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

-and-

THE CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES AND WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION (THE "COALITION")

Interested Party

-and-

NATIVE WOMEN'S ASSOCIATION OF CANADA

Interested Party

STATEMENT OF PARTICULARS OF THE COALITION

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1. The Complainant, Nicholas Dinardo, alleges discrimination on the basis 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*"). Mx. Dinardo makes a series of allegations that the Respondent treated them in an adverse differential manner in the provision of correctional services and failed to provide them with a harassment-free environment. Pursuant to the Tribunal's order of September 18, 2023, the Canadian Association of Elizabeth Fry Societies and West Coast Legal Education and Action Fund Association (together, "the Coalition") joins these proceedings as an interested party, with standing to make submissions on the systemic considerations at issue in the Complaint.

2. The Complaint raises fundamental questions about the place of human rights law in the regulation of prisons, as well as the approach the Tribunal should take when considering claims from people incarcerated within them.

3. The first part of the Coalition's particulars addresses the interpretive approach needed to deal with claims on multiple grounds, which requires "a robust intersectional analysis"[1] grounded in the principles of substantive equality. This intersectional approach asks the Tribunal to situate a complainant in their context and understand them in their complexity.

4. The next part applies this contextual approach to outline the particular ways in which the Respondent's prisons are organized around power imbalances that marginalize and harm people of many gender identities and cause specific harm to transgender and Two Spirit people who are incarcerated. Specifically, the Coalition intends to argue in this proceeding that the binary structure of the Respondent's prisons causes a particularly acute form of harm to transgender and Two Spirit Indigenous people by enforcing the colonial gender binary in all aspects of their lives.

5. The final part of the Coalition's particulars addresses how and why the Tribunal should reject any submissions that seek to pit the perceived needs of

[1] *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 116

federally incarcerated cisgender women against those of people marginalized on the basis of other gender identities and expressions and that have the effect of prioritizing the former at the expense and to the detriment of the latter.

A. An Intersectional Approach Must Capture the Intersecting Structures of Oppression and Disadvantage Impacting a Complainant

6. For at least 20 years, human rights tribunals have used the term "intersectionality" to describe the analysis required for claims made on multiple grounds.[2] As both the Complainant and the Commission note in their Statements of Particulars, the concept of "intersectionality" is "embedded" in section 3.1 of the *CHRA*, which recognizes that a discriminatory practice may be based "on the effect of a combination of prohibited grounds."

7. In the human rights context, intersectionality simply means that the law must meaningfully account for the lived experiences of those falling under its protection who face discrimination on more than one ground. The goal of human rights law is substantive equality, which focuses on the "actual" impacts on the individual or group, taking "full account of social, political, economic and historical factors".[3] Part of this analysis requires examining the way an individual's experiences of discrimination and disadvantage are impacted by the multiplicity of intersecting structures of oppression that impact their lives. Accordingly, where multiple grounds of discrimination are alleged, the interaction of these grounds and structures forms part of the picture that the Tribunal must aim to see. As the Supreme Court of Canada highlighted recently in the *Charter* context:

> [s]ubstantive equality demands an approach "that looks at the full context, including the situation of the claimant group and . . . the impact of the impugned law" on the claimant and the groups to which they belong, recognizing that intersecting group membership tends to amplify discriminatory effects or can create unique discriminatory effects not visited upon any group viewed in isolation. It must remain closely connected to "real people's real experiences": it must not be applied "with one's eyes shut".[4]

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[2] See, for example, *Radek v Henderson Development (Canada) and Securiguard Services (No 3)*, 2005 BCHRT 302 at paras 464-465

[3] *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 39

[4] *Ontario (Attorney General) v G*, 2020 SCC 38 at para 47 [citations omitted; emphasis added]

8. Depending on the nature of the claim, the intersectional approach comes into play in different ways. In some circumstances, it is used to demonstrate why a particular action, or course of conduct, is discriminatory, where a single-axis analysis might not meet the *prima facie* threshold. In those cases, when the conduct is examined in light of other grounds of discrimination, its discriminatory effect emerges. As this Tribunal recognized in *Mr. X*:

> It may be used by complainants in situations when they may be unable to satisfy the test for *prima facie* discrimination on one ground alone, thus adopting a more flexible approach and specifically requesting the Tribunal to consider a more fulsome picture, assisting in assessing subtle forms of discrimination.[5]

9. The Federal Court of Appeal recently affirmed this approach in *Tarek-Kaminker*:

> where multiple grounds of discrimination are present, a single axis analysis may minimize what is in fact, compound discrimination. That is, each proscribed ground, when viewed singly, may not justify a finding of discrimination, but a different picture may emerge when the grounds are considered together.
>
> In other words, in cases where multiple prohibited grounds of discrimination are at play, the whole may be greater than the sum of its parts. Discrimination on the basis of more than one prohibited ground may result from the compounding effect that can occur where multiple, intersecting grounds of discrimination are present, affecting the rights of the individual to substantive equality.[6]

10. In other cases, where even a single-axis analysis would lead to a finding of discrimination, an intersectional approach is still needed to fully understand the nature of the alleged discrimination and its impact on the individual. In a leading case on intersectionality, the Human Rights Tribunal of Ontario highlighted the need to engage in this analysis, even though it found that the incidents were of "sufficient gravity" that the complainant would succeed even on a single ground:

> The danger in adopting a single ground approach to the analysis of this case is that it could be characterized as a sexual harassment matter that involved

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[5] *Mr X v Canadian Pacific Railway*, 2018 CHRT 11 at para 296
[6] *Tarek-Kaminker v Canada (Attorney General)*, 2023 FCA 135 at paras 71-73 [citations omitted]

> a black complainant, thus negating the importance of the racial discrimination that she suffered as a black woman. In terms of the impact on her psyche, the whole is more than the sum of the parts: the impact of these highly discriminatory acts on her personhood is serious.[7]

11. Under neither approach does the intersectional analysis change the complainant's burden to show that a *prima facie* case is made out. Rather, both demand that the Tribunal consider the complainant as a complete person with complex lived experience. In the words of Kimberlé Crenshaw, in her foundational essay cited in several human rights tribunal decisions, intersectional analysis is a challenge to discrimination law to "embrace the complexities of compoundedness" to "take into account the specific and particular concerns" of individuals experiencing discrimination on multiple grounds.[8] As the Human Rights Tribunal of Ontario stated in *Bayliss-Flannery*, an approach that does not recognize the complexity of that lived experience "tends to minimize or even obliterate" the real impact on the individual.[9]

B. The Carceral Context Compounds the Harm Experienced at the Intersections of Indigeneity, Gender Identity and Expression, and Other Grounds

12. Imprisonment inherently magnifies power imbalances and experiences of vulnerability, marginalization, and disadvantage. Intersecting societal factors and disadvantages create a "pipeline to prison" for people who, disproportionately, are at the highest risk of becoming marginalized even prior to contact with the criminal justice system.[10]

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[7] *Baylis-Flannery v DeWilde (Tri Community Physiotherapy)*, 2003 HRTO 28 at para 145
[8] Kimberlé Krenshaw, "Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics." In *University of Chicago Legal Forum*, vol. 1, no. 8, pp. 138-67 (1989), cited in *Baylis-Flannery v DeWilde (Tri Community Physiotherapy)*, 2003 HRTO 28; *Young Worker v Heirloom and another*, 2023 BCHRT 137; *Matias v The Hudson's Bay Company and another*, 2022 BCHRT 17
[9] *Baylis-Flannery v DeWilde (Tri Community Physiotherapy)*, 2003 HRTO 28 at para 144
[10] Canadian Human Rights Commission, "Submission to the United Nations Human Rights Council on the occasion of its review of Canada during the 4th cycle of the Universal Periodic Review", dated April 2023, online at 2-4; Canadian Human Rights Commission, "Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women," dated December 2003, online at 1-3

13. While some harmful dynamics are unique to the prison context, prisons also heighten societal relationships of domination and power imbalances, which further marginalizes vulnerable individuals. In this context, all people experience harm by virtue of being criminalized; however, for people whose experiences of oppression and power imbalances are already impacted by the intersectional impacts of protected human rights grounds, the current prison system creates unique vulnerability while also imposing and exacerbating existing harm. Where incarcerated individuals face discrimination, the prison context shapes and colours the experience and creates the conditions for profound harm. As the Federal Court of Appeal reasoned in *Tan*, the *CHRA* is particularly important for incarcerated people, who live "under the greatest restriction of liberty and government control possible, in all aspects of life and well-being".[11]

14. For individuals who experience marginalization on multiple protected grounds, such as trans or Two Spirit Indigenous people, the Tribunal must pay particular attention to the interaction of those grounds in prison and to their interaction with the experience of being criminalized.

15. While the Coalition's submissions focus on the intersection of gender identity and expression and Indigeneity, it is essential to recall that the Complainant also alleges discrimination on the basis of religion and disability. The Tribunal's analysis must examine the ways in which those grounds, when considered as part of the Complainant's holistic identity, have shaped the Complainant's experiences and the distinct impact that incarceration has had on them. Indeed, the Coalition maintains that the Complainant's circumstances exemplify how multiple marginalized identities are often, in themselves, framed negatively by the Respondent's prison structures and practices. In the circumstance here, each request for accommodation on prohibited grounds of discrimination was used to further characterize the Complainant as a "problem", with the Respondent often treating requirements for accommodation along different axes as in opposition to each other.

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[11] *Tan v Canada (Attorney General)*, 2018 FCA 186 at para 113

i) The Unique Vulnerability of Federally Sentenced Indigenous People

16. The Tribunal has stated, on several occasions, that when dealing with claims involving Indigenous people, the colonial context surrounding and impacting the individual is crucial. As the Tribunal reasoned in *Caring Society*:

> In determining whether there has been discrimination in a substantive sense, the analysis must also be undertaken in a purposive manner "…taking into account the full social, political and legal context of the claim'". For Aboriginal peoples in Canada, this context includes a legacy of stereotyping and prejudice through colonialism, displacement and residential schools.[12]

17. In *Dominique*, the Tribunal stated clearly that the "historical background" of Indigenous people "must be considered by the Tribunal" and noted that this context includes "overrepresentation in the criminal justice system, high crime rates, poverty, and housing shortages and overcrowding, to name just a few."[13] In a claim by an incarcerated Indigenous person, the claim must consider what the Truth and Reconciliation Commission called the "dramatic overrepresentation" of Indigenous people in Canada's prisons, as well as the causes for it.[14]

18. In this regard, the discrimination analysis must engage with the complex dynamic of colonialism and vulnerability. The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls ("MMIWG Report") directly tied colonial violence to the experiences of women, girls, and 2SLGBTQQIA persons in prisons. It described "four pathways" that "continue to enforce the historic and contemporary manifestations of colonialism that lead to additional violence":

- historical, multigenerational, and intergenerational trauma;
- social and economic marginalization;
- maintaining the status quo and institutional lack of will; and

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[12] *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para 402 [citations omitted]
[13] *Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v Public Safety Canada*, 2022 CHRT 4 at para 301
[14] *Honouring the truth, reconciling for the future: Summary of the final report of the Truth and Reconciliation Commission of Canada* (2015) at p. 170

- ignoring the agency and expertise of Indigenous women, girls, and 2SLGBTQQIA people.[15]

The MMIWG Report also noted that "violence is more likely to occur when these four forms of colonial violence intersect in the lives of Indigenous women, girls, and 2SLGBTQQIA people."[16]

19. In the chapter on "Criminalizing and Incarcerating Indigenous Women", the MMIWG Report noted:

> Indigenous women and girls are being criminalized as a result of colonization and their resistance to colonial violence, including systemic oppression and marginalization. Therefore, Canada is incarcerating Indigenous women and girls because of their fight against colonization or due to the impacts of colonization on them.
>
> […]
>
> The maximum security classification for incarcerated Indigenous women and 2SLGBTQQIA people represents sex-based discrimination that places, punishes, or rewards them on the basis of a set of non-Indigenous expected or compliant behaviours. This security classification further discriminates by limiting federally sentenced Indigenous women from accessing services, supports, and programs required to facilitate their safe and timely reintegration.[17]

20. Moreover, the MMIWG Report specifically highlighted the sexual violence of the Respondent's practice of strip-searches and the "danger of misgendering" transfeminine people in prison.[18] Additionally, in the prison context, Indigenous people are particularly vulnerable to the Respondent's use of force. As the OCI stated in its 2020-2021 Annual Report, "being Indigenous or Black was uniquely associated with increased odds of being involved in a use-of-force incident."[19] It concluded that the "[e]vidence of the *over*-use of force generally, and specifically

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[15] Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1a (2019) at p. 111
[16] Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1a (2019) at p. 111
[17] Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1a (2019) at pp. 644-645
[18] Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1a (2019) at p. 638
[19] Office of the Correctional Investigator Annual Report, 2020-2021

with Black and Indigenous individuals, is irrefutable."[20] The following year, the OCI reviewed CSC's response to the 2020-2021 report and concluded that it was "not convinced that CSC has adequately acknowledged or answered my concerns regarding the unique role that race seems to play in *how* force is applied, *how frequently* it is used and *against whom."*[21]

ii) The Marginalization of Federally Sentenced Trans and Two Spirit People

21. The findings in the MMIWG Report reinforce the Tribunal's now over 20-year-old finding that transgender people in prisons are a "uniquely vulnerable group" with a particular "susceptibility to victimization within the prison system."[22] As the Office of the Correctional Investigation ("OCI") has highlighted, this vulnerability continues to this day.

22. The OCI first reported substantively on the issue of gender identity and expression in prison in its 2018-2019 Annual Report. In that Report, it found that:

> It is well-established that transgender people are often very vulnerable in prison, and can be the subject of violence, bullying, harassment and sexual assault, particularly if their institutional placement does not accord with their gender identity or gender expression. They may also be placed in segregation-like conditions for their own safety, which can severely restrict their movement and participation in programming and employment.[23]

23. With respect to the placement and housing of transgender women, the Report stated:

> Evaluating the risks presented by a transgender person who identifies as a woman based on assumptions associated with male anatomy at birth could be considered, on the face of it, discriminatory. And yet, federal penitentiaries are organized and premised upon a clear separation between the biological sexes.[24]

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[20] Office of the Correctional Investigator Annual Report, 2020-2021 [emphasis in original]
[21] Office of the Correctional Investigator Annual Report, 2021-2022 [emphasis in original]
[22] *Kavanagh v Canada (Attorney General)*, 41 CHRR 119 at para 166
[23] Office of the Correctional Investigator Annual Report, 2018-2019
[24] Office of the Correctional Investigator Annual Report, 2018-2019

24. In its 2020-2021 Annual Report, the OCI revisited the concern about safety for trans women in prisons. It noted that the same problems persist, including in institutions designated for women. The OCI "received complaints from transgender individuals and others, including complaints about inappropriate comments from CSC staff and other incarcerated women which could be considered transphobic" and "reviewed a particularly egregious use-of-force incident on a transgender woman that resulted in a disciplinary investigation against CSC staff."[25]

25. Later in 2021, the OCI affirmed that, historically, people of marginalized gender identities and expressions in federal prisons have been forced into segregation or hiding. It also noted that "individuals from the LGBTQ+ community are disproportionately represented as victims of violent and/or sexualized abuse, harassment, bullying, assault and exploitation."[26] The OCI identified the concern that risk assessment and classification tools are based on a gender binary and "raise questions regarding how assumptions about safety, risk and dangerousness, based on physical capabilities of biological men and women, play a role in decisions on placements and transfers of gender-diverse individuals".[27]

26. In 2022-2023, the OCI reiterated that it had previously "voiced concerns regarding institutional placements based purely on anatomy, the need for more consideration for the safety and rights of gender diverse individuals" and noted that it would closely monitor the implementation of the Respondent's new Commissioner's Directive on *Gender Diverse Offenders* ("CD 100").[28]

iii) The Respondent's Binary Prison System Harms and Compounds the Disadvantage of Trans and Two Spirit Indigenous People

27. Given the above, in cases involving trans or Two Spirit Indigenous people who are incarcerated, the Tribunal must engage with the unique and compounded vulnerability of these individuals, both in terms of their broader societal

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[25] Office of the Correctional Investigator Annual Report, 2020-2021
[26] Challenges Faced by Gender Diverse Persons in Federal Corrections: An Ombudsman's Perspective (2021)
[27] Challenges Faced by Gender Diverse Persons in Federal Corrections: An Ombudsman's Perspective (2021)
[28] Office of the Correctional Investigator Annual Report, 2022-2023

marginalization and experiences of disadvantage but also in terms of the unique adverse impacts imposed by the carceral context and the current structures of the prison system. In other words, the Tribunal must consider both the compounding nature of discrimination on multiple grounds, but also the compounding factor of the prison context itself on those experiences of disadvantage.

28. In particular, the analysis must engage with the fact that the Respondent's continued use of a prison system based on a gender binary fails to adequately account for the experiences, needs, and circumstances of people of marginalized gender identities and expressions. This system reinforces systemic inequalities and barriers which disadvantage such individuals and treats them as a problem to be solved rather than recognizing the ways in which the structure of the prison system as a whole contributes to the marginalization of transgender and Two Spirit persons and other people of marginalized gender identities and expressions.

29. Outside the prison context, the imposition of the colonial gender binary continues to cause both physical and spiritual harm to trans and Two Spirit Indigenous people. As per the MMIWG Report, citing expert witness Albert McLeod:

> The imposition of colonial gender norms on Indigenous Peoples around the world has resulted in the rise of ultra-male and ultra-female or type of roles in colonial states. Social systems like health, justice, education, and politics extol these binary gender identities as ideal while discounting or erasing Indigenous values of inclusion and non-interference.[29]

30. Similarly, as Indigenous legal scholars have noted, in many Indigenous societies,

> matrilineal societies, and societies that strived to embrace gender fluidity, were condemned and forced to take up structures based on the male/female binary wherein the male side received privileges and were recognized as having the most valued attributes. Colonialism was, and still is, reliant on patriarchal, heterosexist violence.[30]

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[29] Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1a (2019) at p. 448

[30] Emily Snyder, Val Napoleon, and John Borrows, "Gender and violence: Drawing on Indigenous legal resources." *UBCL Rev.* 48 (2015): 593 at p. 610

31. While the freedom of trans and Two Spirit Indigenous people in the community is constrained in myriad ways, they can nonetheless seek safety, creative self-expression, community, and reciprocal relationships of love and care. The gender binary is imposed and enforced, and causes harm, but not absolutely. In the Respondent's prison system, however, freedom to exist as a trans or Two Spirit Indigenous person is severely constrained and the societal vulnerabilities of persons with marginalized gender identities and expressions are heightened by what the OCI has referred to as the "[t]oxic homophobia, transphobia and masculinity in corrections."[31]

32. For transgender and Two Spirit Indigenous people, the prison system is both a particularly violent manifestation of the colonial imposition of the gender binary and a site of violence based on the binary. This violence occurs in unique ways, which include but are not limited to the manner in which searches, strip searches, uses of force, and removals of clothing are imposed on transgender and Two Spirit Indigenous people. In the Complainant's own circumstances, strip searches, searches, and other instances involving the compulsory removal of clothing are not just violent encounters but are violence that is both colonial and transphobic. The violence which is present in prisons also has unique effects for transgender and Two Spirit individuals. As the Senate Standing Senate Committee on Human Rights noted in its Report on The Human Rights of Federally-Sentenced Persons, "some LGBTQI-2S federally-sentenced persons are targeted by other federally-sentenced persons and staff because of their sexual orientation or gender identity".[32]

33. In addition to the harms of incarceration more broadly, the Respondent's rigid, binary approach to the housing, health care, and programming provided to individuals with marginalized gender identities creates and exacerbates unique and serious harms by preventing these individuals from safely and fully expressing their gender identities and from receiving services and care that are appropriate and responsive to their needs.

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[31] Challenges Faced by Gender Diverse Persons in Federal Corrections: An Ombudsman's Perspective (2021)
[32] Report on The Human Rights of Federally-Sentenced Persons (June 2021) at p. 176

34. In this context, the very assertion of a person's identity as a trans or Two Spirit Indigenous person is perceived as a challenge to the rigid structures of the prison system; laid on top of the already stigmatizing impact of being criminalized, the very assertion of an identity and the request to have that identity accommodated and respected results in individuals being characterized as misfits, troublemakers, or as a threat and danger to others.

35. Being labeled as a troublemaker for asserting one's gender identity interacts with the Respondent's perception that an individual requesting accommodation is a troublemaker in other regards, including with requests such as those related to disability or religion, as noted above. The outcome of this perception is that failing to fit into CSC's norms is deemed misbehaviour that is accompanied by both vulnerability to violence from staff and other incarcerated people, as well as practices of punishment, isolation and solitary confinement, such as placement in Structured Intervention Units, which cause significant, adverse mental health consequences.[33] In other words, CSC's practice of defaulting to segregation to address risks to trans and Two Spirit people who do not fit into the colonial gender binary prison system is a failure to provide services responsive to the real needs of trans and Two Spirit people, a direct imposition of harm against those individuals, and a destructive outcome of imposing a binary prison system.

36. The prison system's approach to correcting and responding to its own construction of trans and Two Spirit Indigenous people as problems both causes additional harm and reinforces binary structures. For example, individuals experiencing gender dysphoria must contend not only with the distress of dysphoria, but have that distress aggravated at every turn by the prison structure. For trans and Two Spirit Indigenous people in the current prison system, the colonial binary can be impossible to escape due to CSC's current structures and practices.

[33] See Report on The Human Rights of Federally-Sentenced Persons (June 2021) at p. 159

C. The Tribunal Must Avoid Establishing a Hierarchy of Rights and Rights-Holders

37. The Courts have long cautioned against a hierarchical approach to human rights. As the Supreme Court of Canada has stated, a "hierarchical approach to rights, which places some over others, must be avoided".[34] As the Federal Court of Appeal has reasoned: "There should be no hierarchies of human rights."[35] The Tribunal must reject any submissions which require establishing a hierarchy of rights or rights-holders or which prioritize remedying the discrimination experienced by some vulnerable groups at the cost of others.[36]

38. The Respondent argues that the "philosophy behind women's incarceration with CSC is to create an environment that offers them the protection against the types of behaviour (i.e., gender-based violence) that Mx. Dinardo has exhibited."[37] This line of argument advocates a hierarchy of rights in three interrelated ways: 1) it suggests that the identities of transgender and Two Spirit people are *less than* other identities; 2) it asks the Tribunal to prioritize the needs and vulnerabilities of cisgender women over the needs and vulnerabilities of people marginalized based on other gender identities and expressions, particularly transgender women and Two Spirit people; and 3) it de-prioritizes and fails to address the gender-based violence experienced by transfeminine people placed in male prisons. The Respondent's assertions in this regard cannot be maintained for several reasons.

39. First, the Respondent's argument is premised on the idea that transfeminine individuals, by default, belong in prisons designated for men, entitled to accommodation only where their rights will not conflict with those of cisgender women. It relies on a false dichotomy of those who commit gender-based violence and those who are victims of it. The Respondent explicitly argues that due to Mx. Dinardo's "mindset", programs developed for "male offenders" are more suitable.[38]

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[34] *Dagenais v Canadian Broadcasting Corp*, 1994 CanLII 39 (SCC) at p. 877
[35] *Canada (Attorney General) v Johnstone*, 2014 FCA 110 at para 81
[36] See Ontario Human Rights Commission, Policy on competing human rights (2012) at section 5.2
[37] Respondent's Statement of Particulars at para 438
[38] Respondent's Statement of Particulars at para 447

To reach this conclusion, it relies on "empirical research" that is not cited, suggesting that the suitability of male programming is empirical fact.[39]

40. This logic means that claims by transfeminine individuals are subject to a different standard, in which respect for their gender identity is conditional on good behaviour, in a way that would not be applied to other identities. Simply, the Respondent would never incarcerate a cisgender woman with a history of perpetrating gender-based violence in an institution designated for men, but it relies on precisely this argument to justify its placement of Mx. Dinardo. In other words, the authenticity of a trans or Two Spirit person's gender identity itself is always in question and provisional.[40] By its own admissions, the Respondent continues to impose its own subjective assessment of a trans or Two Spirit person's "mindset" over the expressed gender identity of the individual and their actual needs and circumstances.

41. Second, the Respondent's reliance on the needs and circumstances of cisgender women as justification for its actions and practices 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 with marginalized gender identities and expressions, including women, transgender, and Two Spirit persons. Specifically, the Respondent contends that the Complainant could not be placed in a women's prison, in accordance with their gender identity and expression, because it would threaten the "integrity of the correctional model for women offenders" who are particularly vulnerable.[41]

42. This alleged rights conflict creates a hierarchy based on a false choice between the safety of cisgender women and the rights of transgender and Two Spirit individuals. This alleged rights conflict, however, is a fiction of the Respondent's own creation. It is the Respondent's binary prison system—in which all people of marginalized gender identities and expressions, including trans and

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[39] Respondent's Statement of Particulars at para 447
[40] See Allison Smith, "Stories of 0s: Transgender Women, Monstrous Bodies, and the Canadian Prison System" (2014) 23 Dal J Leg Stud 149.
[41] Respondent's Statement of Particulars at para 438

Two Spirit people and cisgender women, are forced to exist within a system designed based on cisgender male norms—which places the rights of cisgender women and persons marginalized on the basis of other gender identities and expressions into conflict in the first place. Current prison structures adopt, reinforce, and impose the gender binary on all federally-sentenced people, and it is only because of the Respondent's choice to continue to structure the prison system in this way that conflict emerges. The proper accommodation and inclusion of people of marginalized gender identities and expressions requires the prison structure itself to recognize and respond to the full range of gender identities and expressions.[42]

43. In asserting this conflict between rights-holders, the Respondent appears to maintain that the "philosophy" of the correctional model for women contradicts the stated purpose of CD 100 to assist "staff in meeting the needs of gender diverse offenders, and reiterates CSC's duty to accommodate their needs, regardless of their anatomy (i.e., sex) or the gender marker on their identification documents".[43] While CD 100 allows for possibility of "overriding health or safety concern" in which accommodation is not possible, it is clear that this concern must be "substantiated" with evidence or information that accommodation "would jeopardize the health or safety of the gender diverse offender, other offenders, staff, or members of the public."[44] In other words, any overriding health or safety concerns must be based in evidence, rather than in philosophy. Moreover, a "philosophy" for the correctional model applied to women will only be inclusive and human rights-compliant where it encompasses the full accommodation of trans and Two-Spirit people's needs and circumstances. By framing women's "correctional philosophy" as oppositional to the needs of trans and Two Spirit people, CSC effectively continues its pre-CD 100 status quo, rendering the policy meaningless.

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[42] The Respondent's assertions about "male programming" being the more appropriate choice for the Complainant provide another example of the ways in which the Respondent's choice to impose a rigid gender binary in its structures prejudices people of marginalized gender identities and expressions. It is the Respondent's decision to provide only "male programming" and "female programming" which leads to the conflict that the Respondent then relies on to deny services to the Complainant.
[43] Policy Bulletin 685 re Commissioner's Directive 100, Gender Diverse Offenders
[44] Commissioner's Directive 100, Gender Diverse Offenders

44. As addressed above, the reality is that it is the Respondent's choice to impose a prison structure based on a gender binary. Once this choice is laid bare, it is clear that any attempt to justify its ongoing imposition—or the resulting discrimination and failures to accommodate experienced by people of marginalized gender identities and expressions—becomes a matter of undue hardship, which must be established based on clear, compelling and quantifiable evidence. Notably, the Respondent does not appear to claim that respecting the Complainant's gender identity or expression in placement or the provision of services would have constituted undue hardship. Nor does the Respondent provide the kind of particularized justification needed to show undue hardship or clear, objective, direct and quantifiable evidence to satisfy its burden.[45]

Dated at Ottawa, Ontario, and Vancouver, British Columbia, this 11th day of January, 2024

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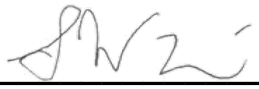
Vancouver, BC V6C 3T7
Unceded Coast Salish Homelands

Per: 
Morgan Rowe/Simcha Walfish/
Amanda Therrien/Humera Jabir

[45] *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at para 41