No. S087858
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

AMANDA INGLIS, DAMIEN INGLIS (by his litigation guardian Amanda Inglis), MARIE PETE, NATASHA LESOPOY, NATAYA LESOPOY (by her litigation guardian Natasha Lesopoy), PATRICIA BLOCK, AMBER BLOCK (by her litigation guardian Patricia Block) and KAYLA STONE

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 BC CIVIL LIBERTIES ASSOCIATION

PART I: INTRODUCTION

1. BCCLA 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* ("*Charter*") as it relates to the decision to cancel the mother-baby program ("Program") at the Alouette Correctional Centre for Women ("ACCW") and, to the extent necessary, on the justifiability of this decision under section 1 of the *Charter*.

2. BCCLA respectfully submits that the analysis of these issues should be informed by a consideration of three fundamental elements: (1) international norms dictate that prisoners should be treated with respect, and in a manner that acknowledges the inherent dignity of the human person; (2) B.C. correctional philosophy requires recognition of the distinct factors impacting the female prisoner; and (3) this country's dismal history as it relates to Aboriginal women.

3. Regarding the principle that prisoners are to be treated with dignity and respect, we turn to Justice McEwan's remarks in *Bacon v. Surrey Pretrial Services Centre*.[1] McEwan J. was faced with an application for *habeas corpus* and *Charter* relief arising out of B.C. Corrections' use of, among other things, solitary confinement while the prisoner was remanded in custody pending trial. Before granting the balance of the relief sought by Mr. Bacon, McEwan J. considered international norms for the treatment of prisoners:

> 272 There are numerous published articulations of a general principle that prisoners should be treated with respect, and in a manner that acknowledges the inherent dignity of the human person. It is antithetical to international norms to say that imprisonment implies an absence of rights mitigated only by the discretionary allocation of privileges. The concept that prisoners retain their human rights and fundamental freedoms subject to lawful incarceration is found in the ***United Nations' Basic Principles for the Treatment of Prisoners***, 14 December 1990, GA 45/11, which states that "all prisoners shall be treated with the respect due to their inherent dignity and value as human beings." The limitations imposed by confinement do not negate this principle:
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>> "[a]ll prisoners shall be treated with the respect due to their inherent dignity and value as human beings." ...
>>
>> 5. Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.
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>> United Nations, *Basic Principles for the Treatment of Prisoners*, 14 December 1990 at Principle 5, http://www2.ohchr.org/english/law/basicprinciples.htm [hereinafter the *" UN Principles for the Treatment of Prisoners"*].

4. In addition, McEwan J. considered Commissioner Arbour's preliminary remarks in her report: *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*. Commissioner Arbour wrote:

> Corrections is the least visible branch of the criminal justice system. Occasions such as this, where its functioning is brought under intense public scrutiny, are

[1] *Bacon v. Surrey Pretrial Services Centre*, 2010 BCSC 805 ["*Bacon*"] [Intervenors' Joint Authorities at tab 3].

few and far between. This may explain the discomfort of Corrections officials in handling this level of public attention. The lack of public scrutiny is in stark contrast to accountability processes in the law enforcement and judicial branches of the criminal justice system. Through hundreds of criminal trials and appeals, systemic shortcomings and individual performances of police officers, prosecutors and judges are examined publicly in a robust adversarial fashion.

Anyone familiar with criminal law enforcement, and with the prosecutorial and trial processes, would identify the presumption of innocence as the principle that animates the many rights granted by law to a person charged with a criminal offence. The risk of convicting an innocent person is not one which we would assume lightly.

A fair criminal process produces reliable convictions and, as a result, the management of a custodial sentence does not have to be plagued with uncertainties about the legitimacy of the enterprise. However, even though the presumption of innocence is displaced by the conviction, in the imposition of punishment, all authority must still come from the law. Parliament authorizes the imposition of certain sentences; the courts impose them and corrections officials implement the court orders. A guilty verdict followed by a custodial sentence is not a grant of authority for the State to disregard the very values that the law, particularly criminal law, seeks to uphold and to vindicate, such as honesty, respect for the physical safety of others, respect for privacy and for human dignity. The administration of criminal justice does not end with the verdict and the imposition of a sentence. Corrections officials are held to the same standard of integrity and decency as their partners in the administration of criminal law.

. . .

Ultimately, I believe that there is little hope that the Rule of Law will implant itself within the correctional culture without assistance and control from Parliament and the courts. ... One must resist the temptation to trivialize the infringement of prisoners' rights as either an insignificant infringement of rights, or as an infringement of the rights of people who do not deserve any better. When a right has been granted by law, it is no less important that such right be respected because the person entitled to it is a prisoner. Indeed, it is always more important that the vigorous enforcement of rights be effected in the cases where the right is the most meaningful. For example, the right not to be subjected to non-consensual body cavity searches is not particularly valuable to those who are unlikely ever to be subjected to such an intrusive procedure. It is only valuable, and therefore should be enforced with the greatest vigour, in cases where such searches are likely to be undertaken. In the same way, the right for a woman not to be subjected to a strip search by a man is of little significance to someone who has never been and is realistically unlikely to ever be strip searched by anyone.

Respect for the individual rights of prisoners will remain illusory unless a mechanism is developed to bring home to the Correctional Service the serious consequences of interfering with the integrity of a sentence by mismanaging it.

The administration of a sentence is part of the administration of justice.[2]

5. BCCLA submits that the administration of a provincial prison sentence must take into account respect and human dignity, especially as those concepts relate to women and their roles as mothers. It will be submitted below that a part of this process is to recognize current mechanisms that exacerbate inequality of vulnerable groups.

6. The second fundamental principle that informs this constitutional analysis arises out of the Defendants' stated philosophy applicable to the female prisoner. This philosophy recognizes the differences between male and female prisoners[3] and mandates, in BCCLA's submission, recognition that disruptions with the mother-child bond cannot be compensated for by transporting breast milk or permitting occasional afternoon playtimes subject to the discretion of the non-prisoner caregiver. The Statement of Philosophy says:

> The BC Corrections Branch has articulated a specific Statement of Philosophy about women offenders. It is intended to provide a foundation for identifying gender-based differences and the establishment of correctional practices that are responsible to the needs of women offenders in both community and institutional settings. The Statement of Philosophy provides [in part]:
> In delivering services and programs to woman offenders, we are committed to the following beliefs, values and principles:
> . . .
> 2. The experiences and needs of men and women offenders are different. One important difference is that women offenders have experienced victimization or exploitation, most often by men, and they continue to be vulnerable.
> . . .
> 6. Aboriginal women have a unique place in terms of their history, the law, their role in Aboriginal communities, and their involvement with the criminal justice system. A concerted approach to meeting their distinct social, cultural and spiritual needs is appropriate.
> . . .
> 8. The relationship between mothers and children, and the connection to family and community are critical to women offenders and should be supported, within the parameters of court orders.
> 9. Because of the relatively small numbers and proportion of woman offenders, it may not be possible to provide a full range of programs and services

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[2] *Bacon*, *supra* at para. 283, citing the Honourable Louise Arbour in her report *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Canada Communication Group, 1996) [Intervenors' Joint Authorities at tab 3].

[3] "Statement of Philosophy – Correctional Service for Women" in vol. 1, tab 18 #CROWN 0034, marked as Exhibit 15.

> specifically for women in every location but every effort should be made to meet the distinct needs of women offenders.

7. Although B.C. Corrections acknowledges that female prisoners have different profiles and needs than male prisoners, there is a lack of research and data which speaks to those differences and how to address them. The result is that, where the needs or characteristics of female prisoners differ from those of male prisoners, those needs or differing characteristics have often been misunderstood, overlooked or under appreciated. One element of this state of affairs is the tendency to over classify female offenders and, as a result, misunderstand the level of risk that they pose.[4] The cumulative result is that these women, many of whom are imprisoned far from their social support systems due to the small number of institutions for women, face additional and unnecessary obstacles to improving their lives and avoiding reincarceration.

8. Finally, BCCLA submits that the unique experience of Aboriginal women and their infants must further inform this constitutional analysis. Remarkably, despite the principles enunciated by Justices Cory and Iacobucci for the Court in *R. v. Gladue*,[5] the cases that follow and section 718(2)(e) of the *Criminal Code*, Aboriginal women continue to be dramatically overrepresented in the B.C. correctional system. In the Provincial Health Officer's 2013 special report, Mary Ellen Turpel-Lafond notes:

> According to data from the Canadian census and BC Corrections, Aboriginal people are disproportionately represented in the BC corrections systems compared to their proportion of the larger population. This overrepresentation has been increasing in recent years as the percentage of adult Aboriginal offenders admitted into custody has risen faster than the growth of the Aboriginal population in BC. <u>The current overrepresentation is particularly pronounced among Aboriginal females</u> and Aboriginal youth. [Emphasis added.]
> The overrepresentation of Aboriginal people in the criminal justice system is a complex and multi-faceted issue. Multiple factors interact to create an environment in which Aboriginal people are not only more at risk of becoming involved in the system but also less likely to leave it. These factors include more immediate and personal elements (eg. health status), larger familial and societal issues (e.g., education, employment) and broader historical aspects (colonialism,

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[4] This issue is more thoroughly canvassed in the closing submission of West Coast LEAF.
[5] *R. v. Gladue*, [1999] 1 S.C.R. 688 ["*Gladue*"] [Intervenors' Joint Authorities at tab 35].

racism).[6]

9. Of significance is that Bill C10 statutorily prohibits sentencing judges from imposing community based sentences for certain offences, such as drug crimes. This means that alternatives to jail for the pregnant offender are simply unavailable to those women facing mandatory minimum sentences. Mothers and pregnant women who might previously have been eligible for a conditional sentence order or suspended sentence will simply no longer have that option. According to the Provincial Health Officer report, for Aboriginal people, this change in the law represents a step backward as it denies the sentencing court the ability to consider the principles enunciated in *Gladue* and is likely to result in increased incarceration of Aboriginal peoples.[7]

PART 2: FACTUAL BACKGROUND

10. BCCLA has avoided exhaustive reference to the evidence and will focus on the concepts that are relevant to the constitutionality of the decision to cancel the Program (and in particular, the equality analysis). However, it submits that the following factors provide important context for this Honourable Court's determination of the constitutional issues:

(a) Women constitute a small percentage of the overall provincially incarcerated prisoner population;

(b) The average stay for the 2010-2011 fiscal year of all provincially sentenced prisoners was 70 days;[8]

(c) Aboriginal women are over-represented in B.C.'s provincial jails;

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[6] *Provincial Health Officer's Special Report: Health, Crime and Doing Time, Potential Impacts of the Safe Streets and Communities Act (Former Bill C-10) on the Health and Well-being of Aboriginal People in BC* (British Columbia: Office of the Provincial Health Officer, March 2013), online: <http://www.health.gov.bc.ca/pho/presentations/health-crime-2013-ppt.pdf> at p. xiii ["*Health, Crime and Doing Time*"] [Intervenors' Joint Authorities at tab 62].

[7] *Health, Crime and Doing Time* at p. 42 [Intervenors' Joint Authorities at tab 62].

[8] "Table 1: Average length of Stay for Inmates in B.C. Correctional Centres by Fiscal Year", Appendix C of July 31, 2012 expert opinion letter of Carmen L.Z. Gress, Ph.D, part of Exhibit 11.

(d) Programs allowing prisoners to keep their babies while incarcerated have operated in the B.C. provincial system since the early 1970s. Similar programs have operated in other provinces and internationally and continue to do so;[9]

(e) Pursuant to federal/provincial transfer agreements, provincially sentenced women were incarcerated at BCCW until its closure in 2004 at which time provincially sentenced women were incarcerated at ACCW or, in much fewer numbers, at Prince George Regional Correctional Centre;

(f) From 2003 to the present, women remanded in custody pending verdict were incarcerated at Surrey Pretrial Services Centre or ACCW;

(g) ACCW was converted from a male prison to a female prison because BCCW was to be closed and ACCW was less expensive to operate than BCCW;[10]

(h) BCCW ran a mother-baby program from 1991 until BCCW was closed in 2004;[11]

(i) At the time of its cancellation, ACCW was the only provincial institution in B.C. which allowed incarcerated women to stay with their infants if they gave birth while in custody;

(j) There were no reported incidents of physical harm to the babies involved in the Program at ACCW;[12]

(k) Brenda Tole was the first warden at ACCW and was encouraged by health care providers and others to continue BCCW's mother-baby program at ACCW;

(l) Warden Tole engaged in research and consultation both in deciding to run the Program and in determining its guiding rules;

(m) The Program operated in close coordination with the Ministry of Child and Family Development ("MCFD") and MCFD played an active role in determining what placement and other arrangements were in the best interests of the prisoner's infant child;[13] and

(n) Mr. Merchant, Provincial Director of the Adult Custody Division of B.C. Corrections at the relevant time, agreed to newborns residing with their mothers at ACCW. He later decided to terminate the Program and not accept new babies. The evidence is unclear about the date the decision was made to cancel the Program. Regardless of the findings of fact made about the timing of the

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[9] Testimony of Brenda Tole (regarding Program at Twin Maples Correctional Facility) on May 28, 2013.
[10] Testimony of Nancy Wrenshaw on June 7, 2013.
[11] Expert report of Professor Michael Jackson, Q.C. at p. 6, marked as Exhibit 8.
[12] In addition, witnesses were cross-examined about the literature and studies pertaining to mother-baby programs operating elsewhere in the world and the witnesses agreed that there appears to be no reported incidents of a death in any of these programs. See for example, the testimony of Dr. Elterman on June 11, 2013.
[13] Testimony of Brenda Tole on May 28, 2013.

decision, the Program operated from 2004 through 2007 without any physical harm to any of the infants.

PART 3: SUBMISSIONS

11. BCCLA makes four principal submissions. First, it submits that the Program can be scrutinized under the *Charter.* Second, it submits that the cancellation of the Program infringes the equality rights of the provincially incarcerated female prisoner ("Claimant Prisoners") and her infant ("Claimant Infants"). Third, it submits that the cancellation of the Program infringes on the liberty and security interests of the Claimant Prisoners and the security of the person interests of the Claimant Infants and that the infringement is not in accordance with the principles of fundamental justice. Finally, it submits that the cancellation of the Program is not justified under s. 1 of the *Charter.*

A. BASIS FOR *CHARTER* REVIEW

12. BCCLA submits that the decision to cancel the Program can be scrutinized under the *Charter*. Indeed, the Defendants appear to agree that the *Charter* is engaged.[14]

13. The corrections administration has statutory jurisdiction to run ACCW and to provide programs, including the mother-baby program. The authority to run the mother-baby program can be found in ss. 38(1) and (2) of the *Correction Act Regulation.*[15] The Regulation provides that:

> Programs for inmates
> 38 (1) The person in charge must establish programs for inmates, including religious and recreation programs.
> (2) As far as practicable, the person in charge must establish programs designed to assist inmates to
> (a) improve their education or training, and
>
> (b) reduce the risk they present to the community.

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[14] See paragraph 11 of the Defendants' Opening Statement.

[15] *Correction Act Regulation*, B.C. Reg. 58/2005 ["*Correction Act Regulation*"]. "Person in charge" is defined in section 1 as "the person in charge of a correctional centre" [Intervenors' Joint Authorities at tab 56].

14. Although the purpose of prison programs is mandated somewhat in the language above, the manner in which these objectives are pursued is not codified. Therefore, the decision as to what programs to run at ACCW is a matter of discretion and the decision to cancel the Program was not mandated by legislation but instead was the result of an exercise of discretion.

15. The Supreme Court of Canada has held that an exercise of discretion permitted by statute must conform to the *Charter*. In *Eldridge v. British Columbia (Attorney General)*, Justice La Forest found that the failure of hospitals to provide sign language interpretation to deaf patients violated section 15 of the *Charter* because it denied the physically disabled the ability to equally benefit from the healthcare system.[16] Although the relevant legislation was neutral in that it did not mandate a discriminatory result, the Court held that exercises of statutory authority by a governmental body are also subject to *Charter* scrutiny:

> … the Charter may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains valid, but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the Charter.[17]

16. Similarly, in *Canada (Attorney General) v. PHS Community Services Society*,[18] the Court considered whether the federal government's refusal to extend an exemption under the *Controlled Drugs and Substances Act* ("*CDSA*") that would permit the continued functioning of Vancouver's safe injection site.[19] In her reasons for judgment on behalf of the entire Court, Chief Justice McLachlin held that the impugned provisions of the *CDSA* did not violate the *Charter* because of the availability of exemptions under the statute but that the Minister's exercise of this discretion did not conform with the *Charter*:

> 117 The discretion vested in the Minister of Health is not absolute: as with all exercises of discretion, the Minister's decisions must conform to the *Charter*: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3. If the Minister's decision results in an application of the *CDSA* that limits the s. 7 rights of individuals in a manner that is not in accordance with the *Charter*, then the Minister's discretion has been exercised unconstitutionally.

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[16] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 ["*Eldridge*"] [Intervenors' Joint Authorities at tab 13].

[17] *Eldridge*, *supra* at paras. 20-21 [Intervenors' Joint Authorities at tab 13].

[18] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 ["*PHS*"] [Intervenors' Joint Authorities at tab 7].

[19] *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ["*CDSA*"].

17. Thus it is submitted that the decision to cancel the Program engages *Charter* scrutiny and as such must be exercised in conformity with the *Charter* and its values.

B. SECTION 15 AND EQUALITY

18. BCCLA submits that the decision to cancel the Program infringed section 15 because it imposed a disproportionate and discriminatory burden on provincially incarcerated female prisoners and their newborns. The discriminatory effects are experienced by mothers as a result of their sex, and for some their family status and/or Aboriginal heritage. For infants, the differential and discriminatory treatment arises by virtue of their family status (being born to single-parent households) and their Aboriginal heritage.

19. We begin the section 15 submission by addressing the legal test. We then discuss the post-*Withler* role of comparator groups in the equality jurisprudence.[20] BCCLA then submits that the comparator analysis approach is not required here and, in fact, demonstrates the difficulties previously identified with the use of comparator groups where the claimants are members of multiple marginalized groups and where no outside group is comparable. BCCLA then discusses the differential treatment experienced by the claimants and concludes the section 15 submission with the argument that section 15 is violated by the decision to cancel the Program.

(1) Section 15 Test (*Kapp*)

20. Section 15 of the *Charter* provides:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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[20] *Withler v. Canada (Attorney General)*, 2011 SCC 12 [“*Withler*”] [Intervenors’ Joint Authorities at tab 54].

21. Courts continue to apply the analysis in *R. v. Kapp* in assessing claims of section 15 infringement:

(1) Does the law create a distinction based on an enumerated or analogous ground?

(2) Does the distinction create disadvantage by perpetuating prejudice of stereotyping?[21]

22. We address each branch of the test in turn below.

(2) Differential Treatment and Comparator Groups

23. Until recently, at the differential treatment stage of the analysis, courts required consideration of the appropriate comparator group in order to determine differential treatment. BCCLA adopts the submission of West Coast LEAF ("WCL") regarding the comparator group analysis and adds the following.

24. In *Withler*, the Court held that the use of comparator groups can fail to capture substantive inequality and may thwart identification of the discrimination at which section 15 is aimed. Writing for the Court, McLachlin C.J. and Abella J. stated:

> 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.

25. In reaching its conclusion, the Court adopted academic criticism which warned that the use of mirror comparator groups may deny equality to a group with distinct needs and

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[21] *R. v. Kapp*, [2008] 2 S.C.R. 483 at para. 17 ["*Kapp*"] [Intervenors' Joint Authorities at tab 38]. See also *Carter v. Canada (Attorney General)*, 2012 BCSC 886 at para. 1026 [Intervenors' Joint Authorities at tab 8].

circumstances that cannot be compared to those of another and, thereby, risks missing inequality suffered by Canada's most dispossessed and marginalized.[22]

26. The Court also recognized that the use of a mirror comparator overlooks the fact that a claimant may be impacted by different and interwoven grounds of discrimination and risks failing to account for more nuanced experiences of discrimination:

> …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.[23]

27. The BCCLA submits that this is such a case. ACCW houses members of some of the province's most vulnerable and disadvantaged groups. The multiple and overlapping conflux of factors experienced by the marginalized populations housed at ACCW render the use of a mirror comparator unhelpful. Since *Withler*, a comparator analysis is unnecessary. Two subsequent decisions support this conclusion.

28. First, the Ontario Court of Justice's decision in *R. v. T.M.B* reflects the shift away from comparator groups.[24] In *T.M.B.*, the Aboriginal offender was convicted of sexual interference of his granddaughter and was subject to the 14-day mandatory minimum sentence established by the *Criminal Code*. The offender argued that the mandatory minimum sentencing provisions infringed sections 7 and 15 of the *Charter* because they prevented consideration of historical prejudice, disadvantage and over-incarceration of Aboriginal peoples within the criminal justice system. It is significant to the case at hand that, although the Court in *T.M.B.* concluded that section 15 was not violated in that case and with that offender, it accepted that the sentencing provisions created a distinction based on an enumerated ground.

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[22] *Withler*, *supra* at para. 59, citing Margot Young's "Blissed Out: Section 15 at Twenty", in Sheila McIntyre and Sandra Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006) 45 at p. 63 [Intervenors' Joint Authorities at tab 54].
[23] *Withler, supra* at para. 58 [Intervenors' Joint Authorities at tab 54].
[24] *R. v. T.M.B.*, 2011 ONCJ 528 ["*T.M.B*"] [Intervenors' Joint Authorities at tab 42].

29. The Court rejected the Crown's argument that, as the mandatory minimum sentence applied to all persons convicted of sexual interference, there was no differential treatment.[25] After citing extensively from *Gladue*, Justice Sparrow stated:

> 88 In my view, the above noted passages from *Gladue* represent a clear finding that aboriginals have suffered historical disadvantage not only because of sociological factors, but because of discrimination in the criminal justice system. … Both the Court in *Gladue* and Parliament, through section 718.2(e), have directed judges to consider historical and sociological factors and restorative justice in sentencing. In my view, in preventing sentencing judges from considering a conditional sentence or an even shorter sentence than that prescribed by s.151(b), the mandatory minimum denies convicted aboriginals the fullest possible range of sentencing options which according to *Gladue* and s. 718(2)(e) should be given consideration.
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> 89 In so doing, in my view, the mandatory minimum creates a distinction between aboriginal and non-aboriginal offenders, as submitted by the Applicant. The former group loses the fullest benefit of an analysis which was deemed necessary to address historical disadvantage not similarly recognized as having been suffered by the latter group. The loss of this benefit or entitlement is in my view a form of adverse impact or indirect discrimination as defined in *Withler*. It has a negative effect, disentitling aboriginal offenders to the fullest benefit of a refined analysis on sentencing, even if the effect on sentence would ultimately have been minimal.

30. In essence, the Court concluded that the facially neutral law had a disproportionate impact on Aboriginal people because it denied them an analysis recognized as necessary in *Gladue* and the cases that follow.[26]

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[25] Contra *R v. Nur,* 2011 ONSC 4874 [Intervenors' Joint Authorities at tab 41], where Justice Code concluded that the mandatory minimum sentencing provisions for firearms offences did not cause a discriminatory effect or disproportionate impact on black offenders.

[26] At para. 85 of *T.M.B.*, *supra* [Intervenors' Joint Authorities at tab 42], Sparrow J. refers to paras. 61, 65 and 68 of *Gladue* and states:

> "Certain crucial passages of . . . *Gladue* should be noted:
>
> > . . . Not surprisingly, the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned. Aboriginal people are overrepresented in virtually all aspects of the system. As this Court recently noted in R v. Williams [1998] 1 S.C.R. 1128 at para. 58, there is widespread bias against aboriginal people within Canada, and [t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system.. .
> >
> > It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance

31. Second, the Federal Court of Appeal considered differential treatment without a comparator analysis in *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*.[27] The case involved a judicial review of a decision of the Canadian Human Rights Tribunal whereby that tribunal had held that there could be no adverse differential treatment (and hence no discrimination) in the provision of child welfare services to First Nations children living on reserve as no other group received child welfare services from the Government of Canada. In other words, the tribunal held that there could not be discrimination if there was no comparator group.

32. The Federal Court held, as was unanimously affirmed by the Court of Appeal, that the tribunal's interpretation of the *Canadian Human Rights Act* as requiring a comparator group analysis was unreasonable and inconsistent with substantive equality.

33. Justice Mactavish of the Federal Court noted the *sui generis* relationship of First Nations and the government. One element of this unique relationship is that First Nations receive certain services that are not available to other Canadians. The result is that they are in a "no man's land", there being no counterpart to compare them to in order to conduct a comparator group analysis.[28] Justice Mactavish did not allow this state of affairs to interfere with full consideration of the applicants' rights and the matter was remitted for reconsideration.

34. Based on the post-*Withler* equality jurisprudence, particularly regarding unique groups, BCCLA respectfully submits that a comparator group analysis is not required here and, in fact, would be inconsistent with the notion of substantive equality.

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abuse, lack of education and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders.

> . . . Moreover, as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be rehabilitated thereby because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.

[27] *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, 2013 FCA 75 [Intervenors' Joint Authorities at tab 16].

[28] *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General),* 2012 FC 445 at paras. 332-336 [Intervenors' Joint Authorities at tab 15].

(3) Does the law create a distinction based on an enumerated or analogous ground?

35. BCCLA submits that the decision to cancel the Program imposed a disproportionate burden on provincially incarcerated mothers and their newborns resulting in discrimination. For the mothers, the different treatment is based on the enumerated or analogous grounds of sex, and for some, ethnic origin and family status. For the newborns, the discrimination is based on the enumerated or analogous grounds of family status and ethnic origin.

36. Although not all women and not all infants in B.C. suffer the differential treatment experienced by the Claimants and not all the affected prisoners are Aboriginal, this does not mean that there is no distinction drawn on an enumerated or analogous ground. In *Quebec (Attorney General) v. A,* the Court stated that heterogeneity within the claimant group does not defeat a claim of discrimination.[29] Writing for the majority, Justice Abella cited *Janzen v. Platy Enterprises Ltd.* for the following:

> … *discrimination does not require uniform treatment of all members of a particular group. It is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of that individual.* If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value. It is rare that a discriminatory action is so bluntly expressed as to treat all members of the relevant group identically. In nearly every instance of discrimination the discriminatory action is composed of various ingredients with the result that some members of the pertinent group are not adversely affected, at least in a direct sense, by the discriminatory action. *To deny a finding of discrimination in the circumstances of this appeal is to deny the existence of discrimination in any situation where discriminatory practices are less than perfectly inclusive.* It is to argue, for example, that an employer who will only hire a woman if she has twice the qualifications required of a man is not guilty of sex discrimination if, despite this policy, the employer nevertheless manages to hire some women.[30]

37. In this case, the decision to cancel the Program had a differential impact on the claimants for the following reasons. First, only women experience pregnancy. In *Brooks v. Canada Safeway Ltd.*, Chief Justice Dickson writing for the Court recognized that pregnancy is unique to

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[29] *Quebec (Attorney General) v. A*, 2013 SCC 5 at para. 354 ["*Quebec*"] [Intervenors' Joint Authorities at tab 30].
[30] *Quebec*, *supra* at para. 354, citing *Janzen v. Platy Enterprises*, [1989] 1 S.C.R. 1252 at 1288-1289 [*Quebec* is in the Intervenors' Joint Authorities at tab 30]. See also *Carter, supra* at para. 1074 [Intervenors' Joint Authorities at tab 8].

women and discrimination on the basis of pregnancy is discrimination on the basis of sex.[31] It is submitted that pregnancy has effects on a woman not only during pregnancy, but afterward, including the production of breast milk, the ability to breastfeed, and physical and emotional vulnerabilities that arise postpartum. These effects should be recognized.

38. Second, the claimants are disproportionately impacted because women are typically the primary caregivers.[32] As a result, separation of mother and infant will create disproportionately more stress for imprisoned mothers than for imprisoned fathers. This is because separation of mother and child is much more likely to result in the child being cared for by a non-biological parent and because these women will disproportionately feel primarily responsible for their child's wellbeing.

39. In the context of rules regarding strip searches of prisoners, the Supreme Court has recognized that section 15 permits the law to treat male prisoners differently than female prisoners when merited. In *Weatherall v. Canada (Attorney General),* La Forest J. on behalf of the unanimous Supreme Court held that it was proper to be more restrictive on the ability of a male guard to strip search a female prisoner than for a female guard to strip search a male prisoner. Because of women's different biology and their generally disadvantaged position in society, equality required differential treatment.[33] While the equality promoting differential treatment at issue in this case is very different, this case shows that, even in the prison context, the *Charter* affords for recognition of the different needs of female prisoners and the accommodations that are required.[34]

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[31] *Brooks v. Canada Safety Ltd.*, [1989] S.C.J. No. 42 (QL) at para. 40 [Intervenors' Joint Authorities at tab 6].

[32] In *Symes v. Canada*, [1993] 4 S.C.R. 695 at paras. 129-131, the majority of the Court as per Iacobucci J., based on the evidence and judicial notice, recognized that women disproportionately incur the social costs of child welfare [Intervenors' Joint Authorities at tab 46].

[33] *Weatherall v. Canada (Attorney General)*, [1993] S.C.J. No. 81 (QL) at para. 6 [Intervenors' Joint Authorities at tab 51].

[34] It should be noted that in *Turner v. Burnaby Correctional Centre for Women*, [1994] B.C.J. No. 1430 at paras. 27-28 [Intervenors' Joint Authorities at tab 48], Justice Low held that it was not discriminatory to deny a mother prisoner access to the mother-baby program because that mother had committed misconduct which resulted in her being moved to secure custody and participants in the program could not be in secure custody. Justice Low held that the prisoner was not denied something given to others; no women in the secure ward could have access because it was not safe. He also held that there was no discrimination because there was no difference in treatment between the complainant and the comparator group because no male prisoners were permitted to have their babies in prison. *Turner* does not bind the Court to deny the relief sought in this case because: the facts being considered were very different, i.e. there was a program in place and the *Charter* issue was with the program's restrictions; the Court

40. Female prisoners are different than male prisoners. They are less violent,[35] their histories tend to be marked by abuse and they tend to have greater health needs.[36] Many have turned to abusing substances and this substance abuse is related their multiple hardships.[37] As noted above the needs of female prisoners are often not well understood or accommodated.

41. A final characteristic of female prisoners that distinguishes them from male prisoners is that there are far fewer female prisoners than male prisoners and, as a result, most provincially incarcerated women in B.C. are housed near two urban centres, ACCW and Prince George.[38] This distinguishes female prisoners from male prisoners who are more likely to be imprisoned closer to their families.

42. Many of these differences and their relationship to Aboriginal status were recognized by New Zealand's Parliament and referred to by Professor Michael Jackson. New Zealand's Parliament has recently amended its corrections legislation regarding mother-baby units because it recognized that the criteria formerly in place were too strict and excluded too many imprisoned women, a disproportionate number of whom are Māori. As cited in the report, the Associate Minister of Corrections said the following before Parliament regarding the amending bill:

> I speak in support of the interests of the most vulnerable in our communities, our children, who are usually the unintended victims of maternal imprisonment. Māori children are particularly impacted as Māori women make up over half of the prison population, and this makes it difficult to break intergenerational offending. Not a lot of us in this House can relate to that, but we have seen it in our own communities.
>
> Maternal imprisonment has been shown to have a negative impact on a child's future development across a range of indicators including physical and mental health, academic achievement, social skills, employment and risk of offending. Maternal imprisonment has a much more detrimental impact than paternal imprisonment, because women continue to carry out most of the primary

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found that granting the relief sought would be unsafe; the Court used a comparator analysis and, clearly, employed a formal equality approach and, if this was a correct analysis at the time, *Withler* shows that this is no longer the case.

[35] Testimony of Lisa Anderson on June 10, 2013 and testimony of Brenda Tole on May 27, 2013.

[36] Testimony of Brenda Tole on May 27, 2013. She testified that, in co-drafting ACCW's Statement of Philosophy, which was approved by headquarters, it was recognized that female prisoners have different needs, including increased healthcare needs. See also testimony of Lisa Anderson on Friday June 7, 2013.

[37] On June 11, 2013, Brent Merchant testified in direct examination that these are often major differences between male and female prisoners.

[38] Brent Merchant testified on June 11, 2013, that women offenders compose a very small number of prisoners compared to the overall prisoners in Canadian correctional centres.

> caregiving responsibilities for children and especially young children. This means children are likely to have a stronger attachment to their mother, and this is disrupted when they are separated from their mother. Women are also more likely to be sole parents than men, and they are more likely to face greater difficulties in finding alternative caregivers for their children. The family unit is more likely to break down when the mother is imprisoned than when the father is in prison.[39]

43. In Canada, a grossly disproportionate number of prisoners are Aboriginal. Although Aboriginal people make up only 4.8 per cent of the general population of B.C., 42 per cent of sentenced women incarcerated in B.C. in the 2010/2011 year were Aboriginal and 29 per cent of remanded women were Aboriginal.[40] In relation to the key element in this case of familial ties, it should be noted that Aboriginal families often involve single mothers parenting alone.[41] The cumulative effect of this state of affairs is that Aboriginal mothers, many single, will experience separation and its negative consequences in a more acute fashion.

44. In regards to the infants, over-incarceration of Aboriginal peoples results in a significantly higher proportion of Aboriginal babies being separated from their primary caregivers due to imprisonment than non-Aboriginal babies. For many of these infants, their Aboriginal status will interact with their family status in a way that results in the Aboriginal infant being much less likely to be raised by a biological parent. This trend continues Canada's shameful historical practice of, through different mechanisms, separating Aboriginal families. As will be discussed further below in discussing the pre-existing disadvantage of Aboriginal peoples, such mechanisms include the uses of displacement or residential schools and the practices of an overzealous child protection system in the 1960's placing Aboriginal children in foster care. Today, these practices continue to have dire repercussions on B.C.'s Aboriginal people.

45. To summarize, because of pregnancy, different vulnerabilities of female prisoners and the increased likelihood of sole parenting for female prisoners, separation of mother and infant is

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[39] Expert report of Professor Michael Jackson at 56, quoting Hon Mita Ririnui. Michael Jackson's report is marked as Exhibit 8.

[40] "Provincial Women in Custody: Population and Programs Profile", Appendix J of July 31, 2012 expert opinion letter of Carmen L.Z. Gress, Ph.D, part of Exhibit 11.

[41] See also Representative for Children and Youth and Office of the Provincial Health Officer of British Columbia, *Kids, Crime and Care. Health and Well-Being of Children in Care: Youth Justice Experiences and Outcomes* (February 2009) online: <http://www.rcybc.ca/Images/PDFs/Reports/Youth%20Justice%20Joint%20Rpt%20FINAL%20.pdf> at p. 48 ["*Kids, Crime and Care*"] [Intervenors' Joint Authorities at tab 63].

different from separation of father and infant. As a result of these differences, a sentence imposed on a female prisoner will often be more severe than a similar sentence imposed on her male counterpart. These differences are compounded by the fact that women are more likely to be incarcerated far away from their families. A further compounding effect is experienced by Aboriginal female prisoners and their children because they are more likely to be incarcerated and to have mothers that are likely to be parenting alone. As discussed further below, state separation of families is all too familiar for Aboriginal people.

(4) <u>Whether the differential treatment is discriminatory</u>

46. In *Kapp*, the Court stated this second branch of the section 15 test as whether the decision creates disadvantage by perpetuating prejudice or stereotyping. BCCLA submits that the differential treatment is discriminatory because it does not have regard to the societal disadvantage and prejudice suffered by female prisoners by virtue of their sex, and, for many, by virtue of their Aboriginal heritage. Instead, it exacerbates the problems they face. Cancellation of the Program does not have regard to the circumstances of the infants, many of whom are Aboriginal and many of whom have single mothers but it instead unnecessarily exacerbates the difficulties the infants will face as persons born into marginalized groups in B.C.

47. In *Quebec*, Abella J. clarified that the existence of prejudice and stereotyping are indicia of discrimination but not necessary elements of discrimination; instead, the question is not one of motive or attitude but is whether the norm of substantive equality is violated by imposing an impermissible negative impact on a protected group.[42] The majority in *Quebec* held that, if "the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory."[43]

48. At this stage of the analysis, a court is to look at the alleged discrimination in its larger social, political and legal context with regard to its purpose. The Court will ask whether the line drawn is appropriate but will not require perfection.[44]

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[42] *Quebec*, *supra* at para. 325 [Intervenors' Joint Authorities at tab 30].
[43] *Quebec*, *supra* at para. 332 [Intervenors' Joint Authorities at tab 30].
[44] *Withler*, *supra* at paras. 66-67 [Intervenors' Joint Authorities at tab 54].

49. In *Kapp*, the Court distanced itself from the human dignity approach used in *Law v. Canada (Minister of Employment and Immigration)*[45] and emphasized the approach used in *Law Society of British Columbia v. Andrews* (focusing on the impact of the law).[46] However, the *Law* factors (discussed below) remain relevant and may be instructive in uncovering discrimination even though they do not provide a rigid or exhaustive analysis and not all of the *Law* factors are relevant in every case.[47]

50. *Law* lists four factors that may assist with the contextual inquiry of whether or not there is discrimination (the "*Law* factors"):

(a) pre-existing disadvantage of the claimant group;

(b) the relationship between the grounds of discrimination and the claimant's characteristics or circumstances;

(c) whether the impugned law has ameliorative purposes or effects; and

(d) the nature of the interest affected.[48]

51. The relevant *Law* factors are addressed below.

(A) Pre-Existing Disadvantage

52. *Law* states that courts have consistently recognized that pre-existing disadvantage is probably the most compelling factor favouring a conclusion that differential treatment is truly discriminatory. Pre-existing disadvantage is relevant because:

> …to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect, and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social

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[45] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at paras. 62-75 ["*Law*"] [Intervenors' Joint Authorities at tab 21].
[46] *Law Society of British Columbia v. Andrews*, [1989] S.C.J. No. 6 (QL) ["*Andrews*"] [Intervenors' Joint Authorities at tab 22]. See *Kapp, supra* at paras. 14-26 [Intervenors' Joint Authorities at tab 38].
[47] *Withler, supra* at para. 66 [Intervenors' Joint Authorities at tab 54].
[48] *Law, supra* at paras. 62-75 [Intervenors' Joint Authorities at tab 21].

> characterization, and will have a more severe impact upon them, since they are already vulnerable.[49]

53. The claimants have clearly suffered historical disadvantage. In fact, they are amongst society's most vulnerable individuals. They are exactly the type of people that the equality guarantee most aims to protect: marginalized persons who have been disregarded and misunderstood in Canadian society. The equality guarantee serves to prevent the government from purposely or unintentionally placing obstacles in their way and denying them equal protection and benefit in Canadian society.

54. In regards to all of the prisoners, they are all women and, as noted above, in *Brooks* and *Weatherall*, the Court has recognized that women have been historically disadvantaged.

55. Because a disproportionate number of prisoners and their children are Aboriginal, the historical disadvantage of Aboriginal people is decidedly relevant. BCCLA submits that this historical and persisting disadvantage is irrefutable. In *R. v. Ipeelee*, the majority of the Supreme Court held as per LeBel J. that courts <u>must</u> take judicial notice of systemic and background factors affecting Aboriginal people in society:

> **60** ... To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples...[50]

56. In *Gladue*, the Court considered the operation of s. 718.2(e) of the *Criminal Code*, which provides that a sentencing judge should pay particular attention to the circumstances of Aboriginal offenders.[51] The Court took note of the interrelationship between the historical and persisting disadvantage of Aboriginal people and the crisis of their drastic overrepresentation in prison populations and the criminal justice system:

> …The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias

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[49] *Law, supra* at para. 63 [Intervenors' Joint Authorities at tab 21].
[50] *R. v. Ipeelee*, [2012] 1 S.C.R. 433 ["*Ipeelee*"] [Intervenors' Joint Authorities at tab 37].
[51] *Gladue*, *supra* at para. 65 [Intervenors' Joint Authorities at tab 35].

> against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons...[52]

57. In *Ipeelee*, the Court held that problems with overrepresentation and alienation of Aboriginal peoples in the criminal justice system have gotten worse since *Gladue* and not better as anticipated.[53]

58. The female prisoner population in B.C. is similarly marked by overrepresentation of Aboriginal people. It is also noteworthy that in a 2003 study appended to the report of Dr. Carmen Gress tendered by the Crown, it is shown that Aboriginal women incarcerated in B.C. exhibit additional features of disadvantage.[54] For example, although 60% of sentenced women in B.C. and 58.2% of the female remand population in B.C. have an education of grade 10 or less, for Aboriginal women 77.8% of sentenced prisoners and 75.7% of remand admissions fit into this category.[55]

59. The Court in *Gladue* also noted that Aboriginal offenders are less likely to be rehabilitated in prison:

> It is true that systemic and background factors explain in part the incidence of crime and recidivism for non-aboriginal offenders as well. However, it must be recognized that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be "rehabilitated" thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.[56]

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[52] *Gladue*, *supra* at paras. 64-65 [Intervenors' Joint Authorities at tab 35].
[53] *Ipeelee, supra* at para. 62 [Intervenors' Joint Authorities at tab 37].
[54] "Provincial Women in Custody Population Profile and Programs", Appendix I of July 31, 2012 expert opinion letter of Carmen L.Z. Gress, Ph.D, part of Exhibit 11.
[55] "Provincial Women in Custody Population Profile and Programs", Appendix I of July 31, 2012 expert opinion letter of Carmen L.Z. Gress, Ph.D at 9, part of Exhibit 11.
[56] *Gladue*, *supra* at paras. 68 [Intervenors' Joint Authorities at tab 35].

60. In regards to history of Aboriginal disadvantage, the particular context that must be emphasized here is the history of dislocation and state disruption of family and community ties. Jonathan Rudin's report for the Ipperwash Inquiry, *Aboriginal Peoples and the Criminal Justice System*, provides a helpful summary of some elements of that state conduct:

> The disappearance of Aboriginal people as a people was also explicitly to be hastened by the development of the residential school system. The core belief of this system was that the future for Aboriginal children could only be assured by working hard to remove their Aboriginal self identity. The residential school experience, as all of Canada now knows, was a failure in almost every respect. It succeeded, however, in alienating thousands upon thousands of Aboriginal people from their communities and from their sense of themselves.
>
> As the use of residential schools in Canada began to decrease in the 1960s and 1970s, a new challenge faced Aboriginal people—the expansion of the jurisdiction of provincial child welfare agencies to include reserve communities. This expansion led to what has been referred to as the "60s sweep" or "60s scoop" where many Aboriginal communities lost most, if not all, of their children to the care of child welfare agencies. Those children who were successfully placed for adoption were almost never placed in Aboriginal homes, but rather were raised by non Aboriginal families. Those children who were not adopted often found themselves living in a succession of foster or group homes, often neglected or abused.[57]

61. The above-mentioned recent special report of the Provincial Health Officer entitled *Health, Crime and Doing Time*, provides further insight into the continuing impact of residential schools and the "60's Scoop" on subsequent generations of Aboriginal persons and parent-child bonds:

> The Indian residential school system forcibly removed Aboriginal children from their families and homes in an attempt to assimilate Aboriginal people into non-Aboriginal society… By 1930, three-quarters of children between the ages of seven and 15 were in residential schools. In these schools, children were forbidden to speak their own languages, abuse was common, and the education provided was of poor quality. Between 1857 and 1996, over 150,000 Aboriginal children attended residential schools. Reports estimate that approximately 80,000 residential school survivors still live across Canada, and that between 14,000 and 35,000 of them live in BC. The legacy of residential schools continues to affect

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[57] Jonathan Rudin, *Aboriginal Peoples and the Criminal Justice System* (Paper commissioned by the Ipperwash Inquiry) Online: <http://www.archives.gov.on.ca/en/e_records/ipperwash/policy_part/research/pdf/Rudin.pdf> at pp. 25-26 (footnotes omitted) [Intervenors' Joint Authorities at tab 60]. The report is not dated but the inquiry started in 2003 and the report was released in 2007.

communities, families, and individuals, despite the resilience demonstrated by Aboriginal people. According to a national report, almost half of residential school survivors living on reserve in Canada report a negative impact on their health and well-being, and 43 per cent of survivors' children living on reserve believe that their parents' attendance at residential schools negatively affected the parenting they received.

When residential schools began to close, a different approach to Aboriginal child welfare was developed. In the 1960s, large numbers of Aboriginal children were removed from their homes and placed in government care—a period of time referred to as the "60's Scoop." Many of these children were removed from families who were loving and supportive, although experiencing poverty, and were placed in non-Aboriginal homes. In the 1950s, only 1 per cent of children in government care were Aboriginal, but by 2006 this had increased to over 50 per cent. In the 1980s, after attention was drawn to the trend of removing Aboriginal children from their homes, a moratorium was placed on the adoption of Aboriginal children into non-Aboriginal families. This led to large numbers of Aboriginal children in long-term foster care with little hope of adoption—a child welfare approach that some have called the "millennium scoop"... Fragmentation of the Aboriginal family persists in British Columbia.[58]

62. As is clear by their enumeration in section 15 of the *Charter*, women are a disadvantaged group in Canada society. It is equally clear that Aboriginal people are subject to historical and persisting disadvantage. Of particular relevance in this case is the over-incarceration of Aboriginal people and the history of state removal of Aboriginal children.

(B) Correspondence

63. Next, we consider whether the decision to cancel the Program corresponds with the characteristics of the claimants. There are two elements to this analysis in this case: whether the decision corresponds with the mothers' needs and whether the decision corresponds with the babies' needs. This is not to say that their interests are not aligned but instead that these two claimant groups have different needs. It is submitted that both can be addressed through continuation of the Program. If a violation of the mothers' section 15 rights is established, facts that are relevant to determining whether the decision to cancel the Program corresponds with the

[58] *Health, Crime and Doing Time*, *supra* at p. 3 (footnotes omitted and emphasis added) [Intervenors Joint Authorities at 62]. See also *Kids, Crime and Care., supra* at p. 7 (in the group studied, more than 1/5 Aboriginal youth had either been in care, in the home of a relative or both, in contrast to less than one in 30 non-Aboriginal youth); p. 13 (over half of the children in care in B.C. are Aboriginal); and p. 23 (over 14% of Aboriginal youth have been in care, in contrast with just over 2% of non-Aboriginal youth) [Intervenors Joint Authorities at 63].

babies' needs will also be relevant in determining if the violation of the prisoners' rights can be justified under section 1.

64. Correspondence should be considered with attention to the scope of the Program. Mothers were not forced to keep their babies and had no unqualified right to do so; the Program was available for women who wanted to participate in it. Further, MCFD had to be in agreement that placement in ACCW was not inconsistent with the best interests of the child. Warden Tole testified that MCFD had the final say.

65. Another relevant point to address at the outset is that there are some prisoners who will not be eligible for alternatives that would allow them to retain custody of their children. For example, Warden Tole testified that some women, including women on remand, were not eligible for temporary absences and therefore could not partake in residential placements outside of ACCW.[59] Further, as stated by Sarah Payne, there are few residential placements for women that will take newborn infants.[60]

66. The possibility of transferring women to the federal system, the Fraser Valley Institution, is not a satisfying alternative. Patricia Block is a good example of this; she was not allowed to participate in the federal program because her sentence was too short and she would not be able to complete the program's requirements. Mr. Merchant admitted in cross-examination that there has never been a transfer of a provincially incarcerated woman in B.C. and her child to a federal institution.[61]

67. Finally, the alternative accommodation of couriering breast milk does not show that the decision to cancel the Program corresponds with the needs of the baby. First of all, it does not compensate for the denial of breastfeeding, which has important social and emotional benefits for mothers and babies. Second of all, after a new mother is separated from her baby and is permitted to have greatly reduced or no access to her infant, it is very unlikely that the practice of

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[59] Testimony of Brenda Tole on May 28, 2013.
[60] Testimony of Sarah Payne on June 3, 2013. Brenda Tole also testified on May 28, 2013, that there were not very many residential placements that would take children.
[61] Testimony of Brent Merchant on June 11, 2013.

expressing will be maintained. Lisa Anderson agreed in her testimony that there is no record of successfully breastfeeding the baby of an ACCW inmate by expressing and freezing her milk.[62]

68. The Defendants do not appear to argue that the decision to cancel the Program corresponds with the mothers' needs; instead they focus on infant safety at ACCW. It is clear that the decision does not correspond to the needs of the mothers. For women who would want to participate in the Program, separation of mother and child likely traumatizes already traumatized women and can in no way be said to correspond to their needs.

69. The testimony of Amanda Inglis demonstrates how, for women at ACCW, it can be expected that the stressful experience of giving birth in prison will often be compounded by the added stress and uncertainty of waiting to see if the justice system can accommodate keeping mother and baby together. Amanda Inglis, because of the support of her doctor at Fir Square, stayed in the hospital for seven weeks after giving birth while her application for parole was considered. This was the only way to avoid separation.

70. Dr. Peggy Koopman's evidence provides that allowing women to keep their babies can often motivate mothers to change and that forced separation can leave them feeling dejected and can aggravate their own attachment disorders or dysfunctional lifestyles.[63] Ms. Payne testified that the troubled women she has worked with at Fir Square often give up hope if their babies are taken away.[64]

71. As children, many of the women themselves were involved in the foster care system and this history of family disruption can compound the trauma of separation from their children. Dr. Koopman stated that:

> Many of the incarcerated mothers have been foster children themselves and they worry excessively about their children in foster care. They are unable to focus on programs or their own future because of that worry. In the writer's experience their worries may be well founded with babies being neglected, harmed and even sexually assaulted.

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[62] Testimony of Lisa Anderson on June 10, 2013.
[63] Expert report of Dr. Peggy Koopman at 4 and 10-12, marked at Exhibit 2.
[64] Testimony of Sarah Payne on June 3, 2013.

> Mothers also worry that their babies will bond with another caretaker and not remember them or that the mother/child bond will be permanently damaged.[65]

72. Although this state of affairs may be relevant for all ACCW prisoners, it bears a special significance for Aboriginal prisoners, who are overrepresented and have a unique history of harmful state disruption of familial bonds. Removal of the mother-baby program results in the continued unnecessary disruption of their ability to bond, attach and learn how to care for one another and cannot be permitted.

73. On the other hand, there is evidence to support the conclusion that the Program corresponded with the prisoner mothers' needs. Allison Granger Brown, a recreational therapist who worked at ACCW, testified that the babies' presence created an atmosphere of hope and the mothers benefited from the fact that someone believed in their ability to parent. Ms. Payne testified that pregnancy can often mark a turning point for a woman with a difficult past.

74. Warden Tole testified that the Program helps mothers turn their lives around because keeping mothers with their babies can reduce recidivism. This opinion is also held by Dr. Martin and Dr. Koopman.[66] This fact and the related increase in opportunity for mother and child to remain together longer term are the most blatant examples of alignment of the interests of mother and child. According to Dr. Koopman's report, she kept in touch with 9 mother-baby dyads once they left ACCW. She reports that 7 of those 9 mothers retained custody of their children.

75. If this Court finds as fact that the affected babies faced similar risks outside of ACCW or that there were no heightened threats to infant safety at ACCW, then there is no correspondence between the decision to cancel the Program and the needs of the infants. It is submitted that the decision to cancel the Program removed one of several options for placement of the infant, i.e. the option of keeping it with its mother. It is submitted that removal of this option was unnecessary and contrary to the interest in having full consideration of the best interests of the child. Further, the women at ACCW were clearly closely monitored and had access to more resources and support than they may have had in the community. Cancellation of the Program means that the prisoners' children have less benefit to the fruits of this support and monitoring.

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[65] Expert report of Dr. Peggy Koopman at 10, marked at Exhibit 2.
[66] Expert report of Dr. Ruth Martin at 9, marked as Exhibit 7; and Expert Report of Dr. Peggy Koopman at 4, marked as Exhibit 2.

(C) Ameliorative Effects

76. BCCLA submits that the third factor has no relevance in these proceedings as the decision to cancel the Program and thereby remove the option of housing prisoners with their infants at ACCW is neither a program nor is it ameliorative.

(D) The Nature of the Interest Affected

77. This third *Law* factor is partially addressed in submissions above. BCCLA submits that the nature of the interest affected is severe. The interests at stake in this case are fundamental. The issue goes to the heart of a mother's ability to nurture and care for her baby, and the right of a baby to receive his or her mother's care. Depriving mothers and children of these fundamental rights including breastfeeding, has profound consequences both short and long-term. One of the many long-term consequences is that regaining custody immediately upon release from prison is difficult and will add to the already significant challenge of re-entering society after a term of incarceration.

78. As will be addressed below in discussion of section 7, cancellation of the Program not only interferes with the mother's rights but also interferes with the child's important interest in remaining with its mother. Further, in cases where a mother would be able to retain custody upon her release, consistency is unnecessarily disrupted.

79. Again, and to repeat somewhat, the impact is particularly profound for the Aboriginal mother. The relevant history of family disruption has already been noted. The cancellation of the program contributes to and perpetuates the historical trend of state separation of generations of Aboriginal families because it presumes the imprisoned mothers to be unfit parents. Due to Aboriginal overrepresentation in provincial institutions, cancellation of the Program disproportionately denies Aboriginal mothers at ACCW and their babies the benefits of maintaining a consistent relationship with each other and avoiding the negative effects of being unnecessarily separated. It prevents the development of a relationship between mother and child that will lay a foundation for a continuing relationship on the mother's release. It also adds

additional obstacles to the mother's successful rehabilitation and reintegration by causing emotional trauma, stress and potential difficulty in regaining custody.[67]

80. Although it is submitted that the Canadian history of residential schools is sufficient to establish that unnecessary state interruption of Aboriginal families is discriminatory, additional support is found by considering international sources. The United Nations *Declaration on the Right of Indigenous Peoples*, which Canada voted in favour of, recognizes the rights of Aboriginal persons to raise their own children and to avoid forcible separation. Its preamble provides that it is recognized that "in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child". Also, heeding historical trends of forced integration and other discriminatory acts, Article 7 provides that indigenous peoples are protected from violence "including forcibly removing children of the group to another group."[68]

81. To conclude, the cancellation of the Program ignores the reality faced by the infants and imposes detriment on both mother and child. This is particularly alarming in the case of Aboriginal prisoners and their children as their people have already suffered from significant unnecessary state interruption of their family bonds.

82. It is respectfully submitted that the decision to cancel the Program, in the words of Abella J. widens the gap between this historically disadvantaged group (women, aboriginal women and their infants) and the rest of society rather than narrowing it and the decision is thus discriminatory. This is particularly so in considering the interaction of grounds of discrimination at issue here.

C. SECTION 7

[67] See pp. 44 and 45 of the Plaintiffs' closing submission, citing the evidence of Dr. Koopman.

[68] See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 69-71 [Intervenors' Joint Authorities at tab 4], for an example of the Supreme Court holding that interpretation of the *Charter* is influenced by international human rights law. The majority recognized that the *Convention on the Rights of the Child* had been ratified but not implemented in Canada and was therefore now law; however, it held that it can still influence the interpretation of domestic law. The Court also considered the *Universal Declaration of Human Rights* and the *United Nations Declaration of the Rights of the Child*.

83. Section 7 of the *Charter* provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The decision to cancel the mother-baby program at ACCW infringes section 7 of the *Charter* because it limits the Claimants' rights to liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice.[69]

84. BCCLA adopts the section 7 submission of the Plaintiffs that the decision to cancel the Program violates the section 7 rights of prisoner mothers and their infants. BCCLA submits that the decision is arbitrary, overbroad and grossly disproportionate.

85. The remainder of BCCLA's section 7 submission addresses the following. First, that this is not a positive rights case. Second, vital section 7 interests are limited by the decision and the limitation is not a necessary incident of imprisonment. Third, the relevant context should be borne in mind. Fourth and finally, it is submitted that substantive equality is a principle of fundamental justice and the decision to cancel the Program infringes upon vital section 7 interests in a manner that does not accord with substantive equality.

(1) Positive Rights

86. In its opening statement, the Defendants suggest that the Claimants' section 7 argument is a positive rights argument and that section 7 does not require the government to enact legislation or create programs.

87. BCCLA submits that this is not a positive rights case. Rather, it is a case of *Charter* infringing state action. The question is whether a program that limited incarceration's infringement upon liberty and security interests can be revoked without engaging section 7. BCCLA respectfully submits that it cannot.

88. One supportive example is *PHS*. In that case, the Court considered the government's refusal to extend the *CDSA* exemption necessary to allow the safe injection site to operate. It held that the risk of imprisonment imposed on staff would in turn limit the section 7 rights of

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[69] See *PHS, supra* at para. 84 ["*PHS*"] [Intervenors' Joint Authorities at tab 7] for the test for a s. 7 infringement. A s. 7 violation requires interference with life, liberty or security of the person that is not in accordance with the principles of fundamental justice.

safe injection site clients as it denied them access to medical supervision and counseling, thereby denying them potentially lifesaving medical care.[70]

89. It is submitted that this case is analogous to *PHS*. This case is partially concerned with the rights of mothers, many of whom are inflicted by the disease of addiction and denial of access to a program that, although not uniformly accepted in society, has strong support and aims to address the multiplicity of challenges facing incarcerated women and, it is submitted, has not been shown to threaten infant safety. Just as the decision which prevented the operation of the safe injection site was not a positive rights issue, so is the decision to cancel to mother-baby program at ACCW.

(2) Stage One: Engagement of Section 7 Interests

90. In its opening statement, the Defendants state that it is the sentence imposed and not the cancellation of the Program that causes the separation of these mothers and their infants (and any harms that follow). While the sentence is an essential element of the deprivation, it is not the sole cause. The presence of other contributing causes does not exonerate the government action. It is akin to arguing that the risks of pregnancy are attributable to the fetus, not to a law that denies access to abortion. Such an argument, if accepted, would mean that a prisoner would be helpless to challenge the lawfulness of the conditions of their confinement, a proposition that Supreme Court of Canada has rejected. It is uncontroverted that the rule of law applies within penitentiary walls.

91. Prisoners retain liberty and security of the person rights. It is submitted that unnecessary separation of mother and newborn is not legitimate punishment and infringes upon important section 7 interests.

92. The Claimant Prisoners' affected section 7 interests are integral to their well-being. The Supreme Court has recognized that the section 7 interests at stake in custody hearings are of the highest order and it is submitted that such reasoning is applicable here. In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, the majority of the Court held as per Chief Justice Lamer that:

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[70] *PHS*, *supra* at para. 91 [Intervenors' Joint Authorities at tab 7].

> 76 The interests at stake in the custody hearing are unquestionably of the highest order. Few state actions can have a more profound effect on the lives of both parent and child. Not only is the parent's right to security of the person at stake, the child's is as well. Since the best interests of the child are presumed to lie with the parent, the child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship.[71]

93. Thus, separation of parent and child engages both of their section 7 interests. The majority in *G.(J.)* held that, without the benefit of legal representation for the mother in the child protection proceeding under consideration, the child's best interests could not be adequately assessed and, thereby, the process had created an unacceptable risk of error and threatened to violate the mother and child's rights to security of the person.[72] This case too concerns a limitation upon the ability to fully consider the best interests of the child by making it more difficult to keep the child with its mother.

94. In the more recent decision of *Winnipeg Child and Family Services v. K.L.W.*, the majority also held that unnecessary disruptions of the parent-child bond have the potential to cause significant trauma to both parent and child.[73] That case concerned the constitutionality of provisions of child protection legislation which permitted the state to apprehend a child without a warrant. Justice L'Heureux-Dubé for the majority held that the statute was constitutional because it created deadlines for swift post-apprehension hearings and limited apprehension to cases where a child was apprehended without a warrant on the basis that the Ministry had reasonable and probable grounds to believe that a child was at risk of serious harm. Chief Justice McLachlin and Justice Arbour dissented. Their dissent, written by Justice Arbour, provides the following regarding the child's best interests in remaining with family:

> 13 My colleague, L'Heureux-Dubé J., has emphasized in her reasons the importance of the child's interest in being protected from harm (paras. 73-75). Although I, too, acknowledge the great significance of this aspect of the child's interest, it is equally important to recognize the child's interest in remaining with his or

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[71] *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 at para. 76 (emphasis added) ["*G.(J.)*"] [Intervenors' Joint Authorities at tab 27].
[72] *G.(J.), supra* at para. 81 [Intervenors' Joint Authorities at tab 27].
[73] *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48 at para. 72 ["*K.L.W.*"] [Intervenors' Joint Authorities at 53]. See also para. 124 where the Court recognized a child's need for continuity.

her parents and that harm may come to the child from precipitous and misguided state interference...

14 If we fail to give sufficient weight to this aspect of the child's security interest, we may also fail to recognize that removing children from their parents' care may have profoundly detrimental consequences for the child. Professor Nicholas Bala makes this point in "Reforming Ontario's Child and Family Services Act: Is the Pendulum Swinging Back Too Far?" (1999-2000), 17 C.F.L.Q. 121, noting that children are not always placed in a foster care environment that is better than the care the child would have received in the home....

15 Just as the child's interests encompass both the interest in being protected from harm and the interest in a continuing parental relationship, we cannot construe society's interest in the context of this appeal as limited only to protecting children from harm, the obvious and overriding purpose of The Child and Family Services Act. I agree that the state's parens patriae jurisdiction over children, exercised on its behalf by the court and child welfare agencies, is well-established in the civil, common and statutory law (per L'Heureux-Dubé J., at para. 75). Yet, there is an equally strong interest in democratic societies in ensuring that state actors cannot remove children from their parents' care without legal grounds to do so. Section 7 requires that this dramatic form of state intervention only take place in accordance with the principles of fundamental justice, and that, in turn, requires that all the various interests at stake be fairly balanced in the context of the case at hand.[74]

95. BCCLA submits that the same reasoning is applicable here; the cancellation of the Program has removed one important option from the individualized process of determining the best interests of the child, i.e. placement with its mother. This option, the one presumed to be preferable at law, is categorically terminated and unavailable for consideration.

96. In short, BCCLA submits that the decision to cancel the Program infringes the security of the person interest of the infants both physically and psychologically by, among other things,

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[74] See also *R.T.*. 2004 SKQB 503[Intervenors' Joint Authorities at tab 43], where the court discussed the stability needs of children and the differences between foster care and adoption. The Court recognized that children are deeply impacted by removal from their homes and that, in very young children, removal may affect their ability to form relationships and their development of self-identity. It held that a foster family is not intended to be a permanent family and cited a Manitoba decision (*Winnipeg (Child and Family Services) v. M.A.*, 2002 MBQB 209 at para. 30) for the principle that "common sense indicates that a foster child cannot have the same feeling of emotional and psychological security as an adopted child."

unnecessarily separating infants from their mothers during the critical formative early period of the infant's life and thereby interferes with the infant's attachment to their mother, deprives infants of the physical and psychological benefits associated with breast-feeding and, in the case of Aboriginal infants, separates them from Aboriginal culture and community. In addition, the BCCLA submits that the decision is contrary to section 2 of the *Child, Family and Community Service Act* which requires, among other things, the preservation of the cultural identity of Aboriginal children.

(3) Relevant Context

97. Thirdly, regarding the principles of fundamental justice, BCCLA submits that the following contextual factors (and which require an assessment of the evidence) are relevant to this Court's determination of arbitrariness, disproportionality, and overbreadth:

a. the decision to cancel the Program revokes an individualized process in favour of a blanket rule;

b. the decision to cancel the Program ignored the benefits, to the mothers and infants (for example, the opportunity to teach positive parenting skills, the health and psychological benefits associated with breast-feeding, and providing the multiple forms of support available at ACCW, including from prison staff, social workers, health care professionals and other incarcerated mothers);

c. the decision to cancel the Program wholly disregarded the community support for the Program (for example, Amy Salmon's evidence addressed the response from community health care providers about the impact of the cancellation of the Program[75]); and

d. the decision to cancel the Program seems to have been made without assessment or, at the very least, sufficient assessment of the benefits of the Program for this group of incarcerated women and their infants.

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[75] Ms. Salmon testified that she was approached by the presidents of the B.C. Children's Hospital and Sunny Hill Health Centre for Children, B.C. Women's Hospital and Healthcare Centre and B.C. Mental Health and Addiction Services after the cancellation of the Program and was asked to prepare an evidence review. Her evidence review was sent to the Minister of Public Safety and Solicitor General and Stephanie MacPherson was copied. The letter attaching the review provides that the evidence review "supports the significant positive impacts of mother-baby programs" and that expert clinicians from their agencies and programs were available to assist. It notable that this evidence review concludes that alternatives to the Program, such as increased visitation, do not provide an adequate substitute that allows for attachment to the mother. It is notable that, despite their being advised of this fact, as testified to by Mr. Merchant, the Corrections Branch has not conducted an assessment of the benefits and outcomes of the alternative approaches available at ACCW today.

98. An additional contextual factor to consider is that the availability of mother-baby programs in federal prisons, but not in provincial prisons exacerbates the substantive inequality created, contributes to the gross disproportionality of the violation and is contrary to the principle of proportionality in sentencing due to the fact that women may seek and receive a longer sentence in order to have the ability to apply for the mother-baby program available in federal prisons. Proportionality in sentencing is a principle of fundamental justice under section 7.[76]

(4) **Substantive Equality as a Principle of Fundamental Justice**

99. The final point BCCLA wishes to address is that substantive equality is a principle of fundamental justice and that cancellation of ACCW's mother-baby program is a deprivation of liberty and security of the person that is not in accordance with the principle of fundamental justice of substantive equality.

100. BCCLA submits that substantive equality is a principle of fundamental justice under section 7.[77] The section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*.[78] The principles of fundamental justice in section 7 need to be read in the context of the *Charter* as a whole, including sections 15 and 28 thereof. Read in this manner, section 7 provides that liberty and security of the person interests cannot be deprived in a manner that discriminates on the basis of sex or ethnic origin.

101. In the child protection cases discussed above, members of the Court have recognized that a section 7 analysis should be informed by the equality guarantee. Although these cases do not go so far as to recognize substantive equality as a principle of fundamental justice, they are supportive of the submission that substantive equality should be so recognized.

102. In *R. v. Malmo-Levine*, the Court contemplated what qualifies as a principle of fundamental justice. Justices Gonthier and Binnie, for the majority, held that it must be a legal principle about which there is significant societal consensus, that is fundamental to the way in which our legal system ought to fairly operate, and that is identified with sufficient precision to

[76] *R. v. Ipeelee* [2012] 1 S.C.R. 433, para. 36; *R. v. Proulx* [2000] 1 S.C.R. 61, para. 82-83
[77] *Philippines (Republic) v. Pacificador*, 1993 CanLII 3381 (ONCA) ["Philippines"] [Intervenors' Joint Authorities at tab 29].
[78] *Andrews, supra* at para. 52, per McIntyre J [Intervenors' Joint Authorities at tab 22].

yield a manageable standard against which to measure deprivations of life, liberty and security of the person.[79] Substantive equality, entrenched in section 15, clearly meets this test.

103. In *Carter v. Canada (Attorney General)*, this Honourable Court held that it need not decide the question of whether equality is a principle of fundamental justice. It is respectfully submitted that this question can be answered and this is particularly important in the criminal justice context. The criminal justice system, including the prison system, interacts with section 7 interests in a variety of ways. However, not all prisoners are the same; some are members of protected groups and are differently affected by incarceration.

104. The majority of prisoners are males and, as a result, the system is better geared towards males than females. The evidence and documented history have also shown that Aboriginal persons, though overrepresented in incarcerated populations, are not properly accommodated and understood. The Court in *Gladue* noted that imprisonment can often be culturally inappropriate for Aboriginal peoples and, as such, is less likely to assist with their rehabilitation.[80]

105. Cases such as this one show that there is a need to recognize the unintended effects of the criminal justice system on vulnerable groups. Section 7 jurisprudence predominately engages with the criminal justice system, the government's bluntest tool. Recognizing substantive equality as a principle of fundamental justice is a crucial step in the process of fulfilling the constitutional guarantee of equality for vulnerable populations who are poorly understood in the traditional mechanisms of the criminal justice system.

106. In this case, recognizing substantive equality as a principle of fundamental justice would ensure that the nature of the interest affected and the gravity of the fact of the involvement of the criminal justice system are central in defining the rights and protections that the law affords to historically disadvantaged groups.

D. SECTION 1

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[79] *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74 at para. 113 [Intervenors' Joint Authorities at tab 40].
[80] *Gladue*, *supra* at para. 68 [Intervenors' Joint Authorities at tab 35].

107. Section 1 provides that the *Charter*: "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

108. The test for whether an infringement is justified under section 1 was addressed recently in *Alberta v. Hutterian Bretheren of Wilson Colony*.[81] The infringement must:

(a) be a limit prescribed by law;

(b) pursue a pressing and substantial objective; and

(c) be proportionate means to further the state's goal.

109. BCCLA adopts the submissions of WCL regarding section 1 and adds the following.

110. In regards to section 7, a violation of section 7 will be saved by section 1 only in cases arising out of exceptional circumstances[82] and those are not present here.

111. BCCLA urges this Court to find that the Defendants do not have a pressing and substantial objective. The Defendants do not argue that budget restrictions guided their decision. Although the Defendants argue that infant safety was the governing consideration in the decision to cancel the program, it is submitted that this is not the case as the program permitted for consideration of the best interests of each child and did not show any history of risk to infants. Further, the decision does not accord with the reality that infants are subject to similar risks outside of ACCW.

112. The evidence shows that the Defendants' real concern was administrative convenience or terminating an avenue of liability. This is evidenced by the fact that there was no catalyst event and the decision was not implemented until there were no more infants at the institution, i.e. the infants already present were allowed to stay. The Defendants' real objectives are not legitimate reasons to limit the Claimants' rights to substantive equality, security of the person and/or liberty.

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[81] *Alberta v. Hutterian Bretheren of Wilson Colony*, [2009] 2 S.C.R. 567 at para. 27 ["Hutterian Bretheren"].
[82] See *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at p. 518 [Intervenors Joint Authorities at tab 33]; and *G. (J.), supra* at para. 99 [Intervenors Joint Authorities at tab 27].

113. BCCLA also submits that the denial of an individualized process in favour of a blanket ban in the face of limited or contrary supportive data is also not rationally connected, minimally impairing or proportionate in its effects. In regards to the proportionality of the beneficial and *Charter*-infringing effects of the law, it is submitted that there is no contest between that salutary and deleterious effects. The evidence has shown that the Program denies significant benefits and creates considerable burdens for a struggling population. If there is a legitimate safety risk for the infants as compared to the risk they would be exposed to in the community, which BCCLA denies, it is minimal and in the balance is totally overborne by the harm caused by the Defendants' decision.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated this 21st day of June, 2013

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Janet Winteringham, Q.C.
Jessica Lithwick
Megan Vis Dunbar