the context by which we evaluate the decision.

38. This entails three considerations in our analysis . First, we must not only consider the decision in isolation, but also the discriminatory effects that arise when it is taken in conjunction with historical environmental and land injustices visited upon First Nations communities, as well as the ways in which this serves to exacerbate existing inequalities. Second, our standards for evaluating what constitutes discriminatory behavior by the Ministry should be adjusted with the acknowledgement that this systemic discrimination exists and that in an administrative context -- wherein a high degree of deference is afforded to government discretion -- such discrimination may be difficult to prove. Finally we must recognize that policies which, in a vacuum, appear to impact both indigenous and non-indigenous people equally could still have discriminatory effects, both because they place additional burdens on an already disadvantaged group, and because the interaction, with social and historical context, creates unique burdens upon the indigenous people affected.

39. Should we not make these concessions, especially in light of the existence of systemic

injustice, we would undermine s. 15's ability to shield vulnerable groups from the real and observable effects of discrimination, it's ability to create a framework of accountibility for the government, and it's ability to halt and reverse historical discrimination that continues to affect every corner of our society.

40. In keeping with this analysis, we submit four lines of argumentation speaking to the creation of disadvantage for Deer River peoples by the site specific modification of emissions regulations as present in this case.

41. First, we must address the matter of transparency. Direct evidence of discriminatory intent is not necessary for a finding of discrimination. However, we believe that the complete lack of insight we were able to obtain into the Director's decision making process warrants discussion. The statute mandates transparency in the materials required for the request, and the text of the Director's decision, but does not mandate any direct stakeholder participation in the decision making process. This limits accountability for discriminatory practice by disguising the underlying administrative formula, and providing only a 'sanitized' final decision, particularly in cases where there is a past record of poor regulatory outcomes where an indigenous community is involved. This creates widespread distrust in the administrative system. As stated by Ms. Archibald:

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

> every aspect of our lives. I cannot and should not be expected to rely upon the word of companies when they say they are doing their best to limit how much they poison us. I cannot and should not be expected to rely on the word of the government, which claims to act in the public interest, yet grants these companies permission to make the pollution worse."
>
> ***Official Problem***, Spring 2020 OJEN Charter Challenge, at para. 14

42. In light of existing environmental injustice against indigenous communities, this lack of transparency creates a gap in the oversight that s. 15 is able to provide. Hence we submit that to avoid future discrimination, and uphold the honour of the administrative state, it is essential that there be representation from the community when decisions are made in order to provide transparency, and act in the best interests of the community. The Ministry has submitted to this standard in the past, inviting the Aamjiwnaang First Nation to nominate an expert to the advisory committee that would decide air quality standards.

> Environmental Commissioner of Ontario,*Good Choices, Bad Choices. Environmental Rights and Environmental Protection in Ontario (*Toronto: Environmental Commissioner,2017) at 128.

43. Second, we must consider the existing disparity in access to healthcare, and healthcare outcomes between indigenous and non-indigenous communities. According to the Pan-Canadian Health Inequalities Reporting Initiative, indigenous communities tend to have lower absolute life expectancies, and lower Health-Adjusted Life Expectancies (HALEs), which account for "years in good health." Suicide risk and mental health hospitalizations are far more common. Diseases like Ms. Archibald's

asthma (which would be substantially worsened by benzene exposure) are more common in indigenous communities. When accounting for the fact that indigenous people are less likely to have access to high quality housing and healthcare (in large part due to the long term histories of displacement to remote areas), face housing discrimination, and have had familial trauma inflicted by the Canadian government, we paint a picture of a community far more vulnerable to the effects of this standard than surrounding communities, and are thus far less likely to be able to withstand a substantial mental health shock, and far less likely to have the wealth to relocate. We also paint a picture of a community that has suffered a legacy of sickness and disease caused by environmental neglect and generational trauma -- a community which is now being expected to bear the burden of additional pollution and environmental injustice.

Public Health Agency of Canada, *Key Health Inequalities in Canada: A National Portrait-Executive Summary* (2018) <https://www.canada.ca/en/public-health/services/publications/science-research-data/key-health-inequalities-canada-national-portrait-executive-summary.html> accessed 6 May 2020

44. Third, we note that a key factor in the finding of discrimination in this case is the administrative framework laid out in the EPA that determines what is required to approve a request for a site specific standard, attached below.

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

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

(b) the Director is of the opinion that,

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

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

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

(ii) the difference between the standard set out in Schedule 3 for the contaminant for the averaging period specified in paragraph 0.1 of subsection 33 (1) and the site-specific standard set by the Director for the contaminant is the minimum difference necessary to enable the person to comply with section 20 with respect to the contaminant, and

(iii) there is **no public interest reason sufficient to require the denial of the request**. O. Reg. 507/09, s. 32 (1); O. Reg. 282/11, ss. 10 (1-4).

Environmental Protection Act, R.S.O. 1990, c. E.19, 1O. Reg. 419/05: AIR POLLUTION - LOCAL AIR QUALITY s.35 (**emphasis added**)

45. The two key provisions here were the economic feasibility of compliance, and the lack of a public interest reason to require the denial of the request. The Director, in their remarks, certainly seemed to believe it was not economically feasible to comply, stating that it may have driven the company to relocate its operations out of province.

46. Based on RuCAN's own evidence, the reduction in production required to meet the provincial standard would have required the company to fire 50 of their workers, approximately 6% of their workforce, and only for a limited amount of time. It is difficult to conceive how this would be so onerous as to force a company to relocate their business.

47. As for the public interest, the effects of increased pollution on the local community are established *infra*.

48. The Director appears to have weighed harm to an indigenous community in the form of a significantly increased frequency of birth defects, developmental disorders and deadly cancers as equal to a slight harm to a majority non-indigenous multinational corporation. This framework -- which places the interests of slight profit over the lives of the Deer River community -- simply cannot be allowed. It replays the priorities that lead and have led to environmental contamination on indigenous lands, and indicates a double standard regarding administrative enforcement.

49. The decision is particularly egregious when considered in the context of the foreseeability of its inequity. We point to the directness of potential harmful environmental and health effects arising from the site-specific thresholds, which is to say, the economic pollution and the increased health risks are ones that follow naturally and foreseeably from quadrupling the allowed levels of a toxin into an environment. These are neither fourth or fifth order effects far down the chain of causality nor are they ones that are contingent upon unanticipatable, obscure, or improbable circumstances. In light of this, we would argue that this level of available foreknowledge means that any judgement of the Director's actions could assume that the potential impacts on the Deer River community were reasonably anticipatable in

their decision making.

50. Furthermore, we point to the concentrated scope of this decision, noting that it is not a matter of making a reasonable attempt at equity in a policy that would have a large and expansive reach, but a single administrative decision targeted at a particular community. This targeted-ness allows for a great level of understanding of the stakeholders affected by the decision and a great level of predictability as to what the effects of the decision will be. As well, the nature of these case-by-case decisions is that they allow for a high degree of fineness in making economic-environmental trade-offs that blanket policy does not, and that they keep the number of factors that need to be accounted for in any decision at a manageable level. This degree of control, however, also entails a degree of culpability for any potentially discriminatory results of the decision that may not apply for larger scale executive or legislative policy.

51. Finally, we submit that when taken within the context of indigenous land rights and the treatment of indigenous culture by the Canadian government, the Ministry's decision has an undeniably discriminatory effect. Specifically we point to the more than a century-long effort by the Canadian government to break apart indigenous communities, displace indigenous populations from lands on which they were traditionally resident, and systemically wipe out indigenous culture -- all of which is evident in the state-sponsored residential school system which lasted up to 1996, to

which the Truth and Reconciliation Commission described as "cultural genocide." Furthermore, we point to the economic and material inequality faced by indigenous peoples, reflected in higher rates of poverty and incarceration, as well as lower average wealth, income, education, life expectancy and housing quality.

52. All this means that the burden of relocation -- an option that is usually presented as a means to escape from environmental pollution -- is particularly and unacceptably onerous for Ms. Archibald and Deer Nation residents. This is for three reasons. Firstly, the people of the Deer River First Nations hold the land as central to their community and individual identities, as well as their identity as indigenous peoples, and thus a departure from the Deer River Reserve would inflict deep fundamental harm onto that identity. Secondly, the century-long effort led by the Canadian government to erode indigenous culture and break apart First Nations communities means reservations become one of few spaces in which indigineous people may freely practice traditions, form indigenous communities and bonds, and exert a measure of autonomy in their affairs. The relocation of a people from a reserve necessarily requires assimilation into non-indigenous spaces and dispersion of on-reserve communities, thus eroding the ability to practice and preserve culture and tradition. Finally, material inequality makes it uniquely difficult for on reserve residents to (1) have the financial ability to relocate and then rebuild their lives after relocation and (2) to then have the time or financial resources to organize community events or to put into cultural preservation and communication efforts.

53. The history of oppression and discrimination against indigenous peoples in Canada mean that the Deer River people already face significant disadvantage in their ability to practice their own culture. We point to the material inequality faced by those on the Deer River reserve that makes it difficult for people to feel safe on their own historical lands, to the forced assimilation that has left many First Nations individuals alienated and disconnected from their heritage, and to the alienation and cultural trauma brought on by a history of injustice, as well as the ongoing stress of living in a industrial pollution site. With this historical context in mind, we submit that the Director's decision has presented the people of the Deer River First Nations with a choice to either move away from a land and community that they have deeply personal and cultural ties to, or else to live with both oncogenic pollution at a level deemed normally unacceptable by federal regulation, and with renewed cultural trauma of insecurity in their own land. In light of that reasoning, we hold that this harm should, in and of itself, be sufficient to satisfy the criteria of perpetuating and exacerbating a disadvantage.

54. We note that this argument as it pertains to s. 15, is presented in a way that is agnostic to the existing pollution caused by the RuCAN company (the regulation of which is a legislative matter, and which pertains to positive rights that we do not wish to speak to). Rather what is being discussed is an administrative government decision which will serve to create and worsen the harmful and discriminatory impacts discussed, thus falling under the scope of s. 15 of the Charter.

ISSUE TWO: DID THE DIRECTOR'S DECISION TO AUTHORIZE EMISSIONS OF THE POLLUTANT BENZENE ABOVE THE USUAL REGULATORY STANDARD INFRINGED MS. ARCHIBALD'S RIGHT TO LIFE, LIBERTY AND SECURITY OF THE PERSON UNDER S. 7 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS?

55. Section 7 of the Charter reads as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> ***The Canadian Charter of Rights and Freedoms***, Schedule B, Constitution Act, 1982, s 7

56. The case brought before the Ontario Supreme Court contained a number of factual questions regarding the effect of benzene contamination on the environment and on health outcomes. These factual matters speak to the existing effects of benzene pollution, as well as the effects of the new site-specific standards; and as such they are central to determining whether or not there was a s. 7 infringement. In absence of a definitive resolution to these factual matters in the lower courts, it is then necessary to establish a framework to view the available evidence prior to any substantive consideration of a possible s. 7 violation.

57. We would first like to submit that a definitive, scientifically rigorous assessment regarding the effects of benzene contamination on the Deer River First Nations is effectively impossible to achieve. This is because metrics of community outcomes are influenced by a great multitude of factors including, but not limited to: socio-economic status, presence of hereditary illness, quality of housing, quality of healthcare and food access. This means that any analysis of available data on these outcomes cannot

effectively isolate for the impacts of benzene pollution without much more intensive study with a socio-economically similar population as a point of comparison. This analysis is made even more complicated by the fact that the task at hand is not assessing the extent of existing impact, but the use of this data to determine the effects of a hypothetical increase in pollution.

58. Demanding such a study as the standard for evidence of harm would place an unreasonable burden on the side of RuCan, both because of the technical difficulties that would be involved in such an undertaking, and because such a study would, by its very nature, require at least the several decades it takes for the long term effects to manifest. In absence of such rigorous proof, our best possible understanding of the effects of benzene pollution (both existing ones and those that may result from the new standards imposed by the Director's decision on the Deer River people) levels would have to be based on the known effects of benzene, available data for the differential health outcomes between the Deer River population and the Canadian population, and evidence of health problems in the Deer River population consistent with benzene exposure.

59. The court has previously articulated in *F.H. v. McDougall* that the standard of evidence in a civil case should be that of clear and convincing evidence such that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test."

60. In light of McDougall, and our evidentiary constraints, we submit: (1) that the uncertainty as to the effects of the pollution as expressed by Dr. Bastarache and Dr.Pagnutti in their testimony is inherent in the nature of available evidence and the testimony they provide should not be dismissed out of hand as a result, and (2) that the clear and convincing evidence standard should apply in determining whether the increase benzene pollutants harm protected s. 7 interests.

61. As stated in *Lockridge v. Director*, the infringement on the right to life in this case must prove two things:

a) A causal connection between the harm or risk of harm asserted
b) They must also establish that such deprivation took place in a manner that did not conform to the principles of fundamental justice.

Lockridge v. Ontario (Director, Ministry of the Environment), [2012] O.J. No. 3016 at paras 70, 78

62. The first is proven by the evidence provided by Martin Bastarache:

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

Official Problem, Spring 2020 OJEN Charter Challenge, at para. 18

63. Bastarache emphasizes the many dangers of benzene, starting off by reasoning that it is a non-threshold toxicant. A non-threshold toxicant refers to a toxic substance that has adverse effects at all levels of exposure. Non-threshold toxicants in large quantities also cause extensive cumulative effects on both humans and their

environments.

64. Bastarache continues to describe some of the effects of benzene on humans:

a) "Exposure to benzene is considered to be a major public health concern by the World Health Organization (WHO). In 2010, the WHO released a report on benzene that noted it is carcinogenic to humans and no safe level of exposure can be recommended."
b) Benzene is known to cause acute myeloid leukaemia and there is limited evidence that it may also cause acute and chronic lymphocytic leukaemia, non-Hodgkin's lymphoma and multiple myeloma. This risk increases exponentially with greater exposure.
c) Benzene is known to be fetotoxic in some organisms and to cause specific chromosomal aberrations in humans who experience occupational exposure.

Official Problem, Spring 2020 OJEN Charter Challenge, at para. 18

65. It is evident that benzene, a toxic pollutant with adverse impacts and cumulative effects on the person and environment, has severe negative long-term effects on affected communities. Any increase in benzene will further compromise the health of the Deer River Valley residents -- a community which already has higher rates of birth defects, cancer, various respiratory issues (such as asthma) and migraines.

66. In Bastarache's cross examination, he conceded that

> "due to its volatility, benzene degrades rapidly, and concentrations of benzene do not remain in the environment in air, soil, or water for long periods of time."

Official Problem, Spring 2020 OJEN Charter Challenge, at para. 19

67. However studies show that the benzene that is released into the atmosphere is known

to

> "react with other chemicals to create smog. This could break down naturally, but it might also attach to rain and snow and be carried to the ground to contaminate water and soil."
>
> Australia, Department of the Environment, Water, Heritage and the Arts, *National Pollutant Inventory: Benzene* (2009) <http://www.npi.gov.au/resource/benzene?fbclid=IwAR2kLoMNv4ntoEScf-gLILO30hMUxsQX87Wc9hTwQGU7RLEMp-OfUJT3g1E> accessed 28 April 2020

68. The study goes on to state that:

> "People can be exposed to benzene in the following ways:
> a) Breathing air that contains benzene — in exhaust fumes, by smoking, or even by breathing second hand cigarette smoke.
> b) Drinking water or eating foods that have been contaminated, even in small amounts.
> c) Coming into contact with products such as petrol, which can enter the body if it touches the skin directly.
> d) Living near industries that produce or use benzene, or living near freeways and busy roads.
> e) Working in an industry where benzene is produced or used, such as in an oil refinery or footwear manufacturer."
>
> Australia, Department of the Environment, Water, Heritage and the Arts, *National Pollutant Inventory: Benzene* (2009) <http://www.npi.gov.au/resource/benzene?fbclid=IwAR2kLoMNv4ntoEScf-gLILO30hMUxsQX87Wc9hTwQGU7RLEMp-OfUJT3g1E> accessed 28 April 2020 at para 17

69. This shows that although benzene does not stay in the environment for extended periods of time, it nevertheless contaminates the environment and its residents through a multitude of ways, many of which are relevant to the Deer River Reserve. For example, the people of the Deer River Reserve all live dangerously close to the industry that releases well above the 0.45 μg limit of benzene into the environment, which has been shown to be one of the many ways to get exposed to benzene. This would suggest that benzene pollution in the atmosphere can cause severe and

irreparable harm to anyone living around the contamination site.

70. The specific question at hand is not whether benzene remains permanently in the environment, but whether the cumulative effects of additional exposure remain permanently in the individual. If that is shown, then it is likely that additional exposure over a period of time would have additional permanent and compounding effects. With regards to this, Dr.Pagnutti testifies that:

> "The cumulative pollutant impact of those plants has severely impacted quality of life on the Deer River Reserve."
>
> ***Official Problem***, Spring 2020 OJEN Charter Challenge, at para. 17

71. While Dr. Pagnutti acknowledges that she could not say for certain whether the health problems experienced by the Deer River residents are the result of contamination in the region, the specific nature of these problems, that is to say increased rates of respiratory illnesses, fetal defects, and particular types of cancer, is consistent with the effects of exposure to benzene presented in Dr. Bastarache's testimony and by the WHO.

72. And also, while Dr. Pagnutti does not present a characterization of the possible outcomes from the new threshold, the existing state of affairs, and the compounding nature of the harms of benzene are sufficient to indicate that (1) in spite of their physical instability, the additional benzene emissions do have permanent effects on the local community, (2) those effects are severe, irreversible and likely to increase

with additional exposure, and (3) regardless of the marginal risk to any individual associated with the new standards, the compounding effect of heightened exposure could, and is likely to still have visible effects when examining the impact across an entire community.

73. In light of this examination of the testimonies provided at trial, we submit that the weight of the evidence points towards severe and negative consequences to the health and personal security of the Deer River people as a result of the Ministry's decision. Furthermore, given what is at stake in this case is the life and health of a community, there is sufficient reason to believe that the risk of harm is great enough to act on the side of caution.

74. In the Superior Court's analysis for its decision, Justice's Carter and Sen opined that:

> " Furthermore, the Ministry argues that Ms. Archibald is seeking a positive right to security of under s.7. I concur with this view and see no grounds upon which to confirm such a right given these facts."
>
> ***Official Problem***, Spring 2020 OJEN Charter Challenge, at para. 25

75. The characterization of Ms. Archibald's case as simply a demand for a positive right to security relies on a conception of the Ministry's decision as nothing more than a withdrawal of legislative protections that the Canadian government is under no obligation to provide. This representation, while accurate to the simplest elements of the situation, ignores both the substance of the Ministry's decision making process and

the nature of its statutory obligation, and thus makes it much more similar to a deliberate action by the government (from which negative statutory protection is recognized) rather than simply inaction. A more detailed analysis of the implementation of the new standards, and the reasoning for our objection is given as follows:

76. First, we note that the implementation of the site-specific standards does constitute active creation of policy elements in two respects.

77. One, because it involves the Ministry making a determination that the increased standards are a matter of economic or technological necessity, and that that necessity outweighs the health and environmental interests of the local community. The text of the EPA states:

> "(1) The Director may approve a request under section 32 and set a site-specific standard for the contaminant that is the subject of the request if….
> b) the Director is of the opinion that,
> (i) the person making the request cannot comply with section 20 with respect to the standard set out in Schedule 3 for the contaminant
> (A) it is not technically feasible for the person to comply, in the case of a person who is relying on any paragraph of subsection 32 (1), or
> **(B) it is not economically feasible for the person to comply, in the case of a person who is relying on a paragraph of subsection 32 (1) other than paragraph 4,**
> (ii) the difference between the standard set out in Schedule 3 for the contaminant for the averaging period specified in paragraph 0.1 of subsection 33 (1) and the site-specific standard set by the Director for the contaminant is the minimum difference necessary to enable the person to comply with section 20 with respect to the contaminant, and
> (iii) t**here is no public interest reason** sufficient to require the denial of the request. O. Reg. 507/09, s. 32 (1); O. Reg. 282/11, ss. 10 (1-4)."

Environmental Protection Act, R.S.O. 1990, c. E.19, 1O. Reg. 419/05: AIR POLLUTION - LOCAL AIR QUALITY s.35 (**emphasis added**)

78. This reasoning matters as policy rather than merely the motivation behind the Director's decision because the EPA only empowers the Ministry to make changes to normal pollutant standards when compliance is, under the Director's discretion, economically or technologically infeasible. That is, the reasoning given by the Ministry becomes a policy element when it's the substance of the reasoning that legitimizes the changes in the first place.

79. Two, because the power granted by the statute to the Ministry is not the non-application of standards, but the creation of temporary, site specific and higher standards. In the process of doing so, it speculates on, analyzes and weighs a variety of economic, public health, and environmental outcomes, and then encodes results of analysis into an alternate set of standards that it feels better balances stakeholder interests that it then implements. That is, that the Ministry is actively outlining new guidelines in determining what the modified emissions limits should be, how long they last, and where, geographically, they apply.

80. None of these policy elements were explicitly outlined in the original statute. In light of this, the Director's decision is not just a limited revocation of EPA protections but the discretionary implementation of a separate policy framework for the region.

81. Second, we note that the decision making body (the Ministry of the Environment) involved in the creation of the new standards is wholly separate from the original legislative body which passed the enabling statute (the EPA). The Ministry has an entirely different role in governance, is accountable to different people, and employs a wholly different decision making process than that of the Ontario Parliament. This separation means that administrative decisions made by the Ministry necessarily involve interests and considerations unforeseen by the original legislation and that the Ministry is therefore empowered to balance those interests as it sees fit. As such, any action by the Ministry could not be seen as a continuation of the same regulatory process as the deliberation and passage of the original statute, but a separate and independent exercise of power.

82. This separation is the reasoning under which we submit the principle articulated by Justice Song's dissent should be held by the court:

> "While it can be argued that there is no positive obligation on the government to provide a clean environment, once it has decided to legislate in this area it must comply with the Charter."
>
> ***Official Problem***, Spring 2020 OJEN Charter Challenge, at para. 29

83. This principle is significant because a government is not a single actor, but rather as a multitude of bodies, each with their own goals, powers and obligations to its people. More specifically to the case at hand, this means that the Ministry of the Environment and the Parliament are separate bodies, and as such, the counterfactual of "inaction" to which we compare the Ministry's decision should not be an absence of EPA

benzene regulation, but the existing status-quo standards as set out in the statute.

84. There are numerous statutes in Canadian law which allow administrative bodies to create regulatory exemptions or alternative guidelines of a nature similar to those set for the RuCAN facility. Each use of these exemptions is an exercise of significant power by the government in a way that functionally allows it to create novel, situation standards. If s. 7 is to operate effectively as a protection for the rights of its citizens against government infringement, such a large part of government power cannot be exempt from it.

85. With this reasoning, we hold that the court should not consider Ms. Archibald was asking for a positive right to security, but rather for a protection from government action. Under this principle, we submit, in accordance with *Canada (Attorney General) v. PHS Community Services Society*, that because pollution levels would not have increased but for the Director's decision, it constitutes a violation of Ms. Archibald's s. 7 right to security.

Canada (Attorney General) v. PHS Community Services Society, 2011 SCC 44, [2011] 3 S.C.R. 134

86. It is also important to consider the special connection indigenous cultures have with their surrounding environment and the reserve that they live on. Like most families/communities, culture is generally passed on through the generations through stories. Most indigenous populations tie their stories to their surrounding environments

to pass on their culture, heritage, and their identity to younger generations. Ms. Archibald further advocates for this idea in her affidavit:

> "My people have a strong connection to our land, our community, and our environment. Our culture and heritage are here. So is what's left of our way of life."

Official Problem, Spring 2020 OJEN Charter Challenge, at para. 14

87. However, evidence and scientific experiments suggest that benzene pollution causes irreparable damage to wildlife that may further endanger the culture and livelihood of the Deer River First Nations. This is stated in the following pollutant inventory made by the Australian government:

> "When aquatic life, like fish, shellfish and other creatures in our rivers, lakes and oceans, is exposed to benzene, it makes them sick and can stop them from having babies. It can alter their behaviour, change their appearance and shorten their lives. When plants are exposed to benzene in the soil their growth can be slowed and they may even die."

Australia, Department of the Environment, Water, Heritage and the Arts, *National Pollutant Inventory: Benzene* (2009) <http://www.npi.gov.au/resource/benzene?fbclid=IwAR2kLoMNv4ntoEScf-gLILO30hMUxsQX87Wc9hTwQGU7RLEMp-OfUJT3g1E> accessed 28 April 2020 at para 15

88. Environmental benzene exposure is not an all-or-nothing problem, and an increase in the level of benzene contamination causes a corresponding increase in harmful environmental impact. The extra pollution resulting from the Director's decision to increase the regulatory benzene threshold (to *four times* the normally allowed levels) both increases the harm that is already being done to environment and heritage of the Deer River People, and has lasting, long term effects in the form of damage to fish

populations, plantlife and the surrounding ecosystem.

89. Additionally, such damage to wildlife would prevent the Deer River First Nations from practicing activities integral to their traditional way of life. An example would be fishing, both a means of survival and also an integral part of keeping tradition alive through communal activities. As stated in *R v. Van der Peet*:

> "In order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."
>
> ***R v. Van der Peet***, 1996] 2 SCR 507. para 46

90. It was further determined in *R v. Sparrow* that things like fishing are Aboriginal rights. As such, by damaging wildlife, benzene pollution takes away the Deer River First Nations' identity, culture, and heritage. And as stated in *Corbiere v. Canada*

> "Decision makers have not always considered the perspectives and needs of Aboriginal people living off reserves, particularly their Aboriginal identity and their desire for connection to their heritage and cultural roots."
>
> ***Corbiere v. Canada***, 1999 , 2 S.C.R. 203 at para 71

91. This all goes to prove that the increase in benzene pollution as a result of the Director's decision subjects the Deer River Nation's to the undue hardship of losing their identity, equivalent to them losing a self-validating purpose. When people lose a self validating purpose it can lead to a state of loss, grief, depression, and anger. All of these effects infringe on the psychological security of the person and thereby infringe

on Ms. Archibald and the entire Deer River Nation's right to security.

92. Furthermore, the Director's decision acts as an unintended, yet effective environmental 'renovation' on the Deer River community. As a result of the Director's decision, the Deer River First Nations are presented with unreasonable choices: move away from the reserve where they were born and raised, leaving behind all their culture, history, and identity, or live on a reserve that is polluted at a level *four times* what environmental regulations normally deem as acceptable .

93. The choices presented to Deer River Community are truthfully an inadvertent miscarriage of justice dealing with alienating an entire community from their culture and ancestry.

94. The Director of the Environment's infringement of psychological security of the person is depicted in our analysis of *Blencoe v. British Columbia* (Human Rights Commission) and *R v. Morgentaler.*

> "In the criminal context, this Court has held that state interference with bodily integrity and serious state-imposed psychological stress constitute a breach of an individual's security of the person. In this context, security of the person has been held to protect both the physical and psychological integrity of the individual"
>
> ***Blencoe v. British Columbia (Human Rights Commission)***, [2000] 2 SCR. 307, at para 55

> "Exposed to a threat to their physical and psychological security under the legislative scheme ... since these are aspects of their security of the person, their s. 7 right is accordingly violated."

***R v. Morgentaler*,** [1988] 1 SCR 30 at page. 163

95. Though the circumstances in *Blencoe v. BC* HRC and *R v. Morgentaler* are dissimilar to the current case, the argument on "state-imposed psychological stress" still stands as a gross miscarriage of justice due to its infringement on the security of the person under s.7 of the Charter.

96. In *Archibald v. Ontario*, section 35 of the Air Pollution – Local Air Quality Regulations under the Ontario Environmental Protection Act (EPA) poses a similar state-imposed psychological stress on the individuals. This was referenced in the affidavit of Murray Cavan where she states:

> "For seven years I have feared every day that he too will bear the burden of growing up in a poisoned land. It is a fear that many of us know. I have counselled many members of our community who feel depressed and anxious about this pollution; it is difficult to express just how much those concerns and fears affect our everyday lives on this land."

Official Problem, Spring 2020 OJEN Charter Challenge, at para. 12

97. It is evident from our analysis and the affidavit that there is a deep psychological burden on the community who are showing signs of mental pressure due to anticipation of physical health detriment from the state permitting RuCAN to excessively "poisoning the land."

98. The state indirectly induces psychological pressure on the Deer River Nation which

severely infringe on Ms. Archibald and the community's s. 7 Charter rights

99. Furthermore, the following studies suggest that this may lead to further intergenerational trauma.

> **"public policies have disrupted [environmental] relations ... and the resulting trauma has incubated negative social conditions for Aboriginal people, making them significantly more vulnerable to a number of threatening social conditions**. Subsequent refinements to the model provide the mental health professional with a generic lens to examine the relationship between intergenerational trauma and social systems that Aboriginal peoples come in contact with"
>
> Peter Menzies, "Intergenerational Trauma from a Mental Health Perspective"(2010) 7 Native Social Work Journal 63 (**emphasis added**)

> "At least two subsequent generations were also "lost". The children of these students became victims of abuse as their parents became abusers because of the residential school experience (p. 363)."
>
> Gagne, M. (1998). The role of dependency and colonialism in generating trauma in First Nations citizens. In Y. Danieli (Ed.), International handbook of multigenerational legacies of trauma. (pp. 355–372). New York: Plenum Press

100. From these articles, it is evident that these "public policies" can cause continued adverse effects, with specific reference to intergenerational trauma. And as noted in the articles, intergenerational trauma can cause at least two subsequent generations to suffer from state imposed and state sanctioned hardship. The perpetuation of intergenerational trauma by state-approved decisions, much like the Director's, is merely a repeat of previous harmful actions to indigenous populations, and must not be condoned or allowed if we are to truly reconcile past neglect and abuse.

101. The statutory aim of the EPA in its entirety is

> "3 (1) to provide for the protection and conservation of the natural environment."

Environmental Protection Act, R.S.O . 1990, c. E.19, s. 3

102. In particular, section 35, under which the Director made their decision, provides a safety valve, enabling the government to balance the economic health of industry with the health of the environment, and the people within it. Drawing upon the precedent established in *Canada (Attorney General) v. PHS Community Services Society*, we submit that this decision was grossly disproportionate.

103. Under the principles established in *Bedford v. Canada*, such an analysis consists of a qualitative comparison between the legislative purpose of the action, and the infringements produced by said action. If said infringements are found to be so extreme that the state's objectives could not reasonably justify them, then the action will be found to be grossly disproportionate. If even one person is affected in a manner found to be grossly disproportionate, the action will be considered in contravention of the principles of fundamental justice.

Canada (Attorney General) v. Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101

104. The government's purpose in this case was to preserve the economic health of the

RuCAN facility, ensure continued employment at said facility, and to encourage technological best practices regarding emissions reduction. All of these are valid goals, and it is well within the Ministry's ambit to decide on them. The effects of the site-specific standard in this case however are extremely severe. A climate of severe psychological insecurity has been created for the entirety of the Deer River Reserve, a sense of distrust towards government, fear for one's way of life, fear for the lives of one's children, and the denigration of one's traditional homes and ancestral lands. People are placed in the untenable position of having to decide between maintaining and upholding their way of life and identity or the continued and enduring safety of their families -- a pattern of generational trauma that has been repeated far too often.

105. Furthermore, we wish to raise a second argument on the grounds of procedural fairness. As established in *Baker v. Canada* (Director of Citizenship and Immigration), the degree to which procedural fairness applies can be determined by a five step analysis:

> "...the nature of the decision being made and process followed in making it...the nature of the statutory scheme and the terms of the statute pursuant to which the body operates...the importance of the decision to the individual or individuals affected... the legitimate expectations of the person challenging the decision... the choices of procedure made by the agency itself...This list is not exhaustive."
>
> ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817 paras 23-28

106. While the decision is largely based around policy, involves a large degree of discretion, and involves the consideration of multiple factors, it is similar to a judicial

process in several key ways: First, it is based on the weighting of the interests of two particular interest groups, in this case the corporation requesting a site specific standard, and the surrounding community; second, it has a direct and severe impact on a narrowly targeted proximate group, which are directly foreseeable at the point of decision; and third, it involves a single decision maker, who must justify his/her decision on the grounds of the above weightings.

107. Second, the statutory framework indicates that this decision is final, with very little option for recourse. While opportunity for comment is provided during a limited time frame, there is no appeals process after a decision has been made, save for the government receiving a request for amendment from the corporation, or the Director deciding independently to later provide an amendment.

108. Third, the impacts of this decision are both very targeted, and very severe. It is a situational decision involving the impact of one group upon one other group, involving severe risks to life, potential deprivation of property and liberty, and intense psychological sanction.

109. Fourth, it cannot reasonably be stated that there was a legitimate expectation of any particular additional components of procedural fairness, no additional promises were made.

110. Fifth, though the Ministry has obviously decided to conduct its affairs in this manner with regard to site specific emissions standards, in certain circumstances somewhat analogous to the present one, namely the MOECC commission currently reviewing emissions standards near Aamjiwnaang, for which the government has provided the Ojibwa of Sarnia with monetary support to hire a technical expert to represent them at said commission. Additionally, the Ministry is also looking towards creating new cumulative emissions standards.

Environmental Commissioner of Ontario,*Good Choices, Bad Choices. Environmental Rights and Environmental Protection in Ontario (*Toronto: Environmental Commissioner, 2017) at 128.

111. With all these factors in mind, it is our submission that procedural fairness requires the addition of one procedural safeguard, which was not provided.

112. As established in *New Brunswick v. G.(J.)*, it is essential, in areas where there is both a great deal of complexity, and significant stakes, for an individual to have expert (whether legal or otherwise) representation, and if they cannot afford that representation, to have it provided for them. We submit that in this quasi judicial circumstance, it is essential that the affected community be able to provide an expert to examine the justification for the site specific standard, and make a case for the community. This would also enable greater scrutiny and transparency around the Director's decision making process, as elaborated in our s.15 analysis.

New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46 at paras 72-75

ISSUE THREE: IF THERE IS AN INFRINGEMENT, IS IT JUSTIFIED BY S. 1 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS?

113. Section 1 of the Charter reads as follows:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> ***The Canadian Charter of Rights and Freedoms***, Schedule B, Constitution Act, 1982, s 9

114. As established in *Doré v. Barreau du Québec*, the proper standard for s.1 analysis of an administrative decision is one of reasonableness. The court must determine whether the decision maker has balanced their statutory objectives and the severity of Charter violations in a reasonable manner, following from an accurate chain of logic, and interpretation of the facts. We submit that the Director in this case misapprehended their statutory objectives, and improperly weighted them against the severity of the Charter violations committed.

115. Furthermore, weighting of Charter violations is an essential part of any administrative or Ministerial decision, as established in several cases, including *United States v. Burns*:

> "The question is not whether we agree with the Minister's decision. **The only issue under the *Charter* is whether, as a matter of constitutional law, the Minister had the power to decide as he did**.

United States v. Burns, [2001] 1 S.C.R (**emphasis added**).

116. The statutory objective of s. 35 of the EPA is to balance the economic health of industry with the preservation of public and environmental health. Considering the Ministry's statement regarding their decision:

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

Official Problem, Spring 2020 OJEN Charter Challenge, at para. 12

117. It is our submission that the Ministry's analysis regarding the proper balance between the degree of advancement of their statutory objectives and the severity of the Charter infringements is unreasonable on four grounds.

118. First, regarding the failure of the Ministry to correctly interpret O.Reg 419/05 with regard to economic necessity. As established *supra*, the Ministry determined that reducing benzene levels to the standard would result in 50 people being laid off, a 6% reduction in workforce, and followed with that the fear of a wholesale relocation of the entire factory that had been in place, and withstood several economic disruptions since 1974. During that period, RuCan remained economically viable without the

expanded production that resulted in the initial emissions increase, and should thus be able to retain viability at the original production level.

119. We cannot speculate on the reasons the Ministry may have believed relocation would occur, because they did not provide any. Based on the information the Director provided, that assessment of "economic necessity" appears completely unreasonable, especially considering the scale of the Charter violations.

120. Second, regarding the justification provided by the Ministry, they seemed focused almost exclusively on encouraging "technology based solutions" phased in slowly. It is our submission that such was unnecessary encouragement in this case, and that the plan put in place by the Ministry would provide no such encouragement. We remind the court that the initial spike resulted from an unsuccessful effort to engage in wholesale upgrade and technology based mitigation in order to increase production. A production based sanction would provide equal encouragement to return to normal production levels, and enable heightened production via the completion of the mitigation scheme they were already in the process of completing.

121. Third, failure to appropriately consider the seriousness of Charter violations in the proximate and historical context. When dealing with worsening direct impacts upon an indigenous community that has already had a long history of environmental pollution as a result of state neglect and interference, and that has already raised complaints

about continuous cumulative benzene exposure, Charter considerations should have been front of mind for the Ministry. Instead they seem to have completely ignored the history of the Deer River community (and indigenous communities altogether), disregarding the disparate impacts that even a short term increase would have on Ms. Archibald and the Deer River people. The only mention of the Ministry's consideration of the special circumstances of aboriginal communities was their paltry attempt to find local support for the decision.

122. Fourth, simple failure of proportionality. In its analysis, the Ministry seems to have decisively weighed in the favour of the short term profits of a polluter employing 900 people, most of them nonindigenous, against the health of 5800 members of an indigenous community. The assistance the standard provided the company was at best minimal, and certainly not necessary, while the harms to indigenous communities, the damage to the very concept of self, the damage to an already fragile health situation, the compounding damages of benzene exposure, were all both fully anticipatable by the Ministry, and fully laid out by the community. Benzene exposure, cumulative exposure, and its intersection with indigenous communities are all issues that the Ministry is currently reviewing, and should have received more than the minimal consideration they received in this decision.

123. For these reasons, we submit the Ministry's analysis was unreasonable, due to failure to reasonably interpret their guiding statutes, and effectively balance their objectives

with Charter violations.

Application to this case

124. In light of the arguments *supra*, we hold that the decision of the Director was discriminatory on grounds of indigenous Identity and On-Reserve Status, violating Ms. Archibald's s.15 rights. Additionally, it violated the s. 7 rights of Ms. Archibald to life, liberty, and security in a grossly disproportionate and procedurally unfair manner. The weighing of the statutory objectives of the Ministry against the impact to the Charter-protected rights of Ms. Archibald was conducted in an unreasonable manner, and thus the decision cannot be saved under s.1.

PART IV
ORDER REQUESTED

125. It is respectfully requested that the appeal be granted, and the Director's decision to grant a site specific standard reversed.

ALL OF WHICH is respectfully submitted by

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Anna Xia

Of Counsel for the Appellant

DATED AT 135 Overlea Blvd, Toronto this 16th Day of May, 2020

APPENDIX A

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