

VANCOUVER

MAY 31 2018 COURT OF APPEAL

BETWEEN:

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

RESPONDENTS
(Plaintiffs)

AND:

ATTORNEY GENERAL OF CANADA

APPELLANT
(Plaintiff)

NOTICE OF MOTION

TO:

ATTORNEY GENERAL OF CANADA

Mitchell R. Taylor, Q.C., Francois Paradis,
Mary French and Shannon Currie

Department of Justice Canada
900-840 Howe Street
Vancouver, BC V6Z 2S9

AND TO:

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

Joseph J. Arvay, Q.C. and
Alison M. Latimer

Arvay Finlay LLP
1710-401 West Georgia Street
Vancouver, BC V6B 5A1

TAKE NOTICE THAT AN APPLICATION will be made jointly by the Native Women's Association of Canada and West Coast Legal Education and Action Fund (together, "The Proposed Intervenor") to the presiding justice at 400 - 800 Hornby Street, British Columbia, at 9:30 a.m. on a date to be determined for an order pursuant to Rule 36 of the *Court of Appeal Rules* that:

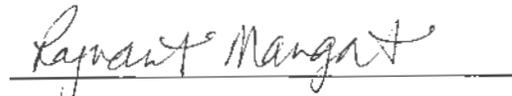
June 25, 2018

- a. The Proposed Intervenor be granted leave to intervene in this appeal;
- b. The Proposed Intervenor be granted leave to file a factum of up to 20 pages in length;
- c. The Proposed Intervenor be granted permission to apply to the panel hearing the appeal for leave to present oral argument; and
- d. No costs be ordered for or against the Proposed Intervenor in respect of this application or the appeal itself.

AND TAKE NOTICE THAT in support of the application will be read the affidavit of Lynne Groulx affirmed on May 29, 2018 and the affidavit of Kasari Govender affirmed on May 30, 2018.

The applicant anticipates that this application will be contested.

Dated: May 31, 2018



Rajwant Mangat
Elana Finestone

Counsel for the Proposed Intervenor

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This application will take no more than 30 minutes to be heard.

VANCOUVER

Court of Appeal File No. CA45092

MAY 31 2018

COURT OF APPEAL

**COURT OF APPEAL
REGISTRY**

BETWEEN:

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

RESPONDENTS
(Plaintiffs)

AND:

ATTORNEY GENERAL OF CANADA

APPELLANT
(Defendant)

**MEMORANDUM OF ARGUMENT ON AN APPLICATION
FOR LEAVE TO INTERVENE**

Attorney General of Canada

**British Columbia Civil Liberties
Association and The John Howard
Society of Canada**

Mitchell R. Taylor, Q.C., Francois
Paradis, Mary French and Shannon
Currie

Joseph J. Arvay, Q.C. and
Alison M. Latimer

Department of Justice Canada
900-840 Howe Street
Vancouver, BC V6Z 2S9

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1710-401 West Georgia Street
Vancouver, BC V6B 5A1

I. OVERVIEW

1. The Native Women's Association of Canada ("NWAC") and West Coast Legal Education and Action Fund ("West Coast LEAF") (collectively, the "Proposed Intervenor") apply jointly under Rule 36 of the *Court of Appeal Rules* for an order that:

- a. The Proposed Intervenor be granted leave to intervene in this appeal;
- b. The Proposed Intervenor be granted leave to file a factum of up to 20 pages in length;
- c. The Proposed Intervenor be granted permission to apply to the panel hearing the appeal for leave to present oral argument; and that
- d. No costs be awarded for or against the Proposed Intervenor in respect of this application or the appeal itself.

2. The Proposed Intervenor submits that this appeal raises public law issues that engage NWAC's and West Coast LEAF's interests as organizations advocating on behalf of equality-seeking groups. NWAC has extensive experience advocating on behalf of Indigenous women across Canada, including examining and understanding the systemic factors that contribute to the criminalization of Indigenous women, their over-representation in federal prisons, and confinement under stringent conditions. West Coast LEAF has substantial expertise and interest in ensuring that Canadian law and the *Charter of Rights and Freedoms* ("*Charter*") are interpreted and applied in a manner consistent with the principles of substantive equality. West Coast LEAF advocates on behalf of all women and people who experience gender based discrimination, including those whose experience of disadvantage occurs along intersecting and multiple axes of marginalization. West Coast LEAF participated as an intervenor in the trial of this matter in the court below.

3. The Proposed Intervenor will bring a unique and helpful perspective concerning the implications of this appeal on the equality rights of criminalized and

federally imprisoned Indigenous women, women with disabling mental health issues, and Indigenous women with disabling mental health issues.

II. THE APPEAL

4. This appeal concerns the constitutionality of administrative segregation in federal prisons, legislative authority for which is found at ss. 31-33 and 37 of the *Corrections and Conditional Release Act*, SC 1992, c. 20 (*CCRA*) (“the impugned provisions”).¹ Administrative segregation is described in s. 31(1) of the *CCRA* as used to “maintain the security of the penitentiary or the safety of any person by not allowing an inmate to associate with other inmates.” Pursuant to s. 31(3), the *CCRA* authorizes confinement in administrative segregation where the institutional head of the penitentiary is satisfied that there is “no reasonable alternative” to administrative segregation and that one or more of the following circumstances arise:

- a. the imprisoned person has acted, attempted to act or intends to act in a manner that “jeopardizes the security of the penitentiary or the safety of any person” and that allowing the imprisoned person to associate with other imprisoned persons would “jeopardize the security of the penitentiary or the safety of any person”;
- b. that allowing an imprisoned person to associate with other prisoners would interfere with an investigation that may lead to criminal or serious disciplinary charges; or
- c. that allowing association with other prisoners would jeopardize the imprisoned person's safety.

5. At the trial level, the plaintiffs (now the respondents) filed a challenge to the constitutional validity and administration of the impugned provisions under ss. 7, 9, 10, 12 and 15 of the *Charter*. In the court below, the plaintiffs were successful in obtaining declaratory relief under s. 52(1) of the *Constitution Act, 1982* on the basis

¹ The *CCRA* provides separate authority for the imposition of segregation from other prisoners as a disciplinary sanction at s. 44(f).

that ss. 31-33 and 37 of the *CCRA* unjustifiably infringe ss. 7 for all prisoners subjected to prolonged, indefinite segregation, and further violate the s. 15 equality rights of Aboriginal prisoners and mentally ill and/or disabled prisoners.²

6. The trial judge declared that the impugned provisions violate s. 7 *Charter* rights to the extent that they:

- a. authorize and effect prolonged, indefinite administrative segregation for anyone;
- b. authorize and effect the warden to be the judge and prosecutor of their own cause;
- c. authorize internal review; and
- d. authorize and effect the deprivation of prisoners' right to counsel at segregation hearings and reviews.³

7. The trial judge further declared that the impugned provisions violate s. 15 of the *Charter* to the extent that they:

- a. authorize and effect any period of administrative segregation for the mentally ill and/or disabled; and
- b. authorize and effect a procedure resulting in discrimination against Aboriginal prisoners.⁴

8. These declarations of invalidity have been suspended for a 12-month period from January 17, 2018, the date of the reasons for judgment.⁵

9. On appeal, this Court is asked to determine whether the trial judge erred in his interpretation that the impugned provisions violate ss. 7 or 15 of the *Charter*. The

² *British Columbia Civil Liberties Association and John Howard Society of Canada v. Canada*, 2018 BCSC 62.

³ *BCCLA* at para. 609.

⁴ *BCCLA* at para 609.

⁵ *BCCLA* at para 610.

appellant argues that the effects of the impugned provisions identified by the trial judge arise not from the *CCRA* as legislative authority, but rather from individual administrative segregation decisions. The appellant argues that the declaration that prisoners who have disabling mental health issues should not be placed in administrative segregation is overbroad and goes beyond the extent of the constitutional inconsistency identified by the trial judge. The Court is also asked to determine whether a declaratory remedy under s. 52(1) of the *Constitution* was appropriate and available to the plaintiffs, in light of the appellant's argument that any constitutional infirmity lies not with the legislation, but with its administration. This will require the Court to consider whether representative plaintiffs have entitlement to remedies under s. 24(1) of the *Charter*. Although the appellant is not challenging the trial judge's finding of discrimination against Aboriginal prisoners, the appellant argues that neither a s. 52(1) nor a s. 24(1) remedy is available to them. Therefore, the Court will be called upon to consider the scope of the declaratory remedy ordered in relation to section 7, and in relation to the s. 15 violation for both prisoners who have disabling mental health issues and for Aboriginal prisoners.

III. LEGAL FRAMEWORK: APPLICATION TO INTERVENE

10. An order granting leave to intervene in an appeal is discretionary, and may be made on any terms and conditions the Court considers appropriate.⁶ This Court may grant leave to intervene in circumstances where:

- a. A party has a direct interest in the appeal; or
- b. The appeal raises public law issues that legitimately engage the applicant's interests, and the applicant brings a different and useful perspective to those issues that will be of assistance in resolving them.⁷

⁶ *Carter v. Canada (Attorney General)*, 2012 BCCA 502 (Chambers) at para. 11.

⁷ *Garcia v. Tahoe Resources Inc.*, 2016 BCCA 320 (Chambers) at para. 7; *Carter* at paras. 11-13, citing *Friedmann v. MacGarvie*, 2012 BCCA 109 (Chambers).

11. In the latter circumstance, the Court will consider the factors articulated in *R v. Watson and Spratt*, namely:

... the nature of the issue before the court (particularly whether it is a 'public' law issue); whether the case has a dimension that legitimately engages the interests of the would be intervenor; the representativeness of the applicant of a particular point of view or "perspective" that may be of assistance to the court; and whether that viewpoint will assist the court in the resolution of the issues...⁸

12. In the present case, the Proposed Intervenor does not assert a direct interest in the appeal, but rather submits that the appeal raises public law issues that fully engage NWAC's and West Coast LEAF's interest in advancing substantive equality for Indigenous women prisoners, imprisoned women with disabling mental health issues, and imprisoned Indigenous women with disabling mental health issues. The Proposed Intervenor applies for leave to intervene based on its ability to bring a unique and useful perspective to the central issues in this appeal, and submits that its perspective will assist the Court in resolving the important constitutional questions arising in this case.

IV. ARGUMENT

13. The following sections will identify the Proposed Intervenor and its interest in this appeal; summarize the submissions that the Proposed Intervenor intends to make if granted leave to intervene; and explain why those submissions will be both useful to the Court and distinct from those of the parties.

14. As noted above, this appeal raises public law issues at the core of the Proposed Intervenor organizations' mandates. Together, NWAC and West Coast LEAF bring demonstrable and recognized experience and expertise concerning the criminalization and imprisonment of Indigenous women, and on the legal analysis of

⁸ *Carter* at para. 13, citing *R v. Watson and Spratt*, 2006 BCCA 234 (Chambers) at para. 3.

substantive equality under the *Charter*. The Proposed Intervenor's contributions to the appeal will assist the Court in resolving the important issues on appeal.

A. The Proposed Intervenor has particular expertise to share

15. The Proposed Intervenor is a coalition of two separate organizations: NWAC and West Coast LEAF. Each organization, its special expertise, and its interest in the appeal are described below.

Native Women's Association of Canada / L'Association des femmes autochtones du Canada

16. NWAC is a national non-profit organization incorporated in 1974. It grew out of the activities of grassroots and regional Indigenous women's associations. At present, NWAC is an aggregate of member associations from across the provinces and territories of Canada, including the BC Native Women's Association. NWAC works to empower Indigenous women and ensure substantive equality for Indigenous women through law reform, research, community engagement, capacity building, program development and delivery, and litigation. The Mohawk Nation of Akwasasne houses NWAC's head office and NWAC's national office is in Ottawa. NWAC's Board of Directors includes a Council of four Elders from across Canada. These Elders serve in an expert advisory capacity to guide the work of the organization.

17. NWAC is consulted by all levels of governments and other public institutions on issues affecting Indigenous women and girls across Canada. Since 1993, NWAC has been recognized by federal, provincial, and territorial government leaders as one of only five National Indigenous Organizations ("NIO") from across Canada. NIOs regularly receive invitations from all levels of government to participate in consultations and meetings on a broad range of issues affecting Indigenous peoples. NWAC is the only National NIO representing the interests of Indigenous women as an umbrella organization for First Nations, Métis and Inuit. NWAC is

regarded as a “*bona fide*, established and recognized national voice of and for aboriginal women.”⁹

18. NWAC’s extensive and long-standing work addressing the criminalization and imprisonment of Indigenous women includes examining systemic factors that contribute to Indigenous women’s contact with the criminal justice system and seeking reforms to ameliorate the disproportionate criminalization and imprisonment of Indigenous women in Canada. In its efforts, NWAC works to ensure that Indigenous women survivors of violence and those with a history of contact with the criminal justice system are included as active participants. In many cases, Indigenous women are both criminalized and unprotected from violence. NWAC recognizes that violence against Indigenous women plays a contributing role in their criminalization.

19. NWAC’s work on violence against Indigenous women draws attention to the root causes of violence which is essential to understanding Indigenous women’s route to criminalization, over-incarceration, and barriers to rehabilitation and reintegration into their communities. NWAC’s work analyzes the effects of intergenerational trauma from residential schools and the *Indian Act*, R.S.C., 1985, c. I-5, which includes addictions, poverty, disabling mental health issues, racism, and child welfare involvement. NWAC understands how these factors increase Indigenous women’s and girls’ vulnerability to imprisonment and contribute to higher levels of security classification and segregation for Indigenous women while imprisoned.

20. This appeal engages the constitutional rights of imprisoned Indigenous women, a population at the core of NWAC’s advocacy and law reform work. NWAC’s work concerning the rights of criminalized and imprisoned Indigenous women includes the litigation, law reform, government consultation, and community initiatives:

⁹ *Native Women’s Association of Canada v. Canada* (1992), 3 FCR 192 (FCA) at para 3.

- a. In 2004, NWAC launched the national Sisters in Spirit Campaign to raise public awareness of the high incidence of violence against Indigenous women and girls. As a result of this campaign, NWAC was engaged by the Government of Canada to implement the Sisters in Spirit ("SIS") Initiative in 2005. NWAC's work on the SIS Initiative was a catalyst for the *National Inquiry into Missing and Murdered Indigenous Women and Girls* ("National Inquiry") currently underway;
- b. In February 2018, NWAC testified before the House of Commons Standing Committee on the Status of Women for their study entitled *Indigenous Women in the Federal Justice and Correctional Systems*. NWAC's submissions included a call for the abolition of segregation for federally-imprisoned Indigenous women;
- c. NWAC met this year with Dubravka Šimonović, the United Nations Special Rapporteur on violence against women to discuss, among other issues, the causes and consequences of Indigenous women's over-representation in prison and the need to address the root causes that lead to disproportionate levels of violence against Indigenous women and girls. The Special Rapporteur's preliminary findings support NWAC's recommendations and include an urgent call to action to address the over-representation of Indigenous women in prison;
- d. NWAC was granted standing to participate in the Part II (institutional) and Part III (expert) hearings of the National Inquiry in June 2017. NWAC has released report cards evaluating the National Inquiry's progress and activities. NWAC has likewise been participating in the National Inquiry's National Indigenous Organization (NIO) Advisory Council.
- e. NWAC was granted standing to participate in British Columbia's Missing Women Commission of Inquiry headed by Hon. Wally Oppal, Q.C. ("Oppal Inquiry"), which completed its work in November 2012;

- f. NWAC is currently engaged in the process of seeking intervener status before the Canadian Human Rights Tribunal in two complaints brought by the Canadian Association of Elizabeth Fry Societies (CHRT File Nos. T1848/7812 and T1849/7912) and one complaint brought by Renee Acoby (CHRT File No. T1850/8023), an Indigenous woman serving a federal sentence as a Designated Dangerous Offender;
- g. NWAC intervened with the Canadian Association of Elizabeth Fry Societies at the Supreme Court of Canada in *Ewert v. Canada (Commissioner of Correctional Service)*, SCC File No. 37233 (appeal heard October 12, 2017; judgment reserved), a case concerning the constitutionality of the Correctional Service of Canada's reliance on risk and security assessment tools to make decisions concerning Indigenous prisoners;
- h. In 2017, NWAC launched a program for imprisoned Indigenous women called "Walking the RED Path – HIV/HCV Initiative" aimed at developing sustainable, evidence-based and culturally relevant health care interventions for use with Indigenous women in federal correctional institutions: Fraser Valley Institution for Women, Edmonton Institute for Women, Buffalo Sage Wellness House, and the Okimaw Ohci Healing Lodge for Indigenous Women;
- i. NWAC intervened before the Supreme Court of Canada in *R v. Kokopenace*, 2015 SCC 27, a case concerning trial fairness for Indigenous accused persons in the criminal justice system and the lack of Indigenous representation on jury rolls;
- j. NWAC intervened before the Saskatchewan Court of Appeal in *R v. Brown*, 2005 SKCA 7 and *R v. Edmonson*, 2005 SKCA 51, two cases arising from the sexual assault of an Indigenous girl. In *Brown*, NWAC made submissions on the application of section 15 equality interests to the trial judge's charge to the jury, and in *Edmonson*, NWAC made submissions on how equality interests are engaged in sentencing;

- k. In 2004, NWAC intervened at the Ontario Court of Appeal in *R v. Hamilton*, 72 O.R. (3d) 1, 2004 CanLII 5549 (ONCA). NWAC argued that *Gladue* sentencing and restorative justice principles for Indigenous offenders should apply to the sentencing of two black female accused to account for the effects of poverty, systemic racism and sexism on their pathway to engaging with the criminal justice system; and
- l. Since at least 1989, NWAC has been granted standing to appear at numerous inquests into the deaths of Indigenous women who had come into contact with the criminal justice system.

West Coast Legal Education and Action Fund

21. West Coast LEAF has been an incorporated non-profit society in British Columbia and a federally registered charity since 1985. West Coast LEAF's mandate is to use the law to create an equal and just society for all women and people who experience gender-based discrimination in British Columbia. Working closely with communities directly impacted, West Coast LEAF uses litigation, law reform, and public legal education to make change across several areas of concern: access to healthcare; access to justice; economic security; gender-based violence; criminalization and imprisonment; and family law and parenting. The organization has a broad representative base.¹⁰

22. West Coast LEAF acts to promote the equality of all women and gender-diverse persons in British Columbia regardless of race, national origin, immigration status, sexual orientation, family or marital status, disability, age, and socio-economic status. West Coast LEAF's work is informed by its recognition that intersecting multiple and overlapping markers of historic disadvantage pose unique, complex challenges to achieving substantive equality in the law. West Coast LEAF has developed expertise in applying an intersectional lens to the implementation of constitutional rights, such that its legal arguments, educational programming, and

¹⁰ *Friedmann* at para. 21.

law reform activities are informed by, and inclusive of, the diversity of women's and gender diverse experiences.

23. In coalition with others or on its own, West Coast LEAF has been granted leave to intervene in numerous cases, including cases before this Court, at the British Columbia Supreme Court and the Supreme Court of Canada. In its interventions, West Coast LEAF's submissions have focused on the application of principles of substantive equality to the development and application of the law. To this end, West Coast LEAF has developed expertise on substantive gender equality and on the use of *Charter* equality rights and statutory human rights in the interpretation and assessment of legislation, common law, and state action.

24. This case concerns the rights of persons imprisoned in federal penitentiaries. In contributing to the development of substantive equality in Canada, West Coast LEAF has developed considerable experience in the areas of prisons and sentencing, including how sex inequality intersects with other forms of disadvantage contributing to the criminalization and over-incarceration of particular groups. Recent work in this area includes the following:

- a. In December 2017, West Coast LEAF made submissions before the House of Commons Standing Committee on the Status of Women concerning the Committee's study on Indigenous Women in the Federal Justice and Correctional Systems. West Coast LEAF's submissions included the need for applying a human rights framework to understand the challenges experienced by criminalized and imprisoned Indigenous women;
- b. In July 2017, West Coast LEAF was granted standing to participate in the Part II (institutional) and Part III (expert) hearings of the National Inquiry. West Coast LEAF is actively participating in the National Inquiry by contributing knowledge of how institutions and systems in British Columbia perpetuate stereotypes about Indigenous women and undermine their rights and safety;

- c. In July and August 2017, West Coast LEAF intervened at the trial of the matter on appeal, arguing that the adverse effects of administrative segregation must be examined in light of the disproportionate harm of solitary confinement experienced by Indigenous women, women with disabling mental health issues, and Indigenous women with disabling mental health issues;
- d. In 2011, West Coast LEAF was granted standing to participate in the Oppal Inquiry. West Coast LEAF withdrew from that Inquiry, and has worked actively with a coalition of Indigenous and women's organizations on the Downtown Eastside of Vancouver to advocate for the rights of criminalized, missing, and murdered Indigenous women and girls, including calling for a national inquiry process. In 2012, West Coast LEAF co-authored a report with the BC Civil Liberties Association and Pivot Legal Society titled "Blueprint for an Inquiry: Learning from the Failures of the Missing Women Commission of Inquiry" critiquing the process engaged in by the Oppal Inquiry;
- e. Since 2009, West Coast LEAF has published annual reports on, among other things, the treatment of provincially-imprisoned women in British Columbia assessed in light of international standards (in particular, the UN *Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)*). West Coast LEAF's most recent CEDAW Report Card in 2017 emphasized the continuing over-representation of Indigenous women and girls in British Columbia's prisons, and called attention to the continued practice of solitary confinement in British Columbia;
- f. West Coast LEAF intervened at the Supreme Court of Canada in *R v. Lloyd*, 2016 SCC 13 to argue that the imposition of the mandatory minimum sentence at issue in the case would have disproportionately adverse consequences for women;

- g. In 2016, West Coast LEAF prepared an op-ed published in the Vancouver Province highlighting the differential, adverse impacts of prolonged imprisonment on women;
- h. In 2013, West Coast LEAF intervened in *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, which challenged the cancellation of the mother-baby program at the Alouette Correctional Centre for Women to argue that the government's action engaged the *Charter's* equality and security of the person rights of imprisoned mothers and their babies;
- i. In 2012, West Coast LEAF wrote to British Columbia's Representative for Children and Youth (in coalition with two other organizations), sharing concerns regarding the centralization of the imprisonment of girls in BC and calling on the Representative to intervene; and
- j. In 2012, West Coast LEAF and its sister organization Women's Legal Education and Action Fund (LEAF) prepared submissions on Bill C-10: *The Safe Streets and Communities Act*, calling on the federal government to delay passage of the omnibus crime bill pending consideration of its impacts on women and Indigenous persons, and with a view to its consistency with the *Charter*.

B. The Appeal raises issues at the core of the Proposed Intervenor's experience

25. The questions raised in this appeal require understanding the application of constitutional rights to persons with multiple, intersecting characteristics, including Indigeneity, disability, and sex. Together, NWAC and West Coast LEAF have interest and expertise in ensuring that the constitutional rights of women in prison are interpreted meaningfully, particularly in circumstances where multiple and intersecting personal characteristics obscure the extent to which the law perpetuates disadvantage and harm.

26. The Proposed Intervenor seeks leave to intervene in this appeal because of the fundamental *Charter* issues engaged by this appeal and the implications of this appeal for criminalized and imprisoned Indigenous women, women with disabling mental health issues, and Indigenous women with disabling mental health issues, constituencies on whose behalf the Proposed Intervenor organizations actively advocate.

27. The Proposed Intervenor submits that its interest in the litigation is substantial. The Proposed Intervenor brings a wealth of experience and expertise on the equality rights engaged in this appeal, and its contributions will assist the Court in determining the constitutionality of the impugned provisions.

C. The proposed submissions will be relevant, distinct and helpful to the Court

28. If granted leave to intervene, the Proposed Intervenor intends to make the following submissions:

- a. The constitutionality of administrative segregation under s. 15 of the *Charter* must be viewed through an intersectional lens which addresses the constellation of characteristics related to the grounds of race (Indigeneity), disability, gender and sex. The Proposed Intervenor submits that arguments concerning the constitutional rights of prisoners cannot ignore the intersection of race, disability, gender and sex, especially in light of the disproportionate and rising rates of Indigenous women in federal prisons, and the high incidence of disabling mental health issues and trauma experienced by imprisoned women, which were shown on the record below to be disproportionately high for Indigenous women;
- b. Legal analysis of the adverse effects of legislation under s. 15 of the *Charter* must be approached with regard to:

- i. the unique and manifold ways in which isolated prisoners who are Indigenous women, women with disabling mental health issues, and/or Indigenous women with disabling mental illness experience the effects of isolation including, for example, the exacerbation of pre-existing trauma, the intergenerational effects of past and continuing colonial policy and practices, impacts of unconscious bias arising from ostensibly neutral state laws or action, lack of access to rehabilitative and re-integrative programming, and greater incidence of self-harming behaviours;
 - ii. the disproportionate harms arising from the use of ostensibly neutral classification and assessments tools, or matrices that fail to appropriately account for the sex, race and/or mental health of imprisoned persons;
 - iii. the realization of substantive equality as opposed to formal equality, and the significance of that distinction in the context of indirect, adverse effects discrimination arising from the law;
- c. Legal analysis of the proportionality test under section 1 of the *Charter* must be approached with regard to:
 - i. The importance of having a range of less drastic, minimally impairing and reasonable alternatives to segregation available for imprisoned Indigenous women, women with disabling mental health issues, and Indigenous women with disabling mental health issues;
- d. Constitutional remedies must be meaningful by taking into account the nature of the rights violated and the actual circumstances and needs of rights claimants, including in instances where claims are brought by

representative plaintiffs, requiring courts to remain flexible and responsive to the circumstances of the case at bar; and

- e. Constitutional remedies must be approached through the interpretive lens of the *Charter's* equality guarantee such that they respond to the needs and circumstances of disadvantaged members of society and foster meaningful access to justice.

D. The Proposed Intervenor will add value to the proceeding

29. The issues raised in this appeal have implications for the fundamental rights of imprisoned Indigenous women, women with disabling mental health issues, and Indigenous women with disabling mental health issues. Together, NWAC and West Coast LEAF have significant experience and knowledge regarding women's equality as protected by s. 15 of the *Charter*. NWAC works daily to identify, monitor, report upon and eradicate systemic discrimination against Indigenous women across Canada. West Coast LEAF's expertise lies in the development and application of substantive equality through an analysis attuned to overlapping and intersectional forms of disadvantage. The Proposed Intervenor can meaningfully contribute to this proceeding by assisting the Court to fully consider the impact of the impugned provisions on the rights of the fastest growing segment of Canada's imprisoned population: Indigenous women.

30. The Proposed Intervenor's submissions will assist the Court by:

- a. Drawing upon the extensive experience of West Coast LEAF in advocating for equality rights to address changes to the legal test for substantive equality under s. 15 of the *Charter* as pronounced by the Supreme Court of Canada in *Withler v Canada (Attorney General)*, 2011 SCC 12 and decisions following; and
- b. Drawing upon NWAC's extensive experience in understanding how Canada's federal prison laws, policies and practices uniquely impact

Indigenous women and deep knowledge of the unique circumstances and colonial histories of criminalized and imprisoned Indigenous women, including histories of violence, trauma, abuse and mental illness;

31. If granted leave to intervene, the Proposed Intervenor will, as West Coast LEAF did in the proceeding at the court below, work in cooperation with the parties to ensure that its submissions neither duplicate those of the parties or intervenors, nor expand the *lis* between the parties.

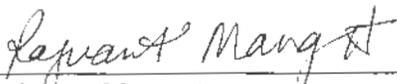
V. RELIEF SOUGHT

32. For the reasons set out above, the Proposed Intervenor respectfully requests:

- a. That it be granted leave to intervene in this appeal;
- b. That it be permitted to file a factum or not more than 20 pages on or before a date to be specified by the Court;
- c. That it be granted permission to apply to the panel hearing the appeal for leave to present oral argument; and
- d. That there shall be no costs of this application or costs of the appeal awarded for or against it.

All of which is respectfully submitted.

Dated: May 31, 2018.



Rajwant Mangat
Elana Finestone

Counsel for the Proposed Intervenor,
NWAC and West Coast LEAF

VI. AUTHORITIES

CASE	PAGE
<i>British Columbia Civil Liberties Association and John Howard Society of Canada v. Canada (Attorney General)</i> , 2018 BCSC 62	3
<i>Carter v. Canada (Attorney General)</i> , 2012 BCCA 502	4, 5
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<i>Garcia v. Tahoe Resources Inc.</i> , 2016 BCCA 320	4
<i>Native Women's Association of Canada v. Canada</i> (1992), 3 FCR 192 (FCA)	7
<i>R v. Watson and Spratt</i> , 2006 BCCA 234	5
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VANCOUVER
MAY 31 2018
COURT OF APPEAL
REGISTRY COURT OF APPEAL

Court of Appeal File No. CA45092

BETWEEN:

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THE JOHN HOWARD SOCIETY OF CANADA

RESPONDENTS
(Plaintiffs)

AND:

ATTORNEY GENERAL OF CANADA

APPELLANT
(Defendant)

AFFIDAVIT OF KASARI GOVENDER

I, KASARI GOVENDER, lawyer, of the City of Vancouver, in the Province of British Columbia, AFFIRM AS FOLLOWS:

1. I am the Executive Director of the West Coast Legal Education and Action Fund Association ("West Coast LEAF"), and as such have personal knowledge of the matters hereinafter deposed to, except where stated to be based on information and belief in which case I verily believe them to be true.
2. I was called to the bar in Ontario in 2006 and in British Columbia in 2007. I joined West Coast LEAF as Legal Director in 2008. Since 2011, I have served as West Coast LEAF's Executive Director. I am authorized to provide this affidavit in support of West Coast LEAF's application for leave to intervene in this appeal.
3. This appeal concerns the constitutionality of ss. 31-33 and 37 of the *Corrections and Conditional Release Act*, SC 1992, c. 20 (CCRA) ("the impugned provisions"), which authorize the use of administrative segregation in federal prisons. The plaintiffs (respondents on appeal) challenged the validity and administration of the impugned

provisions under ss. 7, 9, 10, 12 and 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). The plaintiffs were successful in obtaining declaratory relief under s. 52(1) of the *Constitution Act, 1982* on the basis that the impugned provisions unjustifiably infringe ss. 7 and 15 of the *Charter*.

4. On appeal, this Court is asked to determine whether the trial judge erred in his finding that the impugned provisions violate ss. 7 and 15 of the *Charter*. The appellant argues that the effects of the impugned provisions identified by the trial judge arise not from the *CCRA* itself, but rather from individual administrative segregation decisions. The Court will be asked to determine whether a declaratory remedy under s. 52(1) of the *Constitution* is appropriate and available to the plaintiffs, in light of the appellant's argument that any constitutional infirmity lies not with the legislation, but with its administration. This will require the Court to consider whether the plaintiffs have entitlement to remedies under s. 24(1) of the *Charter*. Although the appellant is not challenging the trial judge's finding of discrimination against Aboriginal prisoners, the appellant argues that neither a s. 52(1) nor a s. 24(1) remedy is available to them. Therefore, the Court will be called upon to consider the scope of the declaratory remedy ordered in relation to s. 7, and in relation to the s. 15 violation for both prisoners who have disabling mental health issues and for Aboriginal prisoners.

5. West Coast LEAF participated as an intervenor in the trial proceeding. West Coast LEAF was granted leave to intervene in the court below on December 15, 2016 and participated in the trial proceeding, which commenced on July 4, 2017 and concluded on September 1, 2017. West Coast LEAF made written and oral submissions at the close of trial and, with leave of the trial judge, was permitted to cross-examine one of the defendant's witnesses.

6. West Coast LEAF now seeks leave to intervene in this appeal jointly with the Native Women's Association of Canada ("NWAC") (together, "the Proposed Intervenor"). This appeal engages fundamental equality rights for criminalized and imprisoned Indigenous women, women with disabling mental health illness, and Indigenous women with disabling mental health illness, constituencies on behalf of

whom the Proposed Intervenor organizations have long advocated. Together with NWAC, West Coast LEAF can provide the Court with a unique and helpful perspective on the issues arising on appeal.

A. Background and Expertise of West Coast LEAF

7. West Coast LEAF is a non-profit society incorporated in British Columbia and registered federally as a charity. West Coast LEAF's mandate is to use the law to create an equal and just society for all women and people who experience gender-based discrimination in British Columbia. Working in collaboration with community, West Coast LEAF uses litigation, law reform, and public legal education to make change. In particular, West Coast LEAF aims to transform society by achieving: access to healthcare; access to justice; economic security; freedom from gender-based violence; justice for those who are criminalized; and the right to parent.

8. West Coast LEAF was created in April 1985, when the equality provisions of the *Charter* came into force. Prior to 2009, West Coast LEAF was a branch of a national organization, Women's Legal Education and Action Fund ("LEAF"). In 2009, West Coast LEAF became an affiliated organization rather than a branch. Both LEAF and West Coast LEAF grew out of the efforts of a group of women who, starting in the early 1980s, worked to ensure that ss. 15 and 28 of the *Charter* would be effective in guaranteeing women substantive equality. Since 2009, West Coast LEAF has involved itself in litigation in its own name.

9. During the last fiscal year, West Coast LEAF had approximately 370 individual and organizational members. As of May 31, 2018, West Coast LEAF employs six full-time staff, four part-time staff, and two interns. West Coast LEAF relies on the support of approximately 200 volunteers to carry out its work.

10. West Coast LEAF acts to promote the equality interests of all women and gender diverse persons in British Columbia, regardless of their race, national origin, immigration status, sexual preference, gender expression, family or marital status, disability or ability, age, socio-economic status or any other personal characteristic. It is committed

to working in consultation and collaboration with other equality-seeking groups to ensure that West Coast LEAF's legal positions, law reform activities and educational programming are informed by, and inclusive of, the diversity of human experience. West Coast LEAF works to ensure the law recognizes that the myriad ways in which discrimination and disadvantage are experienced – in relation to gender, race, and ability, for instance – are overlapping, intersecting and cannot be examined in isolation.

11. Litigation is one of West Coast LEAF's three program areas. Through litigation, West Coast LEAF has contributed to the development of equality rights jurisprudence and the meaning of substantive equality in Canada.

12. West Coast LEAF has intervened, or is intervening, in its own name in the following cases before the Court of Appeal for British Columbia and at the Supreme Court of Canada:

(a) *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*, 2018 BCCA 132 (jointly with Community Legal Assistance Society);

(b) *Trinity Western University and Volkenant v Law Society of British Columbia*, 2016 BCCA 423; SCC File No. 37318 (appeal heard Nov 30-Dec 1, 2017; judgment reserved);

(c) *Denton v Workers Compensation Board*, 2017 BCCA 403 (jointly with Community Legal Assistance Society);

(d) *Schrenk v British Columbia Human Rights Tribunal*, 2017 SCC 62;

(e) *Scott v College of Massage Therapists of British Columbia*, 2016 BCCA 180;

(f) *R. v Lloyd*, 2016 SCC 13;

(g) *British Columbia Public School Employers' Association v British Columbia Teachers' Federation*, 2014 SCC 59;

- (h) *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59;
- (i) *Vilardell v Dunham*, 2013 BCCA 65;
- (j) *British Columbia (Ministry of Education) v Moore*, 2012 SCC 61;
- (k) *Friedmann v MacGarvie*, 2012 BCCA 445;
- (l) *SWUAV v Canada*, 2012 SCC 45 (jointly with Justice for Children and Youth and ARCH Disability Law Centre) and 2010 BCCA 439;
- (m) *Shewchuk v Ricard*, [1986] B.C.J. No. 335, 28 D.L.R. (4th) 429 (BCCA) (jointly with the BC Association of Social Workers, BC Civil Liberties Association, Federated Anti-Poverty Groups of BC and Vancouver Status of Women);

13. Additionally, West Coast LEAF has been granted leave to intervene or to participate as an interested party before the BC Supreme Court on five occasions:

- (a) *Reference re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (the *Polygamy Reference*);
- (b) *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309;
- (c) *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*, 2015 BCSC 534;
- (d) *Trinity Western University and Volkenant v Law Society of British Columbia*, 2015 BCSC 2326; and
- (e) in the trial proceedings of the case on appeal, *British Columbia Civil Liberties Association and John Howard Society of Canada v Canada*, 2018 BCSC 62.

14. West Coast LEAF has also participated as part of a national coalition of six organizations in a judicial inquiry before the Canadian Judicial Council: In the Matter of

an Inquiry Pursuant to Section 63(1) of the *Judges Act* Regarding the Honourable Justice Robin Camp (CJC Report released November 29, 2016).

15. Most recently, West Coast LEAF has been granted standing to participate in Part II (institutional hearings) and Part III (expert hearings) of the *National Inquiry into Missing and Murdered Indigenous Women and Girls* (Order dated August 17, 2017). West Coast LEAF was also granted leave to participate in the provincial Missing Women Commission of Inquiry headed by Hon. Wally Oppal, Q.C., which completed its work in November 2012.

16. West Coast LEAF's second program area is law reform. West Coast LEAF's law reform initiatives seek to ensure that all legislation and policies comply with guarantees of equality for all women and people experiencing gender-based discrimination pursuant to the *Charter*, human rights legislation, and relevant international instruments to which Canada is a signatory. West Coast LEAF's law reform work consists of conducting comprehensive community-based research and analysis, drafting best practices and policy recommendations, and making submissions to governmental and other decision-makers on a range of issues impacting equality-seeking groups.

17. Public legal education rounds out West Coast LEAF's major program areas. West Coast LEAF's educational programming aims to help residents of British Columbia understand and access their equality rights, and to think critically about the law as it affects them. The program aims to transform public legal education, collaborate with diverse equality-seeking groups, distribute public legal education materials, and build upon other West Coast LEAF initiatives. West Coast LEAF's public legal education projects complement and support its litigation and law reform activities, based on the premise that the first step toward asserting rights is understanding them.

18. West Coast LEAF has significant expertise in applying principles of substantive equality to constitutional and legislative interpretation, the development of the common law, and state action that impacts women's lives. This expertise extends to articulating the equality rights at issue in contexts where sex or gender inequality is compounded by other markers of stigma and disadvantage, including race (Indigeneity) and disability.

B. West Coast LEAF's Expertise and Interest in the Appeal

19. This case concerns the rights of persons imprisoned in federal prisons, particularly those with prior experience of serving custodial sentences of imprisonment in administrative segregation, and those at an elevated risk for being detained in isolation in federal prisons. West Coast LEAF's interest in the case relates to the equality interests of criminalized and imprisoned Indigenous women, women with disabling mental health issues, and Indigenous women with disabling mental health issues. Over the years, West Coast LEAF has developed considerable experience in the areas of prisons and sentencing, including how sex inequality and other intersecting forms of disadvantage arise in the context of the criminal justice system.

20. West Coast LEAF's work in this area cuts across its litigation, law reform and educational programming. West Coast LEAF has experience and expertise concerning the rights of criminalized and imprisoned women, including the following:

- a. In July 2017, West Coast LEAF was granted leave to participate in the Part II (institutional) and Part III (expert) hearings of the National Inquiry into Missing and Murdered Indigenous Women and Girls currently underway (Order dated August 17, 2017). West Coast LEAF is actively participating in the hearings on the systemic factors and root causes resulting in high rates of violence against Indigenous women, girls, gender diverse, and Two Spirit peoples.
- b. Since 2009, West Coast LEAF has published annual reports on, among other things, the treatment of provincially-imprisoned women in BC, assessed in light of international standards (in particular, the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)). West Coast LEAF's most recent 2017 CEDAW Report Card, published in December 2017, emphasized government inaction concerning the over-representation of Indigenous women and girls in BC's prisons, and on the disproportionately high rates of isolated confinement for Indigenous women and women experiencing mental illness or disorder.

- c. West Coast LEAF intervened at the Supreme Court of Canada in *R v Lloyd*, 2016 SCC 13 to argue that the imposition of the mandatory minimum sentence at issue in the case would have disproportionately negative consequences for women;
- d. In 2016, West Coast LEAF prepared an op-ed published in the Vancouver Sun highlighting the differential, adverse impacts of prolonged imprisonment on women;
- e. In 2013, West Coast LEAF intervened in *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, a case challenging the cancellation of the mother-baby program at the Alouette Correctional Centre for Women, to argue that the government's action engaged the equality and security of the person interests of imprisoned women and their infants;
- f. In 2012, West Coast LEAF wrote to BC's Representative for Children and Youth (in coalition with two other organizations), sharing concerns regarding the centralization of the imprisonment of girls in BC and calling on the Representative to intervene;
- g. In 2012, West Coast LEAF and LEAF jointly prepared submissions on Bill C-10: *The Safe Streets and Communities Act*, calling on the federal government to delay passage of the omnibus crime bill pending a thorough consideration of the impacts of the proposed legislation on women and Indigenous persons, and with a view to its consistency with the government's obligations under the *Charter*;
- h. In 2007, West Coast LEAF wrote to BC's Minister of Children and Family Development regarding reports of inappropriate, invasive medical procedures being undertaken on girls in prisons. As a result of specific allegations made by a prisoner (on which West Coast LEAF's letter was based), the Ministry conducted an investigation into the reports; and

- i. From approximately 2003 to 2007, West Coast LEAF conducted workshops on the law of consent to sexual activity for at-risk youth held at the Burnaby Correctional Facility.

21. West Coast LEAF seeks leave to intervene in this case jointly with NWAC because the issues on appeal require interpretation and application of equality rights to federally imprisoned women with multiple and intersecting experiences of disadvantage, including race (Indigeneity), disability, gender and sex. West Coast LEAF has particular interest and experience in ensuring that constitutional rights are interpreted meaningfully, and that substantive equality is affirmed in circumstances where multiple and intersecting personal characteristics may impact and obscure the extent to which laws perpetuate disadvantage and harm.

D. Proposed Submissions

22. If granted leave to intervene, West Coast LEAF proposes to make the following submissions jointly with NWAC:

- (a) The constitutionality of administrative segregation under s. 15 of the *Charter* must be viewed through an intersectional lens which addresses the constellation of characteristics related to the grounds of race (Indigeneity), disability, gender, and sex. The Proposed Intervenor submits that arguments concerning the constitutional rights of prisoners cannot ignore the intersection of race, disability, gender, and sex, especially in light of the disproportionate and rising rates of Indigenous women in federal prisons, and the high incidence of disabling mental health issues and trauma experienced by imprisoned women, which is disproportionately high for Indigenous women;
- (b) Legal analyses of the adversely discriminating effects of legislation under s. 15 of the *Charter* must be approached with regard to:
 - i. the unique and manifold ways in which isolated prisoners who are Indigenous women, women with disabling mental health issues, and/or Indigenous women with disabling mental health issues experience the effects of isolation including, for example, the exacerbation of pre-existing

trauma, the intergenerational effects of past and continuing colonial policy and practices, impacts of unconscious bias arising from ostensibly neutral state laws or action, lack of access to rehabilitative and re-integrative programming, and greater incidence of self-harming behaviours;

- ii. the disproportionate harms arising from the use of ostensibly neutral classification and assessments tools, or matrices that fail to appropriately account for the sex, race and/or mental health of imprisoned persons; and
- iii. the realization of substantive equality as opposed to formal equality, and the significance of that distinction in the context of indirect, adverse effects discrimination arising from the law;

(c) Legal analyses of the proportionality test under section 1 of the Charter must be approached with regard to:

- i. The importance of having a range of less drastic, minimally impairing and reasonable alternatives to segregation available for imprisoned Indigenous women, women with disabling mental health issues, and Indigenous women with disabling mental health issues;

(d) Constitutional remedies must be meaningful by taking into account the nature of the rights violated and the actual circumstances and needs of rights claimants, including in instances where claims are brought by representative plaintiffs, requiring courts to remain flexible and responsive to the circumstances of the case at bar; and

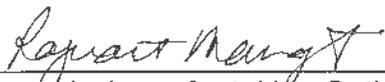
(e) Constitutional remedies must be approached through the interpretive lens of the *Charter's* equality guarantee such that they respond to the needs and circumstances of disadvantaged members of society and foster meaningful access to justice.

23. I have reviewed the Memorandum of Argument included in this Motion Record, and confirm that it is an accurate reflection of the proposed submissions that West

Coast LEAF intends to make jointly with NWAC should this Honourable Court grant it leave to intervene in this appeal.

24. If granted leave, West Coast LEAF and NWAC will work in cooperation with the parties and any other intervenors, and ensure that their presence as an intervenor will not interfere with the parties' ability to achieve determination of the issues at stake for them in this litigation.

AFFIRMED BEFORE ME at the City of)
Vancouver, in the Province of)
British Columbia, this 30th day of)
May 2018.)



A Commissioner for taking Oaths
in British Columbia



KASARI GOVENDER

VANCOUVER

MAY 31 2018

**COURT OF APPEAL
COURT OF APPEAL
REGISTRY**

Court of Appeal File No. CA45092

BETWEEN:

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

RESPONDENTS
(Plaintiffs)

AND:

ATTORNEY GENERAL OF CANADA

APPELLANT
(Defendant)

AFFIDAVIT OF LYNNE GROULX

I, LYNNE GROULX, of the City of Ottawa, in the Province of Ontario, DO AFFIRM THAT:

1. I am the Executive Director of the Native Women's Association of Canada ("NWAC"). I have served NWAC in the role of Executive Director since November 2016. In this role, I have acted as a spokesperson for the organization as well as a professional advisor to the Board of Directors. I have personal knowledge of the matter and facts to which I depose in this Affidavit. Where I state that my knowledge is based on information and belief, I believe it to be true.
2. NWAC is a national non-profit organization incorporated in 1974. NWAC is an aggregate of member associations in the provinces and territories of Canada. The Mohawk Nation of Akwasasne houses NWAC's head office and NWAC's national office is in Ottawa, Ontario. NWAC grew out of the activities of grassroots and regional

Indigenous women's associations over many years. NWAC is the only national organization that has a mandate and resources dedicated exclusively to empowering disadvantaged and discriminated Indigenous women.

3. NWAC's Board of Directors consists of a President, regional representatives from 12 provinces and territories, four Regional Youth Representatives and four Elders from across Canada. The four Elders are senior expert advisors on Indigenous cultural matters within their communities. They guide are intimately involved with NWAC.
4. NWAC seeks to intervene in this appeal on the basis that NWAC can render assistance to the British Columbia Court of Appeal because: (a) the appeal raises public law issues that legitimately engage NWAC's interests, (b) NWAC brings a different and useful perspective to those issues and (c) NWAC's perspective will be of assistance in resolving these issues.
5. This appeal concerns the constitutionality of ss. 31-33 and 37 of the *Corrections and Conditional Release Act*, SC 1992, c. 20 (*CCRA*) ("the impugned provisions"), which authorize the use of administrative segregation in federal penitentiaries. The plaintiffs (respondents on appeal), British Columbia Civil Liberties Association and the John Howard Society of Canada, challenged the validity and administration of the impugned provisions under ss. 7, 9, 10, 12 and 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*").
6. In the court below, the plaintiffs were successful in obtaining declaratory relief under s. 52(1) of the *Constitution Act, 1982* on the basis that ss. 31-33 and 37 of the *CCRA* unjustifiably infringe s. 7 for all prisoners subjected to prolonged, indefinite segregation, and further violate the s. 15 equality rights of Aboriginal prisoners and prisoners with disabling mental health issues.
7. On appeal, this Court will be asked to determine whether the trial judge erred in his finding that the impugned provisions violate ss. 7 and 15 of the *Charter*. The Appellant

argues that the effects of the impugned provisions identified by the trial judge arise not from the *CCRA* itself, but rather from individual administrative segregation decisions.

8. The Court will be asked to determine whether a declaratory remedy under s. 52(1) of the *Constitution* is appropriate and available to the plaintiffs. Of particular importance to NWAC, the Court will be called upon to consider the scope of the declaratory remedy ordered in relation to the section 15 *Charter* violation on the rights of Aboriginal persons and individuals with disabling mental health issues.
9. NWAC now seeks leave to intervene in this appeal jointly with West Coast Legal Education and Action Fund (“West Coast LEAF”) (together, “the Proposed Intervenor”). This appeal engages fundamental equality rights for criminalized and imprisoned Indigenous women, women with disabling mental health issues, and Indigenous women with disabling mental health issues, constituencies on behalf of whom the Proposed Intervenor organizations have long advocated. Together with West Coast LEAF, NWAC can provide the Court with a different and useful perspective on the public law issues arising on appeal.

NWAC’S MANDATE AND SCOPE OF SERVICE

10. NWAC’s principles and objectives are:
 - (a) to be the national voice of Native women;
 - (b) to address issues in a manner which reflects the changing needs of Native women in Canada;
 - (c) to assist and promote common goals towards self-determination and self-sufficiency for Native peoples in our role as mothers and leaders;
 - (d) to promote equal opportunities for Native women in programs and activities;
 - (e) to serve as a resource among our constituency and Native community;
 - (f) to cultivate and teach the characteristics that are unique aspects of our cultural and historical traditions;

- (g) to assist Native women's organizations, as well as community initiatives, in the development of their local projects;
 - (h) to advance issues and concerns of Native women; and
 - (i) to link with other Native organizations with common goals.
11. The above objectives inform NWAC's advocacy and policy on and behalf of Indigenous women who are First Nations, Inuit and Métis, treaty, on-reserve, off-reserve, status, non-status and disenfranchised.
12. NWAC's work examines the systemic factors that affect Indigenous women's contact with the criminal justice system and seeks reforms that will improve the situation of Indigenous women in conflict with the law. NWAC's work analyzes the effects of intergenerational trauma from residential schools and the *Indian Act*, R.S.C., 1985, c. I-5, which include addictions, poverty, disabling mental health issues, racism, and child welfare involvement. NWAC understands how those factors contribute to higher levels of security classification and segregation for federally imprisoned Indigenous women.
13. In many cases, Indigenous women are both criminalized and unprotected from violence. In its law reform efforts, NWAC works to ensure that Indigenous women who have survived violence and/or those with a history of conflict with the law are included as active participants.

NWAC'S EXPERTISE

14. NWAC has extensive experience litigating, consulting with governments and engaging with Indigenous communities across Canada on behalf of Indigenous women. NWAC has particular expertise in unpacking the systemic and root causes of violence against Indigenous women, girls and gender diverse persons. NWAC's work recognizes that violence against Indigenous women plays a contributing role to their criminalization and over-incarceration.

15. NWAC advises all levels of governments and other public institutions on issues affecting Indigenous women and girls across Canada.
16. Since 1993, provincial, territorial and federal government leaders have recognized NWAC as a National Indigenous Organization (NIO). There are only four other NIOs in Canada. NWAC is the only National NIO representing the interests of Indigenous women as an umbrella organization for First Nations, Métis and Inuit. The NIOs regularly receive invitations from federal, provincial and territorial Ministers to participate in departmental consultations and intergovernmental meetings at various levels (including Ministerial) on a broad range of issues affecting Indigenous women.
17. In 2004, NWAC launched the national Sisters in Spirit Campaign to raise public awareness about the alarmingly high rates of violence against Indigenous women and girls in Canada. The Sisters in Spirit research documented cases of missing and murdered Indigenous women and girls throughout Canada until March 2013. The research brought to light cases spanning since the 1980's and was a catalyst to the National Inquiry into Missing and Murdered Indigenous Women and Girls.
18. NWAC's leadership and expertise on violence against and criminalization of Indigenous women was recognized by Commissioner Wally Oppal, Q.C., Chair of the Missing Women Commission of Inquiry in British Columbia. It was established to inquire into police investigations conducted from January 1997 to February 2002 of women missing from the Downtown East Side of Vancouver.
19. On June 12, 2017, NWAC successfully obtained standing in the National Inquiry into Missing and Murdered Indigenous Women and Girls ("MMIWG Inquiry"). This standing allows NWAC to be observers at the "Truth Gathering Process" and have its experts cross-examine witnesses. NWAC's standing has allowed for the organization to ensure that health supports are in place and that the MMIWG Inquiry process follows a trauma-informed model that is inclusive of families and each area's tradition and culture. NWAC has released report cards evaluating the Inquiry's progress and activities. NWAC has

likewise been participating in the Inquiry's National Indigenous Organization (NIO) Advisory Council.

20. As part of its law reform activities, NWAC engages in litigation from time to time to advance the rights of Indigenous women. NWAC has intervened in criminal law and constitutional law cases as well as cases involving access to justice for Indigenous women. Speaking for a unanimous panel at the Federal Court of Appeal, Justice Mahoney recognized NWAC as “*bona fide*, established and recognized voice of and for aboriginal women”: *Native Women's Association of Canada v. Canada*, [1992] 3 F.C.R. 192, 1992 CanLII 8495 (FCA) at para. 3.
21. Over the past 20 or so years, NWAC has been a party or intervenor, in numerous cases from the trial level to the Supreme Court of Canada. NWAC has intervened before the Court of Appeal for British Columbia, the Federal Court of Appeal and the Supreme Court of Canada, including in the following cases:
 - (a) *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627, [1995] 1 C.N.L.R. 47.
 - (b) *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, [1999] 3 C.N.L.R. 19.
 - (c) *Sawridge et al. v. R.*, 1996, Court File Number T-66-86-A, the Federal Court of Appeal; *Sawridge Band v. R.*, 2003 FCT 347, 232 F.T.R. 54; aff'd 2004 FCA 16, [2004] 3 F.C.R. 274.
 - (d) *Melvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153, [2009] 2 C.N.L.R. 236.
22. NWAC's work pertaining to Indigenous women's criminalization and imprisonment cuts across its litigation, law reform, government consultation and community initiatives:

- (a) In February 1989, NWAC appeared at the Ottawa coroner's inquest into the death of Minnie Sutherland, an Indigenous woman who died after police left her in a snowbank;
- (b) NWAC was granted intervener status in the Fatality Inquiry of the March 22, 1998 deaths of Connie and Ty Jacobs on the Tsuu T'ina Reserve (Judge Thomas R. Goodson, Report to the Attorney General, Public Inquiry, *The Fatality Inquiry Act*, May 15, 2000). Connie and Ty Jacobs were shot by a member of the RCMP. NWAC took part in the year-long proceeding and made written and oral submissions to the Public Inquiry in March 2000;
- (c) NWAC intervened in *R. v. Hamilton*, 72 O.R. (3d) 1, 2004 CanLII 5549 (ONCA) before the Ontario Court of Appeal. This was an appeal of a criminal sentence. The trial judge ordered conditional "house arrest" sentences to two black, female accused, taking into account the effects of poverty, systemic racism and bias against women. NWAC made written and oral submissions that the sentencing and restorative justice principles for Indigenous offenders, noted in *R. v. Gladue*, [1999] 1 S.C.R. 688, [1999] 2 C.N.L.R. 252, should apply in this case;
- (d) On January 15, 2005, NWAC appeared before the Saskatchewan Court of Appeal in the two appeals of *R v. Brown*, 2005 SKCA 7 (CanLII) ("*R. v. Brown*") and *R v. Edmonson*, 2005 SKCA 51, 257 Sask. R. 270; leave to appeal ref'd [2005] S.C.C.A. No. 273, 347 N.R. 399 ("*R. v. Edmonson*"). Both cases arose from the sexual assault of a 12 year old Indigenous girl by three men in their twenties. NWAC made written submissions on how the *Charter's* principles of equality apply to the trial judge's charge to the jury in *R. v. Brown* and sentencing in *R. v. Edmondson*;
- (e) NWAC made written and oral submissions with the Canadian Association of Elizabeth Fry Societies before the Supreme Court in the case of *Canada (Attorney General) v. Bedford*, 2013 S.C.C. 72, [2013] 3 S.C.R. 1101;

- (f) NWAC intervened before the Supreme Court in *R. v. Kokopenace*, 2015 S.C.C. 27, [2015] 2 S.C.R. 398, regarding trial fairness for Indigenous accused in the criminal justice system and, in particular, the lack of Indigenous representation on jury rolls;
- (g) Most recently, NWAC intervened with the Canadian Association of Elizabeth Fry Societies in *Ewert v. Canada (Commissioner of Correctional Service)* (appealed from *Canada (Commissioner of Correctional Service) v. Ewert*, 2016 FCA 203 (CanLII)). NWAC argued that Correctional Service Canada's reliance on assessment tools to make decisions concerning Indigenous prisoners violates sections 7 and 15 of the *Charter*. The Supreme Court appeal was heard in October 2017 and NWAC is awaiting the Court's decision;
- (h) In February 2018, NWAC testified before the House of Commons Standing Committee on the Status of Women for their study entitled *Indigenous Women in the Federal Justice and Correctional Systems*. In its submissions, NWAC advocated for the elimination of segregation for federally imprisoned Indigenous women;
- (i) NWAC met in April 2018 with Dubravka Šimonović, the United Nations Special Rapporteur on violence against women to discuss, among other issues, the over-representation of Indigenous women in prison and the need to address the root causes that lead to disproportionate levels of violence against Indigenous women and girls. The Special Rapporteur's preliminary findings support NWAC's recommendations and included an urgent call to action to address the over-representation of Indigenous women in prison;
- (j) NWAC is currently engaged in the process of seeking intervenor status before the Canadian Human Rights Tribunal in two complaints brought by the Canadian Association of Elizabeth Fry Societies (CHRT File Nos. T1848/7812 and T1849/7912) and one complaint brought by Renee Acoby (CHRT File No. T1850/8023), an Indigenous woman serving a federal sentence as a Designated Dangerous Offender; and
- (k) NWAC launched a program for imprisoned Indigenous women entitled *Walking the RED Path – HIV/HCV Initiative ("RED Path")* in 2017. RED Path is a five year project funded

though the Public Health Agency of Canada's HIV and Hepatitis C ("HCV") Community Action Fund. The project aims to develop a sustainable, evidence based, and culturally relevant HIV and HCV intervention for Indigenous women by engaging with imprisoned Indigenous women in four federal correctional institutions: Fraser Valley Institution for Women, Edmonton Institute for Women, Buffalo Sage Wellness House and the Okimaw Ohci Healing Lodge for Aboriginal Women.

NWAC'S INTEREST IN THIS CASE

23. Correctional Service Canada represents that it has made efforts to reduce the prison population of Indigenous women. However, Indigenous women are still the fastest growing prison population in Canada and are disproportionately represented in the segregation and maximum security prison population.
24. NWAC has a substantial interest in ensuring that decisions affecting incarcerated women take into account the specific realities Indigenous women face when in contact with the criminal justice system and the prison system. In particular, NWAC recognizes the need to address the systemic discrimination Indigenous women experience, particularly in decisions where Indigenous women are segregated and where assessment tools determine their security level, level of segregation, and access to mental health resources and programming.
25. NWAC seeks leave to intervene in this case jointly with West Coast LEAF because the issues on appeal require interpretation and application of equality rights to federally imprisoned women with multiple and intersecting experiences of disadvantage, including race (Indigeneity), disability, gender and sex. NWAC's interest in this case specifically relates to the potential outcome for Indigenous women and girls imprisoned in correctional facilities. The outcome of these proceedings will directly affect the interests of the federally imprisoned Indigenous women for whom NWAC advocates.

PROPOSED SUBMISSIONS

26. If granted leave to intervene, West Coast LEAF proposes to make the following submissions jointly with NWAC:
- (a) The constitutionality of administrative segregation under s. 15 of the *Charter* must be viewed through an intersectional lens which addresses the constellation of characteristics related to the grounds of race (Indigeneity), disability, gender, and sex. The Proposed Intervenor submits that arguments concerning the constitutional rights of prisoners cannot ignore the intersection of race, disability, gender, and sex, especially in light of the disproportionate and rising rates of Indigenous women in federal prisons, and the high incidence of disabling mental health issues and trauma experienced by imprisoned women, which is disproportionately high for Indigenous women;
 - (b) Legal analysis of the adversely discriminating effects of legislation under s. 15 of the *Charter* must be approached with regard to:
 - i. the unique and manifold ways in which isolated prisoners who are Indigenous women, women with disabling mental health issues and/or Indigenous women with disabling mental health issues experience the effects of isolation including, for example, the exacerbation of pre-existing trauma, the intergenerational effects of past and continuing colonial policy and practices, impacts of unconscious bias arising from ostensibly neutral state laws or action, lack of access to rehabilitative and re-integrative programming, and greater incidence of self-harming behaviours;
 - ii. the disproportionate harms arising from the use of ostensibly neutral classification and assessments tools, or matrices that fail to appropriately account for the sex, race and/or mental health of imprisoned persons; and
 - iii. the realization of substantive equality as opposed to formal equality, and the significance of that distinction in the context of indirect, adverse effects discrimination arising from the law;

(c) Legal analysis of the proportionality test under s. 1 of the *Charter* must be approached with regard to:

i. The importance of having a range of less drastic, minimally impairing and reasonable alternatives to segregation available for imprisoned Indigenous women, women experiencing disabling mental health issues, and Indigenous women experiencing disabling mental health issues.

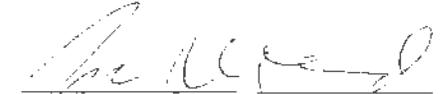
(d) Constitutional remedies must be meaningful by taking into account the nature of the rights violated and the actual circumstances and needs of rights claimants, including in instances where claims are brought by representative plaintiffs, requiring courts to remain flexible and responsive to the circumstances of the case at bar; and

(e) Constitutional remedies must be approached through the interpretive lens of the *Charter's* equality guarantee such that they respond to the needs and circumstances of disadvantaged members of society and foster meaningful access to justice.

27. I have reviewed the Memorandum of Argument included in this Motion Record, and confirm that it is an accurate reflection of the proposed submissions that NWAC intends to make jointly with West Coast LEAF should this Honourable Court grant it leave to intervene in this appeal.

28. If granted leave, the Proposed Intervenor will work in cooperation with the parties and any other intervenors, and ensure that their presence will not interfere with the parties' ability to achieve determination of the issues at stake for them in this litigation.

AFFIRMED BEFORE ME at the City of Ottawa, in the Province of Ontario, this 29th day of May 2018.)
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A Commissioner for taking Oaths in Ontario
(Julia Francesca McDonald)


LYNNE GROULX