COURT OF APPEAL FILE NO. 45092

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ON APPEAL FROM the Order of the Honourable Mr. Justice Leask of the Supreme Court of British Columbia pronounced on January 17, 2018

BETWEEN:

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

RESPONDENTS
(PLAINTIFFS)

AND:

ATTORNEY GENERAL OF CANADA

APPELLANT
(DEFENDANT)

FACTUM OF THE INTEVENOR NATIVE WOMEN'S ASSOCIATION OF CANADA AND WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND

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FACTUM OF THE INTERVENOR NATIVE WOMEN'S ASSOCIATION OF CANADA AND WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND

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CHRONOLOGY OF THE RELEVANT DATES IN THE LITIGATION

June 29, 2018	Native Women's Association of Canada (NWAC) and West Coast Women's Legal Education and Action Fund (West Coast LEAF) were granted leave to intervene jointly in this appeal by Justice Garson in Chambers.

NWAC and West Coast LEAF otherwise adopt the chronology of the Respondents, British Columbia Civil Liberties Association and The John Howard Society of Canada.

OPENING STATEMENT

Prisoners in solitary confinement are among the most vulnerable and marginalized members of society. The trial judge found that solitary confinement violates the equality rights of Indigenous prisoners and prisoners who are mentally ill and/or disabled. The trial judge also found that solitary confinement has severe and disproportionately harmful effects on Indigenous women. However, his analysis does not go so far as to recognize that solitary confinement specifically violates the s. 15 rights of Indigenous women. His reasoning thereby fails to fully address Indigenous women's lived experience, needs, and rights.

Indigenous women are the fastest growing prison population. Their needs and experiences in prison are shaped by the inter-generational effects of colonization and systemic discrimination. In corrections' data collection, Indigenous women are categorized as *either* Indigenous *or* women, such that the unique burdens they bear are neither properly understood nor sufficiently accommodated. To understand the adverse effects of solitary confinement, s. 15 of the *Charter* must be approached through a robust contextual and intersectional framing of Indigeneity, of gender, and when appropriate, of disabling mental health impairments.

An analysis of the adverse effects of systemic discrimination must be attentive to lived experience. For Indigenous women to have the full protection of the law, the Court must recognize how the harms they experience in solitary confinement both arise from, and are interwoven with, their unique social positioning, social history, and identity as *Indigenous women*, not as either/or. Only an analysis of this kind can meaningfully fulfill the promise of substantive equality under the *Charter*.

The appellant asks this Court to turn a blind eye to violations of *Charter* rights by leaving some of the most vulnerable members of society without a responsive and effective remedy. This would be unjust and contrary to the rule of law. Where rights are found to be violated, an appropriate, just, and meaningful remedy is essential. Such remedies are shaped by the rights at stake and the circumstances of the rights-holders. This Court must ensure that prisoners in solitary confinement can access a realistic and viable means of vindicating their *Charter* rights.

PART 1 - STATEMENT OF FACTS

1. NWAC and West Coast LEAF ("WCL") rely on the findings of the Supreme Court of British Columbia and the evidentiary record, highlighting the following conclusions:

   a. Administrative segregation is a form of solitary confinement that imposes the risk of serious psychological harm, including mental pain and suffering, self-harm and suicide, on all federal prisoners subjected to it;[1]

   b. Indigenous[2] women are significantly over-represented in solitary confinement, distinctly vulnerable to its negative impacts, and disproportionately harmed by them;[3]

   c. Indigenous female prisoners have a very high incidence of pre-existing trauma (including sexual and physical abuse) and substance misuse; and social histories including residential schooling, parental substance abuse, and removal from their family homes;[4] and

   d. Indigenous and female prisoners are over-represented among those who have been in both solitary confinement and regional psychiatric facilities.[5]

PART 2 – ISSUES ON APPEAL

2. NWAC and WCL make the following submissions:

   a. Correctly understanding equality rights and appropriate remedies requires a robust contextual approach; the experiences of Indigenous women, including those with disabling mental health impairments are intersecting and must be included in such an analysis.

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[1] Reasons for Judgment (RFJ) at para. 247.

[2] NWAC and WCL use "Indigenous" in place of "Aboriginal" and the phrase "disabling mental health impairments" in place of "mental illness" and "mental disability."

[3] RFJ at paras. 470-471.

[4] RFJ at para. 474.

[5] RFJ at para. 493.

b. Despite their rising numbers in federal prisons, Indigenous women, including those among them with disabling mental health impairments, are afterthoughts in corrections.[6] The appellant's position would effectively erase their distinct, adverse experience of solitary confinement by denying them a remedy. This Court's consideration of the issues on appeal will be incomplete without accounting for the forces of intersectional disadvantage that disproportionately burden Indigenous women.

c. The Court must not permit a remedial vacuum to exist if it finds that the rights violations arise from the administration of the law. Every right begets a remedy and courts must ensure meaningful access to *Charter* justice when the rights of marginalized and vulnerable persons or groups are violated.

PART 3 – ARGUMENT

3. The appellant alleges that the trial judge erred in finding that the solitary confinement provisions infringe the equality rights of mentally ill and/or mentally disabled persons but does not challenge the trial judge's finding of discrimination against Indigenous prisoners.[7] NWAC and WCL submit that the experiences of Indigenous women in solitary confinement are nevertheless intertwined with the issues on appeal and must be considered as part of this Court's analysis of discrimination and remedies.

A. Substantive equality requires an intersectional analysis.

4. Section 15(1) of the *Charter* promotes and protects substantive equality.[8] Substantive equality calls attention to difference and recognizes that differential treatment

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[6] See, e.g., Exhibit [Exh.] 45. Expert Report [ER] of Dr. K. Hannah-Moffat, AB Vol. 10 at pp. 3929-3930 (impossibility of disaggregating data provided as to Indigeneity and gender); RFJ at para. 514 (no data of numbers of prisoners with mental disabilities generally or in solitary confinement).

[7] Factum of the Appellant at paras. 21, 73-85.

[8] *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 2.

may be necessary to ameliorate the actual circumstances of (an) affected group(s).[9] Fulfilling the promise of substantive equality necessitates a legal analysis that is attentive to the distinct ways in which women with overlapping and multiple identities experience disadvantage.[10] The equality claims in this case engage intersecting grounds of race (Indigeneity), disability, sex, and gender.

5. The trial judge found that imprisoned Indigenous women are especially vulnerable to, and disproportionately and distinctly harmed by, solitary confinement.[11] In so doing, he recognized that Indigenous women experience the continuing effects of colonization in specifically gendered and racialized ways. However, the trial judge declined to engage in an intersectional analysis, thereby leaving his findings on discrimination incomplete.[12]

6. NWAC and WCL submit that the issues on appeal require full consideration of the experience of Indigenous women in solitary confinement, especially those with disabling mental health impairments.

7. It is necessary to engage in an equality analysis that truly accounts for Indigenous women's distinct experiences to make visible those socio-cultural harms of solitary confinement that are specific to Indigenous women. Moreover, such an approach is necessary to ensure that the analysis does not itself contribute to minimizing the lived experience of those members of a claimant group acknowledged to be at greater risk of harm. An intersectional analysis enables the court to properly apply the principle of substantive equality.

B. Indigenous women's equality rights must be contextualized.

8. Indigenous women's experience of imprisonment, including of solitary confinement, cannot be divorced from the systemic and background factors that disproportionately

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[9] *Withler* at para. 39.

[10] *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 at paras. 544-45, 562.

[11] RFJ at paras. 470-471.

[12] RFJ at para. 524.

contribute to their criminalization.[13]

9. The crisis of Indigenous over-representation in prisons is a form of long-standing systemic discrimination.[14] Indigenous women are now the fastest growing population in Canadian prisons.[15] Between 2005 and 2015, the federal prison population grew by 10 percent.[16] Over that same period, the Indigenous prisoner population increased by more than 50 percent.[17] Alarmingly, during that same period, the Indigenous women's prisoner population increased by nearly 100 percent.[18]

10. The Supreme Court of Canada has recognized that Indigenous peoples' over-incarceration stems from the inter-generational effects of Canada's history of colonialism, residential schools, and displacement.[19] This is no less the case for imprisoned Indigenous women in solitary confinement. A file review prepared by the Office of the Correctional Investigator (OCI) shows that the majority of the imprisoned Indigenous women under review had themselves attended or had a family member who a attended residential school.[20] Two-thirds of their parents had substance abuse issues.[21] Nearly half of the women had been removed from their families.[22] Almost all of them had had previous traumatic experiences, such as physical and sexual abuse, and problems with

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[13] *R. v. Gladue*, [1999] 1 S.C.R. 688 at paras. 68, 83; *R. v. Ipeelee*, 2012 SCC 13 at para. 60; *Ewert v Canada*, 2018 SCC 30 at para. 58.

[14] *Gladue* at paras 61-64, 67-68; *Ipeelee* at paras. 60, 67.

[15] Exh. 70, Tab F, Annual Report, Correctional Investigator 2015-2016 [OCI 2015-2016], Appeal Book [AB] Vol. 19 [OCI 2015-2016 Report] at p. 7396; RFJ at para. 465.

[16] OCI 2015-2016 Report, AB Vol. 19 at p. 7396; RJF at para. 465.

[17] OCI 2015-2016 Report, AB Vol. 19 at p. 7396; RJF at para. 465.

[18] OCI 2015-2016 Report, AB Vol. 19 at p. 7396; RFJ at para. 465.

[19] *Ipeelee* at paras. 60, 67.

[20] RFJ at para. 474.

[21] RFJ at para. 474.

[22] RFJ at para. 474.

substance misuse.[23] These findings were confirmed by witness testimony.[24]

11. The effects of inter-generational trauma are exacerbated in women's prisons. Indigenous women are imprisoned far from their children, communities, families, and land, and this is uniquely harming to them.[25] The Mother-Child program is largely inaccessible to Indigenous women either because they are ineligible due to their over-representation in higher security settings or because participation requires involving child welfare authorities, a system that many distrust and have experienced first-hand.[26] Although Indigenous women experience discrimination in ways that may be difficult to recognize, the impacts are acute. While the trial judge began to recognize the importance of Indigenous women's ties to their community, family and children, he failed to extend these considerations to find a specific violation of their equality rights.

C. Solitary confinement uniquely harms Indigenous women.

12. The trial judge's equality analysis stops short of connecting Indigenous women's distinct experiences of discrimination with the harms of solitary confinement. This deeper analysis is necessary to fully appreciate how solitary confinement harms Indigenous women. The trial judge heard from two Indigenous women who were imprisoned in solitary confinement. Their evidence is an essential connection between lived experience and the systemic and institutional dimensions of disadvantage.

13. Amanda Lepine was raised by her grandmother, who is a residential school survivor. Ms. Lepine spent significant amounts of time in segregation in youth facilities and during her imprisonment as an adult. She described the trauma, abuse, and confinement she experienced from childhood that shaped her journey to prison:

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[23] RFJ at para. 474.

[24] RFJ at para. 474; Cross Examination of Brigitte Bouchard on August 3, 2017 ["Bouchard Cross"], Transcript [Tr.], Vol. 4 at pp. 1514-1515.

[25] Bouchard Cross, Tr., Vol. 4 at p. 1551, 1559; RFJ at para. 470.

[26] Exh. 95, Marginalized: The Aboriginal Women's Experience in Federal Corrections [Marginalized Report], AB Vol. 26 at p. 10281-10282.

> From as early as I can remember, I was surrounded by substance use, prostitution, gang activity and violence. I was physically abused throughout my childhood, and was sexually abused by my uncle from ages 3 to 10. At age 10, Manitoba Child and Family Services removed me from my home, and placed me in a lock-up facility.[27]

14. Bobby Lee Worm has a history of poverty, substance abuse, violence, and sexual abuse. She experienced solitary confinement as perpetuating long-held feelings of powerlessness:

> Since childhood, my sense of being able to control my life has been shattered again and again. This feeling of powerlessness worsened during the years that I spent in segregation. While in segregation and on the [Management Protocol], I was literally powerless; every aspect of my every moment was controlled and under scrutiny. I felt like I had been thrown in a hole and left to rot.[28]

15. Ms. Lepine's and Ms. Worm's evidence connects individual experiences of solitary confinement to systemic forces. Ms. Worm's evidence highlights how gendered expectations of behaviour and institutional racism, against a backdrop of significant childhood trauma and abuse, come together to perpetuate a form of discriminatory disadvantage uniquely borne by imprisoned Indigenous women, in her case resulting in over 1,000 days of solitary confinement.[29]

16. Solitary confinement is commonly used to "manage" prisoners with disabling mental health impairments, prisoners who self-harm, and those at risk of suicide.[30] CSC's over-reliance on solitary confinement to "manage" these prisoners is borne disproportionately

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[27] Exh. 50, Affidavit of Amanda Lepine, AB Vol. 12, pp. 4416-4418, at paras. 2-4, 13, 17.

[28] Exh. 35A, Affidavit of Bobby Lee Worm [Worm Aff.], AB Vol. 8, pp. 2895-2901; 2914-2915, at paras. 2-4, 8, 12-17, 25-28, 89-90.

[29] Worm Aff., AB Vol. 8, pp. 2902-2904, 2907, 2910-2911, 2916-2917, at paras. 37, 41, 56-58, 67, 72-74, 97-98.

[30] Exh. 68, Plaintiffs' Notices to Admit, Tab A, Annual Report, Correctional Investigator 2014-2015 [OCI 2014-2015 Report], AB Vol. 14 at p. 5232.

by Indigenous women, as their rates of self-injury are 17 times higher than those of non-Indigenous women.[31] Moreover, time spent in solitary confinement itself further increases an Indigenous woman's risk of self-harming, attempting suicide, and dying.[32]

17. Even short periods of solitary confinement are uniquely harmful to Indigenous women. The research confirms that solitary confinement exacerbates distress for prisoners with histories of abuse and trauma, which is disproportionately experienced by Indigenous women.[33] Symptoms of depression and post-traumatic stress disorder become more severe, especially when prisoners have no idea when they will be released and lack any control over their routines. The harms of solitary confinement continue long after release from prison and may be permanent.[34] For Indigenous women, these harms impede their ability to reconnect and return to their children, families, and communities.

18. Culturally and spiritually appropriate services may be sources of support for Indigenous women recovering from trauma and abuse. Yet, Indigenous women in solitary confinement do not have meaningful access to healing practices and spirituality. While some access to Elders is permitted, how it takes place significantly diminishes any possible benefit. Elder visits are often supervised or overheard by staff, take place inconsistently, and may be demeaning.[35] Ms. Lepine explained that her interactions with Elders tended to be during her administrative segregation review hearings in the company of correctional staff.[36] Ms. Worm explained that her visits with Elders took place through food slots in her cell door or, when done outside the cell, she was in restraints throughout

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[31] OCI 2014-2015 Report at p. 51, AB Vol. 14 at p. 5256-5257.

[32] See Worm Aff., AB Vol. 8, p. 2914 at para. 85.

[33] RFJ at para. 470; Exh. 95, Marginalized Report, AB Vol. 26 at 10293; Bouchard Cross, Tr., Vol. 4 at pp. 1514-1515, 1529.

[34] Worm Aff., AB Vol. 8, p. 2915-2916 at paras. 90-96; RFJ at para. 249.

[35] Worm Aff., AB Vol. 8, pp. 2905-2906, 2908 at paras. 50-51, 60.

[36] Cross-Examination of Amanda Lepine on July 27, 2017, Tr., Vol. 3, pp. 1027, 1031-1032, 1037.

the visit.[37] The way Indigenous women in solitary confinement are required to engage with Elders may itself worsen trauma and cultural loss.

19. Indigenous women's unique systemic background factors are inextricably linked to the harms they suffer in solitary confinement. NWAC and WCL submit that these realities must be accounted for in discussions of their s. 15 *Charter* rights. The nexus of systemic disadvantage and harm cannot be understood through Indigeneity or gender alone, as CSC's data would suggest.

D. *Charter* remedies are not optional, nor are they prescriptive.

20. The appellant argues that any rights violations at issue in this case are attributable to the administration of the law alone. This position denies a remedy to the respondents and creates a situation that is unjust and inconsistent with the rule of law. The rule of law requires that where there is a right, there must be a remedy.[38]

21. Courts have the power to grant appropriate and effective remedies. The *Charter* enshrines a remedial regime designed to enforce constitutional rights. As an enforcement mechanism, s. 24(1), "above all else ensures that the *Charter* will be a vibrant and vigorous instrument for the protection of the rights and freedoms of Canadians."[39]

22. *Charter* remedies, like *Charter* rights, evolve over time. The courts are charged with crafting responsive, creative, and innovative remedies to give meaning to *Charter* rights and the rule of law.[40]

23. Courts exercise discretion in fashioning remedies but cannot abdicate their constitutional responsibility to ensure justice is done.[41] The appellant's position, if

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[37] Worm Aff., AB Vol 8, pp. 2905-2906, 2909-2910 at paras. 50, 68.

[38] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para. 25.

[39] *R. v. 974649 Ontario Inc.*, 2001 SCC 81 at para. 19; quoting *Mills v. The Queen*, [1986] 1 S.C.R. 863 at 881 (*per* Lamer J.).

[40] *Doucet-Boudreau* at para. 59.

[41] *Doucet-Boudreau* at paras. 35-36.

accepted, would deny any meaningful avenue to access *Charter* justice for the most marginalized and vulnerable in our society.

E. *Charter* remedies have systemic dimensions and must be responsive.

24. There is no principled basis for confining the use of s. 24(1) remedies to individual plaintiffs. Section 24(1) provides personal remedies for unconstitutional government action. It *also* vindicates the values of the *Charter* and ensures future *Charter* compliance. In this respect, s. 24(1) remedies, as public law remedies, have systemic dimensions. When a s. 24(1) remedy is granted, it is "typically more than an individual claimant's rights that are being affirmed; the benefit of a successful claim enures to society at large."[42]

25. NWAC and WCL submit that an incremental extension of s. 24(1) remedies beyond individual plaintiffs heeds the call of the Supreme Court for a "culture shift"[43] that will ensure an effective and accessible means of enforcing rights for all.

26. By empowering courts to order remedies that are appropriate and just "in the circumstances," s. 24(1) demands an assessment of *all* the circumstances, including the rights at stake and the circumstances of the rights-holders.[44] In this case, the Court cannot undertake an analysis of appropriate and just remedies without fully accounting for the broader social and historical context of disadvantage and exclusion experienced by prisoners in general, by prisoners in solitary confinement, and by prisoners with multiple and overlapping markers of pre-existing disadvantage, such as Indigenous women.

27. NWAC and WCL submit that s. 15's equality guarantee should inform the Court's interpretation of remedies. To fashion a remedy that is both responsive and effective,[45] the Court must again approach its remedy analysis from the perspective and experience of the rights-holders themselves. In this case, that requires the Court to recognize that

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[42] *R. v. Demers*, 2004 SCC 46 at para. 99, *per* Lebel J. (dissenting on the availability of a s. 24(1) remedy during suspension of declaration of invalidity).

[43] *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 1-2.

[44] *Doucet-Boudreau* at para. 55.

[45] *Doucet-Boudreau* at paras. 24-25.

the justice system is inaccessible to prisoners due to the conditions of their confinement and their distinct experiences of disadvantage.[46]

28. Having found that solitary confinement discriminates, the Court must craft a remedy that is deeply rooted in the context *of that discrimination*. The very context that grounds the Court's finding of adverse effects discrimination is stitched together with systemic, institutional and other barriers that deny prisoners in solitary confinement access to just and appropriate remedies.

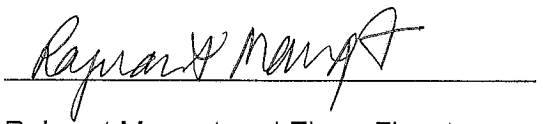
29. The appellant suggests that prisoners in solitary confinement must, one by one, come before the court to seek remedies for violations of their *Charter* rights.[47] NWAC and WCL submit that is unjust, impractical, and fails to give prisoners meaningful access to justice. If the Court denies the respondents a remedy under s. 52 of the *Charter*, it must grant a s. 24(1) remedy that fully accounts for the harms of solitary confinement and its discriminatory effect on Indigenous women.

PART 4 - NATURE OF ORDER SOUGHT

30. NWAC and WCL seek leave to make oral submissions at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, this 31st day of July, 2018.



Rajwant Mangat and Elana Finestone,
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[46] RFJ at paras. 431-433, 436.

[47] Factum of the Appellant at para. 142.

APPENDIX: ENACTMENTS

Canadian Charter of Rights and Freedoms, Part 1 of *the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Enforcement

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

LIST OF AUTHORITIES