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NOT IN ANYONE'S BACKYARD: EXPLORING ENVIRONMENTAL INEQUALITY UNDER SECTION 15 OF THE *CHARTER* AND FLEXIBILITY AFTER *FRASER V CANADA*

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ABSTRACT

Pollution hotspots exist across Canada and disproportionately affect low-income and racialized populations. Examples include Indigenous communities like Aamjiwnaang First Nation in Ontario or Beaver Lake Cree Nation in Alberta; predominantly Black communities in rural Nova Scotia; and poor neighbourhoods in urban cities like Toronto or Vancouver. Such communities face disproportionate environmental burdens due to their proximity to landfills, fossil fuel infrastructure, plastic pollution, and toxic waste. This proximity causes harrowing health effects that would otherwise not be acceptable elsewhere in Canada. Although these inequalities stem from a number of interrelated factors, the role of the state in regulating (and facilitating) polluting activity is key. Across jurisdictions, ministries grant pollution permits to new and existing facilities based on deficient regulatory standards laid out under environmental protection legislation. Ministry officials have direct control over when and where pollution occurs. This paper contends that the inequality that results from these regulatory frameworks triggers constitutional scrutiny under section 15 of the *Charter of Rights and Freedoms*. It is an example of adverse effects discrimination from a legislative framework that appears neutral on its face. Although the application of section 15 to environmental inequality is underexplored, recent developments in the jurisprudence suggest that remedying adverse (environmental) effects discrimination may be more viable than ever. This viability stems from the majority decision in *Fraser v Canada (Attorney General)*, 2020 SCC 28, which introduced significant flexibility into the causation and evidentiary requirements needed to establish adverse effects discrimination under the section. Under the new framework, the popular slogan "Not in Anyone's Backyard" might just be given room to transform from a longstanding aspiration to a new reality.

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INTRODUCTION

Depending on where you are, you can smell environmental racism in Canada.[1] In some communities, you can feel it too; proximity to pollution can cause dizziness, muscle twitching, body rashes, and nausea.[2]

Pollution hotspots exist across Canada and predominantly affect low-income and racialized populations.[3] Examples include Indigenous communities like Aamjiwnaang First Nation in Ontario[4] or Beaver Lake Cree Nation in Alberta;[5] predominantly Black communities in rural Nova Scotia;[6] or poor neighbourhoods in urban cities like Toronto or Vancouver.[7] Such communities—referred to in literature as "shadow places,"[8] "poverty pockets,"[9] and "sacrifice zones"[10]—face disproportionate environmental burdens due to their proximity to landfills, fossil fuel infrastructure, plastic pollution, and toxic waste.[11] This proximity causes harrowing

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1 Deborah Jackson, "Scents of Place: the Dysplacement of a First Nations Community in Canada" (2011) 113:4 American Anthropologist 606 (for an account on the disruption caused by chemical smell in Aamjiwnaang First Nation).

2 Sarah Marie Wiebe, "Bodies on the line: The In/security of Everyday Life in Aamjiwnaang" in Matthew A Schnurr & Larry A Swatuk, eds, *Natural Resources and Social Conflict* (Palgrave Macmillan, London, 2012) 215.

3 Fiona Koza et al, "Canada's Big Chances to Address Environmental Racism" *The Tyee* (26 November 2020), citing UN Human Rights Council, "Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes", 47 sess, A/HRC/45/12/Add.1 (2 October 2020).

4 Sarah Marie Wiebe, *Everyday exposure: Indigenous Mobilization and Environmental Justice in Canada's Chemical Valley* (UBC Press, 2016) at 29 (Aamjiwnaang) [Wiebe].

5 Steven M Hoffman, "Chapter 12 - If the Rivers Ran South: Tar Sands and the State of the Canadian Nation" in John R McNeill & George Vrtis, eds, *Mining North America* (University of California Press, 2017) 339. See also Maia Wikler & Crystal Lameman, "Beaver Lake Cree stand strong as Canada and Alberta attempt to derail tarsands legal challenge" *Briarpatch* (5 June 2020).

6 See Ingrid Waldron, "Experiences of Environmental Health Inequities in African Nova Scotian Communities" (10 September 2016), online (pdf): *The ENRICH Project* <enrichproject.org/wp-content/uploads/2016/10/Final-Environmental-Racism-Report.pdf> [https://perma.cc/N3DC-VN47] [ENRICH].

7 Melissa Ollevier & Erica Tsang, "Environmental Justice in Toronto Report" (2007) City Institute at York University Report [Ollevier & Tsang].

8 Val Plumwood, "Shadow Places and the Politics of Dwelling" (2008) 44 Australian Humanities Review 139 at 139–141.

9 Robert D Bullard, "Anatomy of Environmental Racism and the Environmental Justice Movement" in Benjamin Chavis and Robert Bullard, eds, *Confronting Environmental Racism: Voices from the Grassroots* (South End, 1993) 23 at 17 [Bullard, "Anatomy of Environmental Racism"]; Robert Bullard, "Confronting Environmental Racism in the 21st Century" (2002) 4 Global Dialogue: The Dialogue of Civilization 34 [Bullard, "Confronting Environmental Racism"].

10 Steve Lerner, *Sacrifice Zones: The Front Lines of Toxic Chemical Exposure in the United States* (MIT Press, 2012). See also Dayna Scott & Adrian Smith, ""Sacrifice Zones" in the Green Energy Economy: Toward an Environmental Justice Framework" (2017) 62:3 McGill Law Journal 861 [Scott & Smith].

11 Robert D Bullard, "Environmental Racism and Invisible Communities" (1994) 96 West Virginia L Rev 1037 at 1042; Robert J Brulle & David N Pellow, "Environmental Justice: Human Health and Environmental Inequalities" (2006) 27 Annu Rev Public Health 103 [Brulle & Pellow]; Paul Mohai, David Pellow & J Timmons Roberts, "Environmental Justice" (2009) 34 Annual Review of Environment and Resources 405.

health effects (also known as "pollution burdens") that would otherwise not be acceptable elsewhere in Canada. These unequal burdens constitute a form of environmental inequality.[12]

Although these inequalities stem from a number of interrelated factors, the role of the state in regulating (and facilitating) polluting activity is key.[13] Across jurisdictions, ministries grant pollution permits to new and existing facilities based on deficient regulatory standards laid out under environmental protection legislation.[14] Ministry officials have direct control over *when* and *where* pollution occurs.

I contend that the inequality that results from these regulatory systems triggers constitutional scrutiny under section 15 of the *Charter of Rights and Freedoms* ("*Charter*"), which imposes limitations on statutory authority. It is an example of adverse effects discrimination[15] from a legislative framework that appears neutral on its face.[16] Although the *Charter* has not yet been interpreted to extend to the unequal distribution of environmental burdens,[17] scholars have argued that there is scope within section 15 to capture environmental claims.[18] In addition, recent developments in equality-focussed jurisprudence signal a new emphasis on flexibility in establishing an equality rights infringement, which I argue, render environmental claims under section 15 more viable than ever before.[19]

The application of section 15 to environmental inequality is underexplored. Given that the recognition and remedying of adverse discrimination is crucial to the realization of substantive

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12 See e.g. Robert Bullard, "Overcoming Racism in Environmental Decision-making" (1994) 36:4 Environment: Science and Policy for Sustainable Development 10.

13 Rachel A Morello-Frosch, "Discrimination and the Political Economy of Environmental Inequality" (2002) 20:4 Environment and Planning 477 [Morello-Frosch]. See also Kaitlyn Mitchell & Zachary D'Onofrio, "Environmental Injustice and Racism in Canada: The First Step is Admitting we have a Problem" (2016) 29 Journal of Environmental Law & Practice 305 at 313–328 [Mitchell & D'Onofrio]; Michael Mascarenhas, "Where the Waters Divide: First Nations, Tainted Water and Environmental Justice in Canada" (2007) 12:6 Local Environment 565 [Mascarenhas].

14 David Boyd, *Unnatural Law Rethinking Canadian Environmental Law and Policy* (UBC Press, 2003) at 231–233 [Boyd] ("excessive discretion" is labelled as a "systemic weakness" in Canadian environmental law). See also Lynda Collins & Lorne Sossin, "In Search of an Ecological Approach to Constitutional Principles and Environmental Discretion in Canada" (2019) 52 UBCL Rev 293 at 295–296 [Collins & Sossin]; Jocelyn Stacey, "The Environmental Emergency and the Legality of Discretion in Environmental Law" (2015) 52:3 Osgoode Hall LJ 985 [Stacey].

15 Note, other terms are also used by Canadian courts to describe adverse effects discrimination, including "adverse impact discrimination" and "indirect discrimination."

16 Jennifer Koshan, "Redressing the Harms of Government (In) Action: A Section 7 Versus Section 15 Charter Showdown" (2013) 22 Constitutional Forum 31 at 31–35. See also Margot Young, "Change at the Margins: *Eldridge v British Columbia (AG)* and *Vriend v Alberta*" (1998) 10 Canadian Journal of Women & Law 244.

17 Mari Galloway, "The Unwritten Constitutional Principles and Environmental Justice: A New Way Forward?" (2021) 52:2 Ottawa Law Review 5 at 11.

18 Nathalie J Chalifour, "Environmental Justice and the Charter: Do Environmental Injustices Infringe Sections 7 and 15 of the Charter?" (2015) 28 J Env L & Prac 89 [Chalifour, "Enviromental Justice"].

19 *Fraser v Canada (AG)*, 2020 SCC 28 [*Fraser*].

equality,[20] jurisprudence on section 15 should evolve to capture the distinct dynamics of environmental inequality. While numerous scholars have undertaken detailed socio-legal analyses of disproportionate exposure to environmental hazards across North America,[21] and many have focussed on the regulatory causes for such harms,[22] few scholars have explored the potential application of adverse effects discrimination to environmental regulatory regimes in Canada.[23] Additionally, while there is a wealth of literature on the challenges associated with adverse effects discrimination litigation, few scholars have explored the implications for environmental claims under this framework, particularly after the 2020 Supreme Court of Canada decision in *Fraser v Canada (Attorney General)* ("*Fraser*").[24]

This paper is structured as follows. Part I introduces disproportionate pollution burdens through the case study of Aamjiwnaang First Nation in 'Chemical Valley' and the permitting system under the Ontario *Environmental Protection Act* ("*EPA*").[25] Part II considers the application of section 15 to environmental inequality in this context and the complexities that arise under the adverse effects discrimination framework. Part III explores the newfound flexibility in *Fraser* and its promising implications for environmental claims.

I. TOXIC BURDENS AND STATE RESPONSIBILITY

In the 1980s, the concept of environmental inequality emerged to stand for the simple premise that environmental degradation does not affect everyone equally. Low-income and racialized

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20 Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2014) 19:2 Rev Const Stud 191 [Hamilton & Koshan, "Adverse Impact"].

21 Mitchell & D'Onofrio, *supra* note 13. See also Morello-Frosch, *supra* note 13.

22 Dayna Nadine Scott, "Confronting Chronic Pollution: A Socio-Legal Analysis of Risk and Precaution" (2008) 46 Osgoode Hall LJ 293 explores how the prevailing regulatory approach is incapable of capturing the essence of contemporary pollution harms.

23 Nathalie Chalifour, "Environmental Discrimination and the Charter's Equality Guarantee: The Case of Drinking Water for First Nations Living on Reserves" (2013) 43 Revue Générale de droit 183 at 103 [Chalifour, "Environmental Discrimination"] (application of section 15 to the governance of drinking water in Indigenous communities).

24 See however Nathalie J Chalifour, Jessica Earle & Laura Macintyre, "Coming of Age in a Warming World: The Charter's Section 15 Equality Guarantee and Youth-Led Climate Litigation" (2021) 17:1 Journal of Law & Equality 1 (for a paper on section 15 and climate litigation).

25 I focus on Chemical Valley because of the significant and ongoing empirical work that scholars have done to document environmental pollution in the region. See Wiebe, *supra* note 4; Scott & Smith, *supra* note 10; Scott, *supra* note 22; Jen Bagelman & Sarah Marie Wiebe, "Intimacies of Global Toxins: Exposure & Resistance in 'Chemical Valley'" (2017) 60 Political Geography 76; Sarah Marie Wiebe, "Guardians of the Environment in Canada's Chemical Valley" (2016) 20:1 Citizenship Studies 18; Deborah Davis Jackson, "Shelter in Place: a First Nation Community in Canada's Chemical Valley" (2010) 11:4 Interdisciplinary Environmental Review 249.

communities living in close proximity to environmental hazards and externalities experienced health and social consequences, while those who lived comfortably away from them did not.[26]

A. Introducing Disproportionate Pollution Burdens

In Canada, environmental racism is a widespread problem. The paradigmatic example is "Chemical Valley," which is widely reported as the most polluted area in Canada. Chemical Valley is located in Lambton County, Ontario and is replete with 66 smokestacks that pepper the horizon.[27] The region is home to Aamjiwnaang First Nation, an Ojibwe community that lies within a five kilometer radius of this pollution.[28] In 2016–2017, a total of 45,357 tonnes of pollution was emitted from industries within a 25 kilometer radius from Aamjiwnaang, according to Canada's National Pollutant Release Inventory. This accounted for 10 percent of all air pollution in the province. Strikingly, Ecojustice reported in 2005 that the region's pollution was greater than that of the entire provinces of Manitoba, New Brunswick, or Saskatchewan.[29]

Extreme pollution exposure in Chemical Valley has caused significant health-related harm in Aamjiwnaang First Nation. In particular, toxic pollution is linked to increased risk and incidences of cancer, endocrine disruption, neurobehavioral abnormalities, cardiovascular disease, diabetes, and altered immune function.[30] These risks and effects are compounded by the fact that residents in the area are not exposed simply to one or two dangerous pollutants from one or two sources

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26 Paul Mohai & Bunyan Bryant, *Race and the Incidence of Environmental Hazards: A Time for Discourse* (Boulder, CO: Westview Press, 1992) at 1–9; Robert D Bullard, *Unequal Protection: Environmental Justice and Communities of Color* (San Francisco: Sierra Club Books, 1994); Richard Hofrichter, *Toxic Struggles: The Theory and Practice of Environmental Justice* (Philadelphia: New Society Publishers, 1993); Dorceta Taylor, "The Rise of the Environmental Justice Paradigm" (2000) 43 American Behavioral Scientist 508.

27 Elaine MacDonald, "Exposing Canada's Toxic Secret" (24 October 2017), online (blog): *EcoJustice* https://ecojustice.ca/exposing-canadas-toxic-secret> [perma.cc/V6EW-GAQK]; see also "The Chemical Valley" (7 August 2013), online: *Vice News* <https://www.vice.com/en/article/4w7gwn/the-chemical-valley-part-1> [perma.cc/2NJD-3UHC].

28 Wiebe, *supra* note 4 (for a comprehensive account on the community's proximity to pollution and the social and cultural impacts associated with that proximity). I note that Aamjiwnaang First Nation is located on reserve land, which has a distinct colonial history. See also Max Liboiron, *Pollution is Colonialism* (Duke University Press, 2021) (for a powerful account of how disproportionate pollution on reserve lands is a product of colonialism).

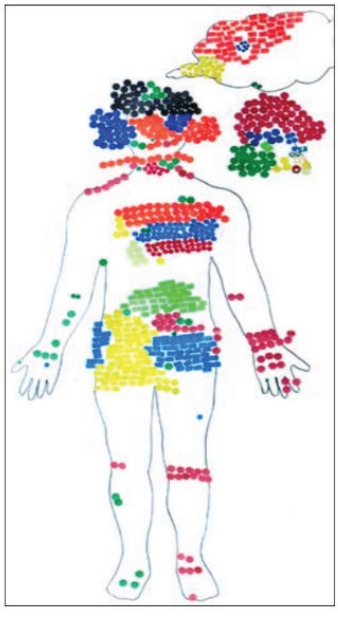
29 Elaine MacDonald, "Return to Chemical Valley - Ten years after Ecojustice's report on one of Canada's most polluted communities" (June 2019), online (report): EcoJustice <https://ecojustice. ca/wp-content/uploads/2019/06/Return-to-Chemical-Valley_FINAL.pdf> [perma.cc/WG9N-YVX5]. See also Elaine MacDonald & Sarah Rang, "Exposing Canada's Chemical Valley: An Investigation of Cumulative Air Pollution Emissions in the Sarnia, Ontario Area" (October 2007) at 10, online (pdf): *Ecojustice* <https://ecojustice.ca/wp-content/uploads/2015/09/2007-Exposing-Canadas-Chemial-Valley.pdf> [https://perma.cc/HD7B-725J]. Note that Sarnia and Aamjiwnaang only total about 177 km of land in Ontario, which represents only 0.015 percent of the surface area of the entire province.

30 Wiebe, *supra* note 4 at 117–119; Isaac Luginaah, Kevin Smith & Ada Lockridge, "Surrounded by Chemical Valley and 'living in a bubble': the case of the Aamjiwnaang First Nation, Ontario" (2010) 53:3 Journal of Environmental Planning and Management 353 at 354 [Luginaah, Smith & Lockridge].

at a given time, but rather, are continuously exposed to dozens of different pollutants all the time.[31]

Given the latency of environmental pollution, environmental harm is difficult to track.[32] This has propelled various community-led efforts to document and shed light on the cumulative harm experienced by residents in Chemical Valley. The Aamjiwnaang Health and Environment Committee, for instance, directed a mapping exercise that enabled community members to learn about the pattern of individual and shared impacts of toxins in the region (See Figure 1). [33]

Figure 1: Body Mapping the Body Burden of Chemical Valley



Source: Sarah Marie Wiebe, Everyday Exposure: Indigenous Mobilization and Environmental Justice in Canada's Chemical Valley, (UBC Press, 2006) at 109.

The exercise revealed a number of startling statistics, including that 25 percent of children suffered from learning and behavioural problems (when compared to the national average of 4.4 percent) and about 40 percent of women had experienced a miscarriage or stillbirth

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31 Wiebe, *supra* note 4.

32 Scott, *supra* note 22 ("[i]n light of all this 'accumulating trouble,' residents of affected communities find it increasingly difficult to characterize the incidence of 'harm' from pollution as deriving from a few discrete, isolated events" at 319). See also Thomas D. Beamish, "Accumulating Trouble: Complex Organization, a Culture of Silence, and a Secret Spill" (2000) 47 Social Problems 473 at 477.

33 According to Dayna Scott, body mapping is "a way of pooling the collective health complaints of people so that patterns can be identified. Residents were asked to place colour-coded sticky dots on maps of a human body to represent their symptoms." See Scott, *supra* note 22 at 319.

(when compared to the national average of 15–20 percent).[34] Indeed, several researchers point out that the Sarnia region reports more hospital admissions for respiratory and cardiovascular illnesses than nearby Windsor and London.[35]

B. A Structural Approach to Identifying Responsibility

How environmental inequality emerges has long been a subject of debate. Although there is extensive literature about the distribution of social groups around environmental hazards—including hazardous waste sites, manufacturing facilities, superfund sites, chemical accidents, and air pollutants—much of this literature focusses on the unequal outcomes linked to such pollution, rather than how the pollution emerged in the first place.[36] According to David Pellow, expert in envrionmental justice, environmental inequality originates through complex processes that can only be understood through a framework that assesses the underlying "structural dynamics" of such inequality.[37] Rather than approaching environmental inequality as being linked to a discrete event (e.g. a particular polluting actor), it is important to understand what creates and sustains pollution in a given community (e.g. the regulatory system that allows the actor to operate).[38]

In Canada, scholars have linked environmental inequality to environmental protection legislation, which gives public officials the discretion to grant pollution permits.[39] These regulatory regimes delineate the types and amounts of pollution that may be emitted by a given project based on various pollution standards.[40] Ultimately, through such regimes, provincial and federal ministries act as "gatekeepers" of pollution, deciding what types, levels, and sources to "let in" in a given region. Since environmental protection laws do not consider

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34 Scott, "Confronting Chronic," *supra* note 22 at 319 as cited in Wiebe, *supra* note 4 at 109.

35 Karen Fung, Isaac Luginaah & Kevin Gorey, "Impact of Air Pollution on Hospital Admissions in Southwestern Ontario, Canada: Generating Hypotheses in Sentinel High-Exposure Places" (2017) 6:1 Environmental Health 18.

36 Bullard, "Anatomy of Environmental Racism", *supra* note 9; Andrew Szasz & Michael Meuser, "Environmental Inequalities: Literature Review and Proposals for New Directions in Research and Theory" (1997) 45:3 Current Sociology 99; Adam S Weinberg, "The Environmental Justice Debate: A Commentary on Methodological Issues and Practical Concerns" (1998) 13:1 Sociological Forum at 25–31. See generally Dorceta Taylor, *Toxic Communities: Environmental Racism, Industrial Pollution, and Residential Mobility* (NYU Press, 2014) [Taylor, *Toxic Communities*].

37 David N Pellow, "Environmental Inequality Formation: Toward a Theory of Environmental Injustice" (2000) 43:4 American Behavioral Scientist 581 at 588 [Pellow, "Environmental Inequality"].

38 *Ibid*. See generally David Pellow "Environmental Racism: Inequality in a Toxic World" in *The Blackwell companion to social inequalities* (Wiley-Blackwell, 2005) 147; Brulle & Pellow, *supra* note 11 at 107–108, who identify two key social dynamics that systematically create environmental inequality are (a) the functioning of the market economy and (b) institutionalized racism.

39 Collins & Sossin, *supra* note 14 at 308.

40 *Ibid*.

whether environmental harm is fairly distributed among all members of the public,[41] pollution burdens are disproportionately allocated to vulnerable communities.[42]

The Ontario environmental protection legislation is a useful case study because it has created and sustained inequality in Chemical Valley for decades. In 2016, the Office of the Auditor General reported that the Ontario *Environmental Protection Act* did not effectively manage the risks to the environment and human health from polluting activities.[43]

There are three key issues with pollution permitting under the *EPA*.[44] First, the Ministry issues permits without fully considering the cumulative pollution of such approvals. Under the *EPA*, there are no limits placed on the number of industries that can operate in a region and the Ministry is typically not required to consider the cumulative effects of pollution before issuing another permit.[45] Although industries might be individually meeting particular standards set by the government, there is no limitation on having multiple polluters close together.[46] The Ministry grants pollution permits to each facility as though they exist in isolation. This results in the approval of projects in areas that are already subject to significant environmental stresses.[47]

Although there has been progress in considering cumulative pollution by the Ministry, it remains limited and insufficient.[48] As of November 2017, the government announced that it would consider the cumulative impacts of air emissions of benzene and benzo[a] pyrene in the Hamilton/Burlington area and benzene in the Sarnia/Corunna area. Notably, this announcement excluded a wide number of contaminants of concern, such as sulphur dioxide. Given the limited scope of Ontario's cumulative effects policy, the conclusions of

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41 The various achievements and shortcomings of environmental assessment as a tool for helping to protect the environment have been extensively reviewed and discussed in the literature. See e.g. Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Markham: LexisNexis Butterworths, 2008); Andrew Green, "Discretion, Judicial Review, the Canadian Environmental Assessment Act" (2002) 27 Queen's L J 785.

42 *Ibid*; Collins & Sossin, *supra* note 14.

43 Auditor General of Ontario, "Ministry of Environment and Climate Change: Environmental Assessments" (2016) online (pdf): *Office of the Auditor General of Ontario*, <https://www.auditor.on.ca/en/content/annualreports/arreports/en16/v1_306en16.pdf> [https://perma.cc/5EAV-ZXG9] (who identified the following issues: approvals do not have expiry or renewal dates; a significant number of emitters may not have proper approvals at all; there are no mechanisms to ensure emitters obtain all required approvals, that the Ministry's monitoring and enforcement was insufficient to deter violations; and the ministry does not assess the cumulative impact of emissions on human health when issuing approvals).

44 *Ibid*.

45 *Ibid* at 340.

46 The term "cumulative effects" is defined as exposures, public health, or environmental effects from the *combined* emissions and discharges in a given geographic area.

47 Wiebe, supra note 4 at 17–19; Scott, supra note 22 at 321-326. See also Ontario, Office of the Auditor General of Ontario, *Good Choices, Bad Choices: Environmental Rights and Environmental Protection in Ontario* (Toronto: Environmental Commissioner of Ontario, 2017) at 130.

48 "After eight and a half year delay, Ontario delivers disappointing cumulative effects policy" (9 November 2017) online (article): *Ecojustice*, <https://ecojustice.ca/pressrelease/cumulative-effects-delay/> [perma.cc/6ZHC-C54G].

a 2017 report by the Environmental Commissioner of Ontario ("ECO") remain largely true today: "Ontario regulates each facility's air emissions as if it were the only emitter."[49] In communities with one or two significant polluters, this might not be an important distinction, but in a pollution hotspot like Chemical Valley, it is "literally a life-threatening defect in environmental policy."[50]

Second, permitting in the province is often based on outdated standards. One example is the standard for sulphur dioxide (SO_2), which—until 2018—had not been updated in over 40 years.[51] In 2017, the ECO reported that this standard was over six times the recommended standard set by the federal government.[52]

Finally, the Ministry also has discretion to modify a standard if a proponent identifies that it cannot be met. In 2017, the ECO observed that government officials lowered standards or allowed various industries to opt out of them on a case-by-case basis. In the context of benzene, which is a known carcinogen, the government set a more stringent health-based air standard in 2016.[53] However, the ECO reported that because several industries were not able to meet the 2016 benzene standard, the government made exceptions for such facilities and developed a new technical standard that these industries could comply with instead.[54]

These three issues within the permitting system expose how pollution hotspots are not only created, but also sustained by the regulatory regime under the *EPA*. Government officials control the amount, type, and concentration of pollutants emitted in any given area of the province, and consequently permit persistent harmful pollution levels in Chemical Valley.

As I will explore below, pollution hotspots can be conceptualized as an indirect consequence of government legislation[55] that amounts to "adverse impact discrimination."[56] As the Office of the Human Rights Commissioner in Ontario identified in a 2009 report, indirect discrimination includes "measures such as authorizing toxic and hazardous facilities in large numbers in communities that are predominantly composed of racial or other minorities,

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49 *Ibid*.

50 Collins & Sossin, *supra* note 14 at 299–300.

51 Environmental Commissioner of Ontario, *supra* note 47 at 128.

52 *Ibid* (for a one hour averaging time, Ontario's standard for SO_2 before 2018 allowed for 259 parts per billion to be emitted, while Health Canada recommends only 40).

53 *Ibid* at 135.

54 *Ibid* at 129.

55 Sheila Foster, "Vulnerability, Equality, and Environmental Justice: the Potential and Limits of Law" in Ryan Holifield, Jayajit Chakraborty & Gordon Walker, eds, *Handbook of Environmental Justice* (Routledge, 2016). See also Tracy R Le Sage, "Environmental Discrimination: Eenie Meanie Miney Mo, Where Should All the Toxins Go" (1994) 22 W St UL Rev 143.

56 *Fraser, supra* note 19 ("[a]dverse impact discrimination occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground" at para 30).

thereby disproportionately interfering with their rights, including their rights to life, health, food and water."[57]

II. INDIRECT DISCRIMINATION & SECTION 15 OF THE *CHARTER*

Under section 15, discrimination exists when facially neutral government action "frequently produce[s] serious inequality."[58] This type of discrimination, referred to as "adverse effects discrimination," focusses on "the results of a system" and how it *impacts* a particular group. As the Abella Report asserts, "[i]f [government action] is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory."[59]

Disproportionate pollution burdens created and sustained by environmental protection legislation are an example of this type of inequality. Although such legislation aims to manage the release of pollutants to regulate the environmental and social effects of pollution, the combined flaws in permitting systems across the country have the effect of allowing dangerous levels of pollution in certain regions. Through these systems, environmental inequality is not only created, but sustained in pollution hotspots. In this way, the *EPA* in Ontario is indirectly producing outcomes that are inconsistent with the overarching goals of the legislation—outcomes that disproportionately affect already vulnerable communities.[60] In other words, the disproportionate pollution burden on a particular group represents a distinction "in its impact" under section 15 of the *Charter*.[61]

Charter claims invoking the equality guarantee must be based on an enumerated ground—whether race, national or ethnic origin, religion, sex, age or disability—or an analogous ground, which must be established based on a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.[62] Marginalized communities affected by pollution hotspots will need to establish what ground they intend to plead. When the community in question is Indigenous or racialized, the protected ground can be race or ethnicity.[63] If by contrast, the community does not fall into an enumerated ground,

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57 Human Rights Council, "Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment", A/HRC/37/5, 37th session, Agenda item 3 at 8, citing Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social, and cultural rights at para 10.

58 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 1989 CarswellBC 16 at 164.

59 Rosalie S Abella, *Report of the Commission on Equality in Employment* (Ottawa: Minister of Supply and Services Canada, 1984), cited in *Canadian National Railway Co v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1138.

60 Collins & Sossin, *supra* note 14 at 295–296. See also Stacey, *supra* note 14.

61 *Centrale des syndicats du Québec v Quebec (Attorney General),* 2018 SCC 18 at para 22.

62 *Withler v Canada (Attorney General),* 2011 SCC 12 at paras 30–33.

63 Chalifour, "Environmental Justice", *supra* note 18. See also Kate Malleson, "Equality law and the protected characteristics" (2018) 81:4 The Modern Law Review 598; Jennifer Koshan, "Inequality and Identity at Work" (2015) 38 Dalhousie LJ 473; Colleen Sheppard, "'Bread and Roses': Economic Justice and Constitutional Rights" (2015) 5:1 Onati Socio-Legal Series (for a discussion about identity and socio-economic rights).

claimants will need to establish an appropriate analogous ground in the circumstances. Due to the established links between poverty and disproportionate pollution burdens, there may be an opportunity to recognize socio-economic status as such a ground. Although courts have rendered mixed decisions on whether poverty is an analogous ground in the past,[64] scholars have found poverty to be the most significant factor in determining unequal distribution of air pollution. Poorer communities tend to be exposed to higher concentrations of air pollution, compared to richer communities.[65]

Given that government legislation enables a regulatory system that creates unequal geographies of pollution, the *Charter* can be engaged to "strike down laws that allow pollution at levels that interfere with human health and well-being."[66]

A. Sketches of Potential Claims

There are a number of different ways to structure a claim alleging environmental discrimination under the *Charter* and this section does not purport to be a comprehensive overview of all of the options available. Rather, the goal of this analysis is to demonstrate, with some imagination, how environmental equality rights claims can be fashioned with existing tools in the section 15 toolbox.

Consider, for example, the claim in *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, where an appellant bookstore—which carried a specialized inventory of books catering to the gay and lesbian community—was disproportionately targeted by customs officials. The officials were conducting classification exercises related to the importation of literature "deemed to be obscene," pursuant to a provision of the *Customs Tariff Act*.[67] The appellants successfully established that these searches were disproportionately affecting them, which led to delays, confiscations, and destruction of materials imported by the appellant bookstore. Although "[t]here is nothing on the face of the Customs legislation, or in its necessary effects, which contemplate[d] … differential treatment based on sexual orientation,"[68] "a large measure of discretion [was] granted in the administration of the Act, from the level of the Customs official up to the Minister," which was indirectly discriminatory to the appellant.[69]

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64 Some early trial court decisions in British Columbia and Nova Scotia recognized poverty-related grounds as analogous under section 15. See *Federated Anti-Poverty Groups v British Columbia (AG)*, [1991] B.C.J. No. 3047, 1991 CarswellBC 349 (BCSC) ("it is clear that persons receiving income assistance constitute a discrete and insular minority within the meaning of s. 15" at para 91); *R v Rehberg*, [1994] W.D.F.L. 378, 1994 CarswellNS 410 (NSSC), ("poverty is analogous to the listed grounds in s. 15" at para 83). But see *R v Banks*, 2007 ONCA 19, (accepted that various proposed grounds relating to economic disadvantage—including homelessness, "beggars" and extreme poverty—did not constitute analogous grounds). See generally Jessica Eisen, "On Shaky Grounds: Poverty and Analogous Grounds under the Charter" (2013) 2:2 Canadian Journal of Poverty Law 1 at 16–20.

65 Anjum Hajat, Charlene Hsia & Marie S O'Neill, "Socioeconomic disparities and air pollution exposure: a global review" (2015) 2:4 Current Environmental Health Reports 440.

66 Chalifour, "Environmental Discrimination," *supra* note 23 at 103.

67 *Little Sisters Book and Art Emporium v Canada (Minister of Justice),* 2000 SCC 69 [*Little Sisters*].

68 *Ibid* at para 125.

69 *Ibid* at paras 125, 133 [emphasis added].

A claim could similarly challenge a permitting regime for causing indirect discrimination to proximate communities. More specifically, in Ontario, a claim could challenge specific sections of the *EPA*, including sections 18, 157, 157.1, 157.2, and 196. These sections allow companies to operate outside or above minimum standards and do not require public officials to consider the majority of cumulative impacts associated with their approvals. A claim could also include a challenge to the standards in the *Air Pollution – Local Air Quality* O Reg 419/05, which sets minimum pollution standards that both the Environmental Commissioner and the Auditor General have criticized as being outdated.[70] Such a claim could seek declaratory and compensatory relief under sections 24(1) and 52 from the government to amend the sections of the legislation that cause indirect effects on the equality rights of the people living in polluted hotspots, to be compliant with section 15.

A claim could also take the form of a judicial review application, as was the case in *Lockridge v Director, Ministry of the Environment*. The case involved a judicial review application commenced by Ada Lockridge and Ronald Plain of Aamjiwmaang First Nation in April 2010 (and discontinued in December 2017).[71] They sought a judicial review of the Ministry of Environment decision that concerned the sulphur output of a specific Suncor plant in Sarnia. They claimed that the failure of the Director to conduct a cumulative effects assessment prior to making his decision infringed the applicants' sections 7 and 15 rights under the *Charter*, as well as their rights to procedural fairness.[72] Lockridge and Plain sought declarations under sections 24(1) and 52, although the latter remedy was later dropped given that section 52 relief is not available on an application for judicial review. [73] The *Lockridge* claim was thus amended to exclude their original claim for a declaration that certain sections of the *EPA* are inoperative "in so far as they allow for the additional discharge of contaminants to air in Chemical Valley absent an assessment and minimization of the cumulative effects of pollution on the Applicants' health."[74]

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70 I note also that there would also be ample opportunity for potential claimants to plead rights infringements under section 7 given the significant health effects associated with pollution hotspots. See Lauren Wortsman, "Greening the Charter: Section 7 and the Right to a Healthy Environment" (2019) 28 Dalhousie J Legal Stud 245 [Worstman].

71 *Lockridge v Director*, *Ministry of the Environment*, 2012 ONSC 2316 [*Lockridge*].

72 *Ibid* at para 1.

73 *Ibid* at para 30.

74 *Ibid* at para 30.

The advantage of a more narrow judicial review application is that the claim is less likely to be struck for non-justiciability,[75] however, the disadvantage is that it will likely be more difficult to establish a causal connection between the specific permit at issue in the application and the environmental harms associated with it. As Justice Harvison Young held in *Lockridge*, "only evidence relating to the [specific permit being challenged] and any synergistic effects of the increase in sulphur production authorized by it are relevant for that purpose…. not any earlier approvals or pre-existing contaminants in the absence of evidence of synergistic effects with the increased level of sulphur production."[76] Given that it is virtually impossible to connect a particular approval with specific health effects, it may be difficult to succeed on judicial review of a particular permit when the claimants are experiencing a multitude of harm connected to a wide range of polluters.

Recourse through judicial review may also limit the ability for courts to affect the status quo. In *Lockridge*—where the claimants had initially wanted to tackle the permitting regime as a whole—it became clear that the judicial review format was unable to affect how permitting was regulated in Ontario—and ultimately, the levels of pollution in the region—given that its focus was on a single approval. According to the Court:

> The consequences of success would be the quashing of the April 2010 Decision and would not affect general emissions from the refinery, and could not generally impose a cumulative effects assessment into the regulatory process, though the applicants and Ecojustice advocate on behalf of such change. [77]

Despite these drawbacks however, it is conceivable that in cases where large sources of pollution can be linked to particular approvals, resorting to judicial review might be very effective.

While it is beyond the scope of this paper to fully explore the opportunities and challenges associated with different courses of action, it is possible to imagine different types of environmental claims that could be launched as adverse effects discrimination cases.[78]

B. Challenges Associated with Adverse Effects Discrimination Claims

Adverse effects discrimination claims have had mixed success over the years. Until recently, only three cases were successful at the Supreme Court: *Eldridge v British Columbia (Attorney General)*, *Vriend v Alberta*, and *Little Sisters*.[79] Classifying these claims into two categories, Dianne Pothier identifies that adverse effects cases can focus on "categorical exclusions," where

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75 Larissa Parker, "Let Our Living Tree Grow: Beyond Non-Justiciability for Public Interest Environmental Claims" (13 September 2021), online: *The Canadian Bar Association* <https://www.cba.org/Sections/Public-Sector-Lawyers/Resources/Resources/2021/PSLEssayWinner2021> [perma.cc/83JR-EDPE]. See also Nathalie Chalifour, Jessica Earle & Laura MacIntyre, "Detrimental deference" (18 November 2020), online: *The Canadian Bar Association Magazine* <https://nationalmagazine.ca/en-ca/articles/law/opinion/2020/detrimental-deference> [perma.cc/L68L-DRCA].

76 *Lockridge, supra* note 71 at para 80.

77 *Ibid* at para 162.

78 Chalifour, "Environmental Justice," *supra* note 18.

79 *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 1997 CarswellBC 1939; *Vriend v Alberta*, [1998] 1 SCR 493, 1998 CarswellAlta 210; *Little Sisters, supra* note 67.

all members of a group or sub-group are adversely impacted by a neutral rule or policy, or "disproportionate impact", where only some members of a group are adversely affected.[80] This distinction is important as Pothier, and later, Hamilton and Koshan argue that the latter type of cases—focussed on disproportionate impact—are more difficult to prove.[81]

Historically, establishing a sufficient causal relationship between the adverse effects and government action has been a key challenge for claimants alleging adverse effects discrimination.[82] It was also more difficult to meet the evidentiary burden required to establish how the impact of the government action or law is discriminatory on a particular group.[83] Over the last two decades, judges focussed on whether the impugned law actually *created* the claimants' disadvantage.[84] As a majority of the Supreme Court held in the oft-cited *Symes v Canada* decision, courts were to "take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision."[85] In other words, the "social costs, although very real, exist outside of the [government action at issue]."[86]

Reliance on *Symes* was an important feature of the Federal Court of Appeal's 2018 decision in *Fraser v Canada*, where the judges concluded, "the mere fact that women disproportionately take advantage of a government program does not mean that the pension treatment afforded to those who participate in the program creates a distinction on an enumerated or analogous ground.[87] Similar arguments also factored into all of the dissenting judges' reasons at the Supreme Court.[88] Justices Brown and Rowe in particular, summarized the Court's (past) approach to causation in section 15 inquiries, as follows:

> A search for impact is a search for causation. The inquiry here is into whether the gap in outcomes is *fully* explained by pre-existing disadvantage or whether state conduct has contributed to it. In other words, s. 15 is concerned with state conduct that contributes to — that is, augments — pre-existing disadvantage.[89]

For years, scholars have criticized this rigid approach for failing to adequately consider the relationships between the broader inequalities that a claimant could be facing and the equality claim they are actually making.[90] Indeed, it is antithetical to the recognition of adverse effects

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80 Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a Systemic Approach" (2010) 4:1 McGill JL & Health 17 at 23.

81 Hamilton & Koshan, "Adverse Impact", *supra* note 20 at 193.

82 *Ibid* at 201–202, 224–225.

83 Jennifer Koshan & Jonnette Watson Hamilton, "Tugging at the Strands: Adverse Effects Discrimination and the Supreme Court Decision in *Fraser*" (9 November 2020), online (article): *ABlawg*, < https://ablawg.ca/2020/11/09/tugging-at-the-strands-adverse-effects-discrimination-and-the-supreme-court-decision-in-fraser/> [perma.cc/CKK2-8JHR] [Koshan & Hamilton, "Tugging at the Strands"].

84 *Ibid.*

85 *Symes v Canada*, [1993] 4 SCR 695, 1993 CarswellNat 1178 at para 134.

86 *Ibid*.

87 *Fraser v Canada (Attorney General),* [2019] 2018 FCA 223, rev'd 2020 SCC 28 at paras 53–54.

88 *Fraser, supra* note 19 at para 247 (Côté J citing *Symes*).

89 *Ibid* at para 175, citing *Kahkewistahaw First Nation v Taypotat, 2015 SCC 30* at para 17 at para 20 [*Taypotat*]; *Quebec (AG) v A,* 2013 SCC 5 [*Quebec v A*] [emphasis added].

90 Hamilton & Koshan, "Adverse Impact", *supra* note 20 at 201.

discrimination to reject claims on the basis that a claimant's disadvantage cannot be fully explained by government action. The very purpose of recognizing this form of discrimination stems from the recognition that some groups may be adversely affected by government action due to their historical disadvantage that is produced and sustained by broader contextual and systemic factors. As Joshua Sealy-Harrington writes:

> "Causation" cannot be limited to its overt, active, and inequality-exacerbating interventions if a meaningful conception of equality is to be realized. Indeed, ubiquitous inequality — linked to "social attitudes and institutions" — can be traced to historical and contemporary government policy, making "causation" defences deceptive and misleading.[91]

Overall, strict causation requirements have had the effect of excluding adverse effects discrimination claims from section 15.[92] The consequence of this was—at least until *Fraser*—that discrimination embedded in apparently neutral government policies or decisions was consistently not recognized as discriminatory.

Such doctrinal requirements related to establishing causation under section 15 might seem particularly insurmountable in the context of environmental problems.[93] Due to the nature of environmental harm—typically transboundary, latent, and large in scope—causation is often difficult to pinpoint with precision. Indeed, understanding environmental harm can be complex because of its temporal and spatial characteristics.[94] That is, the harm itself moves across time and space, covering wide areas and imposing long lasting effects. Although environmental harm may originate in a specific location, it is often impossible to link that harm to a particular polluter.[95] Moreover, toxins accumulate over time. They have a cumulative impact on environments and communities. In an area with multiple polluters, these accumulations make it even harder to identify the cause of harm and its extent.[96]

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91 Joshua Sealy-Harrington, "The Alchemy of Equality Rights" (2021) 30:2 Constitutional Forum 53 at 79.

92 Hamilton & Koshan, "Adverse Impact", *supra* note 20. See also Jonnette Watson Hamilton, "Cautious Optimism: *Fraser v Canada* (Attorney General)" (2021) 30:2 Constitutional Forum 1 at 6. See also Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of British Columbia *(Public Service Employee Relations Commission) v BCGSEU*" (2000) 46 McGill LJ 533.

93 Chalifour, "Environmental Justice," *supra* note 18 at 24, 33–37.

94 Richard J Lazarus, *The Making of Environmental Law* (University of Chicago Press, 2008) at 5–15, 29–40. See also Simon JT Pollard et al, "Characterizing Environmental Harm: Developments in an Approach to Strategic Risk Assessment and Risk Management" (2004) 24:6 Risk Analysis: An International Journal 1551 at 1551. See also Rob White, *Global Environmental Harm: Criminological Perspectives* (Taylor and Francis, 2010) 3 at 6, 17.

95 Worstman, *supra* note 70 at 251.

96 Rob White, *Environmental Harm: An Eco-Justice Perspective* (Policy Press, 2013) [White] (for a comprehensive and critical overview of differing approaches to understanding environmental and social harm).

Harm can be perpetual and potentially intergenerational.[97] Thus, there is a degree of nebulousness inherent in delineating environmental harm that often troubles causation and evidentiary requirements in any legal analysis.[98]

III. FLEXIBILITY AFTER *FRASER*

The *Fraser* decision was the first successful adverse effects claim at the Supreme Court in over twenty years. The case concerned the adverse effects of an RCMP pension plan and its treatment of retired female members with children who had participated in job-sharing work. The program allowed two or more RCMP members to split the responsibilities of one full-time position at reduced pay.[99] While the claimants believed that their job-sharing services should be purchasable under the RCMP pension plan, the RCMP ultimately informed them that their work in the program was equivalent to part-time work, for which no buy back was available under the plan.[100] In response, the claimants brought an application alleging adverse impact contrary to section 15 of the *Charter* in Federal Court.

While the Federal Court and the Federal Court of Appeal denied the application, Justice Abella—writing for the majority—held that the job sharing program created a distinction based on sex and denied a benefit in a manner that has the effect of perpetuating disadvantage.[101] In her reasons, Justice Abella reiterated the importance of recognizing and protecting against adverse effects discrimination and provided clarity on how courts should approach the section 15 analysis when confronted with this type of discrimination. As Justice Abella found, "[i]ncreased awareness of adverse impact discrimination has been 'a central trend in the development of discrimination law'"[102] which means that governments should be "'particularly vigilant about the effects of their own policies.'"[103]

In providing clarity on the section 15 analysis for adverse effects discrimination, Justice Abella explicitly loosened the rules around the causation, evidence, and choice for adverse effects-related claims. As Hamilton and Koshan write, the majority "methodologically unravelled the [challenges]" that have plagued this area of law for decades.[104] In what follows, I consider

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97 In Chemical Valley, a number of studies suggest that the pollution is affecting long-term genetic makeup of the population. See Nancy Langston, "Toxic Inequities: Chemical Exposures and Indigenous Communities in Canada and the United States" (2010), Natural Resources Journal 393 at 400. See also Jedediah Purdy, "The Politics of Nature: Climate Change, Environmental Law, and Democracy" (2010) The Yale Law Journal 1122.

98 Richard J Lazarus, "Restoring What's Environmental About Environmental Law in the Supreme Court" (1999) 47 UCLA L Rev 703 at 748–755.

99 *Fraser, supra* note 19 at para 8.

100 *Ibid* at paras 11, 15.

101 *Ibid* at para 106.

102 *Ibid* at para 31, citing Denise G. Réaume, "Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination" (2001), 2 Theor. Inq. L. 349 at 350–51.

103 *Ibid* at para 31, citing Sophia Moreau, "The Moral Seriousness of Indirect Discrimination" in Hugh Collins and Tarunabh Khaitan, eds, *Foundations of Indirect Discrimination Law* (Oxford: Hart Publishing, 2018) 123 at 145.

104 Koshan & Hamilton, "Tugging at the Strands", *supra* note 83. See also Hamilton, *supra* note 92.

three of these unravellings and reflect on why they may render environmental claims under section 15 more viable than ever.

A. Flexibility in Causation

To recall, under section 15, a claimant must show, on a balance of probabilities, that they experienced discrimination. This requires establishing that a law, program, or activity created a distinction based on an enumerated or analogous ground and that this distinction *caused* a disadvantage by perpetuating prejudice or stereotyping.[105]

In *Fraser,* Justice Abella appears to have added a significant degree of flexibility to the causation component of the section analysis by dismissing some of the causal connections that may have been required in the past. These changes can be summarized into three broadenings of causation. Claimants no longer need to prove that: (1) their protected characteristic caused the disproportionate impact;[106] (2) the impugned law created the claimants' disadvantage;[107] and (3) the challenged policy would "affect all members of a protected group in the same way."[108] Rejecting the Federal Court of Appeal's concern that the job sharing program did not *create* the claimants' disadvantage,[109] Justice Abella held: "[i]f there are clear and consistent statistical disparities in how a law affects a claimant's group, I see no reason for requiring the claimant to bear the additional burden of explaining *why* the law has such an effect."[110]

Claimants thus only need to demonstrate that a law has a disproportionate impact on members of a protected group. If a rule is shown to contribute to or worsen a group's disadvantaged position, this should be sufficient to establish the necessary connection between the rule and the disadvantage.[111] In line with principles of substantive equality, this analysis requires attention to the "full context of the claimant group's situation", to the "actual impact of the law on that situation", and to the "persistent systemic disadvantages [that] have operated to limit the opportunities available" to that group's members.[112]

These changes are promising for environmental claims. Due to the transboundary and latent nature of environmental harm, establishing causation is more difficult in environmental contexts.[113] As introduced earlier, this difficulty arises because temporal and spatial uncertainties around environmental harm render it virtually impossible to establish that X permit caused Y harm. According to Nickie Vlavianos, causation is "the greatest hurdle" for

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105 *Quebec (Attorney General) v A*, 2013 SCC 5 at para 118 [*Quebec v A*]; *Centrale des syndicats du Québec v Quebec (Attorney General),* 2018 SCC 18 at para 75.

106 *Fraser, supra* note 19 at paras 69–70.

107 *Ibid* at para 63.

108 *Ibid* at para 72.

109 *Supra* note 87.

110 *Fraser, supra* note 19 at para 63.

111 *Ibid* at para 70.

112 *Ibid* at para 42; See also *Taypotat, supra* note 89.

113 Lynda M Collins, "An Ecologically Literate Reading of the Canadian Charter of Rights and Free doms" (2009) 26 Windsor Rev Legal & Soc Issues 7 at 42; Robert L Rabin, "Environmental liability and the tort system" (1987) 24 Hous L Rev 27.

rights-based environmental claims.[114] In adding flexibility to how causation is considered under section 15, future claimants are now more easily able to meet the section's causation threshold if they can establish a disproportionate impact on members of a protected group.

There is opportunity in this flexibility for identifying discrimination in pollution hotspots, like Chemical Valley. Justice Abella's loosening of the causation requirements under section 15 render it easier to demonstrate that the environmental effects of a law (or a regime of laws) have a disproportionate impact on members of a protected group. Now, data on the extent of pollution in a given area and the significant health effects associated with it, along with data on the number of permits awarded would likely establish a sufficient causal connection for the purposes of section 15 on a balance of probabilities.[115]

Further, given the systemic and historical nature of environmental inequality,[116] it is unlikely that claimants bringing cases involving environmental inequality would ever, as the dissenting judges contend, be able to prove whether a specific legal regime itself "was responsible for creating the background social or physical barriers which made a particular rule, requirement or criterion disadvantageous for the claimant group."[117] Instead, by stressing that the analysis should be focussed on disproportionate impact, Justice Abella assured that adverse effects discrimination—although its origins are not necessarily completely tied to the government action at issue—is still protected under section 15.

Finally, the Court's assertion that "heterogeneity within a claimant group does not defeat a claim of discrimination," is promising for the application of section 15 to contexts of environmental inequality.[118] As introduced above, environmental pollution does not cause harm in a uniform way. Health problems are not only experienced differently across community members, but they are also constantly evolving. Indeed, residents of pollution hotpots, like those in Aamjiwnaang, typically experience respiratory issues, reproductive problems, and cancer at different rates.[119] Requiring potential claimants to establish identical injuries would have the effect of excluding environmental harm from section 15.

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114 Nickie Vlavianos, "The Intersection of Human Rights Law and Environmental Law", Symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmen tal Damage at University of Calgary (23–24 March 2012) at 9. See also Tim Hayward, "Constitutional Environmental Rights: a Case for Political Analysis" (2000) 48:3 Political studies 558 at 561, 564, 569.

115 The key difference between environmental adverse effects claims and the type of claim in *Fraser* is a difference between benefits and burdens. In *Fraser*, the issue is providing a fairly concrete benefit that we all agree is a benefit (because buying back pension hours gets you more money). But here, the issue is a harm that may arise. It is difficult to say how courts will respond to such differences, but the scientific and statistical research available would certainly assist in making an analogous claim.

116 Randolph Haluza-Delay, "Environmental Justice in Canada" (2007) 12:6 Local Environment (who describes histories and pathways of inequality in the Canadian context at 557). See also Morello-Frosh, *supra* note 13 (for an example in the US context).

117 *Fraser, supra* note 19 at para 71.

118 *Quebec v A*, *supra* note 105 at para 354, cited in *Fraser, supra* note 19 at para 75.

119 Luginaah, Smith & Lockridge, *supra* note 35.

B. Flexibility in Evidentiary Requirements

To establish adverse discrimination, the section 15 framework requires evidence of how the impact of the government action or law is discriminatory on a particular group.[120]

Justice Abella identifies two types of evidence that are "especially helpful" in adverse effects cases under section 15: evidence about the claimant group's situation and evidence about the results of the law.[121] On the first type of evidence, which aims to show that members in a particular group experience a disadvantage, Justice Abella finds that it "may come from the claimant, from expert witnesses, or through judicial notice."[122] This adds flexibility to the evidentiary burden by recognizing the value of testimonial evidence and other types of knowledge in assessing whether a group is experiencing a disadvantage.[123] According to Justice Abella, there was no "universal measure for what level of statistical disparity is necessary to demonstrate that there is a disproportionate impact" on some members of the group.[124]

This broadening of evidentiary requirements is significant for communities experiencing disproportionate pollution burdens, especially those that deploy community-based strategies to expose pollution impacts. The mapping exercise conducted by the Aamjiwnaang Health and Environment Committee, as referenced in section 1 of this paper, is one such example. According to Professor Scott, "[these strategies] seek to marshal the evidence that is needed to demonstrate that chronic exposures to pollution are causing environmental health harms, even at the 'safe doses' permitted by existing regulations."[125] Justice Abella's reasons suggest that such evidence would be admissible for a section 15 claim about disproportionate pollution burdens in communities like Chemical Valley.

The second type of evidence concerns the outcomes that the impugned law or policy (or a substantially similar one) has produced in practice. Evidence about the "results of a system" may provide concrete proof that members of protected groups are being disproportionately impacted. Justice Abella acknowledges flexibility in this area by stating that "clear and consistent statistical disparities can show a disproportionate impact on members of protected groups, even if the precise reason for that impact is unknown."[126]

This newfound flexibility around evidence goes hand in hand with the loosening of causation requirements. Since the specific causal pathways of environmental harm are unknown, statistics about pollution permitting and quantities of pollution emitted in a given region will be important to establish. Together, such statistics and data about health impacts form a full picture of environmental inequality in the region, and reveal how permitting is at the root of the problem.

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120 *Fraser*, *supra* note 19 at paras 50, 52.

121 *Ibid* (neither type of evidence is necessary; sometimes, the disproportionate impact on a group "will be apparent and immediate" at paras 56–61).

122 *Ibid* at para 57, citing *Withler v Canada (AG),* 2011 SCC 12 at para 43.

123 *Ibid*.

124 *Ibid* at para 59.

125 Scott, *supra* note 22 at 298.

126 *Fraser, supra* note 19 at para 62.

C. A Note on Choice

A final unravelling related to causation is the role of claimants' choices in the section 15 analysis. In the past, courts have considered whether differential treatment amounts to a discriminatory distinction if it is linked to choices made by the affected individual or group.[127] According to this position, it is not the law which creates the adverse impact, but rather, the choices made by the claimants.

In *Fraser*, lower court decisions relied on the premise that it was a "choice" to job-share in order to find no distinction under section 15. A majority of the Supreme Court rejected this analysis, finding that the court "misapprehended" section 15 jurisprudence by relying on the claimant's "choice" to participate in the job sharing program. Instead, according to the majority, the Supreme Court "has consistently held that differential treatment can be discriminatory even if it is based on choices made by the affected individual or group."[128]

According to Justice Abella, for many women, deciding to work part-time is not a true choice—the "choice" is between staying above or below the poverty line.[129] In coming to this conclusion, Justice Abella acknowledged "the critical point" that choices are themselves shaped by systemic inequality. The Court cited the following passage by Professor Sonia Lawrence, who poignantly writes:

> . . . a contextual account of choice produces a sadly impoverished narrative, in which choices more theoretical than real serve to eliminate the possibility of a finding of discrimination . . .
>
> *Any number of structural conditions push people towards their choices, with the result that certain choices may be made more often by people with particular "personal characteristics".* This is a key feature of systemic inequality — it develops not out of direct statutory discrimination, but rather out of the operation of institutions which may seem neutral at first glance. [Emphasis original].[129]

By removing choice from the inquiry, Justice Abella signalled it is the recognition of connections between the disproportionate impact that government action has on a particular group, in addition to the historical disadvantages produced and sustained by systemic factors, that allows judges to better identify and protect against adverse effects discrimination.

These conclusions are useful for applicants looking to extend the application of section 15 to environmental inequality. Like the decision to work on a part-time basis, the choice to remain living and working in a pollution hotspot is often outside of an individual's control. Although some may wonder why communities "choose" to stay in pollution hotspots, Dorceta Taylor discusses why moving is typically not feasible for low income and racialized

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127 Sonia Lawrence, "Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15" (2006) 33 Supreme Court Law Review [Lawrence].

128 *Fraser, supra* note 19 at para 86.

129 Lawrence, *supra* note 127, cited in *Fraser, supra* note 19 at para 90.

communities for financial and cultural reasons.[130] Drawing from the work of Evers, Taylor explains that access, ownership, and connection to land are three key reasons why people do not move.[131] Similarly, as Ingrid Waldron summarizes, not only can residents of polluted communities not afford to move elsewhere, but perhaps more importantly, they do not want to because these areas have been home to their communities for generations.[132] The people of polluted communities feel a sense of belonging in their neighbourhoods, just as anyone does, pollution or not.[133] Put simply, home is home.

Cultural connections to land are particularly acute in Indigenous communities like Aamjiwnaang. In *Corbière,* the Supreme Court found that choosing to live on a reserve is connected to First Nations cultural identity and cannot be changed without great costs to band members.[134] According to Justice L'Heureux-Dubé, "the choice of whether to live on- or off-reserve, if it is available to them, is an important one to their identity and personhood, and is therefore fundamental."[135]

Ultimately, one might posit instead that the question should not be whether or not communities should choose to move or stay in pollution hotspots, but rather, why industries in these communities were placed there in the first place.

CONCLUSION

For decades, section 15 has been plagued by a rigid reliance on categories and rules that do not map neatly onto today's complex issues—particularly, environmental ones. Rules around causation, evidentiary requirements, and choice have limited the ability for claimants to rely on courts and section 15 to identify and rectify adverse effects discrimination linked to government action. This has fostered a recurring tension among judges to balance the need for certainty in the rules regarding section 15 and the flexibility required to adequately apply these rules to reality. However, as Professor Colleen Sheppard aptly insists, when strict adherence to rigid rules does not adequately fulfill section 15's goals, we must return to the fundamental promise of substantive equality, which lies in equitable outcomes and equal opportunities for disadvantaged groups.[136]

To adequately fulfill the promise of substantive equality, the section 15 analysis requires a more principled and flexible approach, where anyone experiencing discrimination from a government action is entitled to a true equality in outcomes. As a majority of the Supreme Court stressed in *Fraser,* section 15 should move towards a conceptualization of equality which promotes the flourishing of all individuals in all of their particularity, even when it is

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130 Taylor, *Toxic Communities*, *supra* note 36 at 2–3, 69–97.

131 *Ibid*.

132 Waldron, *supra* note 6.

133 Taylor, *Toxic Communities*, *supra* note 36 at 90.

134 *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 1999 CarswellNat 663 at paras 14–15.

135 *Ibid* at para 62.

136 Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Queens McGill University Press, 2010) at 61–64, 146–148.

impossible to establish that a particular government action fully caused the discrimination at issue.[137] In a way, flexibility in the section 15 analysis refocusses the inquiry around dignity of the person,[138] which is intimately connected to where we live and our environments.[139]

Flexibility in the application of section 15 is also necessary to accommodate environmental claims under the section. Given that environmental pollution and harm carry complex temporal and spatial dimensions, it does not fit neatly within the *Charter* framework. The focus on specific pathways of causation and harm—which are inherently difficult to delineate with precision and difficult to prove with evidence—has the quasi effect of barring the application of section 15 to environmental problems. Maintaining these doctrinal limitations risks losing sight of the important rationale behind section 15 in the first place, which is to rectify inequality when it presents itself. Indeed, rigid rights-based frameworks distract from the very real equality issues at stake.

Cases of environmental inequality are prevalent in the backyards of poor and racialized communities across Canada. While affluent—and traditionally white—communities have long opposed infrastructure and other development projects in their backyards, it is undeniable that the burdens of development and pollution have been displaced—almost exclusively—into the backyards of marginalized communities.

The role of discretionary legislative regimes in creating and sustaining these inequalities is well-documented. As a result, governments have a responsibility to rectify such environmental discrimination under section 15 of the *Charter.* Although jurisprudence on adverse effects discrimination signalled that environmental claimants would be faced with significant challenges around causation and evidentiary requirements to establish environmental discrimination under the section, newfound flexibility in the section 15 framework after *Fraser* signals that the path to challenge unequal pollution burdens may be more possible than ever.

Under the new framework, the popular slogan "Not in Anyone's Backyard" might just be given room to transform from a longstanding aspiration to a new reality—one where the law is able to respond to the widespread environmental discrimination that plagues vulnerable communities across Canada.

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137 Andrea Wright, "Formulaic Comparisons: Stopping the Charter at the Statutory Human Rights Gate" in Margaret Denike, Fay Faraday & Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006).

138 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 1999 CarswellNat 359.

139 Chalifour, "Environmental Justice," *supra* note 18.