No. S-150415
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and
THE JOHN HOWARD SOCIETY OF CANADA

PLAINTIFFS

AND:

ATTORNEY GENERAL OF CANADA

DEFENDANT

AND:

WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND and
CRIMINAL DEFENCE ADVOCACY SOCIETY

INTERVENORS

WRITTEN SUBMISSION OF WEST COAST LEAF

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I. Introduction

1. Canada's use of administrative segregation in federal prisons, as demonstrated by the Plaintiffs, infringes the *Canadian Charter of Rights and Freedoms* ("*Charter*") and cannot be justified in a free and democratic society. The Correctional Service of Canada's practice of segregating prisoners for up to 22-23 hours a day, for an unlimited and unknown duration of time, and without meaningful social contact disproportionately harms and discriminates against women, Indigenous persons, persons with mental illness, and individuals with these multiple and intersecting characteristics of disadvantage. Administrative segregation and/or its administration breaches fundamental, constitutionally-protected equality rights, and consequently must have no place in Canadian law and correctional practice.

2. West Coast Women's Legal Education and Action Fund ("West Coast LEAF") has expertise in the area of constitutional law, and in particular, on the interpretation and application of section 15 of the *Charter*. West Coast LEAF was granted leave to intervene in this action to make legal arguments concerning the constitutionality of the law and practice of administrative segregation authorized in sections 31, 32 and 33 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*") (collectively, the "impugned laws") under sections 7 and 15 of the *Charter*.

3. West Coast LEAF's specific expertise and interest is in the advancement of substantive equality. To that end, these submissions provide this Court with a legal argument for how substantive equality should be applied and understood in this case, and address the following issues:

    a. Under section 15(1) of the *Charter*, substantive equality requires a flexible and contextual analysis focused on the ways in which the impugned laws and their administration compound the disadvantage experienced by individuals with multiple, intersecting characteristics of historic disadvantage – in particular, sex

and/or race/ethnicity (Indigeneity) and/or mental disability.

b. Under section 7 of the *Charter*, substantive equality should be viewed as a principle of fundamental justice, and laws that infringe upon vital section 7 interests in a manner that does not accord with substantive equality must be regarded as constitutionally unsound. Furthermore, substantive equality must be a lens through which the entire section 7 analysis is performed.

c. Should breaches of the *Charter* be found, in meeting its burden to justify the breaches, the Crown should be afforded minimal deference. This is because of the serious nature of the harms, the intersecting disadvantage faced by incarcerated women, and the Crown's acknowledged obligation to curtail the use of administrative segregation. The proportionality analysis must be engaged in a manner consistent with the principle of substantive equality, and take account of the complex dimensions of disadvantage faced by federally sentenced inmates who are women, Indigenous and/or experience mental illness.[1]

II. Section 15 of the *Charter* requires substantive equality

4. The Plaintiffs' claim is that the impugned laws and/or the placement of prisoners in administrative segregation disproportionately and adversely impacts mentally ill and Indigenous prisoners, contrary to section 15 of the *Charter*. West Coast LEAF endorses the submissions of the Plaintiffs in connection with their section 15 claim, and provides the following submissions to highlight the discriminatory adverse effects of segregation experienced by women particular to their unique experience as Indigenous women and/or as women experiencing mental illness.

[1] The term mental illness is used here to track the language in the Plaintiffs' pleadings. The term mental illness is used in these submissions to refer to a range of mental health conditions and disorders that affect one's mood, thinking and behaviour, including symptoms associated with diagnosable mental disorders. In recognition that mental health and well-being exist along a spectrum, the term mental illness as used here is intended to refer to circumstances in which ongoing signs and symptoms cause stress and affect one's ability to function. Symptoms associated with mental illness include those listed at para. 17(a) to (l) of the Plaintiffs' Amended Notice of Civil Claim, amended pursuant to the Consent Order entered June 21, 2017. Self-harming behaviours are included in these submissions under the rubric of mental illness.

Substantive equality must be grounded in the lived experience of prisoners.

5. Section 15(1) of the *Charter* provides that:

> 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.

6. Since the coming into force of the *Charter*'s equality provision, courts have struggled to articulate a comprehensive, definitive analytical framework for adjudicating section 15 claims. Notwithstanding this difficulty, the Supreme Court of Canada has been firm about the significance and centrality of section 15 since the earliest days of its interpretation and application. In *Andrews v. Law Society of British Columbia*, McIntyre J stated that: "[t]he Section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*."[2]

7. In *Andrews*, the Court rejected a formal equality approach (treating likes alike) in favour of substantive equality. The jurisprudence recognizes that formal equality ignores many types of discrimination and does not fulfill the purposes of the *Charter*. In addressing the purpose of section 15, Justice McIntyre observed that section 15 is aimed at "ensur[ing] equality in the formulation and application of the law" but not at eliminating all distinctions, because "identical treatment may frequently produce serious inequality."[3]

8. Substantive equality appreciates that the achievement of equality may require groups and individuals who are unalike in relevant ways to be treated differently. The substantive equality analysis is aimed at "[promoting] a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern,

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[2] *Andrews v. Law Society*, [1989] 1 S.C.R. 143 (S.C.C.) at 185 (per McIntyre J.) [West Coast LEAF Book of Authorities ("WCL BoA"), Tab 1].
[3] *Andrews* at 171.

respect and consideration."[4]

9. Since *Andrews*, the Supreme Court has repeatedly affirmed that substantive equality is the animating norm of section 15(1).[5] In *Withler*, the Court described substantive equality in this way:

> Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.[6]

10. The Court has also highlighted the systemic nature of inequality in Canadian society. It has recently described the section 15 protection of substantive equality as an "approach which recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages."[7]

11. Importantly, substantive equality captures indirect as well as direct discrimination. The Court has reaffirmed that section 15 guarantees protection from both direct and indirect discrimination, meaning that the distinction need not arise on the face of the law, but may arise from disparate impact on particular claimants:

> In some cases, identifying the distinction will be relatively straightforward because a law will, on its face, make a distinction on the basis of an enumerated or analogous ground (direct discrimination). … In other cases, establishing the distinction will be more difficult, because what is alleged is indirect

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[4] *Andrews* at 171.
[5] *Withler v. Canada (Attorney General)*, 2011 SCC 12 ("*Withler*") at para. 2 [WCL BoA, Tab 10]; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 ("*Taypotat*") at para. 17 [WCL BoA, Tab 6]
[6] *Withler* at para. 39 (emphasis added).
[7] *Taypotat* at para. 17.

discrimination: that although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds.[8]

12. After several attempts to craft a multi-step legal framework for identifying substantive inequality, the Supreme Court of Canada has concluded that the pursuit of equality does not lend itself to a rigid analytical framework. Earlier jurisprudence regarding equality as founded in an assessment of harms to dignity, or requiring proof of stereotyping or prejudice no longer forms part of a template for analyzing section 15 claims.

13. A renewed approach to section 15 was unanimously affirmed in *Taypotat*.[9] There, the Court clarified that section 15(1) requires a "flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group."[10] At the core of the inquiry lies the actual impact of the impugned law or state action on the claimant group, and the analysis must be grounded in the relevant social, historical, political and economic context.

14. To establish a section 15 breach, the court must determine whether:

    a. On its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground; and

    b. The impugned law fails to respond to the actual capacities and needs of members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage.[11]

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[8] *Withler* at para. 64.
[9] *Taypotat* at para. 16.
[10] *Quebec (Attorney General) v. A*, 2013 SCC 5 at para. 331 [WCL BoA, Tab 9]
[11] *Taypotat* at paras. 19-20.

15. Proof of prejudice or stereotyping is not required to establish a breach. Rather, "[i]f the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory."[12]

16. The impugned laws may arguably be regarded as neutral on their face, or, rather, equally disadvantageous to all. As demonstrated below, the evidence in this case establishes that the adverse effects of the impugned laws are felt more acutely and in greater proportion by prisoners who are women, Indigenous and mentally ill, including those with present and historical experiences of addiction, trauma and abuse. They thus operate to "widen the gap" for incarcerated members of these historically disadvantaged groups, particularly so where those characteristics intersect.

The equality analysis is not formalistic and must account for intersectional disadvantage.

17. Until relatively recently, courts required formal consideration of an appropriate comparator group for claimants to show differential treatment. The use of comparator groups – either a single "mirror" comparator[13] or multiple comparators[14] – was widely critiqued as subverting substantive equality underlying the section 15 guarantee and allowing a formalistic and artificial analysis to take root.[15] In *Withler*, the Supreme Court re-evaluated the usefulness of the comparator group analysis in deciding section 15 claims. The Court identified several ways in which a comparator group analysis is inappropriate to assess substantive equality.[16]

18. Of particular relevance, the Court recognized that the comparator group analysis is of little utility where (as here) multiple, intersecting grounds of discrimination exist:

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[12] *Taypotat* at para. 20, citing to *Quebec v. A* at para. 332.
[13] The need for a "mirror" comparator required a claimant to establish that they were like the comparator group who received a benefit (or didn't suffer a disadvantage), but for the personal characteristic associated with an enumerated or analogous ground.
[14] *Falkiner v. Director of Income Maintenance Branch (Ontario)* (2002), 159 OAC 135 at para. 72, in which the Ontario Court of Appeal recognized that in some circumstances multiple comparator groups may be necessary, but that even so the court was entitled to refine the chosen comparisons [WCL BoA, Tab 3].
[15] In *Withler*, the Court directly addressed the key components of this critique at paras. 55-60.
[16] *Withler* at paras. 56-59.

> A further concern is that allowing a mirror comparator group to determine the outcome overlooks the fact that a claimant may be impacted by many interwoven grounds of discrimination. Confining the analysis to a rigid comparison between the claimant and a group that mirrors it except for one characteristic may fail to account for more nuanced experiences of discrimination. An individual's or a group's experience of discrimination may not be discernible with reference to just one prohibited ground of discrimination, but only in reference to a conflux of factors, any one of which taken alone might not be sufficiently revelatory of how keenly the denial of a benefit or the imposition of a burden is felt.[17]

19. This Court recently approached the experience of incarcerated mothers in provincial correctional institutions through an intersectional lens in assessing the constitutionality of a decision to cancel the mother-baby program at Alouette Correctional Centre. In *Inglis v. British Columbia (Minister of Public Safety)*, the claimant mother group was presented to the court as having a "constellation of characteristics" – being female, disproportionately Indigenous, with present and historical experiences of addiction and abuse, mental health issues, poverty, foster or institutional care and child apprehension – which related to the enumerated grounds of race, ethnicity, disability and sex. In that case, this Court found the cancellation of the mother-baby program created a distinction upon those multiple, intersecting prohibited grounds.[18]

20. *Withler* establishes that a comparator group analysis is not necessary to demonstrate differential treatment, and may in some circumstances erase or subvert identification of discrimination. As in *Inglis*, formal comparison is unnecessary here and would fail to capture the true negative impact of the impugned laws because of the complex ways in which sex, Indigeneity and mental disability intersect. Comparative data concerning the circumstances of other incarcerated populations, however, will assist the Court in understanding the breadth and nature of disadvantage experienced by Indigenous women and women experiencing mental illness in correctional settings.

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[17] *Withler* at para 58 (internal citations omitted; emphasis added).
[18] *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 ("*Inglis*") at paras. 544-571 [WCL BoA, Tab 5].

Administrative segregation has a differential, disproportionate impact on the basis of intersecting prohibited grounds of sex, indigeneity and disability.

21. West Coast LEAF submits that the impugned laws fall into the category of indirect discrimination, as they place a differential and disproportionate burden on individuals who are identifiable on the enumerated grounds of sex, race/ethnicity (Indigeneity) and mental disability.

22. As discussed in detail below, the evidence establishes (and courts have taken judicial notice) that the federally incarcerated population is disproportionately comprised of Indigenous persons, and persons experiencing mental illness.

23. While sex discrimination has not been pleaded in this case as a separate ground of discrimination, the evidence further shows that Indigenous women are increasingly disproportionately represented in the federal prison population, and that mentally ill prisoners in federal custody are disproportionately women.

24. Federally sentenced women are acknowledged by the Correctional Service of Canada as coming into custody with distinct and different needs, which often arise on the basis of, among other things, their unique pathways to criminal justice system engagement, present and prior experiences of abuse, trauma, and lower socio-economic status and educational attainments.[19] Not surprisingly, the very experiences of women prisoners that create a differential and disproportionate burden for them in prison generally also result in their differential and disproportionate experience of isolated confinement.

25. West Coast LEAF submits that, through expert and lay evidence, the Plaintiffs' have demonstrated that administrative segregation under the conditions found in federal prisons is detrimental to the physical, psychological, social and spiritual health of prisoners. It has further been shown that administrative segregation is particularly detrimental to prisoners who have characteristics disproportionately associated with women in correctional settings, such as experiences of trauma, abuse, and mental illness.

[19] Transcript of Evidence of Nancy Kinsman (August 16, 2017) at pp. 33-34.

As women disproportionately experience those harms, they are in turn especially and further harmed by isolated confinement.

26. The impugned laws and their administration draw distinctions against federally sentenced women on the basis not only of their experience as Indigenous persons or persons with mental illness, but from the intersection of their experience as Indigenous *women* and/or *women* experiencing mental illness.

27. It is not material whether all segregated prisoners suffer the differential treatment experienced by federally sentenced Indigenous women and women with mental illness, or even that all segregated Indigenous women and women with mental illness suffer the same (or comparable) harm.[20] It is also not material that some prisoners may opt to be placed in, or remain in, administrative segregation. Neither the claimant group, nor the magnitude of disadvantage need be homogenous.

The impugned laws discriminate against Indigenous women on the basis of their disproportionate placement in administrative segregation.

28. While the number of federally sentenced women in the custody of the Correctional Service of Canada remains small compared to the population of incarcerated men, their numbers are rising dramatically, both in absolute terms and at a rate faster than that of men. Women currently represent approximately 5% of the federal prison population.[21] Indigenous women have the dubious distinction of being the fastest growing segment of the Canadian prison population. The number of Indigenous women in federal prisons nearly doubled between 2005 and 2015.[22]

29. As of March 31, 2017, 679 women were incarcerated in correctional institutions operated by the Correctional Service of Canada; of those women, nearly 36% are Indigenous.

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[20] *Quebec v. A* at para. 354.
[21] Affidavit #2 of Mike Hayden, marked as Exhibit 135A at Tab B; statistics concerning federally sentenced women ("Women's Stats"), marked as Exhibit 136 at Tab.
[22] Office of the Correctional Investigator, Annual Report of the Office of the Correctional Investigator 2015-2016 (June 30, 2016) ("OCI 2015-2016 Annual Report") at 43 [Exhibit 70, Tab F]; Transcript of Evidence of Brigitte Bouchard (August 3, 2017) at p. 52.

Fifty-seven women had been classified as maximum-security inmates; of women classified as maximum security, 47% are Indigenous. For the 2016-2017 fiscal year, the Correctional Service made 289 placements to administrative segregation at federal institutions for women; approximately 54% of those placements were for Indigenous women. And, at the end of the 2016-2017 fiscal year, ten women were in administrative segregation at federal correctional institutions; 70% of them are Indigenous.[23] Approximately 4% of Canada's population is comprised of Indigenous peoples.[24]

30. In each of the past six fiscal years for which statistics were provided, Indigenous women were grossly over-represented in the numbers of annual placements to administrative segregation based on their numbers in the prison population. In 2011-2012, Indigenous women formed 34% of the federal women's prison population, yet 47% of annual administrative segregation placements were of Indigenous women.[25] Troublingly, despite the law that administrative segregation be used as a last resort, and CSC's mandated requirement to refer to Aboriginal social history, the numbers of annual segregation placements for Indigenous women appear to be trending upward. For each of 2011-2012 through to 2016-2017, annual segregation placements for Indigenous women have been between 12-18% greater than their prison population. The 18% number represents the differential from this past fiscal year, when most (if not all) of the Aboriginal initiatives and initiatives about which Ms. Bouchard testified were firmly in place.[26]

31. As with annual placements in administrative segregation, the numbers of Indigenous women in segregation using a "point-in-time" snapshot are also troubling. In each of the past six fiscal years for which statistics were provided, Indigenous women formed at least 50% of the segregated population on the last day of the fiscal year (March 31). Using this point-in-time data, 70% of segregated women were Indigenous for 2013-2014, and for

[23] Women's Stats [Exhibit 136, cross-referenced between Tabs A, B, D, E, J, K, P and Q]; See also, Transcript of Evidence of Brigitte Bouchard, (August 3, 2017) at p. 54; OCI 2015-2016 Annual Report at 43 [Exhibit 70, Tab F]
[24] OCI 2015-2016 Annual Report at 43 [Exhibit 70, Tab F].
[25] Women's Stats [Exhibit 136, Tabs A, B, J and K].
[26] See generally Transcript of Evidence of Brigitte Bouchard (August 3, 2017) and Strategic Plan for Aboriginal Corrections – Innovation, Learning and Adjustment, dated 2006-07 to 2010-11 [Exhibit 88].

this past fiscal year, 2016-2017.[27]

32. Along with their disproportionate and increasing presence in federal prisons, Indigenous women are also widely regarded as serving sentences under harsher, more restrictive conditions. As with the experience of Indigenous prisoners generally, Indigenous women have been and continue to be disproportionately classified as maximum or medium security, and are accordingly subjected to more stringent conditions of confinement.[28] In the last fiscal year, 47% of the women at maximum security were Indigenous, while the overall women's prison population was 36% Indigenous.[29] Indigenous women are also under-represented at minimum security. In the last fiscal year, 28% of the women classified as minimum were Indigenous.[30]

33. Indigenous women remain in administrative segregation for disproportionately longer periods of time, even in spite of CSC's overall decrease in the duration of segregation placements. For instance, in the past fiscal year, 67% of the population of women in segregation for longer than 17 days was Indigenous.[31]

34. The limitations of the data provided by the Correctional Service of Canada means that we cannot have a full picture of Indigenous women's placement into administrative segregation. Among other things, the data cannot help understand how many Indigenous women were placed in administrative segregation over the course of a year, what proportion of Indigenous women have been placed into administrative segregation, the duration of specific segregation placements, or whether the placements pertain to many prisoners or a smaller subset repeatedly placed in segregation. The data does not disaggregate on the basis of sex, Indigenous status or mental disability to allow for comparison across sub-populations. This limits the ability to understand how security classification impacts prisoners with intersecting disadvantage, and what role those

[27] Women's Stats [Exhibit 136, Tabs P and Q].
[28] Transcript of Evidence of Brigitte Bouchard (August 3, 2017) at p. 48; 2016 Fall Reports of the Auditor General of Canada, Report 3 ("Auditor General Report") [Exhibit 94]; OCI 2015-2016 Annual Report at p. 43 [Exhibit 70, Tab F].
[29] Women's Stats [Exhibit 136, Tabs D and E].
[30] Women's Stats [Exhibit 136, Tabs D and E].
[31] Women's Stats [Exhibit 136, Tabs Y and Z].

disadvantaging factors may play in decisions to place, retain or remove an individual from segregation.[32]

The impugned laws discriminate against Indigenous women on the basis of their disproportionate experience of harm.

35. The socio-economic histories and experiences of Indigenous peoples in Canada are fundamental to understanding how and why individual Indigenous persons may come to have involvement with the criminal justice and correctional systems, as the law has come to recognize. In *R. v. Ipeelee*, Justice Lebel said this:

> Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society. To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples."[33]

36. Justice system actors, including the Correctional Service, have a responsibility to appreciate and integrate how systemic and structural forces of oppression, racism and colonialism continue to shape the experiences of Indigenous persons, families and communities today. This cannot be done without first understanding the intergenerational nature of trauma associated with the state's transgressions against Indigenous peoples, particularly through the residential schools program and the Sixties Scoop, and the complex ways in which historic trauma and disadvantage are perpetuated and reinforced at present, particularly in institutional settings.

37. As described by the Correctional Investigator, "a history of disadvantage follows Indigenous peoples of Canada into prison and often defines their outcomes and

[32] Transcript of Evidence of Mike Hayden (August 21, 2017) at pp. 25-39.
[33] *R. v. Ipeelee*, 2012 SCC 13 at para. 60 (internal citation omitted) [WCL BoA, Tab 12]

experiences there."[34] On the whole, Indigenous prisoners are younger, less educated and more likely to have substance abuse and mental health concerns.[35]

38. While there is a dearth of research on the social histories of Indigenous women in prison (and research on women's correctional experiences and outcomes generally), the preliminary results of one CSC study describe the disadvantage experienced by incarcerated Indigenous women.[36]

39. The research shows that, of the cohort of 174 Indigenous women whose cases were reviewed, 10% had attended a residential school, and 52% had at least one family member attend residential schools. 48% of the women were removed from their family home. 81% of these Indigenous women had experienced physical abuse, 56% had experienced sexual abuse, and 69% had experienced other trauma, including emotional abuse, witnessing the death of a family member or close friend, or involvement in sex work from an early age. Almost all the files indicated previous traumatic experiences and substance abuse.

40. Evidence was presented in this case about the importance CSC places on Aboriginal social history in correctional decision-making concerning Indigenous prisoners.[37] It was admitted, however, that CSC faces challenges in documenting Aboriginal social history and in explaining how Aboriginal social history was incorporated, considered or applied in respect of a particular prisoner or a particular correctional decision.[38] And, due to infrastructural limitations, Aboriginal social history may ultimately come to play a very limited to no role in some decisions to segregate Indigenous prisoners.[39]

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[34] OCI 2015-2016 Annual Report at p. 43 [Exhibit 70, Tab F]; Transcript of Evidence of Brigitte Bouchard (August 3, 2017) at pp. 53-54.
[35] OCI 2015-2016 Annual Report at p. 43 [Exhibit 70, Tab F].
[36] Social Histories of Aboriginal Women Offenders, Emerging Research Results (May 2014) No. 14-7 ("Social Histories") [WCL BoA, Tab 19], and described in OCI 2015-2016 Annual Report at p. 43 [Exhibit 70, Tab F].
[37] Transcript of Evidence of Brigitte Bouchard (August 3 2017) at pp. 31-33.
[38] Transcript of Evidence of Brigitte Bouchard (August 3, 2017) at pp. 55-57.
[39] Transcript of Evidence of Brigitte Bouchard (August 3, 2017) at pp. 39, 56-67.

41. Research on the use of social history with Indigenous women shows "considerable variability in the amount and nature of Aboriginal social history information recorded on women's files."[40] This finding is consistent with the evidence in this case, where the Aboriginal social histories provided in documentation for Ms. Worm and for Ms. Lepine were fairly succinct and lacking in sufficient detail for a fulsome consideration of those factors to correctional decision-making, including decisions about placement into administrative segregation.[41]

42. Ms. Bouchard testified that challenges continue to exist in the application of Aboriginal social history in significant decisions affecting Indigenous offenders, including the significant need for corrections to move past merely documenting social history factors for Indigenous prisoners to understanding how to apply social history to correctional decision-making.[42] Her testimony cases doubt on the appropriateness of CSC's approach to Aboriginal social history. Ms. Bouchard testified that a decision-maker will not necessarily need all the information and context available in a full report on Aboriginal social history. That evidence is troubling because it suggests, notwithstanding a stated intention to approach Indigenous prisoners through trauma-informed processes, as averted to by Ms. Bouchard and Ms. Kinsman in their testimony, CSC's prevailing approach remains at its core non-individualized and security-centric.

43. A more complete picture of the social histories and correctional experiences of incarcerated Indigenous women can be found in a report prepared for Public Safety Canada, and entered into the record as Exhibit 95, *Marginalized: The Aboriginal Women's experience in Federal Corrections* (2012). Many of the trends discussed above regarding Indigenous women's disproportionate experience with more stringent conditions of confinement, including segregation, are confirmed by this report.

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[40] Social Histories.
[41] See, e.g., Transcript of Evidence of Brigitte Bouchard (August 3, 2017) at p. 57-59 and Exhibit 53 (Amanda Lepine working day segregation review).
[42] Transcript of Evidence of Brigitte Bouchard (August 3, 2017) at p. 55; see also, Auditor General Report [Exhibit 94] at para 3.72.

44. The report also speaks to how women are qualitatively differently affected by isolated confinement than men.[43] Administrative segregation may exacerbate distress, particularly for women with histories of trauma, such as physical or sexual abuse. As Indigenous women are disproportionately represented among women with these experiences, including a greater proportion of self-harming behaviours, they are particularly vulnerable to the adverse impacts of isolation.[44]

45. While the Correctional Service has made some efforts to address the needs of Indigenous persons serving custodial sentences of imprisonment, significant resource gaps exist, particularly in relation to Indigenous women's correctional experience and outcomes. Ms. Bouchard testified, for instance, that the Aboriginal Development Community Officer serves as a link between Indigenous inmates, CSC and the community. However, she reported that the Edmonton Institution for Women, where she is the Institutional Head, does not have one, as "there's none specific to women."[45] This is significant given that the Edmonton Institution for Women has among the highest concentration of Indigenous women prisoners and disproportionately higher incidences of segregation.[46] She also describes that resources for Indigenous prisoners vary from facility to facility and from region to region,[47] suggesting that CSC is unable and unprepared to meet the needs of Indigenous prisoners even as institutional transfer has been identified as an alternative to placement in administrative segregation.

The discriminatory treatment of Indigenous prisoners must be understood within the context of the work of the Truth and Reconciliation Commission.

46. West Coast LEAF submits that this Honourable Court must view the correctional experiences and outcomes for all Indigenous prisoners, and the Correctional Service's

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[43] "Marginalized: The Aboriginal Women's experience in Federal Corrections" (2012) ("Marginalized") [Exhibit 95] at p. 33, citing to the Commission of Inquiry into Certain Events at the Prison for Women in Kingston, 1996; see also Transcript of Evidence of Brigitte Bouchard (August 3, 2017) at pp. 66-68.
[44] Marginalized [Exhibit 95] at p. 33.
[45] Transcript of Evidence of Brigitte Bouchard (August 3, 2017) at pp. 27-28.
[46] Transcript of Evidence of Brigitte Bouchard (August 3, 2017) at p. 53; Women's Stats [Exhibit 136, Tabs J, K, P and Q].
[47] Transcript of Evidence of Brigitte Bouchard (August 3, 2017) at p. 19.

responsibility to respond to those experiences and outcomes, with regard to the Recommendations and Calls to Action of the Truth and Reconciliation Commission.[48]

47. The Truth and Reconciliation Commission was mandated to document the truth of survivors, families, communities, and individuals personally affected by the experience of Indian residential schools. Its work is aimed at repairing the relationship between Canada and Indigenous peoples through education, awareness and increased understanding of the legacy and the ways in which those impacts continue to the present time.

48. The Commission's report is a comprehensive historical record on the policies and operations of the residential schools and includes recommendations and actions to be taken by the government and other institutions within society. The Commission's findings and recommendations come at the end of a thorough, multi-year fact-gathering process and are entitled consideration by this Honourable Court.

49. The following Calls to Action are especially relevant to this case:

    a. We call upon federal, provincial, and territorial governments to commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade, and to issue detailed annual reports that monitor and evaluate progress in doing so (No. 30).

    b. We call upon the federal, provincial, and territorial governments to provide sufficient and stable funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders and respond to the underlying causes of offending (No. 31).

    c. We call upon the federal government to eliminate barriers to the creation of additional Aboriginal healing lodges within the federal correctional system (No.

[48] Truth and Reconciliation Commission of Canada: Calls to Action (2015) [WCL BoA, Tab 18].

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d. We call upon the federal, provincial, and territorial governments to work with Aboriginal communities to provide culturally relevant services to inmates on issues such as substance abuse, family and domestic violence, and overcoming the experience of having been sexually abused (No. 36)

e. We call upon the federal government to provide more supports for Aboriginal programming in halfway houses and parole services (No. 37).

f. We call upon the federal, provincial, territorial, and Aboriginal governments to commit to eliminating the overrepresentation of Aboriginal youth in custody over the next decade (No. 38).

The impugned laws discriminate against women with mental illness on the basis of their disproportionate placement in administrative segregation.

50. The statistics provided in evidence do not break down the prison population by mental health status. It appears that the Correctional Service does not have a robust means for tracking mental illness among the prison population, or may be unable to disaggregate that data. It is therefore challenging to gauge the prevalence of diagnosed mental disorders, diagnosable mental illness or significant mental health impairment among federally sentenced women, the change in mental health status over the course of one's incarceration, or the numbers of mentally ill Indigenous and non-Indigenous women who have been placed into administrative segregation over the years. The lack of available data concerning the mental health profile of the prison population at large and of particular subpopulations calls into question how effectively CSC can manage this complex, high-needs population, and how CSC's prior and present efforts in doing so may possibly be evaluated.

51. Nevertheless, other sources of data demonstrate clearly that mental health problems are more common among the incarcerated population than within the general population. A

2015 study of the prevalence of mental disorders among incoming male prisoners estimated that 68% to 82% of men newly admitted to federal custody had a current mental disorder.[49] It does not appear that a prevalence study of mental disorders among female prisoners has yet been completed. The study of male offenders provides data on prevalence for Indigenous male offenders, indicating disproportionately higher mental health disorders for Indigenous men. The data estimates the lifetime prevalence rate at almost 94% for Indigenous men, and their current prevalence rate at 83%.[50] The prevalence of mental illness among Indigenous women in prison, West Coast LEAF submits, will be especially high due to the nexus of their identities as Indigenous and as women.

52. A 2012 study of the mental health needs of federally sentenced women also shows higher proportions of mental illness among this population. Ninety-four percent of the sample had experienced symptoms consistent with a lifetime diagnosis of a psychiatric disorder, and 85% had experienced diagnostic symptoms of more than one disorder. The most notable elevations were for post-traumatic stress disorder, major depressive episode and anti-social personality disorder.[51] Substance misuse was identified as the most notable area of difference between Indigenous and non-Indigenous women, with Indigenous women more frequently experiencing a lifetime dependence on at least one substance.[52] Further research also shows that considerably more women than men are prescribed psychotropic medication (45.7% of women compared to 29.6% of men), with women more likely to have multiple prescriptions.[53]

53. In 2015, the Correctional Investigator documented ten-year trends in the Correctional Service's use of administrative segregation. The results of his report show that

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[49] J.N. Beaudette, et al. (2015). National prevalence of mental disorders among incoming federally-sentenced men offenders (R-337) ("National prevalence of mental disorders") at pp. 15-16, 26, found at Tab 3 of Exhibit 114A (Affidavit of Kelley Blanchette).
[50] National prevalence of mental disorders at p. 47 [Tab 3 of Exhibit 114A].
[51] Mental health needs of federal women offenders, Research at a glance, May 2012, No. R-267 ("Mental health needs") [WCL BoA, Tab 17]
[52] Mental health needs.
[53] S. MacDonald, et al (2015) "Prevalence of Psychotropic Medication Prescription among Federal Offenders" Correctional Service of Canada, No. R-373 [WCL BoA, Tab 20].

administrative segregation has been commonly used to manage mentally ill prisoners, self-harming prisoners and those at risk of suicide. He finds that 11.7% of federally sentenced women and 9.1% of Indigenous prisoners have a history of self-injuring. Of those prisoners in segregation at the time of his study, women and Indigenous prisoners had disproportionate histories of self-injury (22.2% and 16.9% respectively). Conversely, of those prisoners with a history of self-injury, 86.6% had a history of segregation, compared to a rate of 48.1% in the general population who have not self-injured.[54]

54. Apart from self-injury, his review also demonstrated that prisoners with a history of segregation are more likely to have mental health issues (63.2% compared to 48%), have issues with mental abilities (61.6% compared to 47.8%), and issues with cognitive thinking (68.8% compared to 45.3%).[55]

55. The review also looked at the correlation of transfers to regional psychiatric treatment centres and history of segregation, again to demonstrate the prevalence of prisoners with mental illness in conditions of isolated confinement. The numbers of women prisoners and Indigenous prisoners who have been in a treatment centre and placed in administrative segregation are again disproportionately high. The ratio for women is 78.9% and for Indigenous prisoners, it is 72.9%.[56]

The impugned laws discriminate against women with mental illness given their disproportionate experience of harm.

56. The Correctional Service recognizes that female prisoners differ from male prisoners in significant ways. They will have experienced sexism in society, and experienced racism in qualitatively different ways. Many are single mothers and the majority have young children, so they experience a disproportionate loss of parenting responsibilities and bonding with children. Many are involved or have been involved in relationships with

[54] Office of the Correctional Investigator, "Administrative Segregation in Federal Corrections 10 Year Trends" (May 28, 2015) ("10 Year Trends") at pp. 2, 9-13, found at Tab V of Exhibit 68B; Transcript of Evidence of Kelley Blanchette (August 11, 2017) at pp. 37-38.
[55] 10 Year Trends at pp. 3, 19-22 [Exhibit 68B, Tab V].
[56] 10 Year Trends at pp. 3, 23 [Exhibit 68B, Tab V]; Transcript of Evidence of Kelley Blanchette (August 11, 2017) at p. 38.

vast power imbalances, and which influence their crime cycle. They have lower self-esteem and confidence. Many women may be described as more "relational" and thus place higher value on social contact and relationships.[57]

57. Many women will have experienced physical, sexual, psychological and emotional abuse and trauma.[58]

58. As described above, female prisoners' mental health profiles and needs are also qualitatively different than that of male prisoners. Women seek out mental health resources in greater numbers than do men.[59] The circumstances of Indigenous women are particularly compromised, and the effects of these adverse experiences are compounded and multiplied.[60]

59. The disproportionate harm experienced by women in prisons generally and in isolated confinement may be illustrated through the increased risk factors women experience for self-harming behaviours and suicide ideation, which are co-related to mental health.

60. The Correctional Investigator has highlighted a number of concerns regarding the capacity of the Correctional Service to appropriately manage chronic self-harm in prisons. In 2013, he engaged in an investigation of the treatment and management of self-injury among federally sentenced women. The result of that investigation show that a relatively small number of women disproportionately accounted for almost 36% of all reported self-injury incidents. Indigenous women accounted for nearly 45% of all self-injury incidents involving women.[61]

61. The Correctional Investigator repeatedly expressed concern regarding women with complex mental health needs accessing services as a result of inadequate infrastructure,

[57] Transcript of Evidence of Nancy Kinsman (August 16, 2017) at pp. 25, 33-34.
[58] Transcript of Evidence of Nancy Kinsman (August 16, 2017) at pp. 33-34.
[59] Transcript of Evidence of Nancy Kinsman (August 16, 2017) at p. 34.
[60] Transcript of Evidence of Nancy Kinsman (August 16, 2017) at pp. 33-34.
[61] Office of the Correctional Investigator, "Risky Business: An Investigation of the Treatment and Management of Chronic Self-Injury Among Federally Sentenced Women" (September 30, 2013) ("Risky Business") at p. 3, found at Tab X of Exhibit 68B.

staffing, resources and capacity. This was strikingly evident in an investigation into the death of 19-year-old Ashley Smith in 2007, which revealed several individual and systemic failures in the way in which CSC addresses self-harming behaviour. In particular, the resort to security-focused interventions, including placement into administrative segregation, to manage challenging behaviours associated with mental health problems was found to exacerbate the self-harming behaviour.[62]

62. The disproportionately high number of suicides occurring in administrative segregation remains a concern and correlates to existing mental health concerns compounded by segregation itself as an independent risk factor.[63] The Correctional Investigator undertook a three year review of suicides in federal correctional facilities. He found that, similar to suicides occurring outside prison walls, "having a mental health problem or diagnosis or compromised mental health functioning appears to be a significant risk factor for prison suicide."[64] A study of suicides in federal prisons indicates a correlation between suicide and a history of psychological problems, previous suicide attempts, history of self-harming behaviour and difficulties with substance abuse.[65]

63. Notably, nearly half of 30 suicide cases (14) studied by the Correctional Investigator took place while the prisoner was in administrative segregation, under conditions of enhanced supervision, control and isolation. Only one of those 14 prisoners was being actively managed on suicide watch at the time, while three others were being monitored. Nearly all of them had known significant mental health issues.[66]

64. Recently, the Alberta Court of Queen's Bench, in reviewing the reasonableness of decisions to place four men in administrative segregation at the Edmonton Institution,

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[62] Risky Business at p. 4 [Exhibit 68B, Tab X].
[63] Ms. Worm's evidence is that she disclosed suicidal ideation for the first time while in segregation and experienced a deterioration of her mental health in segregation. On January 28, 2008, Ms. Worm attempted suicide after having been in segregation for over six months, after which attempt she was put in observation and then returned to a segregation cell the following day. Affidavit #1 of BobbyLee Worm, dated June 1, 2017, at paras. 56-59.
[64] Office of the Correctional Investigator, A Three Year Review of Federal Inmate Suicides (2011-2014) ("Three Year Review") at p. 7, found at Tab W of Exhibit 68B
[65] Three Year Review at p. 8 [Exhibit 68B, Tab W].
[66] Three Year Review at p. 10-11 [Exhibit 68B, Tab W].

found the adverse impacts of segregation, particularly to mental health, are well-documented and accepted:

> The court can take judicial notice of much public commentary about the potentially deleterious effects on human beings as a result of being kept in solitary confinement. ... [W]ithin the custodial system not only are the effects of placement in involuntary segregation important while they are being served, but they are also important in the eventual completion of the existing sentence and the service of subsequent sentences. As I understand it, the respondent acknowledges that a custodial institution's decision to place inmates in involuntary segregation will affect those inmates throughout their lives.[67]

65. Ms. Worm's evidence provides confirmation of the life-long impacts of administrative segregation. In her affidavit, she states that she continues to feel the impact of segregation to this day, including ongoing anxiety and depression.[68]

The impugned laws discriminate and adversely impact the health, well-being and rehabilitative outlook of women serving custodial sentences of imprisonment on the basis of intersecting grounds of disadvantage.

66. While much has changed on the landscape of women's corrections since the closing of the Kingston Prison for Women, many of the dilemmas first identified in *Creating Choices*, the 1990 Report of the Task Force on Federally Sentenced Women persist. Women continue to be confined in conditions that are more restrictive than necessary. They experience the loss of community and belonging associated with geographic dislocation. Their unique circumstances and criminogenic needs remain misunderstood and inadequately addressed.[69]

67. Notwithstanding important efforts to make women's corrections more gender-responsive, the evidence indicates that the experience of women in prison corresponds to more general correctional trends towards an increased focus on risk and security classification,

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[67] *Hamm v. Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440 at para. 67 (emphasis added) [WCL BoA, Tab 4].
[68] Worm Affidavit, at paras. 84, 96 [Exhibit 35A].
[69] See, Debra Parkes, "Women in Prison: Liberty, Equality, and Thinking Outside the Bars" (2016) 12 J.L. & Equal. 127 ("Parkes") at 129-130, 142-145 [WCL BoA, Tab 16], and Transcript of Evidence of Kelly Hannah-Moffat (July 25, 2017) at pp. 39-41.

which has led to harsher conditions for some women, particularly Indigenous women and women experiencing mental illness.[70] Correctional data collection, assessment processes and decision-making do not adequately account for or assess intersecting axes of identity – for the experiences and needs of a woman who is also Indigenous and also mentally ill.

68. Professor Kelly Hannah-Moffat's evidence in this case references extensive research demonstrating the importance of gender, race and mental health in assessing risk, which she describes is "at the foundation of most security classifications."[71] Her own work has looked at how the failure to properly account for gender, race and mental health can have discriminatory effects. As discussed above, these discriminatory effects arise because imprisonment is experienced differently by those whose lives have been shaped by multiple and compounding expressions of historic disadvantage.

69. Along with experiencing imprisonment differently, Indigenous and/or mentally ill women are also *perceived differently* by correctional authorities. The evidence in this case, and the research at large, shows that Indigenous women are still disproportionately subjected to more punitive conditions of incarceration, and that at least some behaviours symptomatic of mental illness are viewed foremost as security risks.[72]

70. Problematic behaviours associated with dysregulation in an institutional environment that arise because of mental illness or from historical circumstances of trauma are "risk managed." This can put in place a process that leads to further dysregulation, marking prisoners as "high risk" or "difficult to manage." Ms. Worm's evidence about her experience on the Management Protocol, a three-step framework that CSC had used to segregate and manage high risk / high needs female prisoners is illustrative of the way in which assessing behaviour primarily through the rubric of risk and security correlates to punitive conditions of segregated confinement and consequently perpetuates a cycle of institutional maladjustment. Ms. Worm estimated that it took her about three to four years

[70] Apart from the evidence described earlier in this submission, see also, Parkes at 130.
[71] Expert Report of Professor Kelly Hannah-Moffat, dated September 30, 2016, marked as Exhibit 45 ("Hannah-Moffat Report").
[72] See, e.g., Hannah-Moffat Report at para. 65 [Exhibit 45] and Transcript of Evidence of Kelly Hannah-Moffat (July 25, 2017) at pp. 21-23.

to move to the least stringent level of the Management Protocol.[73] Over-classification and administrative segregation may themselves become risk factors for some prisoners.[74]

71. It is no surprise that prisoners with a history of being placed in segregation are also more likely to be assessed as high risk, high needs, low motivation, low reintegration potential and low accountability.[75] These characteristics are associated with a propensity to become subjected to more punitive forms of confinement, and are those that may likewise be reinforced and reified by harsher conditions. Practices of restrictive confinement, such as administrative segregation, thus perpetuate a vicious, punitive cycle which becomes increasing difficult to break.

72. Moreover, in prison, as in society, behavioural expectations are gendered. "Institutional adjustment" is used as a reference for how well a prisoner will get along in the correctional environment. The focus is very much on how able and willing prisoners are to adapt and comply.[76] Behavioural expectations – that good women respect authority, are agreeable and pro-social – are also culturally situated. Indigenous women, whose distrust of correctional staff may be based on prior adverse experiences with authority, may come to be seen as uncooperative.[77] Both Ms. Worm and Ms. Lepine were viewed at various points during their incarceration as exhibiting problems with institutional adjustment. While institutional adjustment and behavioural expectations impact all prisoners, Indigenous women appear to be held to particularly high standards.[78]

73. Problems arise too with the screening and risk assessment tools used by correctional staff to make critical decisions about women prisoners, particularly where multiple axes of identity are present. Specifically, there are concerns around the validity of screening and

[73] Transcript of Evidence of BobbyLee Worm (July 19, 2017) at pp. 49-50; Affidavit #1 of BobbyLee Worm, dated June 1, 2017 ("Worm Affidavit") at paras. 64-78 [Exhibit 35A]
[74] Transcript of Evidence of Kelly Hannah-Moffat (July 25, 2017) at p. 27; Hannah-Moffat Report at para. 65, reference to Ashley Smith's circumstances as revealing "how behaviour exacerbated by prolonged time in segregation increasingly becomes characterized as an institutional security threat, rather than as an effect of the conditions of confinement."
[75] 10 Year Trends at p. 3 [Exhibit 68B, Tab V].
[76] Parkes at pp. 142-143.
[77] Marginalized at pp. 23-24 [Exhibit 95].
[78] Parkes at pp. 142-143.

actuarial tools for use with women and Indigenous prisoners. In the 2015-2016 Annual Report, the Correctional Investigator recommended that CSC "develop new culturally appropriate and gender specific assessment tools, founded on *Gladue* principles, to be used with male and female Indigenous offenders."[79] Many of the various screening and assessment tools used by CSC are not validated for use with women, Indigenous persons and mentally ill prisoners, or in any intersectional way.

74. These tools and screens are routinely used in making decisions that impact the conditions of confinement, and play an important role in determining what programming and services may be available to a prisoner. Apart from concerns about whether particular tools are appropriate for use with certain sub-populations of prisoners, the tools are only as useful as the individuals administering them and what they are able to do with the information collected. Dr. Koopman testified that the "Immediate Needs Checklist – Suicide Risk," which is used by non-health care staff to screen prisoners for suicidality and self-harming behaviour, is ineffective at best and may, in some circumstances, add to a prisoner's distress.[80] This tool is currently used as part of revised Commissioner's Directive 709 as a way to screen for prisoners who are inadmissible to administrative segregation due to the immediacy of their risk of suicide.[81]

75. Concerns about the operationalizing of revised CD 709 extend to the very limited portion of the mentally ill population in federal institutions who are now prohibited from admission to administrative segregation. Dr. Blanchette's testimony confirms that many categories of prisoners with mental health needs fall outside the scope of the prohibition.[82] She testified that only 182 prisoners (out of a population of over 14,000) have been flagged as those with a "serious mental illness with significant impairment."[83] According to Ms. Kinsman's testimony, all of the individuals with that flag in the Ontario region prisons are in custody outside mainstream prison environments, including the one

[79] OCI 2015-2016 Annual Report at pp. 46-47 [Exhibit 70, Tab F].
[80] Transcript of Evidence of Peggy Koopman (August 24, 2017) at pp. 39-46.
[81] Commissioner's Directive 709, date in effect 2017-08-01 ("CD 709"), marked as Exhibit 76.
[82] Transcript of Evidence of Kelley Blanchette (August 11, 2017) at pp. 55-68.
[83] Transcript of Evidence of Kelley Blanchette (August 11, 2017) at pp. 9, 90.

woman who was flagged at Grand Valley Institution.[84] This further suggests that the definition is intended to – and does in fact – only exempt a very small number of prisoners with mental illness. Data was not provided to ascertain how many of the 182 flagged prisoners are women, Indigenous women and/or mentally ill women. The narrowness of the definition and in how it appears to be interpreted is deeply troubling. There can be no assurance that the disproportionate segregation of Indigenous women and mentally ill women will not continue under the new policy.

76. Evidence was provided to the Court of the programs and services that are available to prisoners, including targeted interventions aimed at women, Indigenous persons and persons with complex mental health needs, including while those populations are admitted to administrative segregation. This is contrasted with evidence from prisoners about their experience in administrative segregation. Ms. Worm and Ms. Lepine testified that their admissions to administrative segregation limited their inability to, among other things, access or continue educational programs, counselling and behavioural therapies, or regularly practice elements of their spirituality.

77. Evidence was also provided that, while certain activities are routinely "on offer," prisoners may not be able to take advantage of them due to circumstances outside their control. While in segregation, the process of movement to other parts of the prison or to make use of time outside of the cell was described as challenging and as a potential flashpoint for conflict with correctional staff.

78. Professor Hannah-Moffat testified to the profound disconnect that exists between correctional policy and practice in federal prisons, and the need for policy to be understood in its practiced context.[85]

79. The rehabilitative purpose of corrections is an important consideration. Prisoner's post-release outcomes are connected to their experience within the prison environment. Disproportionate over-classification of Indigenous women and women experiencing

[84] Transcript of Evidence of Nancy Kinsman (August 16, 2017) at p. 69.
[85] Transcript of Evidence of Kelly Hannah-Moffat (July 25, 2017) at pp. 51-55.

mental illness, limiting their ability to access rehabilitative programs and services indirectly through placement in strict conditions of confinement, including segregation, and assessing their progress in a correctional plan against behavioural norms that, in the circumstances of many, do not account for histories of trauma and abuse only further disadvantages these women.

80. West Coast LEAF submits that the impugned laws and their application are discriminatory because they do not have regard for the historical and continuing societal disadvantage suffered by Indigenous women and women experiencing mental illness. The impugned laws and their application perpetuate and exacerbate societal disadvantage – they widen the gap – for Indigenous women and for women experiencing mental illness.

Section 7 Submission

81. The Plaintiffs claim that the impugned laws and the placement of prisoners in administrative segregation engage and infringe the section 7 rights to life, liberty and security of the person, and that those infringements offend the principles of fundamental justice that laws must not be overbroad, grossly disproportionate, or procedurally unfair, and the principle of fundamental justice requiring reasonable accommodation of the disabled. West Coast LEAF endorses the Plaintiffs' section 7 submissions.

82. West Coast LEAF submits that substantive equality must also be recognized as a principle of fundamental justice in criminal justice and correctional contexts. West Coast LEAF submits that the impugned laws and their application to all Indigenous prisoners and prisoners with mental illness, but particularly in respect of Indigenous women and women experiencing mental illness or both, infringes upon vital section 7 interests in a manner that does not accord with substantive equality.

Substantive equality is a principle of fundamental justice.

83. Once a deprivation of life, liberty or security of the person has been established, the court must determine whether that deprivation is in accordance with principles of fundamental justice.

84. West Coast LEAF submits that substantive equality is a principle of fundamental justice. A law that causes section 7 deprivations in a manner that exacerbates the disparate impacts of the criminal justice system on groups of people already facing multiple forms of disadvantage cannot accord with the fundamental tenets of our legal system.

85. Equality has been recognized as a principle of fundamental justice within the meaning of section 7 of the *Charter*: a deprivation of life, liberty or security of the person must not occur as a consequence of a "discriminatory distinction based on group attributes."[86]

86. As recognized by the Supreme Court in *Andrews*, the equality provision of the *Charter* "is the broadest of all guarantees" and "it applies to and supports all other rights guaranteed by the *Charter*."[87] Substantive equality has previously been used in cases concerning procedural justice to inform the Court's analysis of a fair adjudicative process.[88] The concept of equality has also been invoked by the Court in assuring the justness and proportionality of sentencing.[89]

87. The Supreme Court has set out an analytical framework for understanding what qualifies as a principle of fundamental justice. A principle of fundamental justice must be a legal principle about which there is a significant societal consensus, that is fundamental to the

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[86] *Philippines (Republic) v. Pacificador* (1993), 1993 CanLII 3381 (ONCA), 14 O.R. (3d) 321 (C.A.) at 337, leave to appeal refused, [1993] S.C.C.A. No. 415: Doherty J., speaking for the court, states that he "has no doubt that the equality rights created by s. 15 are principles of fundamental justice." [WCL BoA, Tab 8]; See also, *R. v. Oakes*, [1986] 1 S.C.R. 103 at para. 64, identifying principles of a free and democratic society including "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity." [WCL BoA, Tab 15]

[87] *Andrews*, at p. 185; *New Brunswick (Minister of Health & Community Services) v. G(J)*, [1999] 3 S.C.R. 46 at para. 112 (per L'Heureux-Dube J.) [WCL BoA, Tab 7].

[88] See, *G.(J.)* at para. 112; *R v. Darrach*, [2000] 2 S.C.R. 443 at para 31 [WCL BoA, Tab 11]; *R v. Mills*, [1999] 3 S.C.R. 668 at paras 6-64 [WCL BoA, Tab 14].

[89] *Ipeelee* at para. 68 (describing just sanctions as those that do not operate in a discriminatory manner).

way in which our legal system ought to fairly operate, and that is identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty and security of the person.[90] Substantive equality, entrenched in section 15, meets this test.

88. This Court has previously declined to decide the question of whether equality is a principle of fundamental justice.[91] It is respectfully submitted that this question can be answered and that is it particularly important to do so in the context of this case. The criminal justice system, including the correctional system, engages section 7 interests in a number of ways. However, not all prisoners are the same, and not all have the same experience within the criminal justice system; some are members of protected groups, and are disproportionately impacted by incarceration.

89. Cases such as this one show how the criminal justice system has staggeringly disparate effects on vulnerable protected groups. In this case, where vital interests are at stake and the evidence demonstrates that incarceration is experienced differently and disproportionately by prisoners whose identities bear multiple and compounding markers of historic disadvantage, the constitutionality of the infringements to life, liberty and security of the person cannot be addressed without recognition of these disparate impacts. Recognizing substantive equality as a principle of fundamental justice in this context is a crucial step in the process of fulfilling the constitutional guarantee of equality for particularly vulnerable populations.

Alternatively, substantive equality must inform and ground the section 7 analysis.

90. If this Honourable Court declines to address the question of substantive equality as a principle of fundamental justice, West Coast LEAF submits that substantive equality is nevertheless essential to understanding the section 7 harms in the present case. The Court's analysis of the constitutionality of the impugned laws and their administration

[90] *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74 at para. 113 [WCL BoA, Tab 13].
[91] *Carter v. Canada (Attorney General)*, 2012 BCSC 886 at para. 1290 [WCL BoA, Tab 2]; *Inglis* at paras. 495-499.

under section 7 should be rooted in advancing the core constitutional value of substantive equality.

91. In *G.(J.)*, Justice L'Heureux-Dube emphasized the particularly important role of equality in interpreting the scope and content of the section 7, regardless of whether a section 15 breach is established:

> Before turning to the analysis of the s. 7 rights implicated and the principles of fundamental justice, I would emphasize that this case also implicates issues of equality, guaranteed by s. 15 of the Charter. These equality interests should be considered in interpreting the scope and content of the interpretation of the rights guaranteed by s. 7. ... All *Charter* rights strengthen and support each other and s. 15 plays a particularly important role in that process. The interpretive lens of the equality guarantee should therefore influence the interpretation of other constitutional rights where applicable, and in my opinion, principles of equality, guaranteed by both s. 15 and s. 28 are a significant influence on interpreting the scope of protection offered by s. 7.[92]

92. West Coast LEAF submits that this Court's analysis of section 7 harms must have regard to the disparate and disproportionate impact of those harms on particular prisoners in order to truly appreciate the life, liberty and security interests engaged by the impugned laws and their administration.

III. Section 1 Submission

93. West Coast LEAF submits that, should breaches of the *Charter* be found, the Crown should be afforded only minimal deference in meeting its burden to justify those breaches.

94. Minimum deference is due in this case to the Crown's justification because of the serious nature of the harms, the particularly vulnerable and marginalized population experiencing those harms, the intersecting disadvantage and discrimination experienced by particular subpopulations, and the Crown's acknowledged obligation to curtail the use of administrative segregation, and its clear ability to take steps to do so. Where there are no

[92] *G.(J.)* at para. 112.

meaningful barriers to the Crown remedying severe and unconscionable constitutional breaches, deference to the Crown is not merited.

95. The analysis of the proportionality of the impugned laws and/or their administration to the serious harm and disadvantage experienced by prisoners in administrative segregation must proceed in line with a contextual inquiry which takes account of the complex, multiple and overlapping dimensions of disadvantage faced by federally sentenced prisoners who are women and Indigenous and/or mentally ill.

IV. Conclusion

96. West Coast LEAF respectfully submits that the impugned laws and/or their administration unjustifiably violate sections 7 and 15 of the *Charter*.

97. Administrative segregation as historically and currently practiced in Canadian prisons disproportionately harms and discriminates against some of the most marginalized and disenfranchised members of Canadian society – Indigenous women and women with mental illness serving custodial sentences of imprisonment in federal prisons.

98. The evidence establishes that the majority of women admitted to administrative segregation are Indigenous, experience mental illness, or both. The Correctional Service of Canada has taken some notice of the disproportionately adverse effects of imprisonment on women, Indigenous persons and those experiencing mental illness, and has taken some steps towards mitigating the harm that is caused by the impugned laws and their administration.

99. The Correctional Service's efforts at reform, however, are not enough. They do not make constitutionally compliant the impugned laws and practices that permit the confinement of persons for up to 22-23 hours a day, for an unlimited and unknown duration of time, without meaningful social contact, and with regard primarily to the interests of correctional authorities. The constitutional compliance of administrative segregation

cannot rest on individual exercises of discretion and on individual interpretations of screening tools and policy documents.

100. West Coast LEAF submits that there is no justifiable reason why the limited numbers of women incarcerated in isolated confinement today must be subjected to the harsh and punitive conditions of administrative segregation. In recognition of the high mental health needs, unique victimization and criminogenic profile of women offenders, large numbers of whom are Indigenous and/or experience mental illness, and the discriminatory and disproportionate harm experienced by this population, West Coast LEAF respectfully submits that constitutional compliance requires the prohibition of the practice of administrative segregation altogether for all federally sentenced women.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25th DAY OF AUGUST, 2017.

Rajwant Mangat

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