

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN

NICHOLAS DINARDO

Complainant

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

CORRECTIONAL SERVICES CANADA

Respondent

**MOTION FOR INTERESTED PARTY STATUS BY THE CANADIAN
ASSOCIATION OF ELIZABETH FRY SOCIETIES AND WEST COAST LEGAL
EDUCATION AND ACTION FUND ASSOCIATION**
(pursuant to Rule 27 of the *Canadian Human Rights Tribunal Rules of
Procedure, 2021*)

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TAB 1

Tribunal Files : T2747/12321, HR-DP-2868-22

CANADIAN HUMAN RIGHTS TRIBUNAL

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Respondent

**NOTICE OF MOTION FOR INTERESTED PARTY STATUS BY THE CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES AND WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION
(pursuant to Rule 27 of the *Canadian Human Rights Tribunal Rules of Procedure, 2021*)**

TAKE NOTICE that the proposed interested party – a coalition representing the Canadian Association of Elizabeth Fry Societies (“CAEFS”) and West Coast Legal Education and Action Fund Association (“West Coast LEAF”) (collectively herein, the “Coalition”) – hereby applies to the Canadian Human Rights Tribunal (the “Tribunal”), pursuant to Rule 27 of the *Canadian Human Rights Tribunal Rules of Procedure, 2021*, for an order granting it interested party status on the following terms:

- a. All parties shall provide the Coalition a copy of their respective Statements of Particulars and all disclosure in this Complaint;
- b. The Coalition may file a Statement of Particulars, cross-examine witnesses, and make written and oral submissions at the hearing; and,

- c. Any further or other order that the Tribunal may deem appropriate.

The Coalition propose that the motion be heard in writing, unless directed otherwise by the Tribunal.

AND FURTHER TAKE NOTICE that the motion shall be made on the following grounds:

- a) as evidenced in the affidavit of Emilie Coyle, CAEFS and its network, including its local member societies and the criminalized women and other persons of marginalized gender identities and expressions who drive its work, has a genuine and substantial interest in the issues raised in this Complaint and will be directly affected by its disposition, particularly by the Tribunal's decision regarding the incarceration of Two-Spirit people and other persons of marginalized gender identities and expressions in prisons that do not align with their gender identity and any barriers to accessing appropriate programming. CAEFS will bring a unique and relevant perspective to this Complaint, as a long-standing advocate for criminalized women and persons of marginalized gender identities and expressions in the prison system;
- b) as evidenced in the affidavit of Rajwant Mangat, West Coast LEAF has a demonstrable, ongoing interest in promoting the equality interests of all women and people who experience gender-based discrimination, including pursuing justice for persons who are criminalized and incarcerated. Due to its history of advocacy and public education work, West Coast LEAF is uniquely placed to assist the Tribunal in interpreting and applying substantive equality principles under the *Canadian Human Rights Act* ("CHRA") in a manner that takes account of the lived experiences of women and people who experience gender-based discrimination;
- c) If granted interested party status, the Coalition will bring a unique and relevant perspective to the proceedings. The Coalition has a demonstrable historical and current interest in the interpretation and application of the

CHRA to the lived experiences of criminalized women and persons of marginalized gender identities and expressions. Both Coalition members regularly provide advice to criminalized women and persons of marginalized gender identities and expressions on matters pertaining to human rights, both in and outside the federal prison system. Both Coalition members also have extensive experience advancing the rights of women and persons of marginalized gender identities and expressions under human rights law in legal proceedings, including proceedings before this Tribunal, the Supreme Court, and other courts and tribunals. The Coalition will draw on its collective, longstanding interest and expertise in the interpretation and application of equality law and non-discrimination, including the use of intersectional, substantive equality principles to assist the Tribunal;

- d) The Coalition will make submissions that are different from those of the other parties in the proceeding. Specifically, if granted interested party status, the Coalition will submit that:
- i. Human rights law must meaningfully account for the lived experiences of those who fall under its protection. This Tribunal has recognized this crucial point on several occasions. In the context of incarcerated Two-Spirit people and other persons of marginalized gender identities and expressions, this demands a robust and intersectional approach to the unique and complex nature of discrimination faced by these groups, both within the context of prison systems and in Canadian society more broadly;
 - ii. The interpretive approach to the *CHRA* must recognize the full range of harm experienced by persons of marginalized gender identities and expressions. In addition to misogyny, persons of marginalized gender identities and expressions experience further forms of discrimination such as transphobia and transmisogyny. The prison system itself is harmful to all persons, including individuals who fall within the gender binary; for persons of marginalized gender identities and expressions,

however, the harm experienced is both compounded and unique. These distinct and exacerbated harms flow from the increased societal vulnerability of persons of marginalized gender identities and expressions, which are heightened within prisons, and because an approach to prison systems that is not inclusive of the experiences, needs, and circumstances of persons of marginalized gender identities and expressions ignores and compounds the harms these individuals experience;

- iii. The prison system fails to properly accommodate people of marginalized gender identities and expressions. The Respondent's continued use of a prison system that is not inclusive of the experiences, needs, and circumstances of people of marginalized gender identities and expressions reinforces systemic inequalities and barriers which compound their disadvantage. As such, Two-Spirit persons and other persons of marginalized gender identities and expressions are regarded as "misfits" or as problems to be solved within the prison system, rather than recognizing how the binary structure of prison excludes Two-Spirit persons and other persons of marginalized gender identities and expressions and contributes to their marginalization;
- iv. In addition to the mental, physical, and spiritual harm caused by incarceration more broadly, the Respondent's rigid, binary approach to housing and programming excludes persons of marginalized gender identities and expressions thereby creating and exacerbating unique and serious harms by preventing these individuals from safely and fully expressing their gender identities; and,
- v. The Respondent's reliance on the needs and circumstances of cisgender women as justification for its actions, practices and policies is, itself, a product of a prison system based on a gender binary, which excludes and fails to consider or address the real needs and

circumstances of people of marginalized gender identities and expressions, including but not limited to both women and Two-Spirit people.

- e) The Coalition is committed to working with the parties and the Tribunal to ensure the expeditiousness of these proceedings; and,
- f) Such further and other grounds as counsel may advise and the Tribunal may permit.

AND FURTHER TAKE NOTICE that the following documents will be referred to in support of the said motion:

- a) the Affidavit of Emilie Coyle, affirmed July 14, 2023, and;
- b) the Affidavit of Rajwant Mangat, affirmed August 2, 2023, and;
- c) such further and other material as counsel may advise and this Tribunal may permit.

Dated at Ottawa, Ontario, and Vancouver, British Columbia, this 2nd day of August, 2023



Per: Humera Jabir

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Counsel for the Proposed Interested
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TAB 2

Tribunal Files : T2747/12321, HR-DP-2868-22

CANADIAN HUMAN RIGHTS TRIBUNAL

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CANADIAN HUMAN RIGHTS COMMISSION

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CORRECTIONAL SERVICES CANADA

Respondent

AFFIDAVIT OF EMILIE COYLE

I, Emilie Coyle, of the City of Ottawa, in the Province of Ontario, AFFIRM THAT:

1. I have been employed with the proposed interested party, Canadian Association of Elizabeth Fry Societies ("CAEFS"), as Executive Director since January 2020. On the basis of this experience and my responsibilities in this position, I have knowledge of the matters deposed to herein. Where my knowledge is based on information and belief, I have so stated the basis of such information and belief.
2. The present Complaint alleges that the Respondent discriminated against the Complainant, Nicholas Dinardo ("Mx. Dinardo"), in the provision of services while federally-sentenced and failed to provide them with a harassment free environment on the grounds of disability, race, colour, national or ethnic origin, gender identity or expression and religion, contrary to section 5 and section 14 of the *Canadian Human Rights Act*.
3. In particular, the Complainant alleges that the Respondent has: i) held them inappropriately in solitary confinement; ii) denied them adequate mental health

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services and labelled them manipulative; iii) used excessive force; iv) denied them the right to live freely and safely in their identity as Two-Spirit and failed to respect their individualized protocol; v) failed to maintain their confidentiality; vi) failed to provide a harassment and violence-free environment; vii) denied them access to a women's institution, whilst continuing to transfer them to maximum-security institutions for men; viii) denied them access to appropriate programming; and ix) failed to provide them with appropriate access to religious practices.

4. CAEFS has significant expertise and a demonstrable historical and current interest in the interpretation and application of the *CHRA* to the lived experiences of criminalized women, Two-Spirit persons, and other people of marginalized gender identities and expressions. It seeks leave to intervene as an interested party, in coalition with West Coast LEAF, on this basis.

The Proposed Interested Party

5. Founded in 1978, CAEFS is a federation of 22 autonomous Elizabeth Fry Societies, which are local community-based non-profit agencies. It is governed by a Board of Directors comprised of a maximum of 18 members, including a president, an Indigenous representative, and three Board members elected by the membership in each of the five regions in Canada.

6. CAEFS is dedicated to raising awareness about the issues faces by criminalized women and people of marginalized gender identities and expressions, advocating for legislative and administrative reform in the criminal justice system, and providing public education on criminal justice issues. Some local member Elizabeth Fry Societies provide direct services to federally-sentenced women under contract with the Correctional Service of Canada ("CSC"). Additionally, CAEFS engages, trains, and supports Regional Advocates who are mandated to visit every federal prison designated for women at least once every month and to meet with the women and other people of marginalized gender identities and expressions who are incarcerated therein, to meet with any organized committees, and then to meet

with each prison's senior management team as part of the monitoring of conditions of confinement.

7. CAEFS's network also includes the criminalized women and other persons of marginalized gender identities and expressions who are involved in its work in a number of different capacities, including as part of our national office team, board, advocates, and as executive directors of local Elizabeth Fry Societies.

8. CAEFS has a long history of advocating and supporting the rights of criminalized women and other persons of marginalized gender identities and expressions in a wide range of legal and administrative fora, including both as a party and as an intervener before this Tribunal, CSC's Offender Complaint and Grievance Process, and many other courts and tribunals.¹

9. Of particular note to the present Complaint, CAEFS is the Complainant in two ongoing systemic human rights complaints before this Tribunal, which alleges that CSC discriminates against women in the federal prison system based on sex, race, national or ethnic origin, religion and disability, as well as through the intersection of multiple grounds.² Recently, in its March 24, 2023 Amended Statement of Particulars, CSC has taken the position that the outcome of the present case will have direct implications for the hearing and decision in CAEFS' pending matters before this Tribunal. Attached hereto and marked as **Exhibit "A"** is the relevant excerpt from CSC's March 24, 2023 Amended Statement of Particulars.

10. Over the years, CAEFS has made numerous submissions to Parliamentary committees on issues affecting federally sentenced women and other persons of marginalized gender identities and expressions. It has also been invited to

¹ *Canadian Association of Elizabeth Fry Societies v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 470; *Beaudry v The Canadian Assn. of Elizabeth Fry Societies*, 1997 CanLII 514 (ON CA); *Canadian Association of Elizabeth Fry Societies v Office of the Chief Coroner*, 2016 SKQB 109; *Smith v Porter*, 2011 ONSC 2744 and 2011 ONSC 2593; *Dorsey v Canada (Attorney General)*, 2023 ONCA 64; *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 177; *Mission Institution v Khela*, 2014 SCC 24; *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*, 2017 ONSC 4191; *R v Neve*, 1996 ABCA 242; *R v Ryan*, 2013 SCC 3

² Files: T1848/7812-T1850/8012

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participate in consultations with CSC, the National Parole Board, and the Department of Justice. CAEFS has been granted standing at countless inquests and inquiries, and representatives have also provided expert evidence in inquests, as well as such other proceedings as transfer and sentencing hearings.

11. CAEFS has extensive experience advancing the equality rights of women and other persons of marginalized gender identities and expressions whose behaviour is, or is sought to be, criminalized, and has developed a depth of knowledge concerning the interactions of such individuals with the legal system and particularly with the federal prison system.

12. Through its litigation and advocacy work, CAEFS has sought to advance equality rights jurisprudence and to contribute to the development of an approach to interpreting human rights legislation that meaningfully accounts for the lived experience of incarcerated and criminalized people, in order to address the persistent ways in which women and other persons of marginalized gender identities and expressions are impacted by criminalization are denied humanity and excluded from community.

CAEFS's interest in the experiences of incarceration of gender-diverse individuals

13. CAEFS has an active, concrete, and distinctive interest in the matters at issue in this Complaint. CAEFS is uniquely positioned to provide the Tribunal with insights based on its work with criminalized women and other persons of marginalized gender identities and expressions who are directly impacted by the approach to interpreting and applying the *CHRA* to situations involving the incarceration of Two-Spirit people and other persons of marginalized gender identities and expressions.

14. In its 2018-2019 report, the Office of the Correctional Investigator reported that incarcerated persons of marginalized gender identities and expressions individuals, such as transgender individuals, are vulnerable in prisons as they are frequently subjected to violence, bullying, harassment and sexual assault, particularly when their institutional placement does not align with their gender

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identity or gender expression.³ The report noted that nearly two-thirds (63%) of individuals requiring accommodation based on consideration of gender identity and expression were currently residing within male prisons.⁴ As a result of the increased risk of harm, transgender persons in prison are often placed in segregation-like conditions for their own safety, thereby restricting their movement and access to placement and programming.⁵ In addition to the above, the investigator noted that there remained a “considerable” amount of homophobia and transphobia among staff and inmates.⁶

15. While incarcerated in federal prisons, the human rights of individuals are governed by the *CHRA*. As such, criminalized Two-Spirit people and other persons of marginalized gender identities and expressions will be directly and materially affected by any decision that considers whether the Respondent’s denial of appropriate services and programming, and the systemic exclusion and failure to consider the needs and circumstances of persons of marginalized gender identities and expressions, violates their right to be free from discrimination and harassment under the *CHRA*.

16. As part of its work advancing the rights of federally sentenced women and other persons of marginalized gender identities and expressions, CAEFS is committed to supporting and advancing equality principles, as enshrined in the *CHRA*. Through its litigation and advocacy work, CAEFS has played an active role in promoting an understanding of equality that recognizes the historical disadvantage and discrimination experienced by criminalized women and other persons of marginalized gender identities and expressions, as well as the need to recognize the barriers and marginalization they face.

³ Office of the Correctional Investigator, Annual Report 2018-2019 (June 24, 2019), online: <https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2018-2019#s7:~:text=It%20is%20well,programming%20and%20employment.>

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Office of the Correctional Investigator, Annual Report 2019-2020 (June 26, 2020), online: <https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2019-2020#:~:text=there%20is%20a%20considerable%20amount%20of%20transphobia%20and%20homophobia%20among%20inmates%20and%20some%20staff.>

17. Similarly, CAEFS seeks an order granting it interested party status in the current case in order to provide assistance to the Tribunal in understanding the intersecting grounds of discrimination experienced by criminalized and incarcerated Two-Spirit people and other persons of marginalized gender identities and expressions. This perspective will assist the Tribunal in adjudicating the complaint before it by providing an important and relevant context for interpreting the grounds of discrimination raised in this complaint.

The Coalition's Proposed Intervention

18. Broadly speaking, the Coalition proposes to make submissions on the following issues:

- a) Human rights law must meaningfully account for the lived experiences of those who fall under its protection. This Tribunal has recognized this crucial point on several occasions. In the context of incarcerated Two-Spirit people and other persons of marginalized gender identities and expressions, this demands a robust and intersectional approach to the unique and complex nature of discrimination faced by these groups, both within the context of prison systems and in Canadian society more broadly;
- b) The interpretive approach to the *CHRA* must recognize the full range of harm experienced by persons of marginalized gender identities and expressions. In addition to misogyny, persons of marginalized gender identities and expressions experience further forms of discrimination such as transphobia and transmisogyny. The prison system itself is harmful to all persons, including individuals who fall within the gender binary; for persons of marginalized gender identities and expressions, however, the harm experienced is both compounded and unique. These distinct and exacerbated harms flow from the increased societal vulnerability of persons of marginalized gender identities and expressions, which are heightened within prisons, and because an approach to prison systems that is not inclusive of the experiences, needs, and circumstances of persons of marginalized gender

- 7 -


identities and expressions ignores and compounds the harms these individuals experience;

- c) The prison system fails to properly accommodate people of marginalized gender identities and expressions. The Respondent's continued use of a prison system that is not inclusive of the experiences, needs, and circumstances of people of marginalized gender identities and expressions reinforces systemic inequalities and barriers which compound their disadvantage. As such, Two-Spirit persons and other persons of marginalized gender identities and expressions are regarded as "misfits" or as problems to be solved within the prison system, rather than recognizing how the binary structure of prison excludes Two-Spirit persons and other persons of marginalized gender identities and expressions and contributes to their marginalization;
 - d) In addition to the mental, physical, and spiritual harm caused by incarceration more broadly, the Respondent's rigid, binary approach to housing and programming excludes persons of marginalized gender identities and expressions thereby creating and exacerbating unique and serious harms by preventing these individuals from safely and fully expressing their gender identities; and,
 - e) The Respondent's reliance on the needs and circumstances of cisgender women as justification for its actions, practices and policies is, itself, a product of a prison system based on a gender binary, which excludes and fails to consider or address the real needs and circumstances of people of marginalized gender identities and expressions, including but not limited to both women and Two-Spirit people.
19. If granted leave, the Coalition will expand upon these submissions.
20. I can confirm that CAEFS is committed to confine its participation to matters arising out of its perspective and experiences. The Coalition is committed to

working with the parties to ensure that its participation does not unduly delay or complicate the proceedings and does not result in repetition. It will not detract from the particular issues at stake between the parties to the Complaint.

21. I make this affidavit in support of an application for interested party status in this Complaint and for no other improper purpose.

AFFIRMED REMOTELY BEFORE ME)
by Emilie Coyle, stated as being)
located in the City of Ottawa,)
before me at the City of Ottawa,)
this 14th day of July 2023 in)
Accordance with O Reg 431/20,)
Administering Oath or Declaration)
Remotely.)

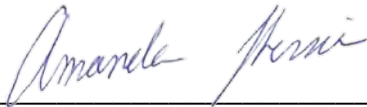


A Commissioner, etc.

Signature: Emilie Coyle
Emilie Coyle (Jul 14, 2023 10:40 EDT)
Email: ecoyle@caefs.ca

Emilie Coyle

This is **Exhibit "A"** referred to in the affidavit of Emilie Coyle affirmed remotely before me, this 14th day of July, 2023 in accordance with O Reg 431/20, *Administering Oath or Declaration Remotely*.

A handwritten signature in blue ink that reads "Amanda Perri". The signature is written in a cursive style and is positioned above a horizontal line.

A Commissioner, etc.

File Nos. T1848/7812 and T1849/7912

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CORRECTIONAL SERVICE OF CANADA

Respondent

- and -

NATIVE WOMEN'S ASSOCIATION OF CANADA

Interested Party

**RESPONDENT'S AMENDED RESPONSE TO STATEMENTS OF PARTICULARS
MARCH 24, 2023**

Counsel for the Respondent:

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
British Columbia Region
National Litigation Sector
840 Howe Street, Suite 900
Vancouver, BC V6Z 2S9

C. Litigation Context: Overlapping Complaints

47. As matters stand, these complaints, as set out in CAEFS' and the Commission's most recent Statements of Particulars, overlap with the following pending human rights complaints, that have also been referred to the Tribunal for inquiry:

1. *West Coast Prison Justice Society v Correctional Service of Canada*, CHRT File No. T2462/1920

In this proceeding, West Coast Prison Justice Society (WCPJS) brings what is described in WCPJS's statement of particulars as a representative complaint on behalf of all offenders in CSC custody with mental disabilities,⁶ including women and Indigenous offenders. WCPJS's and the Commission's amended Statements of Particulars seek wide-ranging, systemic remedies against CSC including as regards the provision of mental health and correctional services. CSC filed its Respondent's Statement of Particulars on February 14, 2023, in which it denies the allegations of discrimination and opposes the remedies sought.

2. *Nicholas Dinardo v Correctional Service of Canada*, CHRT File Nos. T2747/12321; HR-DP-2868-22

In these joined proceedings, Mx. Dinardo alleges that CSC has treated them, and federal inmates with mental health disabilities generally, in an adverse differential manner and fails to accommodate them by, *inter alia*: (i) placing or maintaining inmates with mental health disabilities in higher levels of security; (ii) providing inadequate mental health care and treatment or access to therapeutic environments; (iii) placing inmates with mental health disabilities in SIUs and observation cells, which are alleged to be akin to solitary

⁶ West Coast Prison Justice Society's Statement of Particulars defines "mental disability" to include not only mental health disorders as defined in section 85 of the *Corrections and Conditional Release Act* [CCRA], but also a wide range of other disabilities (diagnosed or undiagnosed) including "trauma-related impairments and needs."

confinement; and (iv) failing to provide Indigenous inmates with culturally appropriate mental health care or other supports. CSC filed its respondent's statement of particulars on January 31, 2023. CSC denies the allegations of discrimination and opposes the remedies sought.

48. These potential overlaps raise risks of potentially conflicting findings and duplicative use of resources. The Respondent also remains concerned about the breadth and unmanageability of these overlapping complaints, including the within complaints.

D. Response to the Facts as Alleged: Introductory Comments

49. CSC denies the allegations of discrimination being made in these complaints. CAEFS, the Commission's and NWAC's statements of particulars provide an incomplete picture of federal women's institutions, and overlook important contextual factors and considerations that necessarily inform CSC policies and procedures as regards federal offenders in women's institutions.

50. In addition, as currently framed, the other parties' statements of particulars do not meaningfully identify the policies, practices or activities that they impugn, the alleged adverse impacts in any particular instance, or how CSC's policies, practices or activities have discriminated against any particular individual. Rather, the statements of particulars, especially that of the Commission, comprise a series of generalized assertions and decontextualized statistics. Taken at face value the complaints appear to encompass all aspects of federal women's institutions, including all aspects of security classification, mental health services, Indigenous culture and spirituality, rehabilitation and reintegration, programming, and living environments including the SIU.

51. CSC's primary position is that these complaints are overbroad and so diffuse as to fall outside the scope of the Tribunal's role under the *CHRA*. Further, to the extent CAEFS specifically impugns Management Protocol and segregation, these aspects of the complaints are moot, as both Management Protocol and segregation have long since ceased. In particular, Management Protocol was eliminated in 2011 following policy changes, and segregation was legislatively abolished in November 2019.

TAB 3

Tribunal Files : T2747/12321, HR-DP-2868-22

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Commission

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CORRECTIONAL SERVICES CANADA

Respondent

AFFIDAVIT OF RAJWANT MANGAT

I, RAJWANT MANGAT, of the City of Vancouver, in the Province of British Columbia, AFFIRM THAT:

1. I have been employed with the proposed interested party, West Coast Legal Education and Action Fund Association ("West Coast LEAF") since March 2016, first as the organization's Director of Litigation and then, as of September 3, 2019, as its Executive Director. Based on this experience and my responsibilities in this position, I have knowledge of the matters deposed to herein. Where my knowledge is based on information and belief, I have so stated the basis of such information and belief.
2. The present Complaint alleges that the Respondent discriminated against the Complainant, Nicholas Dinardo ("Mx. Dinardo"), in the provision of services while federally sentenced and failed to provide them with a harassment free environment on the grounds of disability, race, colour, national or ethnic origin, gender identity or expression and religion, contrary to ss. 5 and 14 of the *Canadian Human Rights Act* ("CHRA").
3. In particular, the Complainant alleges that the Respondent has: i) held them inappropriately in solitary confinement; ii) denied them adequate mental health

services and trivialized their self-harm; iii) used excessive force; iv) denied them the right to live freely and safely in their identity as Two-Spirit and failed to respect their individualized protocol; v) failed to maintain their confidentiality; vi) failed to provide a harassment and violence-free environment; vii) denied them access to a women's institution, whilst continuing to transfer them to maximum-security institutions for men; viii) denied them access to appropriate programming; and ix) failed to provide them with appropriate access to religious practices.

4. West Coast LEAF has a demonstrable, ongoing interest in promoting justice and substantive equality for all women and people who experience gender-based discrimination, including pursuing justice for persons who are criminalized and incarcerated. In coalition with the Canadian Association of Elizabeth Fry Societies ("CAEFS"), West Coast LEAF seeks interested party status to participate in this matter on the basis of its longstanding interest and expertise in the interpretation and application of equality law and non-discrimination, including the use of intersectional, substantive equality principles to understand and address the circumstances and needs of people who are criminalized and incarcerated.

The Proposed Interested Party

5. West Coast LEAF is a non-profit society incorporated in British Columbia and registered federally as a charity. West Coast LEAF works to deepen justice and substantive equality for women and people who experience gender-based discrimination in British Columbia. While focused on issues arising in British Columbia, West Coast LEAF also acts in matters of national significance that are important to the equality and human rights of people in British Columbia. Working in collaboration with community, West Coast LEAF uses litigation, law reform, and public legal education to dismantle gender-based discrimination and move towards gender justice by advancing access to justice, healthcare and economic security, promoting freedom from gender-based violence, supporting the rights of people who are criminalized, and supporting child and family wellbeing.

6. West Coast LEAF was created in April 1985 when the equality provisions of the *Charter* came into force. From its founding until 2014, West Coast LEAF operated as an affiliate of Women's Legal Education and Action Fund ("LEAF") and much of its litigation work was carried out under the auspices of LEAF. Beginning in 2009, West Coast LEAF began to carry out litigation in its own name.

7. West Coast LEAF is a member-based organization. As of March 2023, West Coast LEAF had approximately 470 members. At present, West Coast LEAF's work is carried out by 14 staff members, and benefits from the services of approximately 115 volunteers.

8. West Coast LEAF acts to promote the equality interests of all women and people who are marginalized on the basis of gender in British Columbia, including where disadvantage is experienced along multiple and intersecting axes of marginalization such as race, national origin, immigration status, Indigeneity, sexual orientation, gender identity, gender expression, family or marital status, disability or ability, age, socio-economic status or any other personal characteristic. It is committed to working in consultation and collaboration with other equality-seeking groups to ensure that West Coast LEAF's legal positions, law reform activities, and educational programming are informed by, and inclusive of, the diversity of human experiences.

9. Through litigation, West Coast LEAF has contributed to the development of equality rights jurisprudence and the understanding of substantive equality in Canada, both through specific challenges to discriminatory or unconstitutional laws or government actions, as well as in matters where the adverse effects of laws or government actions may compromise the realization of substantive equality.

10. West Coast LEAF's law reform program consists of community-based research and analysis, drafting policy recommendations, and making submissions to decision-makers to ensure that legislation, practices, and policies comply with guarantees of equality for all women and people experiencing gender-based

discrimination pursuant to the *Charter*, human rights legislation, and relevant international instruments to which Canada is a signatory.

11. West Coast LEAF's public legal education program aims to help residents of British Columbia understand and access their equality rights, and to think critically about the law as it affects them. West Coast LEAF's public legal education work complements and supports its litigation and law reform activities, based on the premise that the first step toward asserting rights is understanding them.

12. West Coast LEAF has intervened in cases before multiple courts and tribunals, including before the Supreme Court of Canada, particularly on matters involving the interpretation and application of equality law principles. To date, West Coast LEAF has intervened before the Supreme Court of Canada on 17 occasions.¹ West Coast LEAF also extensive experience intervening before the BC Court of

¹ *R v Tsang*, SCC File No. 40447 (appeal heard May 18, 2023; judgment reserved); *Glen Hansman v Barry Neufeld*, 2023 SCC 14; *Canadian Council for Refugees, et al v Canada (Citizenship and Immigration), et al*, 2023 SCC 17; *Ross McKenzie Kirkpatrick v Her Majesty the Queen*, 2022 SCC 33; *AS v Her Majesty the Queen, et al.*, 2022 SCC 28 and *Her Majesty the Queen v JJ*, 2022 SCC 28; *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27; *Barendregt v Grebliunas*, 2022 SCC 22; *Colucci v Colucci*, 2021 SCC 24, *Michel v Graydon*, 2020 SCC 24; *Bent v Platnick*, 2020 SCC 23, and *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22; *Law Society of British Columbia v Trinity Western University and Volkenant*, 2018 SCC 32; *Schrenk v British Columbia Human Rights Tribunal*, 2017 SCC 62; *R v Lloyd*, 2016 SCC 13; *British Columbia Teachers' Federation v British Columbia Public School Employers' Association*, 2014 SCC 70; *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59; *British Columbia (Ministry of Education) v Moore*, 2012 SCC 61; *Downtown Eastside Sex Workers United Against Violence v Canada*, 2012 SCC 45.

Appeal and the BC Supreme Court.² On two occasions, West Coast LEAF has participated as an interested party at the BC Human Rights Tribunal.³

13. West Coast LEAF has also been granted participant status in several inquiries engaging gender equality. In August 2017, West Coast LEAF was granted standing to participate in the Part II (institutional) and Part III (expert) hearings of the National Inquiry into Missing and Murdered Indigenous Women and Girls (final report released June 2019). West Coast LEAF actively participated in the National Inquiry by contributing its knowledge of how institutions and systems in British Columbia perpetuate stereotypes about Indigenous women, girls and Two-Spirit people, and undermine their rights and safety. In 2011, West Coast LEAF was granted standing to participate in British Columbia's Missing Women Commission of Inquiry headed by Hon. Wally Oppal, K.C. ("Oppal Inquiry"), which completed its work in November 2012. West Coast LEAF has also intervened (as part of a coalition of six organizations) in an inquiry before the Canadian Judicial Council: *In the Matter of an Inquiry Pursuant to Section 63(1) of the Judges Act Regarding the Honourable Justice Robin Camp*.

14. Apart from its intervention work, West Coast LEAF is currently litigating a constitutional challenge to BC's family law legal aid regime before the BC Supreme Court: *Single Mothers Alliance of BC v British Columbia* (BCSC File No. SI 733843) (Notice of Civil Claim filed April 26, 2017). This case is brought pursuant to ss. 7 and 15(1) of the *Charter*, as well as s. 96 of the *Constitution Act*.

² *TL v British Columbia (Attorney General) et al.*, 2023 BCCA 167 and 2021 BCSC 2203; *R v Ellis*, 2022 BCCA 278; *Council of Canadians with Disabilities v British Columbia (Attorney General)*, 2020 BCCA 241; *AB v CD*, 2020 BCCA 11; *British Columbia Civil Liberties Association and John Howard Society of Canada v Canada (Attorney General)*, 2019 BCCA 228 and 2018 BCSC 62; *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*, 2018 BCCA 132 and 2015 BCSC 534; *Denton v Workers Compensation Board*, 2017 BCCA 403; *Law Society of British Columbia v Trinity Western University and Volkenant*, 2016 BCCA 423 and 2015 BCSC 2326; *Vilardell v Dunham*, 2013 BCCA 65; *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309; *Friedmann v MacGarvie*, 2012 BCCA 445; *Reference re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588; *Downtown Eastside Sex Workers United Against Violence v Canada*, 2010 BCCA 439.

³ *RR v Vancouver Aboriginal Child and Family Services Society*, 2022 BCHRT 116; *Oger v Whatcott*, 2019 BCHRT 58.

West Coast LEAF has a clear and demonstrated interest in the subject matter of this Complaint

15. West Coast LEAF is uniquely positioned to assist the Tribunal in its role of interpreting and applying the principles of substantive equality and non-discrimination engaged in this complaint and enshrined in the *CHRA*.

16. West Coast LEAF has extensive experience and expertise in working to ensure that human rights law develops in accordance with principles of substantive equality in cases where discrimination on the basis of Indigenous identity, racialization, gender identity, and (dis)ability are at issue. West Coast LEAF's past intervention work includes involvement in cases where the principles of substantive equality and non-discrimination were adjudicated in the context of criminalization and incarceration. West Coast LEAF has held intervener or interested party status in several cases engaging subject matter related to the issues raised in the Complaint, including:

- a) West Coast LEAF intervened in *Glen Hansman v Barry Neufeld*, 2023 SCC 14, on the issue of the proper interpretation and application of BC's *Protection of Public Participation Act* ("PPPA") where there is the possibility that an expression or claim may provoke hostility against an identifiably vulnerable group in society or a group protected by s. 15 of the *Charter* or human rights legislation. In this case, the expressions at issue took place in the context of Mr. Hansman speaking out against Mr. Neufeld's derogatory remarks about 2SLGBTQI+ people and attacks on an educational resource about sexual orientation and gender identity;
- b) West Coast LEAF intervened in *RR v Vancouver Aboriginal Child and Family Services Society*, 2022 BCHRT 116, on the issue of systemic discrimination against Indigenous families, and, in particular, the experiences of Indigenous mothers with (dis)abilities in the child welfare system, the social context of the human rights complaint, and the protection from discrimination under the *Human Rights Code* of BC. West Coast LEAF has also been granted intervener status in the judicial review of the Tribunal's decision;
- c) West Coast LEAF intervened in *R v Ellis*, 2022 BCCA 278, a sentencing appeal, to make submissions on, among other things, the gendered impacts of incarceration and specific impacts on Indigenous people;
- d) West Coast LEAF intervened in *AB v CD*, 2020 BCCA 11, which concerned a family law dispute between AB, a 14-year-old transgender boy, and his

father, CD, to argue in favour of a broad and inclusive interpretation of family violence and a robust contextual analysis of the best interests of the child in accordance with a child's *Charter*-protected rights and interests;

- e) West Coast LEAF intervened in *Oger v Whatcott*, 2019 BCHRT 58, on the issue of interpreting the BC *Human Rights Code's* protection from discriminatory publication in conformity with principles of substantive equality and non-discrimination protected by the *Charter*, the *Code*, and relevant international human rights instruments and norms;
- f) In 2018, West Coast LEAF and Native Women's Association of Canada ("NWAC") intervened before the British Columbia Court of Appeal in *British Columbia Civil Liberties Association and John Howard Society of Canada v Canada (Attorney General)*, 2019 BCCA 228, a constitutional challenge to Canada's administrative segregation regime in federal prisons. West Coast LEAF and NWAC made submissions about the unique and disproportionately harmful experiences of Indigenous women and women with mental health disabilities in administrative segregation. West Coast LEAF had previously intervened at the trial level in *British Columbia Civil Liberties Association and John Howard Society of Canada v Canada (Attorney General)*, 2018 BCSC 62;
- g) West Coast LEAF intervened in *Trinity Western University v Law Society of British Columbia* at the Supreme Court of Canada (2018 SCC 32), as well as before the BC Court of Appeal (2016 BCCA 423) and BC Supreme Court (2015 BCSC 2326), to argue that the university's Community Covenant violates the *Charter's* equality provisions and discriminates on the basis of sex, sexual orientation and marital status;
- h) West Coast LEAF intervened at the Supreme Court of Canada in *BC Human Rights Tribunal v Schrenk*, 2017 SCC 62, a case concerning the scope of the BC Human Rights Tribunal's jurisdiction over complaints about discrimination regarding employment to argue that the approach to discrimination must reflect the reality of systemic, intersectional disadvantage arising from characteristics including an individual's sex, race, religion, ancestry, sexual orientation and/or (dis)ability;
- i) West Coast LEAF intervened in *R v Lloyd*, 2016 SCC 13 to argue that the imposition of the mandatory minimum sentence at issue in the case would have disproportionately negative impacts on women and to argue that criminal sentencing must be individualized and contextualized in order to promote the principles of substantive equality in the criminal justice system and the equality guarantee in s. 15 of the *Charter*;
- j) West Coast LEAF intervened in *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, a case challenging the cancellation of the mother-baby program at the Alouette Correctional Centre for Women, to

argue that the government's action infringed the equality and security of the person interests of incarcerated women and their babies pursuant to ss. 7 and 15 of the *Charter*;

- k) West Coast LEAF intervened in *Moore v British Columbia (Education)*, 2012 SCC 61, which concerned discrimination against severely learning-disabled students, to argue that importing the requirements of s. 15 *Charter* jurisprudence into the *prima facie* test for discrimination in the BC *Human Rights Code* would increase the burden on equality claimants, contrary to the purposes of human rights law.

17. West Coast LEAF's law reform work has also sought to ensure the criminal justice system in Canada is consistent with substantive equality for criminalized women and people of marginalized genders. Its work in this area includes the following activities:

- a) Since 2009, West Coast LEAF has published annual report cards which measure BC's progress in advancing gender equality for women and, since 2018, for other people of marginalized genders. These report cards have included sections on gender equality in the criminal justice system, including sentencing, prisons, and reintegration, and rehabilitation. The 2019/2020 Gender Equality Report Card highlighted the specific experiences of trans and non-binary prisoners;
- b) In 2017, West Coast LEAF, in coalition with the British Columbia Civil Liberties Association, Pivot Legal Society, and Community Legal Assistance Society, published the Report "Justice Reform for BC" with recommendations for comprehensive reform to BC's justice system in 10 main areas of law and policy, including but not limited to policing, access to justice, corrections, human rights, and mental illness and addiction;
- c) In 2017, West Coast LEAF made submissions before the House of Commons Standing Committee on the Status of Women concerning the Committee's study on Indigenous Women in the Federal Justice and Correctional Systems. West Coast LEAF's submissions addressed the need to apply a human rights framework to understanding the gendered impacts of criminalization and incarceration of Indigenous people;
- d) In 2014, West Coast LEAF wrote to Senators from British Columbia regarding *Bill C-279: An Act to amend the Criminal Code and the Canada Human Rights Act (Gender Identity)* and urged Senators to pass the Bill without delay in order to protect transgender people in Canada from hate crimes under the *Criminal Code* and assure their right to equality under the *CHRA* because members of the trans community in Canada experience extreme levels of violence, stigma and discrimination;

- e) In 2012, West Coast LEAF and LEAF prepared submissions on Bill C-10: *The Safe Streets and Communities Act*, calling on the federal government to delay passage of the omnibus crime bill pending consideration of its impacts on women and Indigenous persons, and with a view to its consistency with the *Charter*.

18. As shown in the work described above, West Coast LEAF has developed a demonstrable expertise and interest in the subject matter of the Complaint and in ensuring that principles of substantive equality are reflected in the interpretation and application of the *Charter* and human rights legislation in Canada including the *CHRA*.

The Coalition's Proposed Intervention

19. The Coalition proposes to make submissions on the following issues:
- a) Human rights law must meaningfully account for the lived experiences of those who fall under its protection. This Tribunal has recognized this crucial point on several occasions. In the context of incarcerated Two-Spirit people and other persons of marginalized gender identities and expressions, this demands a robust and intersectional approach to the unique and complex nature of discrimination faced by these groups, both within the context of prison systems and in Canadian society more broadly;
 - b) The interpretive approach to the *CHRA* must recognize the full range of harm experienced by persons of marginalized gender identities and expressions. In addition to misogyny, persons of marginalized gender identities and expressions experience further forms of discrimination such as transphobia and transmisogyny. The prison system itself is harmful to all persons, including individuals who fall within the gender binary; for persons of marginalized gender identities and expressions, however, the harm experienced is both compounded and unique. These distinct and exacerbated harms flow from the increased societal vulnerability of persons of marginalized gender identities and expressions, which are heightened within prisons, and because an approach to prison systems that is not

inclusive of the experiences, needs, and circumstances of persons of marginalized gender identities and expressions ignores and compounds the harms these individuals experience;

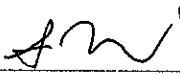
- c) The prison system fails to properly accommodate people of marginalized gender identities and expressions. The Respondent's continued use of a prison system that is not inclusive of the experiences, needs, and circumstances of people of marginalized gender identities and expressions reinforces systemic inequalities and barriers which compound their disadvantage. As such, Two-Spirit persons and other persons of marginalized gender identities and expressions are regarded as "misfits" or as problems to be solved within the prison system, rather than recognizing how the binary structure of prison excludes Two-Spirit persons and other persons of marginalized gender identities and expressions and contributes to their marginalization;
- d) In addition to the mental, physical, and spiritual harm caused by incarceration more broadly, the Respondent's rigid, binary approach to housing and programming excludes persons of marginalized gender identities and expressions thereby creating and exacerbating unique and serious harms by preventing these individuals from safely and fully expressing their gender identities; and,
- e) The Respondent's reliance on the needs and circumstances of cisgender women as justification for its actions, practices and policies is, itself, a product of a prison system based on a gender binary, which excludes and fails to consider or address the real needs and circumstances of people of marginalized gender identities and expressions, including but not limited to both women and Two-Spirit people.

20. If granted leave, the Coalition will expand upon the above submissions.

21. I can confirm that West Coast LEAF is committed to confine its participation to matters arising out of its perspective and experiences. The Coalition is committed to collaborating with the parties to ensure that its participation does not unduly delay or complicate the proceedings and does not result in repetition. It will not expand the issues beyond those identified by the parties to the Complaint.

22. I make this affidavit in support of an application for leave to intervene in this Complaint and for no other improper purpose.

AFFIRMED REMOTELY BEFORE ME)
by Rajwant Mangat, stated as being)
located in the City of Vancouver,)
before me at the City of Ottawa,)
this 2nd Day of August, 2023 in)
Accordance with O Reg 431/20,)
Administering Oath or Declaration)
Remotely.)



A Commissioner, etc.



Rajwant Mangat

TAB 4

Tribunal Files : T2747/12321, HR-DP-2868-22

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN

NICHOLAS DINARDO

Complainant

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

CORRECTIONAL SERVICES CANADA

Respondent

**MEMORANDUM OF ARGUMENT OF THE PROPOSED INTERESTED PARTY, THE
CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES AND WEST COAST
LEGAL EDUCATION AND ACTION FUND ASSOCIATION
(pursuant to Rule 27 of the *Canadian Human Rights Tribunal Rules of
Procedure, 2021*)**

Part I - Statement of Facts

Overview

1. A coalition on behalf of the Canadian Association of Elizabeth Fry Societies ("CAEFS") and West Coast Legal Education and Action Fund Association ("West Coast LEAF") – herein, the Coalition – brings this motion seeking interested party status under section 50 of the *Canadian Human Rights Act* and Rule 27 of the *Canadian Human Rights Tribunal Rules of Procedure, 2021*.

Canadian Human Rights Act, [RSC 1985, c H-6](#) at section 50 ["CHRA"];
Canadian Human Rights Tribunal Rules of Procedure, 2021, [SOR/2021-137](#)
["Rules"], Rule 27

2. The present Complaint will require the Tribunal to consider the interpretation of the *CHRA* in relation to the experiences of incarcerated Two-Spirit people and other persons of marginalized gender identities and expressions. The Coalition's interests will be materially affected by the Tribunal's decision in this matter.

Further, the Coalition has significant and unique expertise in the matter before the Tribunal. It therefore makes this motion to be granted interested party status and asks that it be allowed to make a meaningful contribution to this case by filing a Statement of Particulars, cross-examining witnesses, and making written and oral submissions at the hearing. The Coalition does not propose to call its own witnesses.

3. If granted Interested Party status, the Coalition will provide submissions which address the following themes: first, the Tribunal must adopt an intersectional approach when addressing discrimination faced by individuals with marginalized gender identities, including women, transgender, Two-Spirit, and other people of marginalized gender identities and expressions; second, the Tribunal must recognize that the protection of transgender, Two-Spirit, and other people of marginalized gender identities and expressions does not result in the erosion of safety for incarcerated cisgender women; and third, the degree to which the federal prison system continues to be based on binary classifications of gender disproportionately harms individuals with marginalized gender identities and expressions.

Factual Background

4. The present Complaint alleges that the Respondent discriminated against the Complainant, Nicholas Dinardo ("Mx. Dinardo"), in the provision of services while federally sentenced based on the grounds of race, colour, national or ethnic origin, religion, gender identity or expression, and disability contrary to ss. 5 and 14 of the *Canada Human Rights Act* (the "CHRA").

5. In particular, the Complaint alleges that the Respondent has discriminated against the Complainant on the basis of their Two-Spirit gender identity by: subjecting them to an unsafe and traumatizing living environment where they are subjected to isolation, violence, and threats; failing to provide gender-affirming clothing; repeated misgendering and strip-searches by male staff; denying gender appropriate placement; and denying gender-appropriate programming.

CHRA at section 5 and section 14; Affidavit of Emilie Coyle, Motion Record [“MR”] Tab 2 at paras 2-3 [“Coyle Affidavit”]; Affidavit of Rajwant Mangat, Motion MR Tab 3 at paras 2-3 [“Mangat Affidavit”]

The Proposed Interested Party – CAEFS

6. Founded in 1978, CAEFS is a federation of 24 autonomous Elizabeth Fry Societies which are local community-based non-profit agencies. Some local Elizabeth Fry Societies, who are members of CAEFS, provide direct services to federally sentenced women under contract with the Correctional Service of Canada (“CSC”). CAEFS Regional Advocates are mandated to visit every federal prison designated for women at least once every month and to meet with the women and people of marginalized gender identities and expressions who are incarcerated therein, to meet with any organized committees, and then to meet with each prison’s senior management team as part of the monitoring of conditions of confinement.

Coyle Affidavit, MR Tab 2 at paras 5-6

7. In its 2018-2019 report, the Office of the Correctional Investigator (the “OCI”) reported that incarcerated transgender individuals are vulnerable in prisons as they are frequently subjected to violence, bullying, harassment and sexual assault, particularly when their institutional placement does not align with their gender identity or gender expression.¹ The report noted that nearly two-thirds (63%) of individuals requiring accommodation based on consideration of gender identity and expression were currently residing within male prisons.² As a result of the increased risk of harm, transgender inmates are often placed in segregation-like conditions for their own safety, thereby restricting their movement and access to placement and programming.³ In addition to the above, the OCI noted that there

¹ Office of the Correctional Investigator, Annual Report 2018-2019 (June 24, 2019), online: <https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2018-2019#s7:~:text=It%20is%20well,programming%20and%20employment>.

² *Ibid.*

³ *Ibid.*

remained a “considerable” amount of homophobia and transphobia among staff and inmates.⁴

Coyle Affidavit, MR Tab 2 at para 14

8. While incarcerated in federal prisons, the human rights of criminalized women and people of marginalized gender identities and expressions are governed by the *CHRA*, whether they seek to enforce those rights before this Tribunal or within CSC’s Offender Complaint and Grievance Process. As a result, CAEFS has extensive experience advancing the equality rights of women and people of marginalized gender identities and expressions whose behaviour is criminalized. It has developed a depth of knowledge concerning the interactions of such individuals with the legal system and particularly with the federal prison system.

Coyle Affidavit, MR Tab 2 at para 8

9. CAEFS also has a long history of advocating and supporting the rights of criminalized women and people of marginalized gender identities and expressions in a wide range of legal and administrative fora, including before this Tribunal, CSC’s Offender Complaint and Grievance Process, and numerous tribunals and courts, including the Supreme Court of Canada.⁵

10. Of particular note to the present Complaint, CAEFS is acting as the Complainant in two ongoing systemic human rights complaints before this Tribunal alleging that CSC discriminates against women in the federal prison system based on sex, race, national or ethnic origin, religion and disability, as well as through the

⁴ Office of the Correctional Investigator, Annual Report 2019-2020 (June 26, 2020), online <https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2019-2020#:~:text=there%20is%20a%20considerable%20amount%20of%20transphobia%20and%20homophobia%20among%20inmates%20and%20some%20staff.>

⁵ *Canadian Association of Elizabeth Fry Societies v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 470; *Beaudry v The Canadian Assn. of Elizabeth Fry Societies*, 1997 CanLII 514 (ON CA); *Canadian Association of Elizabeth Fry Societies v Office of the Chief Coroner*, 2016 SKQB 109; *Smith v Porter*, 2011 ONSC 2744 and 2011 ONSC 2593; *Dorsey v Canada (Attorney General)*, 2023 ONCA 64; *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 177; *Mission Institution v Khela*, 2014 SCC 24; *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*, 2017 ONSC 4191; *R v Neve*, 1996 ABCA 242; *R v Ryan*, 2013 SCC 3

intersection of multiple grounds.⁶ Recently, in its March 24, 2023 Amended Statement of Particulars, CSC has taken the position that the outcome of the present case will have direct implications for the hearing and decision in CAEFS's pending matters before this Tribunal.

Coyle Affidavit, MR Tab 2 at para 9; Excerpt from the Amended Statement of Particulars of CSC, dated March 17, 2023, Exhibit A to the Coyle Affidavit

11. In addition to its litigation experience, CAEFS has made numerous submissions to Parliamentary committees on issues affecting federally sentenced women and has been invited to participate in consultations with CSC, the National Parole Board, and the Department of Justice, among others. CAEFS has been granted standing at countless inquests and inquiries, and representatives have also provided expert evidence in inquests, as well as such other proceedings as transfer and sentencing hearings.

Coyle Affidavit, MR Tab 2 at para 10

12. Through its litigation and advocacy work, CAEFS has sought to advance equality rights jurisprudence and to contribute to the development of an approach to interpreting human rights legislation that meaningfully accounts for the lived experience of incarcerated and criminalized people, in order to address the persistent ways in which women and people of marginalized gender identities and expressions are impacted by criminalization, are denied humanity, and are excluded from community.

Coyle Affidavit, MR Tab 2 at para 12

The Proposed Interested Party – West Coast LEAF

13. Created in April 1985, West Coast LEAF is a non-profit society incorporated in British Columbia and registered federally as a charity. West Coast LEAF works to deepen justice and substantive equality for women and people who experience gender-based discrimination in British Columbia. Working in collaboration with

⁶ Files: T1848/7812-T1850/8012

community, West Coast LEAF uses litigation, law reform, and public legal education to dismantle gender-based discrimination and move towards gender justice by advancing access to justice, healthcare and economic security, promoting freedom from gender-based violence, supporting the rights of people who are criminalized, and supporting child and family wellbeing.

Mangat Affidavit, MR Tab 3 at para 5

14. From its founding until 2014, West Coast LEAF operated as an affiliate of Women's Legal Action Fund ("LEAF") and much of its litigation work was carried out under the auspices of LEAF. Beginning in 2009, West Coast LEAF began to carry out litigation in its own name. As of March 2023, West Coast LEAF has approximately 470 members. West Coast LEAF employs 14 staff members. West Coast LEAF relies on the support of approximately 115 volunteers to carry out its work.

Mangat Affidavit, MR Tab 3 at paras 6-7

15. West Coast LEAF acts to promote the equality interests of all women and people who are marginalized on the basis of gender in British Columbia, including where disadvantage is experienced along multiple and intersecting axes of marginalization such as race, national origin, immigration status, Indigeneity, sexual orientation, gender identity, gender expression, family or marital status, disability or ability, age, socio-economic status or any other personal characteristic. It is committed to working in consultation and collaboration with other equality-seeking groups to ensure that West Coast LEAF's legal positions, law reform activities, and educational programming are informed by, and inclusive of, the diversity of human experiences.

Mangat Affidavit, MR Tab 3 at para 8

16. Through litigation, West Coast LEAF has contributed to the development of equality rights jurisprudence and the understanding of substantive equality in Canada, both through specific challenges to discriminatory or unconstitutional laws

or government actions, as well as in matters where the adverse effects of laws or government actions may compromise the realization of substantive equality.

Mangat Affidavit, MR Tab 3 at para 9

17. West Coast LEAF has intervened in cases before multiple courts and tribunals, including before the Supreme Court of Canada, particularly on matters involving the interpretation and application of equality law principles. To date, West Coast LEAF has intervened before the Supreme Court of Canada on 17 occasions.⁷ West Coast LEAF also has extensive experience intervening before the BC Court of Appeal and the BC Supreme Court.⁸ On two occasions, West Coast LEAF has participated as an interested party at the BC Human Rights Tribunal.⁹

Mangat Affidavit, MR Tab 3 at para 12

⁷ *R v Tsang*, SCC File No. 40447 (appeal heard May 18, 2023; judgment reserved); *Glen Hansman v Barry Neufeld*, 2023 SCC 14; *Canadian Council for Refugees, et al v Canada (Citizenship and Immigration), et al*, 2023 SCC 17; *Ross McKenzie Kirkpatrick v Her Majesty the Queen*, 2022 SCC 33; *AS v Her Majesty the Queen, et al.*, 2022 SCC 28 and *Her Majesty the Queen v JJ*, 2022 SCC 28; *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27; *Barendregt v Grebliunas*, 2022 SCC 22; *Colucci v Colucci*, 2021 SCC 24, *Michel v Graydon*, 2020 SCC 24; *Bent v Platnick*, 2020 SCC 23, and *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22; *Law Society of British Columbia v Trinity Western University and Volkenant*, 2018 SCC 32; *Schrenk v British Columbia Human Rights Tribunal*, 2017 SCC 62; *R v Lloyd*, 2016 SCC 13; *British Columbia Teachers' Federation v British Columbia Public School Employers' Association*, 2014 SCC 70; *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59; *British Columbia (Ministry of Education) v Moore*, 2012 SCC 61; *Downtown Eastside Sex Workers United Against Violence v Canada*, 2012 SCC 45.

⁸ *TL v British Columbia (Attorney General) et al.*, 2023 BCCA 167 and 2021 BCSC 2203; *R v Ellis*, 2022 BCCA 278; *Council of Canadians with Disabilities v British Columbia (Attorney General)*, 2020 BCCA 241; *AB v CD*, 2020 BCCA 11; *British Columbia Civil Liberties Association and John Howard Society of Canada v Canada (Attorney General)*, 2019 BCCA 228 and 2018 BCSC 62; *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*, 2018 BCCA 132 and 2015 BCSC 534; *Denton v Workers Compensation Board*, 2017 BCCA 403; *Law Society of British Columbia v Trinity Western University and Volkenant*, 2016 BCCA 423 and 2015 BCSC 2326; *Villardell v Dunham*, 2013 BCCA 65; *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309; *Friedmann v MacGarvie*, 2012 BCCA 445; *Reference re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588; *Downtown Eastside Sex Workers United Against Violence v Canada*, 2010 BCCA 439.

⁹ *RR v Vancouver Aboriginal Child and Family Services Society*, 2022 BCHRT 116; *Oger v Whatcott*, 2019 BCHRT 58

18. West Coast LEAF has also been granted participant status in several inquiries engaging gender equality. In August 2017, West Coast LEAF was granted standing to participate in the Part II (institutional) and Part III (expert) hearings of the National Inquiry into Missing and Murdered Indigenous Women and Girls (final report released June 2019). West Coast LEAF actively participated in the National Inquiry by contributing its knowledge of how institutions and systems in British Columbia perpetuate stereotypes about Indigenous women, girls and Two-Spirit people, and undermine their rights and safety. In 2011, West Coast LEAF was granted standing to participate in British Columbia's Missing Women Commission of Inquiry headed by Hon. Wally Oppal, K.C. ("Oppal Inquiry"), which completed its work in November 2012. West Coast LEAF has also intervened (as part of a coalition of six organizations) in an inquiry before the Canadian Judicial Council: *In the Matter of an Inquiry Pursuant to Section 63(1) of the Judges Act Regarding the Honourable Justice Robin Camp*.

Mangat Affidavit, MR Tab 3 at para 13

19. Apart from its intervention work, West Coast LEAF is currently litigating a constitutional challenge to BC's family law legal aid regime before the BC Supreme Court: *Single Mothers Alliance of BC v British Columbia* (BCSC File No. SI 733843) (Notice of Civil Claim filed April 26, 2017). This case is brought pursuant to ss. 7 and 15(1) of the *Charter*, as well as s. 96 of the *Constitution Act*.

Mangat Affidavit, MR Tab 3 at para 14

PART II – ISSUES

20. The central issue to be determined on this motion is whether the Coalition ought to be granted interested party status in the Complaint. If the Coalition is granted interested party status, the Tribunal must also specify the scope of the Coalition's participation.

Rules, supra at 27(3)

21. The Coalition submits that it should be granted interested party status, with the ability to meaningfully participate in this matter.

PART III – ARGUMENT

A. The Coalition Ought to Be Granted Interested Party Status

22. Rather than setting rigid criteria, the Tribunal's modern practice is to address requests for interested party status holistically, on a case-by-case basis. The Tribunal generally takes the following factors into consideration:

- a) Whether the proposed interested party is affected by the proceedings, and;
- b) Whether the proposed interested party can provide assistance to the Tribunal in determining the issues before it. That assistance should add a different perspective to the positions taken by the other parties.

Letnes v Royal Canadian Mounted Police, [2021 CHRT 30](#) at paras 12-18; *First Nations Child & Family Caring Society et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, [2016 CHRT 11](#) at para 3 [“Caring Society (2016)”]

(i) The Coalition Has an Interest and Will Be Directly Affected by the Outcome of this Proceeding

23. The Tribunal has consistently granted interested party status where the proceedings would have an impact on the moving party's interests, or that of a large number of its members. For example, in *First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of*

Indigenous and Northern Affairs Canada), the Tribunal granted interested party status to the Innu Nation primarily because a large number of members of the Innu Nation would be affected by the outcome of that decision. The Coalition meets this same criterion, given the disproportionate impact that any determination in this case will have on its interests and the members of its network.

First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), [2020 CHRT 31](#) [*Caring Society* (2020)]; *Attaran v Citizenship and Immigration Canada*, [2018 CHRT 6](#) at para 16 [“Attaran”]

24. As stated above, individuals with marginalized gender identities experience disproportionate violence and harassment while incarcerated from both fellow inmates and from staff. The Respondent’s binary and exclusionary approach to the housing and programing needs of incarcerated Two-Spirit persons and other people of marginalized gender identities and expressions compounds this harm. These individuals experience, not just the direct harm of misogyny, homophobic and transphobic violence, both within and outside of prison, but also criminalization that flows from social stigma, loss of housing, and loss of employment.

Coyle Affidavit, MR Tab 2 at para 14

25. Furthermore, unlike other individuals, every aspect of the life of incarcerated women and all people of marginalized gender identities and expressions is governed by the *CHRA*. The Federal Court of Appeal, in *Tan*, emphasized the importance of the *CHRA* to incarcerated people, as they live “under the greatest restriction of liberty and government control possible, in all aspects of life and wellbeing.” Whereas an employee in a federally regulated enterprise, or an individual receiving services from that enterprise, is subject to the *CHRA* during that relationship or exchange, the day-to-day lives of federally sentenced persons, including those that the Coalition serves and advocates for within its networks, are entirely governed by the Federal Government and, therefore, the *CHRA*.

Tan v Canada (Attorney General), [2018 FCA 186](#) at para 113; Mangat Affidavit, MR Tab 3 at para 17; Coyle Affidavit, MR Tab 2 at para 7

26. Therefore, the Tribunal's approach to addressing the discrimination faced by incarcerated Two-Spirit people and other people of marginalized gender identities and expressions will materially and disproportionately affect the interests of the people that the Coalition represents, works and advocates with, and provides services to. If the intersecting and systemic harms experienced by this population are not considered, the Tribunal risks crafting a remedy that fails to address the scope of the harm faced by some of the most marginalized individuals who experience criminalization and incarceration.

Coyle Affidavit, MR Tab 2 at para 15

27. Additionally, this decision will have an impact on CAEFS and its ongoing litigation. As noted above, CAEFS is currently the Complainant in two Complaints before this Tribunal alleging systemic discrimination against women in the federal prison system based on sex, race, national or ethnic origin, religion and disability, as well as through the intersection of multiple grounds. CSC, who is the Respondent in both this proceeding and in CAEFS's complaints, has taken the position that the Tribunal's determination in this matter may have an impact on CAEFS's complaints. The Supreme Court has recognized that a direct interest can be established where a legal issue to be determined in a case has the potential to directly impact other litigation to which a proposed intervener is a party. In *Reference re Workers' Compensation Act, 1983*, the Court recognized that this is particularly true where the opposing party in the proposed intervener's litigation will also be participating in the matter in which intervention is sought, creating potential prejudice to the proposed intervener:

I agree with Pigeon J. that "any interest" extends to an interest in the outcome of an appeal when a legal issue to be determined therein will be binding on other pending litigation to which the applicant is a party. Although this is usually a tenuous basis upon which to base an application for intervention, in this appeal Mr. Cowper's client is in the unenviable position of facing an opponent in the British Columbia litigation, the Attorney General of British Columbia, who has the right to intervene in this appeal. There is an

aura of unfairness about this which should be remedied by granting this application unless the other criteria dictate the contrary conclusion.

Coyle Affidavit, MR Tab 2 at para 9; *Reference re Workers' Compensation Act*, 1983, [\[1989\] 2 SCR 335](#) at 340

28. Given that the Respondent in CAEFS's application is also the Respondent in this appeal, the Coalition submits that the "aura of unfairness" referred to in the *Reference re Workers' Compensation Act* will exist if the Government has the opportunity to make submissions on issues that it has maintained will affect CAEFS's litigation while CAEFS does not.

(ii) The Coalition Brings a Useful and Different Perspective before this Tribunal

29. If granted interested party status, the Coalition will provide expertise that is not otherwise available to the Tribunal, including insights on the systemic and intersecting grounds of discrimination experienced by criminalized Two-Spirit persons and other people of marginalized gender identities and expressions. Furthermore, the Coalition will be able to provide assistance to the Tribunal based on CAEFS's and West Coast LEAF's extensive experience assisting decision-makers in interpreting and applying equality principles in a manner that takes account of the lived experiences of women and people of marginalized gender identities and expressions, including in contexts where such persons are criminalized and incarcerated.

Mangat Affidavit, MR Tab 3 at paras 12-14; Coyle Affidavit, MR Tab 2 at paras 8-13

30. In *Attaran*, the Tribunal granted the Chinese and Southeast Asian Legal Clinic ("CSALC") interested party status as it was satisfied that CSALC's expertise, as evidenced by an "impressive track record of test case litigation and making representations to Parliamentary committees," could be of assistance to the Tribunal.

Attaran, supra at para 22

31. The Coalition organizations have, in combination and individually, decades of experience advocating for the rights of criminalized women and people of marginalized gender identities and expressions. Like CSALC, the Coalition has significant expertise in litigating issues under the *CHRA* and appearing before courts and Tribunals, as well as Parliamentary committees. CAEFS's and West Coast LEAF's extensive advocacy track record and the expertise they can bring to bear on the matters at issue will assist the Tribunal in gaining a better understanding of the specific discrimination faced by federally-sentenced individuals with marginalized gender identities and expressions.

Coyle Affidavit, MR Tab 2 at paras 8-12

32. The Coalition seeks to make submissions before this Tribunal that will provide a distinct contribution to the determination of the issues in the present Complaint. Broadly speaking, the Coalition proposes to make submissions on the following issues:

- a) Human rights law must meaningfully account for the lived experiences of those who fall under its protection. This Tribunal has recognized this crucial point on several occasions. In the context of incarcerated Two-Spirit people and other persons of marginalized gender identities and expressions, this demands a robust and intersectional approach to the unique and complex nature of discrimination faced by these groups, both within the context of prison systems and in Canadian society more broadly;
- b) The interpretive approach to the *CHRA* must recognize the full range of harm experienced by persons of marginalized gender identities and expressions. In addition to misogyny, persons of marginalized gender identities and expressions experience further forms of discrimination such as transphobia and transmisogyny. The prison system itself is harmful to all persons, including individuals who fall within the gender binary; for persons of marginalized gender identities and expressions, however, the harm experienced is both compounded and unique. These distinct and exacerbated harms flow from the increased societal vulnerability of persons of

marginalized gender identities and expressions, which are heightened within prisons, and because an approach to prison systems that is not inclusive of the experiences, needs, and circumstances of persons of marginalized gender identities and expressions ignores and compounds the harms these individuals experience;

- c) The prison system fails to properly accommodate people of marginalized gender identities and expressions. The Respondent's continued use of a prison system that is not inclusive of the experiences, needs, and circumstances of people of marginalized gender identities and expressions reinforces systemic inequalities and barriers which compound their disadvantage. As such, Two-Spirit persons and other persons of marginalized gender identities and expressions are regarded as "misfits" or as problems to be solved within the prison system, rather than recognizing how the binary structure of prison excludes Two-Spirit persons and other persons of marginalized gender identities and expressions and contributes to their marginalization;
- d) In addition to the mental, physical, and spiritual harm caused by incarceration more broadly, the Respondent's rigid, binary approach to housing and programming excludes persons of marginalized gender identities and expressions thereby creating and exacerbating unique and serious harms by preventing these individuals from safely and fully expressing their gender identities; and,
- e) The Respondent's reliance on the needs and circumstances of cisgender women as justification for its actions, practices and policies is, itself, a product of a prison system based on a gender binary, which excludes and fails to consider or address the real needs and circumstances of people of marginalized gender identities and expressions, including but not limited to both women and Two-Spirit people.

33. If granted interested party status, the Coalition will expand upon these submissions.

B. The Coalition Ought to Be Allowed to Meaningfully Participate in the Proceedings

34. Given the Coalition's unique contributions, which would otherwise not be available to the Tribunal, the Coalition requests that it be allowed to meaningfully participate in the proceedings. The Coalition is committed to working with the parties and the Tribunal to ensure the expeditiousness of these proceedings.

35. The Coalition will ensure that it does not repeat arguments or delay the proceedings. The Coalition will focus its contributions on those areas in which it can provide a different perspective and remains committed to abiding by any timetable set by the Tribunal.

Coyle Affidavit, MR Tab 2 at para 20; Mangat Affidavit, MR Tab 3 at para 21

36. Lastly, the Coalition submits that the impact of these proceedings on its interests — and the usefulness of the contributions it will make — outweigh the potential inconvenience of adding it as an interested party to the proceedings. The Coalition maintains that there would be no prejudice to the parties if this motion is granted. To the contrary, the Coalition's contributions will benefit the proceedings and will provide the Tribunal with essential insights to reach its decision.

Caring Society (2020), *supra* at para 44

PART IV – ORDER REQUESTED

37. The Coalition seeks an Order granting it interested party status on the following terms:

- a. All parties shall provide the Coalition a copy of their respective Statements of Particulars and all disclosure in this Complaint;
- b. The Coalition may file a Statement of Particulars, cross-examine witnesses, and make written and oral submissions at the hearing; and,
- c. Any further or other order that the Tribunal may deem appropriate.

Dated at Ottawa, Ontario, and Vancouver, British Columbia, this 2nd day of August, 2023

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Per: Humera Jabir

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List of Authorities

Legislation

Canadian Human Rights Act, RSC 1985, c H-6, section 50

Canadian Human Rights Tribunal Rules of Procedure, 2021, SOR/2021-137,
Rule 27

Jurisprudence

Attaran v Citizenship and Immigration Canada, [2018 CHRT 6](#)

Beaudry v The Canadian Assn. of Elizabeth Fry Societies, [1997 CanLII 514](#) (ON CA)

*Canadian Association of Elizabeth Fry Societies v Canada (Public Safety and
Emergency Preparedness)*, [2010 FC 470](#)

*First Nations Child & Family Caring Society et al. v Attorney General of Canada (for
the Minister of Indian and Northern Affairs Canada)*, [2016 CHRT 11](#)

*First Nations Child & Family Caring Society of Canada et al. v Attorney General of
Canada (representing the Minister of Indigenous and Northern Affairs Canada)*,
[2020 CHRT 31](#)

Letnes v Royal Canadian Mounted Police, [2021 CHRT 30](#)

Reference re Workers' Compensation Act, [\[1989\] 2 SCR 335](#)

Tan v Canada (Attorney General), [2018 FCA 186](#)