

**COURT OF APPEAL FOR ONTARIO**

**BETWEEN:**

**IDA ARCHIBALD**

**(Appellant)**

**- and -**

**ONTARIO (MINISTER OF THE ENVIRONMENT)**

**(Respondent)**

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**RESPONDENT'S FACTUM**

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**The Law Society of Upper Bloor  
1141 Bloor St W, Toronto, ON M6H 1M9**

Ana Sophia Rashid-Cocker  
Jana van Heeswyk  
Anna Krukowski

**Of Counsel for the Respondent**

**Telephone:** 416 393-1420

**Fax:** 416 393-1420

**Email:** [lsu.bloor@gmail.com](mailto:lsu.bloor@gmail.com)

**PART I:  
INTRODUCTION**

1. This case concerns a complex decision, made by the Director of the Ministry of the Environment (hereafter “the Director”) about how to balance the competing needs of the economy, the environment, and local communities. The appellant submits that the Director’s decision violated her rights under sections 15, 7, and 1 of the *Canadian Charter of Rights and Freedoms*. While Ms Archibald raises many of her concerns, we respectfully submit that there is no concrete connection between the Director’s decision and these concerns. The appellant has not provided proof of an explicit link between the Director’s decision and discriminatory purpose or effect; further, the Director’s actions did not create a disadvantage that perpetuates prejudice or stereotype. In fact, we see evidence of how the Director’s decision will contribute to increased economic activity and reduced net emissions in the St. Pierre locale over time. In addition, we have not seen concrete evidence showing how the Director’s decision causes death, or an increased risk of death, to Ms Archibald. We respectfully submit that, upon the lack of evidence of violation of s. 15 and s. 7, this appeal should be dismissed. Even if the court should find that Ms. Archibald’s s. 15 and s. 7 *Charter* rights were violated, we submit that the infringement is saved by s. 1. In light of the numerous factors that the Director had to weigh in her complex decision, the significant and pressing interests of other relevant parties, and the temporary timeframe of the site-specific exemption, we find that any such infringement upon Ms Archibald’s *Charter* rights would be limited and justifiable. As such, we respectfully submit that the Director’s decision does not violate the *Charter* and that this appeal should be dismissed.

**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 Ontario's *Environmental Protection Act (EPA)*. The site-specific standard for benzene is set as follows: (i) 3.0 µg/m<sup>3</sup> from the date of the approval to December 31, 2018, and (ii) 1.9 µg/m<sup>3</sup> 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/m<sup>3</sup>) in Schedule 3 of Ontario 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-Hodgkins 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 section 7 of the *Canadian Charter of Rights and Freedoms*;
  - b) declare that the same decision infringed her right to equality under section 15 of the *Charter*; and
  - c) declare that these infringements of sections 7 and 15 are not reasonable limitations on these rights.
17. In determining a finding, Carter and Sen JJ. considered a variety of factors and evidence. They took into account the health of residents of the Deer River Reserve and of St. Pierre, scientific evidence on the properties and effects of benzene, and the environmental and economic impacts of the RuCAN plant. They also acknowledged the long-standing discrimination and disadvantage faced by the Indigenous peoples of Canada, including the members of Ms. Archibald's community.
18. Overall, Carter and Sen JJ found that the Director's decision did not violate Ms. Archibald's right to equality under s. 15 of the *Charter*. Although it is possible that collective pollution from multiple sources in the St. Pierre locale had health implications, such health issues cannot be said to be caused by the Director's

decision. Thus, Carter and Sen JJ also found that Ms. Archibald's rights to life, liberty, and security of the person under s. 7 of the *Charter* were not infringed upon. Furthermore, Carter and Sen JJ agreed with the Ministry's reasoning that Ms. Archibald sought a positive right to security under s. 7 of the *Charter*. Under the circumstances, they found no reason to substantiate the right. Finally, given that no infringements upon Ms. Archibald's rights under s. 7 and s. 15 of the *Charter* were found, there was no need to address justification under s. 1.

**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 section 15 of the *Canadian Charter of Rights and Freedoms*?**

19. Section 15 of the *Canadian Charter of Rights and Freedoms* guarantees that:

(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.

(2) Subsection (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.<sup>1</sup>

20. To determine whether discrimination has occurred, *Kahkewistahaw First Nation v. Taypotat* (2015) establishes a two-part test that consists of two questions:

(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?<sup>2</sup>

21. Indigenous individuals are certainly protected from discrimination on the basis of race, nationality, and ethnicity, by s. 15. of the Charter. The question is now whether the Director's actions created a distinction based on this ground.

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<sup>1</sup> *Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 15 [*Charter*]

<sup>2</sup> *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 SCR 548 [*Taypotat*]

22. RuCAN operates in the village of St. Pierre, 5 kilometres away from Deer River reserve. The operations of RuCAN's factory are just as relevant, if not more so, to St. Pierre's residents as they are to the residents of Deer River Reserve.
23. While Indigenous communities are certainly historically disadvantaged, the appellant has not demonstrated an explicit connection between the Director's decision and discriminatory effects to herself on the basis of her race, nationality, or ethnicity.
24. Thus, the Director's decision does not create a distinction between Deer River First Nation residents, and those of other races, nationalities, or ethnicities.
25. Ultimately, the burden lies upon the claimant to show proof of discriminatory purpose or effect.<sup>3</sup> We submit that, even if the court concludes that the appellant's proof is evidence of distinction based on an enumerated or analogous ground, the court will find that the second question fails. Due to a lack of conclusive evidence linking benzene to the disproportionate health challenges faced by the Deer River community, the appellant's complaint against the Director's decision cannot stand. Further, the due process taken by the Director and the balanced consideration of all parties' interests allowed for a fair decision that ultimately benefits all parties involved, including Ms Archibald herself.
26. The second question asks: Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? While recognizing the historical disadvantage faced by First Nations communities in Canada, there is no evidence that conclusively demonstrates that the Director's decision exacerbates that disadvantage.
27. Benzene emissions were already present in the St. Pierre locale, both from existing RuCAN production and from the nearby Rio Ciervos factory. Per Carter and Sen, JJ., the Director was not

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<sup>3</sup> *Law v. Canada*, [1999] 1 SCR 497 at para. 76-83

“in a position to end pollution of the Deer River First Nation in the context of RuCAN's application under the *EPA*.”<sup>4</sup>

28. It should be noted that the decision to allow a temporary increase in benzene emissions has not been scientifically proven to increase health risk, a fact conceded by Dr Barstache under cross examination: “[T]he 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.”<sup>5</sup>
29. Further, under cross examination, Dr Pagnutti conceded that she could not conclusively link the disproportionate health effects suffered by Deer River residents to benzene.
30. Thus, the Director's decision cannot be conclusively linked to the perpetuation of prejudice or stereotype by creating a disadvantage to Ms Archibald or to her community.
31. In *Kahkewistahaw First Nation v. Taypotat*, the court found that a clear correlation between a law and its effects is necessary to determine discrimination:

“While the evidentiary burden need not be onerous, the evidence must amount to more than a web of instinct.”<sup>6</sup>

Thus, a claim of discrimination cannot be determined based on the inconclusive evidence available.

32. It should also be taken into account that the Director's decision was taken after an extensive public consultation process, in which Ms Archibald participated. The interests of all stakeholders were considered as the Director made the decision she felt best addressed each of the needs at play.

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<sup>4</sup> *Ontario v. Archibald*, [2018] at para. 26 [*Archibald*]

<sup>5</sup> *Ibid* at para. 19

<sup>6</sup> *Taypotat*, *supra* at para. 34

33. The Director's decision is not inherently discriminatory to the Indigenous inhabitants of the Deer River Reserve. It was based on an environmental as well as an economic argument, taking into account the interests of all parties, including those 275 Deer River residents who work at the factory and rely on the income from these jobs.
34. The *EPA* requires careful consideration of both environmental and economic factors, recognizing "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."<sup>7</sup>
35. In fact, by refusing RuCAN's request for a site-specific emissions exemption, the Director would have put in jeopardy at least 50 jobs at the RuCAN factory, creating employment uncertainty for its workers – including the 275 Deer River residents who work there – and would have thus perpetuated the disproportionate economic disadvantage faced by Ms Archibald's community. The disproportionate economic disadvantage faced by Indigenous communities was specifically highlighted by Dr. Pagnutti.
36. Per the Director, "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*."<sup>8</sup>
37. Further, in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador*, it is emphasized that:

"[I]n determining whether a decision is reasonable, the inquiry for a reviewing court is about 'justification, transparency and intelligibility'. This represents a respectful appreciation that a wide range of specialized decisions-makers render decisions in their respective spheres of expertise, using concepts and

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<sup>7</sup> *Archibald*, *supra* at para. 20

<sup>8</sup> *Ibid* at para. 20

language often unique to their areas and rendering decision[sic] that are often counter-intuitive to a generalist.”<sup>9</sup>

38. Thus, it is important for the court to consider the Director’s specialized role as a decision-maker and the vast range of details she must factor into her decisions. Although it may appear counter-intuitive, we confidently submit that the Director took a responsible decision, balancing competing needs and ensuring each party involved will eventually benefit.
39. The Director’s decision takes measures to ensure that the community will benefit in the long run. By allowing the factory to temporarily exceed standard regulations, the Director’s decision gives the company better ability to invest in green technology and eventually reduce its emissions.
40. The Director’s decision, in fact, will ultimately benefit both Ms Archibald and her community in the long run, rather than create discriminatory disadvantages.
41. Thus, it can be concluded that the Director’s decision does not constitute discrimination based on s. 15 of the *Charter*.

**Issue Two: Did the Director’s decision to authorize emissions of the pollutant benzene above the usual regulatory standard infringe Ms. Archibald’s right to life, liberty and security of the person under section 7 of the *Canadian Charter of Rights and Freedoms*?**

42. The framework for a Section 7 claim requires a two-stage analysis. The first is to determine if there has been a corresponding deprivation of the claimant’s life, liberty or security of the person. *Carter V Canada* states that:

“[t]he right to life is engaged where the law or state action imposes death or increased risk of death on a person, either directly or indirectly.”<sup>10</sup>

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<sup>9</sup> *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador*, [2011] 3 SCR 708 [*Newfoundland and Labrador Nurses' Union*]

<sup>10</sup> *Carter v. Canada*, [2015] 1 SCR 331 at para. 6

The Director's decision to allow for a site-specific exemption does not directly impose death on the claimant in any capacity. There is also insufficient evidence that it amounts to an indirect increased risk of death. Dr. Bastarche conceded that:

“[t]he 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”.<sup>11</sup>

Aside from the exceptionally low risk, cancer has several outcomes apart from death. Dr. Bastarche also admitted that concentrations of benzene rapidly degrade and remain in the environment for a short period.

43. Ida Archibald's right to liberty - the freedom for an individual to make important life choices without interference of the state - is not compromised. In *Alberta V Cunningham*, it was ruled that:

“There is no need to decide whether place of residence is protected by s.7 because any impact on liberty was not shown before the chambers to be contrary to the principle fundamentals of justice”.<sup>12</sup>

Specifically, the actions of the government were not grossly disproportionate to the issue because:

“[t]he legislation was adopted after consultation with M,tis [sic] in the province...”.<sup>13</sup>

44. Similarly, The Ministry of the Environment, in accordance with Section 35 of the *EPA*<sup>14</sup> conducted a broad public consultation with local communities and other stakeholders. The Deer River First Reserve- Archibald's residence, was one of the communities that were consulted. Furthermore, Ms. Azzahra noted that some

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<sup>11</sup> *Ontario V Archibald*, [2018] ONCA --- at para. 14 [*Archibald*]

<sup>12</sup> *Alberta V Cunningham*, [2011] 2 SCR 670 at para. 7 [*Cunningham*].

<sup>13</sup> *Cunningham supra* para. 43 at para. 7

<sup>14</sup> *Environmental Protection Act*, 1990, O. Reg. 419/05, s 35, ss 1(b).



members of the Deer River First Nation supported RuCAN's request. Archibald's liberty to remain on the reserve has not been breached, as the Ministry's decision involved consultation with her community.

45. Moreover, Archibald's security of the person is not violated by the Director's decision. To apply s. 7 any harm on the person must be directly caused by the government's actions. In *Operation Dismantle V R*, the appellants were unable to prove a causal link between the decision to permit missile testing and the increase in the threat of nuclear conflict, thus, their claim was dismissed.<sup>15</sup> Following that legal precedent, it is evident that Archibald's s. 7 claim must also be dismissed. Dr. Pagnutti established that there is no certainty that benzene emissions are responsible for the observed impacts upon the Deer River First Nation and highlighted that there were several other factors that could account for adverse health effects. There is no causal link between the benzene and any harm on the claimant, and as a result, s. 7 cannot be applied.
46. Additionally, in *Trang V Alberta* the court held that that s. 7 is not engaged merely because there is a greater risk of riding in a prison van in comparison to other vehicles. In cases where s. 7 was triggered, there was also a legally imposed restriction on access to health care and other remedying services, such as in *R V Morgentaler*. The ruling judge determined that these cases:

“Do not stand for a general proposition that every state action that imposes a greater risk of personal injury on a citizen is a breach of s. 7”.<sup>16</sup>

Ms. Azzahra's decision does not deprive the appellant of any life-saving medical service. So, even if there was a greater risk imposed by the benzene, (which has not been proven) s. 7 should still not be engaged.

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<sup>15</sup> *Operation Dismantle V The Queen*, [1985] 1 SCR 441 at para. 3 [*Operation*]

<sup>16</sup> *Trang V Alberta (Edmonton Remand Centre)*, [2007] ABCA 263 at para. 29 [*Trang*].

47. In *Tanudjaja V Canada*, appellants were denied their s. 7 claim to affordable, adequate and accessible housing because the government has no positive obligation under s. 7 to sustain life, liberty or security of the person.<sup>17</sup> Following that same principle, there is no deprivation under the first stage of the s. 7 analysis, as the state does not have to ensure Archibald's residence is emission-free. The *Charter* does not confer a freestanding right to a clean environment.
48. Finally, the Director's decision is per the *EPA*. Under s. 35(1) it states that:

“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) it is not economically feasible for the person to comply...”.<sup>18</sup>

Without the site-specific exemption, 50 jobs at RuCAN would have been lost. For many, employment is a key part of survival. By following the *EPA*, the Director is considering the lives of those affected, helping to ensure the wellbeing and security of employees and their families. It is for these reasons that there has been no violation of s. 7 of the *Charter*.

**Issue Three: If there is an infringement, is it justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?**

48. S. 1 of the *Charter* 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<sup>19</sup>. Since such a violation is incredibly serious and must not be taken lightly, the onus lies with the government to prove (1) that there was a pressing and substantial purpose motivating the alleged *Charter* violation and (2) that the

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<sup>17</sup> *Tanudjaja V Canada (Attorney General)*, [2014] ONCA 852 at para. 30 [*Tanudjaja*].

<sup>18</sup> *Environmental Protection Act*, 1990, O. Reg. 419/05, s 35, ss 1(b).

<sup>19</sup> *Charter supra* para 19 at c 11.

state's actions are demonstrably justifiable in a free and democratic society. This is referred to as the Oakes test and its analysis will make up the bulk of this section.

49. The first question of the Oakes test is based on whether or not the limit is prescribed by law. The government has the right to amend the *EPA* and the site-specific standard was made pursuant of section 35 of the Air Pollution - Local Air Quality Regulations of the *EPA*. Hence, the law passes this section of the Oakes test.
50. The second portion of the Oakes test relates to the justification of the limits prescribed by the law. The law must pass all of the following requirements in order for the infringements to be considered acceptable. The first of these requirements is that the law has a pressing and substantial objective. The Ministry of the Environment's (the Director's) decision to grant RuCAN a site-specific emissions standard has a substantial and pressing objective, because it aims to help the region economically as well as environmentally in the long run.
51. The new emission standard enables RuCAN to meet its production demands and allows them to keep all of their 900 employees, 275 of which are residents of the Deer River Reserve. These individuals rely on their positions at the factory to support their livelihoods. In addition, Azzahra's affidavit offers clear evidence that attracting and maintaining investment in Ontario is an underlying policy goal of the provincial government. Harsh environmental regulations in Canada have driven out a number of companies into other jurisdictions, including Encana, an oil company that relocated from Calgary, Alberta to Colorado in January of 2020 due to the restrictive nature of the environmental bill, Bill C-69. The site-specific emission standard ensures RuCAN will remain based in Ontario for the years to come, supporting the local economy of St. Pierre while contributing to Canada's rubber industry.
52. The fight against climate change is also a substantial and pressing objective of the questioned law. The site specific emissions standard will enable the company to maximize revenue, giving them the ability to invest in the best available eco friendly

technologies and machinery in the long run. RuCAN has agreed to decrease emissions of benzene by 63 per cent by 2023 while maintaining its economic output. Although this may mean higher levels of pollution for now, the limited timeframe outlined in the questioned law will ensure future environmental benefits for the region and will help Canada reach its goals to fight climate change.

53. Seeing as the economic and environmental objectives of the law are substantial and pressing, the questioned law passes this section of the Oakes test.
54. Next, the director's actions must be demonstrably justifiable in a free and democratic society. The law in question "must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of sufficient importance".<sup>20</sup>
55. The decision has a rational connection to improving the environmental impacts of the factory in the long run while enabling RuCAN to meet its production demands. The company must take "actions to reduce air emissions as much as possible with technology-based solutions and best practices." The plan offers RuCAN a staged reduction of benzene emissions through a five year period to ensure the benzene air standard stated in Schedule 3 if Ontario Regulation 419/05 is met at the end of the five years. There is therefore a rational connection between the director's decision and the *EPA* to control air pollution, while preserving the jobs at the factory.
56. The decision offers minimal impairment of Archibald's rights and freedoms. Section 35 (a) 1, b) ii) of the *EPA* states: "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

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<sup>20</sup> *R. v. Oakes*, [1986] 1 SCR 103 at para 70

contaminant is the minimum difference necessary to enable the person to comply with section 20 with respect to the contaminant.” On cross examination, Dr. Bastarache stated that benzene is known to “degrade rapidly, and concentrations of benzene do not remain in the environment in air, soil, or water for long periods of time.” This means that the impacts of the influx of benzene emitted at present will not impact Archibald significantly in the future. Dr. Bastarache also mentioned that the likelihood of RuCAN’s site-specific standard increasing risk of cancer was extremely low. In short, minimal impairment of Archibald’s rights and freedoms are at stake.

57. Finally, the Oakes test states that the positive outcome of the decision outweighs the negative impacts caused. If the site specific standard was not put in place, RuCAN would likely not invest in any green machinery, which would damage the environment in the long run.

58. In *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador*, the decision of the director seemed counter-intuitive:

“This represents a respectful appreciation that a wide range of specialized decision-makers render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist”.<sup>21</sup>

Likewise, the director’s decision to give RuCAN a short term site specific emission standard exemption may appear to be harmful to the environment in many people’s minds. However, the long term impacts of this emission standard are beneficial.

59. In conclusion, any infringements of Archibald’s rights and freedoms pass the Oakes test, and are therefore justified.

### **Application to this case**

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<sup>21</sup> [*Newfoundland and Labrador Nurses’ Union*] *supra* para 42 at para 13

60. To summarize the argument of the respondents, the appellants of this case have failed to prove their case regarding Ida Archibald's s. 7 and s. 15 *Charter* rights. They have not called upon enough evidence to satisfy either portion of the *Kahkewistahaw First Nation V. Tapoyat* test for discrimination. They have failed to demonstrate any infringements upon Archibald's life, liberty or security. They are unable to identify a causal link between the benzene emissions and an increased risk of death or harm to the security of the person. Archibald's access to medical services has not been hindered, and as established in *Tanudjaja V Canada*, the government has no positive obligation to sustain s. 7. If the court finds any violations, they are justified under s. 1. The decision had a substantial and pressing objective, many employees were at risk. In addition, the decision was prescribed by s. 35(1) of the *Environmental Protection Act* and had a rational connection to the objective with minimal impairments of Archibald's rights. Thus, the decision passes the *Oakes Test*. Furthermore, it should be considered that the Director has a respective sphere of expertise, and her decision balances environmental and economic implications of a site-specific exemption in the most responsible way possible.

#### **PART IV**

#### **ORDER REQUESTED**

61. It is respectfully requested that Justice Carter and Justice Sen, JJ.'s ruling in this case be upheld, as we submit there have been no unjustifiable *Charter* infringements.

**ALL OF WHICH** is respectfully submitted by

Ana Sophia Rashid-Cocker,  
Jana van Heeswyk,  
Anna Krukowski

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Of Counsel for the Respondent

**DATED AT TORONTO** this 18<sup>th</sup> Day of May, 2020

**APPENDIX A**

**AUTHORITIES TO BE CITED**

**Legislation and Acts of Parliament:**

*Canadian Charter of Rights and Freedoms*, ss. 1, 7, 15.

*Environmental Protection Act, 1990*, O. Reg. 419/05, s 35, ss 1(b).

**Jurisprudence:**

*Alberta V Cunningham*, [2011] 2 SCR 670 at para. 7

*Carter V Canada*, [2015] 1 SCR 331 at para. 6

*Kahkewistahaw First Nation v. Taypotat*, [2015] 2 SCR 548 at para. 34

*Law v. Canada*, [1999] 1 SCR 497 at para. 76-83

*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador*, [2011] 3 SCR 708

*Ontario v. Archibald*, [2018] at para. 19, 20, 26

*Operation Dismantle V The Queen*, [1985] 1 SCR 441 at para. 3

*R. v. Oakes*, [1986] 1 SCR 103 at para 70

*Tanudjaja V Canada (Attorney General)*, [2014] ONCA 852 at para. 30

*Trang V Alberta (Edmonton Remand Centre)*, [2007] ABCA 263 at para. 29