NO: S087858
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

AMANDA INGLIS, DAMIEN INGLIS (by his litigation guardian Amanda Inglis), PATRICIA BLOCK, and AMBER BLOCK (by her litigation guardian Patricia Block)

PLAINTIFFS

AND:

MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF BRITISH COLUMBIA, and LISA ANDERSON AS WARDEN OF ALOUETTE CORRECTIONAL CENTRE FOR WOMEN

DEFENDANTS

# WRITTEN SUBMISSIONS OF THE INTERVENOR WEST COAST LEAF

## I. INTRODUCTION

1. West Coast LEAF was granted leave to intervene in this action to make legal arguments on the interpretation and application of sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") to the government action at issue in this case and, to the extent necessary, on the justifiability of that action under section 1 of the *Charter*.

2. West Coast LEAF's area of expertise and the focus of its submissions in this case are on the concept of equality. It will address four aspects of equality that are engaged in the present case.

3. First and foremost, West Coast LEAF will argue that, based on the recent decision of the Supreme Court of Canada in *Withler v. Canada (Attorney General)*, [2011] 1 SCR 396, s. 15 does not require a "comparator group" analysis. Rather, in this context a substantive equality analysis requires a deeper and more nuanced consideration of the relationships between the claimants and others than the comparator group approach affords. This is

particularly so in situations like the present case, where the claimant group differs from the comparator "norm" on the basis of multiple intersecting characteristics. Application of a comparator group analysis, even where multiple comparator groups are identified for each differentiating characteristic, may well preclude finding a contravention of s. 15 and discrimination in a legal sense because it fails to capture the reality of their experience.

4. Second, and in the alternative, West Coast LEAF will apply the comparator group analysis as refined in *Carter v. Canada*, 2012 BCSC 886 to the claimant mothers and babies in this case and will demonstrate that even on this approach, cancellation of the Mother-Baby program (the "Program") at Alouette Correctional Centre for Women ("ACCW") contravenes s. 15.

5. Third, while West Coast LEAF relies on the Plaintiffs' submissions with respect to the s. 7 claim, it will argue that in addition to the requirement of non-arbitrariness, equality is also a principle of fundamental justice and cancellation of the Program at the ACCW violates this principle.

6. Fourth, West Coast LEAF will argue that, if cancellation of the Program is a limit "prescribed by law" (and West Coast LEAF will submit that it is not), application of the s. 1 tests, particularly the proportionality inquiry, must take account the particular characteristics of the claimants, including the complex dimensions of the disadvantages faced by them.

## II. EQUALITY

### A. The Role of Comparison in the Equality Analysis

#### (1) Section 15 protects substantive equality

7. Since the coming into force of s. 15, courts have struggled to identify the harm at which constitutional equality guarantees and statutory anti-discrimination laws are aimed. This is perhaps most evident in the Supreme Court of Canada's equality jurisprudence, where the challenge of articulating a comprehensive legal test for contravention of s. 15 has continued since *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 43.

8. In *Andrews*, the Court rejected a formal approach to equality, described as the "similarly situated approach," whereby groups or individuals who are alike in relevant respects must be treated similarly, but if they are unalike, equality does not apply. Instead, the Court determined that s. 15 protects "substantive equality." Substantive equality includes the concept of formal equality, but goes deeper in that it recognizes that equality also

requires groups and individuals who are unalike in relevant ways to be treated differently in order to realize their s. 15 equality rights. As *Andrews* makes clear, the substantive equality analysis is designed to advance "the promotion of equality", defined to entail "the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration" (at p. 171).

9. The concept of substantive equality resonates at an abstract level and can be compellingly illustrated with relatively simple examples. For example, is it discriminatory to refuse to hire a woman because she is pregnant? The employer could say it hires both men and women, so it is not treating them differently. Pregnant women are not like men or non-pregnant women because they will be unavailable to work for some period of time in the foreseeable future. On a formal equality analysis, pregnant women are not similarly situated in the context of availability for work. Sex discrimination only protects women as compared to men (or men as compared to women) to the extent that they are alike. Since pregnancy is a condition unique to women, equality does not apply.

10. However, on a substantive equality analysis, the characteristic of being pregnant can be identified as inextricably linked to the characteristic of being female – while not all women get pregnant, only women get pregnant. Thus, the differentiating characteristic is part of the ground of sex. Employers must treat pregnant women "differently" by not refusing to hire them even though they will be unavailable for work for a period of time, and even though this would be an acceptable reason not to hire a non-pregnant person who is going to be away for an equivalent period for a holiday.

11. To take another example: a state program subsidizes standard computers for high school students. However for low-vision students, a computer is useless without a special magnifier. On a formal equality analysis, low-vision students have no basis for complaint as they receive the same subsidy as other students. However, a substantive equality analysis reveals the discrimination: The government subsidy is based on the assumption that all high school students can use computers, and this is not the case for low vision students. According them equal benefit of the law requires different treatment. This is often the case in disability-based discrimination claims. See for e.g. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624*;* S. Moreau, Equality Rights and the Relevance of Comparator Groups (2006) 5 J.L. & Equality 81-95 ("Moreau").

12. But in many cases, it is much more difficult to apply a substantive equality analysis in a way that respects the notion that a legislature's choice to provide legal benefits to (or impose burdens on) some groups and not others is sometimes legitimate and not

discriminatory. Courts have been asked to decide whether discrimination has occurred in all sorts of contexts. For example, is it discriminatory not to provide the same level of compensation benefit to people who are "temporarily totally disabled" as are accorded to people who are permanently totally disabled? (*Granovsky v. Canada*, 2008 SCC 28, [2008] 1 SCR 703) Is it discriminatory to exclude couples who do not marry or enter civil unions from the rights to assets and support that accrue to those who marry or enter civil unions? (*Quebec (Attorney General) v A*, 2013 SCC 5) Is it discriminatory to effectively deny to those who require assistance to commit suicide the ability to do so legally when those who can commit suicide without assistance are not so burdened? (*Carter*)

13. The history of equality jurisprudence in the Supreme Court of Canada demonstrates that, while formal equality analysis is relatively easy to reject in the abstract, the complexity of substantive equality – a concept that is as much aspirational as it is real – makes it challenging to apply in practice. In difficult cases, formal equality thinking tends to creep back in.

14. The one proposition that the Supreme Court of Canada has consistently affirmed is that equality is a comparative concept (as, for example, in *Andrews, Law v. Canada (Minister of Employment and Immigration*, [1999] 1 SCR 49 and *Withler*). However, the nature of the comparison that occurs in a s. 15 case has been the subject of much debate.

**(2) Rise of the comparator group analysis**

15. *Andrews* was the Court's first formulation of the s. 15 analysis. Justice McIntyre described discrimination in the s. 15 sense as follows (at para. 37):

> I would say then that discrimination may be described as a distinction, whether intentional or not, but based on grounds relating to personal characteristics of the individual or group, which has the effect of burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

16. This statement provided the foundation for a three-part test:

(1) Does the law create a distinction?

(2) Is the distinction based on enumerated or analogous grounds?

(3) Does it have the effect of imposing disadvantages not imposed on others or withholding or limiting access to advantages available to others?

17. As the majority of the Court noted in *Quebec v. A*, this formulation did not clearly identify when an adverse effect based on an enumerated or analogous ground is discriminatory, and in subsequent cases, different members of the Court provided two responses: one, which said discrimination occurs only if the grounds-based distinction is irrelevant to the goals or values underlying the law; the other was to say that discrimination exists if the grounds-based distinction is contrary to protecting human dignity (*Quebec v. A*, at paras. 147-149, referring to *Miron v. Trudel*, [1995] 2 SCR 418, *Egan v. Canada*, [1995] 2 SCR 513, and *Thibaudeau v. Canada*, [1995] 2 SCR 627).

18. In its 1999 decision in *Law*, the Supreme Court unanimously adopted a comprehensive multi-factored s. 15 test based on a synthesis of these approaches (at para. 88):

(1) Does the law draw a formal distinction between the claimant and others based on one or more personal characteristics, or fail to take into account the claimant's already disadvantaged position within Canadian society?

(2) Is an enumerated or analogous ground the basis for the differential treatment?

(3) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

19. In answering this third question, referred to as the dignity requirement – four contextual factors guide the analysis (*Law*, at para. 88):

(1) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue;

(2) The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others;

(3) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society; and

(4) The nature and scope of the interest affected by the impugned law.

20. Only one year after *Law*, the Supreme Court found it necessary to refine the *Law* test. Although Justice Binnie said that he "had no desire to burden with further nuances the already complicated world of equality rights," (at para 35) but found it necessary to do so to resolve the disability claim in that case. Writing for the Court, he determined that s. 15 breaches should be resolved by identifying a comparator group: "Identification of the group in relation to which the appellant can properly claim "unequal treatment" is crucial." Further, the proper comparator group must be determined with regard to the purpose and effect of the benefit at issue (para. 47).

21. In *Hodge v. Canada*, 2004 SCC 65, [2004] 3 SCR 357, the Court further refined the comparator group analysis, holding that the proper comparator group is a "mirror" comparator group:

> 23 The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the *Charter* or omits a personal characteristic in a way that is offensive to the *Charter*.

22. In other words, a claimant had to establish that they were "like" the comparator group who received the benefit except for the personal characteristic associated with an enumerated or analogous ground (*Hodge*, at paras. 25, 31). The focus on the relevant similarities in the situation of claimants and the comparator group echoes the formal equality thinking the Court had rejected in *Andrews*.

23. Recognizing that a single mirror comparator might not always be appropriate, in *Falkiner v. Director of Income Maintenance Branch (Ontario)* 2002, 159 OAC 135, the Ontario Court of Appeal broadened the notion of the comparator group to include the possibility of multiple comparators:

> 72 Because the respondents' equality claim alleges differential treatment on the basis of an interlocking set of personal characteristics, I think their general approach is appropriate. Multiple comparator groups are needed to bring into focus the multiple forms of differential treatment alleged. Even accepting this general approach, however, the court is still entitled to refine the complainants' chosen comparisons to more accurately reflect the subject-matter of the complaint.

24. The Ontario Court of Appeal confirmed that the chosen comparator group or groups, as the case may be, must still accurately reflect the subject-matter of the complaint. Nevertheless, the Court of Appeal was live to the notion that substantive equality is a complex concept, which may involve several intersecting analogous or enumerated grounds of discrimination.

25. The comparator group analysis came to dominate the s. 15 jurisprudence. As Justice Binnie observed in *Hodge*, many s. 15 claims turned on the proper identification of a comparator group by the plaintiff:

> 18 As is evident, a misidentification of the proper comparator group at the outset can doom the outcome of the whole s. 15(1) analysis. In fact, the seemingly straightforward selection of a comparator group has proved to be the Achilles' heel in a variety of recent cases, including *Granovsky, supra*, *Lovelace, supra*, and *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54. In other cases, the selection has sparked a good deal of judicial debate, as in *M. v. H.*, [1999] 2 S.C.R. 3, and *Gosselin, supra*. The correctness of the "comparator group" contended for by a claimant has thus been an important battleground in much of the s. 15(1) jurisprudence and, in my view, this issue is also at the forefront of the present appeal.

**(3) Conceptual flaws in the comparator group analysis**

26. The fundamental defect in a comparator group analysis, whether the requirement is as stringent as a single "mirror" comparator, or broadened to include multiple comparators, is that it eliminates most of the substantive element of the equality analysis and returns to a formal equality mindset.

27. The comparator group analysis is particularly inadequate in circumstances where, as in this case, the claimant group alleges adverse treatment on the basis of multiple personal characteristics. In their critique of the formalism inherent in the comparator group analysis and its inability to address claims based on multiple grounds, Daphne Gilbert and Diana Majury describe its defects as follows:

> In *Falkiner*, the claimants alleged differential treatment on the basis that they are single mothers on social assistance. Given that there are three characteristics at play here, the claimants argued, and Laskin J. agreed, that no single comparator group would capture all of the differential treatment that is the object of complaint. …
>
> The principal critique of the comparative approach adopted in *Falkiner* is that it is a non-intersectional analysis of an intersectional claim. Justice Laskin's approach requires that the claimants be dissected into specific characteristics, each to be examined separately and in isolation, and then pasted back together for a final conclusion. Described as interlocking, the claimants' characteristics are nonetheless treated as severable and unrelated. The claimants are not treated as whole people and the interactive nature of the sites of oppression is rendered invisible, even negated. Although in *Falkiner*, this dissection does not defeat the claim, there will be cases where the claimant does fall through the cracks on each of the separate analyses. Black women falling through the cracks of separated race and sex analyses was the whole point of Kimberlé Crenshaw's ground-breaking article on intersectionality. Crenshaw provided numerous examples of situations in which, for example, no Black women were hired by an employer but because Black men (race) and white women (sex) had been hired, Black women's claim of discrimination failed under the severed grounds of race and sex. As this example clearly illustrates, the source of the problem is in the narrow construction and application of discrete grounds. However, the invocation of multiple distinct comparator groups, each attaching to a separate characteristic (ground), compounds the problems of a narrow grounds approach. And, regardless of outcome, the process of dissection is, in and of itself, an insult to the claimants' dignity.
>
> See: Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006) 24 Windsor Y.B. Access Just. 111; see also Moreau.

**(4) Rethinking the utility of the comparator group analysis**

28. In *Withler*, the Supreme Court of Canada decided it was time to re-evaluate the usefulness of the comparator group ain the s. 15 analysis. The Supreme Court identified four ways in which a comparator group analysis is not appropriate for assessing substantive equality guarantees.

29. First, the definition of the comparator group may effectively determine the outcome (*Withler*, at para. 56). As a result, factors going to discrimination — whether the

distinction creates a disadvantage or perpetuates prejudice or stereotyping — may be eliminated or marginalized. (as Justice Binnie noted in *Hodge*, above at para. 24.)

30. Second, trying to identify a precisely corresponding comparator group "becomes a search for sameness, rather than a search for disadvantage," which obscures the real issue of whether the law disadvantages the claimant or perpetuates a stigmatized view of the claimant (*Withle*r, at para. 57).

31. Third (and of particular importance here), comparator group analysis is unhelpful where claimants allege multiple grounds of discrimination (*Withler*, at para 58):

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

32. Fourth, the Court accepted that finding the "right" comparator group unfairly burdens claimant, for two reasons (*Withler*, at para. 59):

> First, finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison. As Margot Young warns:
>
> > If there is no counterpart in the experience or profile of those closer to the centre, the marginalization and dispossession of our most unequal will be missed. These cases will seem simple individual instances of personal failure, oddity or happenstance.
> >
> > ("Blissed Out: Section 15 at Twenty", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 45, at p. 63)
>
> Second, it may be difficult to decide what characteristics must be "mirrored". Rational people may differ on what characteristics are relevant, as this case illustrates. The concern with claimants spending time

> and money in a pre-trial search for the appropriate comparator group is exacerbated by the possibility that trial judges may or may not accept the claimant's choice, and compounded by the fact that appeal courts may adopt a different comparator group later in the proceedings. When the appropriate comparator group is redefined by a court, the claimant may be unable to establish his or her claim because the record was created in anticipation of comparison with a different group.

33. *Withler* therefore established that a comparator group analysis is *not* required to establish a contravention of s. 15.

**(5) Relevance of comparisons to s. 15 analysis post-*Withler***

34. Rejection of the comparator group analysis does not mean that comparisons are irrelevant to s. 15. However, as the Supreme Court recognized in *Withler*, the role of comparison in a substantive equality analysis is not captured by the relatively formal analytical tool of the comparator (or mirror comparator) group. The Court affirmed that proof of a s. 15 breach requires affirmative answers to two questions (*Withler*, at para. 61):

> (1) Does the law create a distinction based on an enumerated or analogous ground?
>
> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

35. Comparisons *may* help to answer both questions, but the nature of the comparison will vary depending on the context of the case (*Withler*, at para. 61). Context, not a particular form of comparison, grounds the equality analysis in relation to both questions. With respect to the question of whether the law creates a distinction based on an enumerated or analogous ground, the Court elaborated as follows: (*Withler*, at para 63):

> It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.

36. With respect to whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping, the Court also elaborated: (*Withler*, at paras. 65-66):

> 65 The analysis at the second step is an inquiry into whether the law works substantive inequality, by perpetuating disadvantage or prejudice, or by stereotyping in a way that does not correspond to actual characteristics or circumstances. At this step, comparison may bolster the contextual understanding of a claimant's place within a legislative scheme and society at large, and thus help to determine whether the impugned law or decision perpetuates disadvantage or stereotyping. The probative value of comparative evidence, viewed in this contextual sense, will depend on the circumstances. …
>
> 66 The particular contextual factors relevant to the substantive equality inquiry at the second step will vary with the nature of the case. A rigid template risks consideration of irrelevant matters on the one hand, or overlooking relevant considerations on the other: *Kapp*. Factors such as those developed in *Law*- pre-existing disadvantage, correspondence with actual characteristics, impact on other groups and the nature of the interest affected - may be helpful. However, they need not be expressly canvassed in every case in order to fully and properly determine whether a particular distinction is discriminatory (see *Ermineskin Indian Band*; *A.C. v. Manitoba*; *Hutterian Brethren*). Just as there will be cases where each and every factor need not be canvassed, so too will there be cases where factors not contemplated in *Law* will be pertinent to the analysis. At the end of the day, all factors that are relevant to the analysis should be considered.

37. *Quebec v. A* is the Court's most recent s. 15 decision. The divergence between the judges on the question of whether a s. 15 breach was established on the application of the *Withler* test demonstrates that the application of substantive equality even under its newest formulation remains challenging. While it is relatively easy to require a contextual analysis in the abstract, and to point to indicia such as prejudice and stereotyping, identifying whether a specific legislative measure actually has those effects is harder.

38. Justice Abella, writing for the majority of the Court on the s. 15 breach, held that prejudice and stereotyping help the court to identify whether the norm of substantive equality has been breached; they are not discrete elements of the analysis that claimants must prove:

> 327 We must be careful not to treat *Kapp* and *Withler* as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them. Such an approach improperly focuses attention on whether a discriminatory *attitude* exists, not a discriminatory impact, contrary to *Andrews*, *Kapp* and *Withler* …

39. Justice Abella criticized Justice LeBel (who wrote for the minority of judges who found no s. 15 breach) for placing too much weight on current social *aspirations and attitudes*, in which women are just as free as men to choose how they conduct their lives, including a decision about whether to formalize their relationship with their partners. In her view, the *effect* of a law that treats women on equal footing to men with respect to a decision about whether to marry, however laudable that objective, is to perpetuate the prejudice and disadvantage experienced by women who are not in that position.

40. Referring to the social and legal history in which women have been significantly disadvantaged by separation as compared to men, and the persistence of the feminization of poverty particularly following the end of a relationship, as well as to A's particular circumstances (A. was some 15 years younger than her partner, had not grown up in Canada, was financially dependent upon B., and was primarily caring for their three young children), she concluded that the effect of treating as equal individuals who are not equal is to perpetuate the disadvantage of the more vulnerable person.

41. The divergent views of Justices Abella and LeBel in *Quebec v. A.* as to whether A. and B. were equally affected by the law in question reveals how hard it is to identify and challenge assumptions of formal equality. While men and women are equal in the abstract, their experience of marriage-like relationships, particularly when factors such as age, child-bearing and rearing, and economic independence are involved, is very different. Women like A. do not have an "equal" voice in a decision about whether to marry. A statutory assumption of equality does not make it so.

42. The Supreme Court of Canada's equality jurisprudence establishes that s. 15 contains guarantees of substantive equality, the breach of which is proved by showing that the law (or government action) makes a distinction based on an enumerated or analogous ground, and creates a disadvantage by perpetuating prejudice or stereotyping. The Supreme Court of Canada's experience in applying a substantive equality analysis demonstrates that courts must be vigilant in ensuring that assumptions about the way our society ought to be, particularly in relation to our aspirations for equality, do not blind us to the realities of unfairness and oppression experienced by particular claimant groups.

43. In summary, a review of the Supreme Court of Canada's jurisprudence establishes the following four propositions with respect to s. 15:

(a) Section 15 guarantees substantive equality, not merely formal equality; context must inform the analysis from the outset;

(b) Claimants must demonstrate that the law creates a distinction based on an enumerated or analogous ground, and proof of the adverse impact of the law on a claimant group is sufficient;

(c) Claimants must also demonstrate that the distinction creates a disadvantage in that the norm of substantive equality is breached, and demonstrating that the distinction perpetuates prejudice or stereotypes will do so; and

(d) Comparisons of various kinds may be helpful in answering both prongs of the *Withler* test but a comparator group analysis is not required.

## B. The Section 15 Analysis in this Case

### (1) Setting the context: who are the claimants and what is their claim?

44. The claimant groups in this case are:

(a) Mothers housed at ACCW, whether on remand or serving sentences who wish to have their baby remain with them and for whom the Ministry of Children and Family Development (the "MCFD") has said to be the primary caregiver of that baby based on the best interests of the baby; and

(b) Babies of those mothers.

45. West Coast LEAF adopts the submissions of the Plaintiffs and the British Columbia Civil Liberties Association ("BCCLA") with respect to the multiple characteristics of disadvantage that disproportionally affect the mothers and babies, including poverty, social isolation, mental health status, Aboriginal origin, dysfunctional family history, and present and multi-generational experience of child apprehension.

46. The evidence establishes that, until some point in 2007, the Program at ACCW allowed that babies born to women while they were housed at ACCW would, if MCFD determined that it was in the best interests of the particular baby, be able to reside with its mother at ACCW, and be given support to establish a positive attachment psychological

and physiological attachment. The Program was cancelled and was replaced by a policy that, among other things, prohibited any baby from residing at ACCW with its mother (the "Policy").

47. The s. 15 claim in this case is that the cancellation of the Program drew a distinction based on an enumerated or analogous ground that violates the substantive norm of equality by perpetuating prejudice and stereotyping. The cancellation was a decision made by Brent Merchant, in his capacity as the Provincial Director, Adult Custody, Corrections Branch.

48. This claim must be situated not only in the socio-economic and historical context of the claimant group, it must also be approached with appreciation of the relevant international context. As the Plaintiffs have noted, international instruments should inform the interpretation of the *Charter*. In addition to the instruments cited by the Plaintiffs, Article 7 of the *United Nations Declaration on the Rights of Indigenous Peoples* (for which Canada officially declared support on November 12, 2012) provides:

> *Article 7*
>
> 1. Indigenous peoples have the rights to life, physical and mental integrity, liberty and security of the person.
>
> 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

**(2) Distinction Based on an Enumerated or Analogous Ground**

49. In *Withler*, the Court reaffirmed that a distinction need not be on the face of a law, it may arise from its disparate impact (emphasis added):

> 64 In some cases, identifying the distinction will be relatively straightforward, because a law will, on its face, make a distinction on the basis of an enumerated or analogous ground (direct discrimination). This will often occur in cases involving government benefits, as in *Law*, *Lovelace* and *Hodge*. <u>In other cases, establishing the distinction will be more difficult, because what is alleged is indirect discrimination: that although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds.</u> Thus in

> *Granovsky*, the Court noted that "[t]he CPP contribution requirements, which on their face applied the same set of rules to all contributors, operated unequally in their effect on persons who want to work but whose disabilities prevent them from working" (para. 43). In that kind of case, the claimant will have more work to do at the first step. Historical or sociological disadvantage may assist in demonstrating that the law imposes a burden or denies a benefit to the claimant that is not imposed on or denied to others. The focus will be on the effect of the law and the situation of the claimant group.

50. Cancellation of the Program falls into the second category of cases. It has a disproportionately negative impact on the claimants that can be identified by factors relating to enumerated or analogous grounds in s. 15. The evidence in this case establishes that the claimants are disproportionately Aboriginal, female (some babies are male), with present and historical experiences of addiction, mental health issues, poverty, foster or institutionalized care and child apprehension. This constellation of characteristics relates to the enumerated grounds of race, ethnicity, disability and sex, and, for the babies, to the analogous ground of family (which is addressed in more detail below).

51. The disproportionately negative impact of the cancellation of the Program on the claimants is evident in relation to this constellation of characteristics.

52. The Program offered the claimants an important and unique opportunity to break the cycle of family dysfunction for both mothers and babies; for mothers to experience feelings of self-worth and competence, and to assist in their transition from the institution into the community; and for babies to establish attachment to their mothers from birth, experience the benefits of breastfeeding, and avoid separation from their cultural and family background.

53. The cancellation of the Program had the opposite effect: it sent a powerful demeaning message to mothers whose babies who as a result of the cancellation of the Program were now being apprehended that they are not safe to be around; that their babies must be protected from them. Many of the mothers come from backgrounds of broken attachment. Apprehending their babies reopens these wounds from the past, disrupting the mother-baby bond and creating severe (and potentially insurmountable) hurdles to establishing attachment. See in particular Dr. Koopman's expert report (Exhibit 2) and testimony on May 29, 2013.

54. Comparisons between the claimants and others cannot fully capture the full negative impact of the cancellation because of the complex ways in which these s. 15

characteristics intersect. However, the adverse impact on the claimants can be partially illustrated though comparisons with other groups:

(a) Mothers (both Aboriginal and non-Aboriginal) who receive community placement through sentencing, or who are able to avail themselves of mother-baby programs at federal correctional facilities;

(b) Incarcerated men (whether Aboriginal or not) who do not experience the loss of self-worth and physical deprivation inherent in having a child one is capable of breast-feeding apprehended following delivery; and

(c) Babies whose mothers are not incarcerated at ACCW, who are able to reap the significant benefits of breastfeeding and bonding with a mother who is willing and able to form an attachment with them.

55. Cancellation of the Program in conjunction with the risk classification system that applies to female prisoners also has a disproportionately negative impact on the claimant group because of its tendency to systemically overclassify them.

56. Within the British Columbia corrections system, female inmates are classified according to risk (high, medium and low), and in particular, risk of harm to themselves, to other offenders, to staff, and to the outside community. See in particular the testimony of Brenda Tole on May 27, 2013.

57. The classification of a particular inmate is conducted prior to admission to ACCW, based on the screening process described in Professor Nicholls' expert report:

> All new inmates are seen very briefly (5-20 mins), typically by an individual with a bachelor's degree, who does not generally have expertise in violence risk assessment beyond having taken part in a half-day workshop on the JSAT [Jail Screening Assessment Tool], in which violence risk would comprise only one of many topics covered.

58. While the importance of taking into account gender, ethnicity and culture in the risk classification process has been recognized, in practice, little has been done to ensure this takes place. According to Prof. Nicholls' expert report:

(a) The individuals conducting risk assessments in British Columbia are not required to have any particular training in gender or cultural sensitivity (11-12);

(b) The assessment tools are largely informed by experiences with male prisoner populations, and the field of risk assessment has "focused largely on research with Caucasian men;"

(c) Findings related to risk assessment measures developed for the male prison population "would have limited relevance to the inmate population at ACCW which is comprised entirely of women and has a large representation of women of Aboriginal descent, particularly among the remanded women"(31);

(d) Gender of both the assessor and the client has an implication for the accuracy of risk assessments. Studies of risk assessments "were found to be particularly limited in their ability to assess female patients' risk of future violence"; and

(e) Experts in the field of risk assessment have less confidence in the utility of existing risk assessment measures for female populations:

> Recent research results and reviews on risk factors and risk assessment in female offenders suggest that – although many violence risk factors seem to be valid for both men and women – the assessment and formulation of violence risk differs at least to a certain degree between men and women and, consequently, that there is a need for more gender-sensitive risk assessment [Citations removed] … (38)

59. The impact of this risk assessment process is to misclassify female inmates into higher risk categories. See: Hannah-Moffat, Kelly. "Sacrosanct or Flawed: Risk, Accountability and Gender-Responsive Penal Politics", 22 Current Issues Crim. Just. 193 (2010-2011) ("Hannah-Moffat") at 201).

60. In the particular context of ACCW, Brenda Tole confirmed the misclassification of female prisoners (and in particular, Aboriginal female prisoners):

(a) Female inmates do not pose the same risk either within the community or within a correctional center as male inmates; and

(b) There was a consistent over classification of female offenders (and in particular, Aboriginal women offenders) to levels of security that were higher than what was required by their initial assessment.

See the testimony of Brenda Tole on May 27-28, 2013.

61. Further complicating the classification process is the intersection between the various characteristics of Aboriginal female inmates. As observed by criminologist Kelly Hannah-Moffat at 206:

> It is difficult to assess how various forms of oppression intersect, overlap and co-exist in the lives and governance of penal subjects and how these reciprocally-constituted layers of social, political and economic marginalization inform the normative criteria contained in risk instruments and are used to depict particular individuals as *risky*, *needy* or *dangerous*.

62. The systemic over-classification of female prisoners affects all women incarcerated at ACCW. With respect to the claimant group, it exacerbates the disproportionately negative impact of cancellation of the Program.

63. While the Program operated, inmates at ACCW could remain with their children based solely on an individualized assessment of their actual ability to care for their newborns (namely, whether the MCFD deemed it to be in the best interests of the child that the child not be apprehended). The mother's classification within the corrections system was not, on its own, the basis for determining whether or not she could remain with her child.

64. Following the cancellation of the Program, the classification system – not the individualized assessment of the best interests of the child by MCFD – determines whether mothers and babies can remain together.

65. As Lisa Anderson, the former warden at ACCW, testified, if a woman is classified as "low" security, and the warden (exercising her discretion) deems it to be appropriate, the woman may be placed in the community with her newborn. If however the woman is classified as "medium" security, community placement is not available and, since there is no longer a Program, the baby will be apprehended following delivery, *even* if MCFD has determined that it is in the best interests of that baby to remain with his or her mother.

66. For these reasons, West Coast LEAF submits that cancellation of the Program creates a distinction based on enumerated or analogous grounds.

**(3) Perpetuation of prejudice and stereotyping**

67. Cancellation of the Program perpetuates the stigmatizing assumption that the mothers – as a result of their incarceration and classification within the corrections system – are incapable of providing the security, love and care that their babies require. They are seen

as the archetype of the "bad mother," the sort of person that is very likely to harm her baby. Vigilant state oversight and intervention is necessary to protect these babies from their "bad mothers."

68. This stereotype has a further severe negative impact on the Aboriginal claimants who, after a history of colonialism, and displacement that was imposed on them, are presumed to be unable to care for themselves or their families.

69. As Nancy Wrenshall, the former warden of BCCW pointed out in her evidence, the fact that women are imprisoned does not mean they are bad mothers. The mothers in ACCW are their children's primary caregivers, and this is the case before they go to prison and after they are released. See the testimony of Nancy Wrenshall on June 7, 2013.

70. Cancellation of the Program and the Policy implemented in its wake perpetuates the prejudice against incarcerated mothers as necessarily posing a risk to their child because of the conduct that brought them into the justice system.

71. The prejudice is also perpetuated by the assumption that a mother who wants to remain with her newborn while incarcerated is "selfish" - willing to expose her baby to the assumed risks of the prison system, including exposure to other inmates, many of whom share the characteristics of the claimant mothers) in order to satisfy her own desire to keep her baby with her.

72. The classification system assigns a risk level based on an assessment that fails to account for the inequalities and marginalization the woman has experienced as a result of a her constellation of s. 15-type characteristics. The prejudicial assumptions based on a "medium" security classification justify the further prejudice of having her baby apprehended.

73. For the women whose babies are apprehended, not only does this action detrimentally affect their potential for rehabilitation, community integration, and reconciliation with their babies, the fact that their babies have been apprehended at birth perpetuates the stereotype that they are "bad" mothers and "bad" people.

74. West Coast LEAF submits that cancellation of the Program satisfies the *Withler* analysis in that it violates the norm of substantive equality.

## C. Comparator Group Analysis in this Case

### (1) Introduction

75. In the alternative, West Coast LEAF submits that a comparator group analysis, imperfect as it is as a tool for uncovering substantive inequality, also demonstrates that cancellation of the Program infringes s. 15 in two respects.

76. First, it infringes on the s. 15 rights of the mothers on the intersecting grounds of sex and ethnicity (Aboriginality) because it has a disproportionate impact on Aboriginal women who are overrepresented in the prison population, and whose status as mothers is stigmatized and burdened by the history of colonialism, displacement, and residential schooling.

77. Second, it infringes on the s. 15 rights of babies on the intersecting grounds of family status and ethnicity (Aboriginality) because it removes them from the care of their mothers, in circumstances where their mothers are willing and able to care for them, and thereby depriving the babies of attachment and other benefits of remaining with their mothers, that are not experienced by babies born to non-incarcerated or federally-incarcerated mothers who are eligible to participate in the federal mother-baby program.

78. In approaching a comparator group analysis where Aboriginal heritage is one of the grounds claimed, the court must be mindful of the unique relationship between First Nations and government, and to ensure that the absence of a comparator group does not defeat the claim (*First Nations Child & Family Caring Society of Canada v. Canada (AG)* 2013 FCA 75 at paras. 332-336).

**(2) Comparator group analysis for the mothers**

79. As was the case in *Carter,* it is clear that the mothers invoke enumerated grounds of discrimination. The central issue in the comparator group analysis for the mothers is whether the law creates a distinction based on those grounds (*Carter,* at para 1030).

80. With respect to the enumerated ground of sex, one comparator group is men incarcerated in provincial corrections facilities.

81. The disproportionate negative impact of cancellation of the Program on the mothers as compared to the male comparator group is clear: incarcerated men do not experience the loss of self-worth and physical deprivation inherent in delivering a child that one is capable of providing primary care and breast-feeding, only to have that child apprehended following delivery.

82. The psychological and physical burden of incarceration in the event of the birth of a child and without access to the Program is significantly greater for the claimants than it is for this comparator group. This discrimination is the same type of discrimination that the Supreme Court of Canada accepted when it held that pregnancy discrimination is a form of sex discrimination. See: *Brooks v. Canada Safeway Ltd.*, [1989] 1 SCR 1219.

83. The negative impact is caused by cancellation of the Program, not the conduct that led to the mothers' incarceration or the decision of the sentencing judge. It is widely accepted that it is not necessary that the impugned state action be the sole or even the primary cause of the deprivations at issue. See: *R. v. Morgentaler*, [1988] 1 SCR 30; *Rodriguez v British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *Victoria (City) v Adams*, 2009 BCCA 563; 100 B.C.L.R. (4th) 28 at 86-89.

84. Consideration of the contextual factors in *Law* supports the conclusion that cancellation of the program breaches s. 15. In particular, the claimant mothers suffer significant historical and ongoing disadvantage. Cancellation of the Program had no ameliorative purpose. The nature of the claimants' interest in remaining with their babies is fundamental to their identity and personhood.

**(3) Comparator group analysis for the babies**

85. West Coast LEAF submits that cancellation of the program infringes the s. 15 rights of the babies based on their ethnicity (Aboriginality) and family status as a child born to a mother who is imprisoned.

86. While "family status" is an enumerated ground in the British Columbia *Human Rights Code*, RSBC 1996 c 210, it has not yet been recognized expressly as an analogous ground under s. 15 by the Supreme Court of Canada.

87. In her dissenting opinion in *Thibaudeau*, Madam Justice McLachlin (as she then was) concluded that an individual's status as a separated or divorced custodial parent was an analogous ground within the meaning of s. 15, noting at p. 722:

> The imposition of prejudicial treatment solely on the basis of this status may violate the dignity of an individual and his or her personal worth to a degree affecting the individual's personal, social or economic development. One's status *vis-à-vis* one's former spouse involves the individual's freedom to form family relationships and touches on matters so intrinsically human, personal and relational that a distinction based on this ground must often violate a person's dignity.

88. West Coast LEAF submits that the family status of the babies satisfies the test for establishing an analogous ground. The test for establishing an analogous ground was confirmed in *Corbiere v. Canada (Minister of Indian and Northern Affairs),* [1999] 2 S.C.R. 203 at para 13:

> What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 -- race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the Law analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.

89. Article 2(2) of the *United Nations Convention on the Rights of the Child* recognizes the rights of a child not to be discriminated against based on the status or activities of their parents.

90. Children of incarcerated parents are the "invisible victims" of crime and the corrections system; these children have violated no laws, yet suffer the stigma of criminality as a result of their parent's actions. See: Oliver Robertson, "Collateral Convicts: Children of incarcerated parents", Quaker United Nations Office (March 2012) at 2.

91. As described in Robertson at page 2:

> Unfortunately, children of incarcerated parents are too easily ignored in the criminal justice system, which deals with identifying and responding to individual guilt or innocence. Children interacting with the criminal

> justice system (for example when visiting incarcerated parents) are "reduced to a security risk assessment, [while] within the broader community they are silent and silenced." Only rarely do ministries responsible for children see them as a group exposed to particular challenges, meaning children of incarcerated parents often fall into the gaps between government agencies.

92. West Coast LEAF submits that the status of the claimant babies in this case as children of incarcerated mothers is an immutable characteristic of historic disadvantage, analogous to the grounds listed in s. 15, and as such they are unquestionably worthy of protection from discrimination based on the status of their mothers.

93. A comparator group for these claimants is babies born to non-incarcerated or federally incarcerated mothers who are able to access the federal mother-baby program and remain in their mothers' care because that is in their best interests.

94. Cancellation of the Program had a disproportionately negative impact on the claimant babies, depriving them of attachment and bonding with their mothers and the benefits of breastfeeding, notwithstanding that their mothers were able and willing to care for them.

95. Prior to the cancellation of the Program, determining whether the babies born to women imprisoned at ACCW could remain with their mothers was based solely on an assessment of the best interests of the child by MCFD. In other words, MCFD could determine that the child was not in need of apprehension by the state, notwithstanding the fact that the mother was incarcerated.

96. The hallmarks of the "best interest" test (whether applied in the family law, criminal law or child protection context) are that:

    (a) There are no presumptions applied; in each case, the unique situation of the individual child must be carefully considered;

    (b) The past conduct of the parent is not taken into consideration unless the conduct is relevant to the ability of the person to act as a parent of a child;

    (c) Kinship ties and the child's attachment to his or her extended family should be preserved if possible; and

    (d) The cultural identify of Aboriginal children should be preserved.

See: *Child, Family and Community Service Act*, RSBC 1996 c 46, s. 2(e) and (f); 4(2); *Family Law Act*, SBC 2011 c 25, ss. 41(e), 37(2)(f), *Gordon v. Goertz*, [1996] 2 S.C.R. 27

97. West Coast LEAF also relies on the submissions of the Plaintiffs with respect to the internationally-recognized rights of children to have decisions affecting them made only in their best interests.

98. Following the cancellation of the Program, the claimant babies' best interest no longer determines their right to remain with their mothers. The Policy absolutely prohibits this, even if MCFD determines that doing so would be in the best interest of the baby. As described in the Robertson report, these babies are reduced to a "security risk." Their interests and personhood are not considered. Thus, cancellation of the Program creates a distinction based on the analogous ground of their family status as children of incarcerated mothers.

99. With respect to the "dignity" requirement, West Coast LEAF submits that the cancellation of the Program perpetuates the stigmatization of the claimant babies, who are born to incarcerated mothers, as needing to be "saved" by the state from their mothers regardless of the actual circumstances of the particular baby, whose best interests may be served by remaining with their mother and out of foster care. Cancellation of the Program fails to recognize the personhood of the babies and respect their interests; it subordinates the actual circumstances of the babies to the perceived, not proven, risks relating to the operation of a correctional facility and the fact that their mothers reside in a correctional facility. For this reason also, s. 15 is breached.

## III. LIFE, LIBERTY AND SECURITY OF THE PERSON

### A. Equality is a Principle of Fundamental Justice

100. West Coast LEAF adopts and relies on the Plaintiffs' and BCCLA's submissions on s. 7, and will only address the proposition that equality is a principle of fundamental justice.

101. Equality has been recognized as a principle of fundamental justice within the meaning of s. 7 of the *Charter*: a deprivation of life, liberty or security of the person must not occur as a consequence of a "discriminatory distinction based on group attributes". See: *Philippines (Republic) v. Pacificador* (1993) 14 O.R. (3d) (ON CA; leave to appeal to SCC dismissed April 28, 1994).

102. In *New Brunswick (Minister of Health and Community Services) v. G. (J.)* [1999] 3 S.C.R. 46 at 112), Justice L'Heureux-Dube emphasized the importance of recognizing

equality as a principle of fundamental justice regardless of whether a s. 15 breach is established:

> 112 Before turning to the analysis of the s. 7 rights implicated and the principles of fundamental justice, I would emphasize that this case also implicates issues of equality, guaranteed by s. 15 of the *Charter*. These equality interests should be considered in interpreting the scope and content of the interpretation of the rights guaranteed by s. 7. This Court has recognized the important influence of the equality guarantee on the other rights in the *Charter*. As McIntyre J. wrote in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 185:
>
> > The section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*.
>
> All *Charter* rights strengthen and support each other (see, for example, *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 326; *R. v. Tran*, [1994] 2 S.C.R. 951, at p. 976) and s. 15 plays a particularly important role in that process. The interpretive lens of the equality guarantee should therefore influence the interpretation of other constitutional rights where applicable, and in my opinion, principles of equality, guaranteed by both s. 15 and s. 28, are a significant influence on interpreting the scope of protection offered by s. 7.

103. West Coast LEAF submits that equality should be recognized as a principle of fundamental justice for two reasons. First, at a conceptual level, doing so affirms that equality is a foundational principle of our justice system.

104. Second, at a doctrinal level, s. 7 violations are much less easily justified under s. 1 than are s. 15 violations. This is because "the rights protected by s.7 – life, liberty, and security of the person – are very significant and cannot ordinarily be overridden by competing social interests" (*G. (J.)* at p. 99 per Lamer J).

105. By contrast, given the breadth of s. 15 contraventions and the many competing interests engaged, the s. 1 analysis is often more detailed and searching than the analysis of the contravention.

106. The Supreme Court of Canada has affirmed that the relationship between a parent and child engages security of the person and liberty interests in the context of child protection proceedings, emphasizing, in the case of the parent, the stigma and distress that arise from the loss of parental status. See: *G. (J.); R. B. v. Children's Aid Society of Metro Toronto*, [1995] 1 SCR 315.

107. In the present case, the evidence establishes that, both on an individual level, for the named Plaintiffs, and on a systemic level, for all provincially incarcerated women and babies who cannot remain together because Corrections Branch cancelled the Program, the impact on their liberty and security interests is profound. Women and their newborns who, in the expert determination of MCFD, should be together, are separated at birth. This deprives the woman of her choice to parent, a matter of "fundamental personal importance" (*R. B.*, at p. 368, per LaForest). It deprives both mothers and babies of physiological and psychological security at the most fundamental level.

108. While all s. 15 breaches involve contraventions of fundamental constitutional rights, some limitations on those rights and, in particular, some measure of unequal treatment on the bases of enumerated or analogous grounds, is reasonable and justified in our society.

109. However, in cases such as this, where the discriminatory state action impairs the claimants' interests at such a basic level of personhood, West Coast LEAF submits that the state should have to justify its action on the rigorous standard established by the Court in *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] 2 SCR 486 at 518:

> Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.

110. West Coast LEAF submits that the Defendants' evidence does not meet this stringent standard.

## IV. JUSTIFICATION

111. West Coast LEAF's s. 1 submissions address justification of the s. 15 breach. As set out above, this case does not involve the extraordinary circumstances that would justify the violation of s. 7.

### A. Cancellation of the Program was not a limit prescribed by law

112. Section 1 may be invoked to save an otherwise discriminatory action or burden in cases involving reasonable limits that are prescribed by law. West Coast LEAF respectfully submits that the cancellation of the Program cannot be justified under s. 1 because the decision to cancel the program was not prescribed by law.

113. In *R. v. Therens*, [1985] 1 S.C.R. 613 at para. 56, the Court stated:

> The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of the statute or regulation or from its operation requirements. The limit may also result from the application of a common law rule.

114. The denial of the claimants' rights to remain together was a decision made by Brent Merchant, at that time the Provincial Director of the Adult Custody Division of BC Corrections, not by the legislature. West Coast LEAF relies on the Plaintiff's submissions with respect to the arbitrariness of the decision to cancel the Program.

115. As a result, s. 1 cannot be used to justify the cancellation of the Program.

## B. Alternative Argument: The Section 15 infringement is not a reasonable and justifiable limit

116. If cancellation of the Program is a limit prescribed by law, its justifiability must be proved by the Defendants under the *Oakes* test. See: *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567.

117. West Coast LEAF adopts the submissions of the Plaintiffs and supplements them as follows.

118. As Madam Justice Smith pointed out in *Carter*, justification under s. 1 is a process of demonstration, not intuition or automatic deference (*Carter*, at para 1175). It is not enough for the Defendants to rely on the "intuitive" assumption that prisons are no place for babies, or that Corrections Branch ought to be granted deference in determining what programming will be available in the provincial prison system.

119. In *Hutterian Brethren*, the Court recognized that deference is required to accord leeway to government in its regulatory responses to social problems:

> Often, a particular problem or area of activity can reasonably be remedied or regulated in a variety of ways. The schemes are typically complex, and reflect a multitude of overlapping and conflicting interests and legislative concerns. They may involve the expenditure of government funds, or complex goals like reducing antisocial behaviour. The primary responsibility for making the difficult choices involved in public governance falls on the elected legislature and those it appoints to carry out its policies. Some of these choices may trench on constitutional rights.
>
> ...

> If the choice the legislature has made is challenged as unconstitutional, it falls to the courts to determine whether the choice falls within a range of reasonable alternatives. Section 1 of the *Charter* does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only that it be "reasonable" and "demonstrably justified". Where a complex regulatory response to a social problem is challenged, courts will generally take a more deferential posture throughout the s. 1 analysis than they will when the impugned measure is a penal statute directly threatening the liberty of the accused.
>
> (paras 35, 37)

120. In general, the policy decisions surrounding imprisoned women and their babies involve complex social problems. However, this case does not attract deference.

121. The blanket prohibition imposed by the Policy that babies cannot reside with their mothers at ACCW, does not fall within the description (from *Hutterian Brethren*) of a "complex regulatory response to a social problem." The Policy reduces babies are reduced to security concerns with no individualized assessment of their needs or best interests.

122. The Defendants submit that the dominant purpose of the Policy is to ensure the safety of those within correctional centres. West Coast LEAF acknowledges that safety is a pressing and substantial objective.

123. West Coast LEAF submits that the limits on the claimants' s. 15 rights are not proportionate to the significant impact that the cancellation of the Program had on the claimants.

124. First, there is no evidence of a rational connection between the objective of maintaining the safety of the infants, inmates, corrections officials and the public, and separating infants from their mothers.

125. The Defendants urge the Court to conclude that a "precautionary approach" to infant safety is appropriate and can justify an infringement of s. 15. In particular, the fact that safety risks may be unknown (for example, because adequate risk assessments of the population of ACCW are not conducted) justifies keeping babies and mothers apart. This argument fails to address the Defendants' responsibility to *demonstrably* justify the infringement of the claimants' s. 15 rights.

126. The only evidence of risk of harm to the babies while at ACCW consisted of minor incidents – exposure to noise, cigarette smoke and shouting; a mother bouncing the baby in a baby chair too enthusiastically; one choking incident; exposure to influenza – that

occur as much if not more in the outside community. Studies of similar programs both federally and internationally reported no safety incidents involving the babies in the program. See in particular the expert report of Michael Jackson (Exhibit 8)

127. It is irrational to suggest that it is better for newborns – who could otherwise be physically and psychologically nourished by their mothers – to be removed from their mothers based on the "potential for harm" or the minor incidents described during the trial that are equally prevalent in the community, than to allow them to reside with their mothers when it is in their best interests to do so. Cancelling the Program is not rationally connected to the safety objective.

128. Second, the Defendants have not demonstrated that the Policy is a reasonable alternative to the Program and minimally impairs the rights of the claimants.

129. The Policy provides two options for women who give birth at ACCW:

(a) Release the mothers into community facilities so that they may remain with their babies; or

(b) Place the babies in foster care (and not necessarily with a family member), and allow (but in no way require) visits to ACCW and deliver pumped breast milk from mothers to their babies as Corrections Branch considers it appropriate.

130. The first option is not a viable alternative to the Program. As described above, the right to be released into the community is based not on an individualized assessment of the best interests of the child, but on the mother's sentence and risk classification system which contributes to the systemic discrimination experienced by the claimant mothers.

131. The evidence establishes that women at ACCW are having their babies apprehended at birth. Prior to the cancellation of the Program, MCFD may have determined that it was in the best interests of some, if not all, of the babies to remain with their mothers.

132. The second option fails to mitigate the significant stress and impact that apprehension of the newborn has on both mother and baby. Mothers and babies do not have the opportunity to experience attachment and the benefits of breastfeeding that they would otherwise have if they remained together. See in particular the expert report of Dr. Koopman (Exhibit 2) and her testimony on May 29, 2013.

133. The evidence in Dr. Koopman's expert report was confirmed by Patricia Block's testimony about her experiences with visitation after she was separated from Amber following her birth. In particular, Ms. Block testified that:

(a) While in prison, Amber's visits were infrequent and were based on the availability of the foster mother. Amber visited two times per week for an hour, which increased to three times per week or two visits per week for two hours if the foster mom was available;

(b) There were as many as 5 different people caring for Amber while they were separated. Several different people brought Amber to visit Ms. Block while in the community residence in Peardonville, including the foster mother, the foster mother's sister, Amber's grandparents, and the parent support worker; and

(c) She tried to continue to breastfeed Amber while in prison, but had difficulties in doing so. At one point, the foster mother stopped feeding Amber the breast milk that Ms. Block had pumped, because she worried it "wasn't good milk." Ms. Block had to inform MCFD, who then ordered the foster mother to provide the breast milk to Amber.

See the testimony of Patricia Block on May 30, 2013.

134. Third, the deleterious effects of cancellation outweigh any salutary effects. *Hutterian Brethren* holds that the final step of the proportionality analysis focuses on the seriousness of the infringement, and asks more broadly whether the "benefits of the impugned law are worth the costs of the rights limitation" (para. 77). As Chief Justice McLachlin explained, only the final branch takes full account of the severity of the deleterious effects of a measure on individuals or groups (para 76).

135. West Coast LEAF submits that the significant and lasting deleterious impact of the cancellation of the Program is not proportionate to the peace of mind benefits of taking a "precautionary approach" to the safety of the infants, absent any evidence that the babies or anyone else is actually endangered by operation of the Program.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st DAY OF JUNE, 2013.

_____

Nitya Iyer
Counsel for West Coast LEAF

_____

Jillian Frank
Co-Counsel for West Coast LEAF