IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Inglis v. British Columbia (Minister of Public Safety),* 2013 BCSC 2309

Date: 20131216
Docket: S087858
Registry: Vancouver

Between:

Amanda Inglis, Damien Inglis (by his litigation guardian Amanda Inglis), Patricia Block, and Amber Block (by her litigation guardian Patricia Block)

Plaintiffs

And

Minister of Public Safety and Solicitor General of British Columbia, Attorney General of British Columbia, and Lisa Anderson as Warden of Alouette Correctional Centre for Women

Defendants

And

British Columbia Civil Liberties Association and West Coast Women's Legal Education and Action Fund

Intervenors

Publication Restriction Notice: Pursuant to the inherent jurisdiction of the Court, no person shall publish, broadcast or transmit any information that could be used to identify:

1. any woman who participated or sought to participate in the Mother-Baby Program at Alouette Correctional Centre for Women with the exception of any woman who wishes to identify herself; or
2. any woman, other than the Plaintiffs, who is or was incarcerated at Alouette Correctional Centre for Women whose name is referenced in this proceeding with the exception of any woman who wishes to identify herself; or
3. any information that identifies the location of staffing stations or particular structures at Alouette Correctional Centre for Women that are not publically available on maps.

The order applies indefinitely unless otherwise ordered. These reasons for judgment comply with the publication ban.

Before: The Honourable Madam Justice Ross

Reasons for Judgment

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Table of Contents

	Paragraph Range
I. SUMMARY	[1] - [17]
II. INTRODUCTION	[18] - [29]
III. HISTORY OF THE LITIGATION	[30] - [36]
IV. THE MOTHER BABY PROGRAM	[37] - [214]
A. Previous Provincial Mother Baby Programs	[37] - [51]
1. Twin Maples	[37] - [38]
2. Burnaby Correctional Centre for Women	[39] - [51]
B. The Mother Baby Program at ACCW	[52] - [214]
1. Transition from BCCW	[52] - [64]
2. The Mother Baby Program at ACCW	[65] - [83]
3. Observations of Witnesses	[84] - [134]
i. Alison Granger-Brown	[84] - [88]
ii. Dr. Amy Salmon	[89] - [92]
iii. Dr. Ronald Abrahams	[93] - [95]
iv. Bonnie Smith	[96] - [103]
v. Barbara Jean Collis	[104] - [104]
vi. DM – one of the mothers who participated in the Program	[105] - [134]
4. Decision to Cancel the Mother Baby Program	[135] - [186]
5. The Aftermath	[187] - [214]
V. THE PLAINTIFFS	[215] - [254]
A. Patricia and Amber Block	[215] - [236]
B. Amanda and Damien Inglis	[237] - [254]
VI. EXPERT EVIDENCE	[255] - [322]
A. Dr. Peggy Koopman	[255] - [261]
B. Dr. Ruth Martin	[262] - [273]
C. Professor Michael Jackson	[274] - [276]
D. Dr. Carmen Gress	[277] - [280]
E. Dr. Maureen Olley	[281] - [287]
F. Dr. Michael Elterman	[288] - [294]
G. Dr. Mary West	[295] - [299]
H. Dr. Richelle Mychasiuk	[300] - [306]
I. Dr. Tonia Nicholls	[307] - [312]
J. Evelyn Wotherspoon	[313] - [322]

VII. FINDINGS OF FACT [323] - [346]
A. Matters that were not Contentious [323] - [335]
1. Characteristics of the Population of Women Incarcerated in Provincial Institutions [324] - [327]
2. Rooming In [328] - [328]
3. Benefits of Breastfeeding [329] - [331]
4. Attachment [332] - [334]
5. Emotional Well-being of Mothers [335] - [335]
B. Matters in Contention [336] - [346]
1. Program or Ad Hoc Practice [337] - [339]
2. Decision to Cancel or Policy [340] - [341]
3. Timing of the Decision to Cancel the Program [342] - [343]
4. Reason for the Decision to Cancel [344] - [346]
VIII. BASIS FOR CHARTER REVIEW [347] - [357]
IX. LEGISLATIVE AND SOCIAL CONTEXT [358] - [371]
A. International Instruments [359] - [364]
B. Legislation [365] - [371]
X. SECTION 7 [372] - [501]
A. General Principles [372] - [378]
B. Is there an Infringement to the Security of the Person? [379] - [412]
1. General Principles [379] - [387]
2. Submissions of the Plaintiffs [388] - [388]
3. Submissions of the Defendants [389] - [411]
i. Is this a claim for a positive right? [390] - [394]
ii. Is there serious state-imposed psychological stress? [395] - [404]
iii. Is the deprivation the result of the impugned state action? [405] - [411]
4. Conclusion re Security of the Person [412] - [412]
C. Is the Infringement Contrary to the Principles of Fundamental Justice? [413] - [500]
1. General Principles [413] - [418]
2. Arbitrariness [419] - [475]
i. The Test [419] - [423]
ii. Submissions of the Plaintiffs [424] - [431]
iii. Submissions of the Defendants [432] - [439]
iv. Discussion [440] - [475]
a. What is the Objective of the Legislation? [440] - [445]

b. What is the Relationship between the Impugned Decision and the Objectives of the Legislation? [446] - [475]

3. Overbreadth and Gross Disproportionality [476] - [494]

i. The Concepts [476] - [478]

ii. Discussion [479] - [494]

4. Equality as a Principle of Fundamental Justice [495] - [499]

5. Conclusion re Principles of Fundamental Justice [500] - [500]

D. Conclusion re Section 7 [501] - [501]

XI. SECTION 12 [502] - [505]

XII. SECTION 15 [506] - [614]

A. General Principles [507] - [521]

B. Threshold Issues [522] - [537]

1. Is this a Claim of Unequal Treatment by or under the Law? [523] - [528]

2. Is this a Demand for a Positive Benefit? [529] - [536]

3. Conclusion re Threshold Issues [537] - [537]

C. What is the Distinction? [538] - [542]

D. Is the Distinction Based on an Enumerated or Analogous Ground? [543] - [571]

1. Submissions of the Intervenors [544] - [553]

2. Submission of the Defendants [554] - [557]

3. Discussion [558] - [571]

i. Mothers [558] - [562]

ii. Infants [563] - [571]

E. Is the Differential Treatment Discriminatory? [572] - [614]

1. Submissions of the Intervenors [572] - [587]

i. Pre-existing Disadvantage [576] - [584]

ii. Correspondence [585] - [585]

iii. Ameliorative Effects [586] - [586]

iv. Nature of the Interest Affected [587] - [587]

2. Submissions of the Defendants [588] - [595]

3. Discussion [596] - [610]

4. Conclusion [611] - [614]

XIII. SPECIFIC CLAIMS OF THE INDIVIDUAL PLAINTIFFS [615] - [626]

A. Amanda Inglis [615] - [620]

B. Patricia and Amber Block [621] - [626]

XIV. SECTION 1 [627] - [651]

A. General Principles [627] - [628]

B. Prescribed By Law [629] - [631]
C. Section 7 [632] - [633]
D. Pressing and Substantial Objective [634] - [634]
E. Proportionate Means [635] - [651]
1. Rational Connection [635] - [637]
2. Minimal Impairment [638] - [643]
3. Proportionality [644] - [651]
XV. REMEDY [652] - [659]

I. SUMMARY

[1] The plaintiffs in this matter are former inmates of the Alouette Correctional Centre for Women ("ACCW") and their children, who bring this action on their own behalf and on behalf of all provincially incarcerated women who wish to have their babies remain with them while they serve their sentence and the babies of those mothers. The litigation arises from the decision to cancel a program that permitted mothers to have their babies with them while they served sentences of provincial incarceration. The central issues in the litigation are whether the decision to cancel the program engaged constitutionally protected rights of the mother and babies affected by the decision and if so, whether those rights were infringed.

[2] ACCW previously provided a program allowing provincially incarcerated mothers and their babies to reside at the institution together (the "Mother Baby Program" or the "Program"). The Program was similar to programs that had been offered in the province since 1973. Mothers who would be giving birth during their incarceration in a provincial institution could apply to return to ACCW with their baby after their delivery. It was an essential aspect of the Program that mothers and babies would only be permitted to reside together at ACCW if the representatives of the Ministry of Children and Family Development (the "MCFD"), acting pursuant to the provisions of the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46 [the *CFCS Act*], concluded that it would be in the best interests of the child to do so. The Program operated from the time ACCW opened until the decision was made by the BC Corrections Branch (the "Branch" or "Corrections") to cancel the Program.

[3] The plaintiffs challenge the constitutionality of that cancellation, alleging that it unjustifiably infringed their ss. 7, 12 and 15 rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [the *Charter*].

[4] Much of the evidence at trial concerned the questions of when the decision was made to cancel the Program and for what reason. The central findings of fact in relation to these issues are:

(a) the Program and its predecessors had a record of successful operation. While no systematic evaluation was undertaken, it appears that outcomes for both mothers and babies were positive. This is consistent with the research literature with respect to prison nurseries. There were no incidents of injury or harm to infants in the program;

(b) the decision to cancel the Program was made by Brent Merchant sometime after March 2006 and before July 2007. The decision to cancel the Program was not based upon a reasonable apprehension of potential harm to infants. It was not based upon considerations of cost. Rather it was based upon Mr. Merchant's conclusion that infants were not within the mandate of Corrections, that he did not have to accommodate them and that he was not prepared to extend the mandate to do so; and

(c) there was no assessment or evaluation of the Program, its risks or benefits undertaken by Corrections prior to the decision to cancel.

[5] The parties were in essential agreement with respect to the characteristics of the population of provincially incarcerated women as being less violent than male offenders, vulnerable, with low levels of education and employment, many with mental health issues, and histories of being victims of abuse. In addition, it was common ground that Aboriginal women are significantly overrepresented in the population of provincially incarcerated women.

[6] A considerable body of expert evidence was placed before the Court. The following were prominent themes:

(a) rooming in is considered best practice for mothers and babies in the post-partum period and is associated with health and social benefits for both mothers and babies;

(b) breastfeeding is associated with important health and psychosocial benefits for both infants and mothers;

(c) one of the most important developmental tasks of infancy is the formation of attachment by the infant to a primary caregiver, usually but not necessarily the mother. Secure attachment is important to the infant's psychological and social functioning. Interference with attachment puts the infant at risk for developmental deficits and future psychological and social difficulties; and

(d) the importance of individualized decision-making with respect to the best interests of the child.

[7] One important aspect of analysis of rights under the *Charter* is a consideration of the provisions of international human rights documents ratified by Canada. There were a number of international human rights documents that were addressed in this regard reflecting the following themes that are relevant to the analysis in the present case:

(a) the acknowledgment of the family as the fundamental social unit that as such is entitled to protection by the state;

(b) that special protection should be afforded to mothers, before and after childbirth, and children;

(c) that the best interests of the child shall be a primary consideration in all actions taken by the state concerning children;

(d) that a child shall not be separated from his or her parents against their will except with due process and where it is necessary in the best interests of the child;

(e) that except for those limitations that are demonstrably necessitated by the fact of incarceration, incarcerated persons retain their residual rights and freedoms; and

(f) that the state's responsibilities with respect to prisoners shall be discharged in keeping with its fundamental responsibilities for promoting the well-being and development of all members of society.

[8] The concept of the best interests of the child is an important theme in the international human rights instruments. It is also a foundational principle of the *CFCS Act*. The defendants argued that the *CFCS Act* was not part of the legislative context in the present case and that Mr. Merchant was not required to consider the best interests of the child in making the decision to cancel the Program.

[9] I concluded that the concept of the best interests of the child and the *CFCS Act* do form an important part of the context in this case. The defendants submitted that Corrections is entitled, without any consideration of the best interests of the children affected, to make decisions that will inevitably result in children being seized by the state. I concluded that the state cannot be permitted, through such compartmentalization, to avoid its obligations under the *CFCS Act* and the values and rights represented in that statute or to sidestep the principle that in all state actions concerning a child, the best interests of the child shall be a primary consideration.

[10] For the reasons that follow, I concluded that, the decision to cancel the Program violated the rights to security of the person and liberty contrary to the principles of fundamental justice under s. 7 and the right to equality under s. 15 of the *Charter*. These violations cannot be justified under our Constitution's saving provision.

[11] With respect to s. 7, I concluded that the interests of mothers and infants to remain together is one aspect of the security of the person of each that falls within the scope of s. 7. The decision to cancel the Mother Baby Program removed one important option, the one presumed at law to be favourable, from the process of determining the best interests of the child. As a result, infants have been and will be separated from their mothers during the critical formative period of their life, interfering with their attachment to their mother, and depriving them of the physical

and psychological benefits associated with breastfeeding. The mothers have already and will continue to suffer the adverse consequences of separation from their infants. The decision to cancel the Mother Baby Program was state action that constituted an infringement of the s. 7 rights to security of the person of both mothers and babies.

[12] With respect to whether the deprivation was contrary to the principles of fundamental justice, I concluded that the decision to cancel the Mother Baby Program was arbitrary, overbroad and grossly disproportionate and therefore contrary to the principles of fundamental justice. In that regard the following findings were of particular significance:

(a) the decision was based upon a consideration of mandate that did not take account of the constitutional rights of the mothers and infants affected. As such there was no legitimate state objective;

(b) Mr. Merchant adopted a standard, a guarantee of safety, that he acknowledged was impossible to meet, one that was inappropriate given the constitutional issues implicated by the decision;

(c) prior to the decision to cancel, there was no investigation to determine whether there was a reasonable apprehension of harm;

(d) the evidence does not support a conclusion that there was a reasonable apprehension of harm; and

(e) the decision revoked an individualized process founded upon a determination of the best interests of the infants and replaced it with a blanket exclusion.

[13] With respect to s. 15, I concluded that the decision to cancel the Mother Baby Program violated the s. 15 right to equality of the members of the affected groups; namely provincially incarcerated mothers who wish to have their baby remain with them while they serve their sentence and the babies of those mothers.

[14] In that regard I found that the Mother Baby Program was a program that respected the family unit and bond between mother and infant, both aspects of the rights of security of the person. Infants were placed based upon a determination by the MCFD of their best interests, consistent with the provisions of the *CFCS Act.* It was a program that was consistent with the themes identified earlier in the international treaties and conventions and with the principles developed in the common law concerning state intervention in the family unit.

[15] Provincially sentenced mothers and their babies are members of a vulnerable and disadvantaged group. In that regard the circumstances of Aboriginal mothers and their infants are of particular concern given the history of overrepresentation of Aboriginal women in the incarcerated population and the history of dislocation of Aboriginal families caused by state action. The Mother Baby Program represented a significant step forward in the amelioration of the circumstances of the mothers and their babies who qualified.

[16] The cancellation of the Program infringed upon the interests of the security of the person for both affected mothers and infants. It resulted in the separation of mothers and infants who would otherwise have been able to stay together, thereby depriving each of the benefits associated with the Program and exposing each to the risks associated with separation. The cancellation increased the disadvantage experienced by this vulnerable population. I concluded that it constituted discrimination in that it was state conduct that widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it.

[17] I found that the decision was not a reasonable limit prescribed by law that can be demonstrably justified pursuant to s. 1 of the *Charter.* As a result I have granted declaratory relief, set aside the decision and remitted the issue for reconsideration in a manner consistent with the requirements of ss. 7 and 15(1) as those requirements have been described in these reasons. The effect of the relief granted has been suspended for a period of time to give the government time to correct the unconstitutionality of the present situation and comply with the Court’s direction.

II. INTRODUCTION

[18] From 1973 until 2008, programs have been made available in British Columbia to women who gave birth while serving sentences of provincial incarceration that allowed the mothers to keep their babies with them in their respective institutions. Over the years, more than a hundred infants and their mothers have taken part in these programs.

[19] ACCW is a provincial correctional facility for women offenders which opened in 2004. ACCW provided its Mother Baby Program from the time it opened until the decision was made by Corrections to cancel the Program in 2008. The Program enabled the babies of incarcerated mothers to receive the benefits of breastfeeding and bonding with their mothers in the critical months following birth. It also permitted the mothers to develop bonds with their infants.

[20] It was an essential aspect of the Program that mothers and babies would only be permitted to reside together at ACCW if the representatives of the MCFD, acting pursuant to the provisions of the *CFCS Act*, concluded that it would be in the best interests of the child to do so.

[21] As a result of the decision to cancel the Mother Baby Program, the MCFD has had to apprehend babies who are now no longer able to live with their mothers at ACCW. Many of these babies, who would have stayed with their mothers as part of the Program, have and will be placed in foster care.

[22] The plaintiffs Amanda Inglis and Patricia Block bring this litigation on behalf of themselves and their children, as well as on behalf of the other women and children affected by the cancellation of the Mother Baby Program at ACCW. Ms. Inglis and Ms. Block are mothers who were incarcerated at ACCW after the cancellation of the Mother Baby Program.

[23] The plaintiffs argue that the decision to cancel the Mother Baby Program was made without regard to the constitutional rights of the mothers and babies affected. In particular, the plaintiffs argue that the right of mothers to care for their newborn

infants is an aspect of the right to security of the person secured by s. 7 of the *Charter*. The plaintiffs argue that the right of infants to the personal care of their mothers, including the opportunity to receive the social and health benefits of breastfeeding and maternal-infant bonding is an aspect of the right to security of the person secured by s. 7 of the *Charter*.

[24] The plaintiffs and intervenors argue that the decision to cancel the Mother Baby Program constituted an infringement of those s. 7 rights as the decision was arbitrary, overbroad, and grossly disproportionate, and as such was made in breach of the principles of fundamental justice.

[25] The plaintiffs argue that the decision to cancel the Mother Baby Program also violated the right to equality of the affected mothers and babies contrary to s. 15 of the *Charter*. They submit that the decision constituted discrimination by virtue of sex and family status. The plaintiffs submit further that the effect of the cancellation was to systematically discriminate against Aboriginal women and children by reason of the history of disproportionate interference by government in the parenting of their children and the disproportionate representation of Aboriginal women in the population of provincially incarcerated women.

[26] The defendants take the position that the plaintiffs' claims, under both ss. 7 and 15, in reality seek to impose a positive duty to create programs to mitigate the consequences of incarceration for newborns and their mothers. It is the defendants' contention that the *Charter* prescribes no such duty.

[27] The defendants also assert that, to the extent that rights of the security of the person were engaged, there was no infringement because the cancellation did not entail any comment on the fitness of the mothers to parent, and because reasonable alternatives were put in place to allow the mother and child to bond. The defendants submit that the decision to cancel the Program was consistent with the principles of fundamental justice, and also that it was consistent with the purposes of the *Correction Act*, S.B.C. 2004, c. 46 [the *Correction Act*], which require the Warden to maintain the security and safety of those in the correctional centre.

[28] With respect to the s. 15 claim, the defendants take the position that the decision did not create a distinction based upon enumerated or analogous grounds. The defendants submit that any disadvantage that resulted was based on the actual circumstances of the incarcerated mothers. The Branch policy did not perpetuate prejudice or stereotyping and did not constitute discrimination.

[29] It is important to emphasize that the plaintiffs do not contend that every mother has an absolute constitutional right to remain with her baby. As noted above, participation in the Mother Baby Program required the final approval of the MCFD to the particular mother and particular infant. That approval was based upon the determination of the best interests of the child. The plaintiffs accept that the question of the best interests of the child is fundamental.

III. HISTORY OF THE LITIGATION

[30] The action was originated by writ and statement of claim filed on November 7, 2008. At the time, there were a number of plaintiffs including Ms. Block, Ms. Inglis and Damien Inglis. When the action was commenced, Ms. Block was still pregnant, not yet having given birth to Amber. The original statement of defence was filed on February 27, 2009.

[31] Subsequently all of the plaintiffs except Ms. Block chose to discontinue and for a time Ms. Block remained the only plaintiff.

[32] The defendants applied for an order, pursuant to Rule 9-5(1)(b) and (d) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 and the inherent jurisdiction of the Court, dismissing the action on the ground that the plaintiff, Patricia Block, lacked standing to advance the claim. That application was dismissed; see reasons indexed 2012 BCSC 200. In those reasons I concluded that Ms. Block has personal standing to advance her claim for relief pursuant to s. 24(1) arising from the challenge of government action, namely the decision to cancel the Mother Baby Program, and public interest standing to advance the entire action as pleaded.

[33] Ms. Block then brought an application seeking to add her daughter, Amber Block, as a plaintiff. Ms. Block had consented to act as Amber's litigation guardian. Ms. Block also sought an order allowing two of the original plaintiffs in the action, Amanda Inglis and her son Damien Inglis, to rejoin the action by setting aside a notice of discontinuance that had been filed on their behalf. The applications were granted; see reasons indexed 2012 BCSC 1023. In those reasons I concluded that Amber Block and Amanda Inglis have standing to advance claims pursuant to s. 24(1) and public interest standing to claim all of the relief sought in the litigation, and that Damien Inglis has public interest standing to claim all of the relief sought.

[34] By order dated August 21, 2012, the British Columbia Civil Liberties Association ("BCCLA") and the West Coast Women's Legal Education and Action Fund ("West Coast LEAF") were granted leave to intervene in these proceedings.

[35] The plaintiffs filed an amended statement of claim dated March 20, 2013. An amended statement of defence was filed on May 9, 2013. The plaintiffs filed a reply dated May 23, 2013.

[36] The intervenors filed written arguments at trial and were given leave to make oral submissions. In final argument the plaintiffs dealt with the record and made submissions primarily with respect to s. 7 and s. 1. The intervenors made submissions primarily with respect to s. 15 and s. 1. The plaintiffs adopted the submissions of the intervenors with respect to s. 15.

IV. THE MOTHER BABY PROGRAM

A. Previous Provincial Mother Baby Programs

1. Twin Maples

[37] The first program in British Columbia that allowed a mother to keep her baby with her during incarceration began in 1973 at the Twin Maples Correction Centre ("Twin Maples"). A pregnant woman who had received a sentence of incarceration was permitted to keep her child with her at the facility after the baby was born.

[38] The program was then continued until the institution closed in 1991, with some 80 babies having remained with their mothers at Twin Maples during their incarceration. The goal of the program was to allow mothers who were willing and able to take care of their children to have those children live with them at the institution. Twin Maples also maintained a daycare centre at the facility.

2. Burnaby Correctional Centre for Women

[39] When Twin Maples closed, a similar mother baby program was initiated in the Open Living Unit ("OLU") at the Burnaby Correctional Centre for Women ("BCCW"). BCCW was a provincial institution, but it also housed federally sentenced women pursuant to an Exchange of Service Agreement between the Federal and Provincial governments. The institution consisted of two facilities, the Secure Unit and the OLU. The Secure Unit housed federally sentenced women, provincially sentenced women and a remand population. Women were assigned to the OLU if they met the institution's criteria for an open setting. Factors considered by the institution included criminal history, institutional behaviour and motivation to change. Women who qualified for open custody were considered to be at low risk to re-offend or escape, to be of low risk to the public in the event of escape and to have demonstrated a positive institutional adjustment.

[40] BCCW began its mother baby program in January 1991 and continued it until the institution closed. The program at BCCW was limited to children up to the age of two years. Prior to acceptance, the mother had to sign an agreement regarding the care of the child. The ultimate authority to approve or deny acceptance into the program rested with the institution. In order to qualify for the mother baby program at BCCW, a woman had to meet the requirements for classification into the OLU. In addition, the MCFD had to conclude through its own procedures and criteria that the mother was a suitable primary caregiver considering the institutional setting.

[41] There was no fence around the OLU, though the doors were alarmed at night, and there was a staff presence at all times. The OLU housed 24 women and was physically separate from the rest of the institution. There was a kitchen area,

communal dining room, large living area, communal bathrooms and a small walking track and gazebo on the outside grounds. The OLU also had a community daycare centre on the grounds. Inmates could apply to work at the daycare, under supervision. The daycare was used by both staff and members of the community.

[42] In addition to the mother baby program, there was an extended visitation program in place for older children. The children could come for longer visits with their mother of up to a week. There was also a private family visiting apartment in the secure unit that provided for extended private family visits.

[43] Nancy Wrenshall is a former corrections official who retired after a lengthy career in both federal and provincial corrections. During her career she served as the warden at Fraser Valley Institution ("FVI") and Mountain Institution, as the District Director at BCCW, a position equivalent to that of warden, and as deputy warden at Matsqui Institution.

[44] In 1992, Ms. Wrenshall was seconded from federal corrections to BCCW for a one-year term to help set up certain programs at the institution. The mother baby program was already in operation at the time. One of the mothers participating in the mother baby program at that time was a woman who was serving a life sentence for murder. She was transferred from Kingston Penitentiary, spending six months at BCCW with her baby. She was then returned to Kingston and the baby was placed with family members.

[45] In 1998, Ms. Wrenshall returned to BCCW as the District Director. The mother baby program was still in operation. She noted that at the time, Headquarters, the term commonly adopted within Corrections to describe the upper management of that service, knew and approved of the program. During her tenure, her superiors never raised any concerns regarding the program. She was not aware that any evaluation of the program was undertaken by Corrections. She was also not aware of any safety concerns. During her tenure, there were no safety incidents involving the babies.

[46] Ms. Wrenshall stated that additional efforts were made at BCCW to facilitate families staying together. For example, one child was in his father's care while his mother was incarcerated. The father could not find suitable daycare so he brought the child to the OLU every day, where the child spent the day with his mother. His father returned after work to pick up the child. Other children who were in the primary care of family members would come to stay with their mothers at the institution over the weekends.

[47] Ms. Wrenshall stated that the philosophy of the program was to help to ensure that family bonds were maintained. This was consistent with the Statement of Philosophy – Correctional Service for Women that the Branch had adopted (the "Statement of Philosophy"), which recognized that:

> 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.

[48] She stated that Corrections recognized that women were typically primary caregivers for their children; and that just because the women were incarcerated did not mean that they were bad mothers. Their approach acknowledged that the women would typically recover custody after their incarceration and that it did not make sense to contribute to a disconnection of the family bond.

[49] Ms. Wrenshall stated that in her experience, it was important to try to normalize the environment in a correctional facility as much as possible since women offenders become institutionalized more rapidly than men. She stated that the presence of children in the institution had a positive effect, easing tensions. She was not aware of any negative reaction to the mother baby program by staff. Her assessment of the mother baby program was positive.

[50] Ms. Wrenshall also served as warden of FVI, a federal institution. A mother baby program is also offered at that institution. She concluded that FVI offered a safe environment for its mother baby program. She stated that different factors such as the size and nature of the population and the physical layout of the institution

relate to risk. In her experience however, there are methods that can be adopted to safely accommodate mothers and babies. She did not agree that the high turnover of population at ACCW meant that it could not be a safe environment for mothers and babies.

[51] While no formal evaluation of the mother baby program at BCCW was undertaken, in 1997 Donna MacLean conducted research concerning that program as part of a Master of Arts program at Simon Fraser University. Part of her study surveyed the opinions of inmates and staff with respect to the program. The majority of both inmates and staff surveyed endorsed the program and believed that it should be continued.

B. The Mother Baby Program at ACCW

1. Transition from BCCW

[52] In 2001, Corrections was required to make very significant budget cuts and a decision was made to close a number of facilities, including BCCW. As a consequence of that decision, the federally sentenced women formerly housed at BCCW were sent to FVI. Corrections decided to remodel the Alouette Correctional Centre for Men and use it as a facility for provincially sentenced women. As the Alouette facility was older than BCCW, its operating costs would be lower than those of BCCW.

[53] Ms. Wrenshall was involved in the planning process for the conversion of the Alouette facility. She left BCCW in 2003, part way through the transition and returned to federal corrections.

[54] In 2003, Brenda Tole was appointed Project Director of the remodelling project. At the time of her appointment, Ms. Tole reported to Bert Phipps, the Provincial Director of the Adult Custody Division. Ms. Tole was selected by a merit-based panel to be named the District Director of ACCW when the project was completed.

[55] During this period, Ms. Tole, who had been employed in various capacities in Corrections since 1972, conducted an extensive review of the literature concerning women offenders and the facilities housing them in other jurisdictions. Her conclusions, based upon that review and on her own observations, were:

1. Women offenders were less violent both in the community and in the institution than men offenders.
2. There was consistent over-classification of women offenders to levels of security that were higher than required by the assessments.
3. There was a very high proportion of offenders with substance abuse involvement.
4. A high proportion of women offenders were mothers of dependent children.
5. There was a very significant overrepresentation of First Nations women.
6. There was significant history of abuse, both as children and as adults.

[56] During the remodelling phase of ACCW, Ms. Tole was approached by Sarah Payne, who was in charge of the Fir Square program at Women's Hospital in Vancouver. Ms. Payne is a registered nurse and midwife. She has extensive experience working with mothers in the downtown eastside who abuse substances and conducting research with respect to outcomes of pregnancies complicated by related issues.

[57] Ms. Payne described Fir Square as the special unit established at BC Women's Hospital to treat pregnant women with substance abuse issues. Fir Square is the only unit of its kind in the country. Ms. Payne noted that 65-70% of the clients at Fir Square are Aboriginal women. In her experience there was a difficulty finding Aboriginal foster placements. The Fir Square program had a long-standing relationship with BCCW.

[58] The babies at Fir Square room in with their mothers. Ms. Payne noted that babies are not discharged from Fir Square until they are healthy and ready to leave. Accordingly, when a mother incarcerated at BCCW was returned to the institution from hospital with her baby, the infants had no special medical needs.

[59] Ms. Payne explained to Ms. Tole that their research and experience at Fir Square indicated that babies that were able to stay with their mothers following delivery had much better health outcomes. Ms. Payne asked Ms. Tole if the mother baby program would be continuing at ACCW. Ms. Tole replied that she would consult with Headquarters.

[60] Ms. Payne recalled the conversation with Ms. Tole regarding starting a mother baby program at ACCW. She told Ms. Tole that with provincial sentences so short it was a good opportunity to keep mothers and babies together. Her belief was based upon research concerning infant attachment, and the benefits of breastfeeding. She shared the medical benefits of not separating mothers and babies with Ms. Tole, who was supportive of the idea.

[61] Ms. Payne stated that in her experience, women who could not keep their babies often lost hope, relapsed and went back to their old lifestyle. Women who were able to keep their babies had a sense of purpose, which aided in their efforts to recover from addiction.

[62] After the conversation with Ms. Payne, Ms. Tole conducted a review of literature concerning mother baby programs. She concluded that she supported the proposal. Ms. Tole then conferred with Brent Merchant, who was appointed the Provincial Director and became her immediate superior when Mr. Phipps became the Assistant Deputy Minister in 2004. She summarized the information she had received for Mr. Merchant and provided him with some of the research literature.

[63] Mr. Merchant authorized Ms. Tole to consult with the other major participants, including staff and the MCFD. He then authorized Ms. Tole to proceed with the implementation of the Mother Baby Program at ACCW.

[64] During the Program’s development phase, Ms. Tole consulted with representatives from the MCFD and with corrections staff from BCCW, many of whom would be transferred to ACCW. She consulted with wardens from the federal

system. She also conferred with the health care unit members. The reaction to the Program by staff, management and the representatives of the MCFD was positive.

2. The Mother Baby Program at ACCW

[65] ACCW opened in April 2004. At the time it opened as a women's facility, ACCW housed women who were classified as medium and open security.

[66] ACCW is located in a rural, forested setting. At the time it opened there were several buildings located inside a fenced compound. These were an administration building, stores, a dining hall and living units. There were two larger living units and a smaller living unit, known as Alder Unit. A staff station and health care unit was attached to the Alder Unit. A separate building housed facilities for programs, including a gymnasium, a library, a computer lab and counselling offices. There was also a segregation unit used to house inmates for disciplinary purposes.

[67] While the inmates were able to move freely around the grounds of ACCW, there was a rule in place prohibiting access to other living units.

[68] At the time it opened, ACCW housed 40 inmates. The population fluctuated over the years, reaching a high of approximately 160 and then falling.

[69] In 2009, two structures known collectively as Monarch Unit were opened. They were designated as open units and were located outside the perimeter fence. In 2012, a secure unit was also constructed outside the perimeter fence, with inmates housed in the secure unit having no access to any of the grounds of ACCW.

[70] Alder Unit was selected as the unit in which any babies would be housed. In Alder Unit there were several double rooms, a common living area and communal bathrooms. The mothers with babies were housed in a room of their own.

[71] In preparation for the commencement of the Mother Baby Program, ACCW acquired equipment for the babies and created a safe play area. The first baby returned with its mother in August 2005.

[72] First aid, when needed, was provided by the nursing staff, who were present from 7:00 a.m. until 10:00 p.m. In addition, all of the officers in charge, a post which is staffed 24 hours a day, were provided training in infant CPR. The babies were seen on a regular basis by a physician and public health nurses.

[73] The Program had the following fundamental elements:

(a) only mothers who gave birth during their incarceration and those infants were eligible;

(b) acceptance into the Program required the approval of the MCFD as part of a written long-range plan for the child with the primary focus on the best interests of the child;

(c) the initial decision to approve an application was made by a multi-ministry, multi-disciplinary group that included representatives from the MCFD, Corrections, the ACCW health care manager, hospital representatives, the mother and members of the immediate or extended family;

(d) only mothers, approved babysitters and health care personnel, if required, were allowed to touch and care for the babies;

(e) applicants for the babysitter positions were screened by the sentence management coordinator. If approved, babysitters received orientation and were required to sign an agreement that contained the applicable rules;

(f) the mothers and approved babysitters had to sign an agreement for voluntary testing for substance abuse; and

(g) the sentencing management coordinator conducted screening to determine placement of non-mother inmates in Alder Unit. Placement of non-mother inmates in that unit was done on a case-by-case basis to ensure that only those who presented no risk to mothers and babies would be placed in

the unit. The rules of the institution provided that no one was to be in a unit to which they were not assigned.

[74] ACCW continued BCCW's practice of having pregnant inmates deliver at the Fir Square Unit. Ms. Payne described the meetings at Fir Square concerning a discharge for women who wished to return to ACCW with their babies. The plan always involved the MCFD. The safety of the baby was always a paramount consideration. She did not recall representatives of the MCFD expressing concern about the ACCW environment.

[75] Ms. Payne noted that she never heard of safety problems with respect to ACCW's Mother Baby Program. She attended ACCW while the Program was operating. Her observation was that the babies were healthy, alert and content.

[76] A Protocol Agreement between the MCFD, the Ministry of Public Safety and Solicitor General, ACCW and the Fraser Health Authority was developed and eventually signed in 2006. The purpose of the Protocol was to outline the agreements that were in place in relation to pregnant women in custody. It outlined the roles and responsibilities of the various parties. The Protocol addressed communication, family development planning, protection reporting and response in high risk pregnancies, information sharing and conflict resolution. The Protocol expressly contemplated mothers and babies returning to ACCW together.

[77] Section 2 of the Protocol set out Principles and stated in part:

> These principles are based on the Guiding Principles as set out in Section 2 of the Child Family & Community Service Act and the general principles outlined in the Handbook for Action on Child Abuse (2003):
>
> - Collaboration is an effective way to promote the best interests of children and to reach effective support planning
> - Children's needs are best met in their own families
> - Parents are entitled to support to provide for their children
> - The safety and well-being of children are paramount considerations
> - Children are entitled to protection from abuse, neglect, harm and threats of harm
> - Responses to families should be sensitive to the needs and cultural, racial and religious heritage of the child and families involved.

[78] Ms. Tole stated that she observed very positive effects on the mothers that were returned to ACCW with their babies. Additionally, the babies seemed healthy, happy and were developing at a normal rate. The staff and other women in custody were supportive of the Program. In her view the Program made a significant difference in the atmosphere and environment of the institution.

[79] She stated that the majority of the staff moved over from BCCW and were familiar with the mother baby program from that institution. She had many conversations with her officers who were very supportive. She was aware of a few officers who found it stressful.

[80] Ms. Tole did not agree that the physical layout of ACCW created any safety risk that could justify the cancellation of the Program. It was her view that ACCW provided a safe environment for the mothers and their babies. She did not agree that either the increase in inmate population at ACCW or the presence of women on remand constituted a risk to the babies or would justify the cancellation of the Program. She stated that she did not see contraband as a concern with respect to the babies. There were no incidents during her tenure in which babies came in contact with contraband.

[81] Ms. Tole reported regularly to Headquarters about the Program. She never raised any concerns with Headquarters about the safety of the infants. In her view there was no issue to raise. There had not been any incidents giving rise to a concern for infant safety. During her tenure as warden, Headquarters never raised any concern with her regarding infant safety.

[82] Mr. Merchant described making regular visits to the facility during Ms. Tole's tenure and observing the babies. He recalled Ms. Tole speaking in very positive terms about the Program, noting that it was going smoothly and that having a child in the unit had a calming effect on the other women. He recalled that Ms. Tole commented on the positive effect the Program had on the mothers, that they appeared to take on a new sense of responsibility and change their behaviour. She discussed the importance of bonding between mother and child.

[83] Ms. Tole also recalled that Mr. Merchant made regular visits to ACCW while the Program was running. His response to the Program was generally positive, although he did from time to time express some concern about not being notified in advance of a decision to admit a mother and baby to the Program at ACCW.

3. Observations of Witnesses

i. Alison Granger-Brown

[84] Alison Granger-Brown is a nurse who has completed graduate degrees in human development and is presently working on her Ph.D. Ms. Granger-Brown has been employed in the field of corrections since 1999. From 2004 to 2007, she worked as a recreation therapist and volunteer coordinator at ACCW. Part of her work at ACCW involved working with the mothers and babies to facilitate the attachment between them and to build capacity to parent. She left ACCW in 2007 and is now working in federal corrections.

[85] Ms. Granger-Brown stated that the public health nurse would visit ACCW every week to weigh and check over the babies, and to give advice about breastfeeding, how to play with the babies and the like.

[86] Ms. Granger-Brown stated that in her opinion, nothing she saw or heard about posed a safety risk to the infants at ACCW. She never saw anything that caused her to be concerned for the infants' well-being.

[87] It was her experience that the presence of the babies created a great deal of positive energy at the institution, creating a sense of hope and joy. The women were careful around the babies. She agreed that there were some women who expressed difficulty with the presence of the babies. She stated that they worked with those women and where appropriate, referred them to specialist assistance.

[88] She stated that her experience with the Program was very positive, and that she felt it was positive for staff, the women and the children.

ii. Dr. Amy Salmon

[89] Dr. Amy Salmon has a Ph.D. in sociology and health education. From 2005 to 2008, she was a researcher with the BC Centre of Excellence for Women's Health. From 2008 to 2011, she was a researcher with the Women's Health Institute.

[90] Dr. Salmon conducted research from 2006 to 2008 with mothers who had delivered at BC Women's Hospital including mothers who brought their infants back to ACCW. She interviewed health care professionals who were working with the women in the Program, and also attended meetings at ACCW in connection with her research.

[91] It was her observation that the babies who lived at ACCW as part of the Mother Baby Program appeared healthy, happy, unremarkable, alert, and engaged with their environment. They were involved with their mothers. When they fussed, they moved to their mothers and then settled quietly. The mothers appeared interested and engaged with their babies. They seemed happy, healthy and relaxed; they were attentive mothers who were responsive to their babies.

[92] Dr. Salmon also interviewed staff at ACCW. It was her impression that the staff were entirely positive about the Program. They were impressed with the gains the women were making and keen to report on the extent to which the presence of babies contributed to the positive environment.

iii. Dr. Ronald Abrahams

[93] Dr. Ronald Abrahams is a physician. He is a clinical professor of family practice and the medical director of the Fir Square Unit.

[94] Dr. Abrahams stated that he has a background in both obstetrics and addiction, interests that were combined at Fir Square. In his experience, pregnant women with substance abuse issues face further trauma when they have their babies seized because of their addiction. They have been able to improve outcomes with appropriate non-judgmental interventions. He stated that this can prove to be a transformative experience for a woman with a history of drug addiction.

[95] It was his evidence that prior to the decision to cancel the Mother Baby Program, there were very positive relations between ACCW and the staff at Fir Square. The staff at Fir Square supported the Program and had observed very positive outcomes.

iv. Bonnie Smith

[96] Bonnie Smith is a correctional supervisor. She joined the Corrections Service in 2003 and transferred to ACCW in June 2006. Ms. Smith stated that at the time she was one of only a few officers to transfer to ACCW that had not previously worked at BCCW.

[97] At the time of her transfer, she was working as a corrections line officer. She was assigned to work in Alder Unit during the time when the Mother Baby Program was in operation. From February 2007 until October 2007, Ms. Smith worked as a core program deliverer at ACCW, after which she took on the position of mental health liaison officer at the institution.

[98] Ms. Smith stated that part of her duty as a line officer on Alder Unit was to monitor the babies and document any observations of note that she made. The officers were instructed that only mothers and babysitters were to touch the babies. They were further instructed to enforce the rule that babies were not to sleep in the same bed as their mothers.

[99] She stated that Alder Unit, including the quiet room set aside for mothers and babies, could be noisy at times. There were, from time to time, arguments between the inmates that officers would observe and document. Officers were vigilant with respect to concerns about contraband, concerns which are ever-present in a prison environment. However, she personally never observed drugs at ACCW.

[100] During one of her night shifts, Ms. Smith was called to a health incident with one of the babies. The baby's airway was blocked with mucous and the baby was choking. Ms. Smith had taken a 'safe babies' course on her own time. Following her safe babies training, she put the baby in recovery position and cleared the airway.

An ambulance was called and the baby checked over. Ultimately, the baby was fine. Ms. Smith recalls being concerned because the rules prohibited touching the infants.

[101] It was her observation that while some of the other inmates were positive and supportive of the Program, others were jealous of the mothers with babies. It was her observation that the mothers involved in the Program tried their hardest to be good mothers.

[102] Ms. Smith did not observe any difference between the sentenced population and the women on remand.

[103] She stated that the Mother Baby Program was a significant transition for her, describing it as a different experience for a correctional officer. When she was transferred to ACCW, there was no special training given to her in relation to the Program.

v. Barbara Jean Collis

[104] Barbara Jean Collis has been with Corrections since 2001. She was serving at ACCW in 2007. Ms. Collis stated that she has found drugs in the centre and more commonly paraphernalia. She agreed that the presence of drugs is a chronic issue in prisons that every institution must take steps to manage. Ms. Collis stated that to the best of her recollection, she has never charged an individual for possession of drugs on Alder Unit and certainly never a mother participating in the Program.

vi. DM – one of the mothers who participated in the Program

[105] The Court also heard from DM, one of the mothers who had been able to bring her baby back to ACCW with her. Ms. M is the mother of three children – twins M and C age 7 and D age 6. While D currently lives with her, the twins do not. Ms. M is now employed as a health care worker.

[106] Ms. M was born in Terrace in 1984. Her parents broke up when she was quite young. They shared joint custody for a brief time, then Ms. M lived with her father full

time from age 3 to age 11. During this time she had no contact with her mother. At age 11 she went to live with her mother in Nelson.

[107] Ms. M graduated from high school in Nelson as an honor roll student. After graduation, she moved to Kelowna and was employed as a cook. She entered college at Okanagan University College, but eventually dropped out and moved to Calgary to continue a career in cooking.

[108] She received a diploma in culinary arts from the Alberta Institute of Technology. Ms. M moved back to Nelson and obtained work at the New Grand Hotel. There, she met SF, the father of her children. They started dating and she moved in with him.

[109] In 2004, the couple moved to Abbotsford. Ms. M had no other friends or family there. She stated that she then learned that Mr. F had a criminal history and issues with drug addiction. He started to use crack cocaine again and convinced Ms. M to try it. She hadn't used drugs before this.

[110] Their drug use increased and both stopped going to work. Mr. F started committing crimes in order to support their drug habits and became verbally and physically abusive to Ms. M. Mr. F was asked by others to commit arsons, arsons which Ms. M ultimately witnessed him commit. During their time in Abbotsford, Mr. F was incarcerated on several occasions.

[111] Ms. M gave birth to the twins in 2005. The babies' urine tested positive for crack cocaine, and they were apprehended in the hospital because of their parents' drug use. When Ms. M was released from hospital she could not see the twins to say goodbye. She described it as one of the worst moments in her life.

[112] The twins went to foster care and Ms. M investigated a recovery house, with her goal being to recover custody of the twins. Ms. M found a bed at a rehabilitative centre, but Mr. F, having recently been released from custody, did not want her to go to recovery unless they could attend the facility together. This resulted in a delay in

Ms. M's enrollment in a recovery program until December 2005. During this time, she had supervised visits with the twins.

[113] The couple attended the recovery program; however they were then arrested for arson in February 2006. Ms. M was remanded to Surrey Pre Trial ("SPT"). In March she found out that she was pregnant.

[114] While at SPT, Ms. M had no contact with the twins. She learned that the Ministry was planning to have them adopted. She tried to get her parents to take the twins but they refused. She suggested her sister as an appropriate adoptive parent but the Ministry disagreed. In the result the twins stayed in foster care.

[115] After learning of the Mother Baby Program at ACCW from another inmate, Ms. M applied for transfer there. She wanted to be able to keep this baby with her, stating that she did not believe she would be able to deal with the loss of her baby again. She did not think she would be able to do anything positive with her life if she had to go through that separation again.

[116] She was transferred to ACCW in July 2006 while still on remand and housed in Alder Unit. There were mothers and babies there at the time. She described ACCW as a refreshing change from SPT. She enjoyed the experience at ACCW.

[117] Ms. M was transferred to BC Women's Hospital due to complications with her pregnancy. She went into premature labor and her son D was delivered by an emergency caesarean section on August 23, 2006.

[118] After the delivery, she learned that she would not necessarily be able to keep D with her at ACCW. The Ministry would decide if that would be possible. There was a meeting to discuss her application. The participants included two social workers from the MCFD, Ms. Tole, and Dr. Abrahams. Ms. M was informed the next day that approval had been given for D to return to ACCW with her. The issue of her being on remand had been one of the concerns discussed in the meeting in that there was no release date to plan for.

[119] Ms. M said it was a relaxed and easy-going environment at Alder Unit. She was able to have visits with the twins. The first was very difficult because the twins did not realize who she was as it had been a year since she had seen them. She breastfed D until he was ten months old. Her relationships with staff were positive.

[120] Ms. M pleaded guilty at an early opportunity. She was sentenced at the end of May 2007 to a sentence of 40 months less time served of nine months. She was released on parole on October 1, 2007.

[121] She said that there were periods of tension at ACCW but she never felt harm would come to D. Toward the end of her sentence, she was assigned to a work detail on a fisheries project outside the institution. Another inmate wanted her to bring drugs into the institution. She refused and reported the matter. It was very close to her parole and she was frustrated and angry. However, she stated that she was not worried about her safety or that of D. She did not believe any of the women at ACCW would harm any child there. She said that there were no drugs in Alder Unit while she was there.

[122] Ms. M was taken to some entries in the prison logs created by staff. One entry dated March 28, 2007 states that Ms. M had reported that another inmate had spread a rumour that she was a rat. The entry states that Ms. M had said “she was not going to be safe here if it wasn’t stopped.” Ms. M did recall the incident. She agreed that she was upset and that she had a conversation with staff but did not agree that the note was an accurate account of what she had said. It was her evidence that no one ever threatened her well-being while she was at ACCW.

[123] She was taken to another entry concerning the request to bring drugs into the institution that arose shortly before her parole. The entry in the log stated that she “was very concerned about the safety of her son due to others on the unit being involved with drugs in the centre”.

[124] Ms. M’s evidence was that she was angry and upset about the incident because she was close to her release date and concerned that the incident might

affect her parole. She stated that she never felt that any harm would come to D or herself. She denied saying to staff that she or her son had been threatened. She stated that she understood that the other inmate was investigated and sent back to SPT. Her understanding was that this was due to that inmate's efforts to bring drugs into ACCW.

[125] Ms. Collis made one of the entries concerning Ms. M in September 2007. She stated that she had an excellent rapport with Ms. M at the time. She recalled that Ms. M was visibly upset talking to her about her and her son's safety. She testified that Ms. M said that she was concerned that drugs were going to be in the unit on which she and her son were living. Ms. Collis stated that she believed that Ms. M had genuine concerns about the safety of her son. It was her evidence that she recorded what she had been told.

[126] The defendants seek a finding of fact that, contrary to her testimony, Ms. M was concerned about a threat to her baby. I accept that both Ms. M and Ms. Collis were credible witnesses who did their best to give a reliable and honest account.

[127] To some extent, the differences between their evidence can be explained by the fact that Ms. Collis is reporting her observations about Ms. M and her interpretation of Ms. M's motivations. With respect to the allegations of possible threats to D, the note states:

> She is very concerned about the safety of her son due to others on her unit being involved with drugs in the centre.

The language of the note reflects a conclusion about Ms. M's state; it does not purport to recount Ms. M's words.

[128] I note that there are a number of entries from several different officers concerning this issue. In these entries it is clear that Ms. M was being pressured by other inmates to bring drugs into the institution, that she responded by reporting the matter to the officers and that Ms. M was concerned about possible repercussions for her impending parole. The other entries do not record Ms. M stating that there

had been a threat to her child or that she was concerned about his safety. If she had made such statements to other officers, I am confident that they would have been reported.

[129] I think that it is unlikely that Ms. M would have reported a concern for her son's safety only to Ms. Collis and not to the other officers to whom she was reporting concerns about the same issue. Given the fact that Ms. M was reporting her concerns to a number of different officers at this time, I think that if she had concerns for her son's safety she would have expressly raised such concerns.

[130] Ms. M gave very candid testimony that did not appear to be self-serving. She is in the best position to know her thoughts and concerns. I accept her evidence that she did not fear for her son's safety during their stay at ACCW.

[131] When Ms. M was released, she went to the Peardonville recovery program with D. She started working as a landscaper and enrolled in a residential care program which she completed, graduating with distinction. She was hired at a facility in Maple Ridge shortly after graduation. She enrolled in a psychiatric nursing program at Douglas College and had completed two years of the program when she decided to put school on hold as D was diagnosed with diabetes.

[132] She is still working full time, providing care for a young man with complex health needs who requires 24/7 care.

[133] Ms. M did not try to regain primary custody of the twins after her release from ACCW. She agreed to put the twins up for adoption, provided she could select the family and that it would be an open adoption. That was done and she has maintained contact with them.

[134] Ms. M had this to say about the opportunity to keep D with her in ACCW:

> A It was everything for me. Being able to keep DM gave me the motivation to do something good with my life. And I -- every day when I see him and we're our own little family, he's everything for me. I can't picture my life without him. I think it would be drastically different had I not had the opportunity to be with him the way that I was.

4. Decision to Cancel the Mother Baby Program

[135] As noted above, the first infant returned to ACCW in August 2005. In January 2006, another infant was living at ACCW as part of the Program. In March 2006, at least two inmates at ACCW were pregnant and possible candidates for the Program.

[136] By email dated March 29, 2006, Mr. Merchant requested that Ms. Tole draft a policy to deal with female offenders and their children. The email states:

> I would like for you to draft a policy regarding female offenders and their children. That policy would then be finalized by one of our HQ analysts and placed in Provincial Policy. The policy needs to address all three centres that hold females – PG and SPSC will not be holding children with the mother under any circumstance and that needs to be made clear in the policy. ACCW may hold the child but under very rare, exceptional and strict conditions. That is, the offender would have had her child while in our care, that all other options for placement outside of the centre have been exhausted, that MCFD has been involved, and using the centre would be the very last option. Additionally how long the child remains at the centre needs to be determined. I would be inclined to be thinking in terms of how many days or weeks vs how many months. Anyway all of this needs to be articulated in the policy including notification and approval by HQ when this happens. In developing the policy Dana will assist or assign one of the analysts.
>
> I'm not sure how you would like to proceed with this – have a rough draft done up and then we can have a larger discussion about that policy or begin with the larger discussion and then move into writing the policy. I'll leave that to you to determine.
>
> While this policy and process is being developed please keep Stephanie and me apprised if there is a possibility that a child may be held at the centre.

[137] The email suggests to me a distinct cooling in Mr. Merchant's attitude towards the Program, as exemplified by the direction that it would be available only in "very rare, exceptional" conditions and the suggestion that the stays in such circumstances should be measured in days or weeks, not months. This was the first expression of such restrictions to Ms. Tole by Mr. Merchant.

[138] Ms. Tole did not receive the assistance that had been referred to in Mr. Merchant's email. Eventually she wrote a draft policy herself and provided a copy to Mr. Merchant by email dated September 11, 2006. The email stated:

> This is the first draft but I wanted to send it to you so you could give me feedback on the general direction this policy is going.

[139] The draft policy stated that the accommodation of children would be limited to ACCW at that time and that the Program would only accommodate children who were born during the mother's incarceration at ACCW. It noted that the best interests of the child would be the preeminent consideration in all decisions relating to participation in any program accommodating children at the institutions. The draft policy provided that decisions would be made on a case-by-case basis and that a baby could only return to ACCW when the MCFD had determined it was appropriate as part of a written long-range plan for the child. The draft noted that a number of documents would be attached, including the Protocol with the MCFD and the Fraser Health Authority, the guidelines for units and the babysitting assessment criteria.

[140] Although Ms. Tole's email stated that she was seeking feedback, she testified that neither Mr. Merchant nor anyone else from Headquarters provided any. Mr. Merchant testified that he did respond to Ms. Tole when he first got the draft and that he told her that it needed to be completely redone. It was his testimony that she never provided a revised draft.

[141] I prefer Ms. Tole's evidence with respect to this matter. Her recollection in general of these events appeared to be much clearer than Mr. Merchant's. In addition, Mr. Merchant had sent several emails to Ms. Tole pressing her for the initial draft policy. Following the receipt of the draft, there do not appear to be any requests to her for a revised draft. In light of the priority that Mr. Merchant attached to the creation of a policy, it does not seem likely that Mr. Merchant would have requested Ms. Tole make revisions and then have never followed up when they were not forthcoming. Further, if Ms. Tole had been instructed to make revisions, it is not likely that she would have simply ignored her superior's directions. Ms. Tole did not produce a second draft. This is consistent with her testimony that she was waiting for feedback as she had requested in her email.

[142] Mr. Merchant testified that he was not satisfied with the draft and that it did not address the things that had been discussed. He stated that it did not specify that children would only be housed at ACCW under exceptional circumstances. He said that he was concerned that the policy did not address what would be done while the inmate was pregnant, although that was not one of the matters identified in his initial email to Ms. Tole. He stated that the policy did not address consultation with outside agencies, although that was dealt with in the Protocol which was meant to be an attachment to the policy. He stated that it did not clarify the roles of staff, what would happen if something went wrong, who was supposed to be around the children, and who was allowed to hold the child. Apparently he did not appreciate that many of these matters were addressed in the documents that the draft policy proposed be attached.

[143] As noted above, while these were all criticisms of the draft policy that Mr. Merchant expressed in his testimony at trial, I have concluded that he did not express these concerns and criticisms to Ms. Tole at the time.

[144] Stephanie Macpherson occupied the position of Deputy Provincial Director Adult Custody from 2004 to 2008. Ms. Macpherson testified that Mr. Merchant likely forwarded her Ms. Tole's draft policy because she had the responsibility of overseeing the management of women offenders. She stated that it would have been her responsibility to review the draft, provide her comments to Mr. Merchant and to initiate discussions where clarification was required.

[145] Ms. Macpherson recalled discussing Ms. Tole's draft policy with Mr. Merchant. She recalled the discussion included comments about the length of time it had taken Ms. Tole to produce the draft. Beyond that, she did not have specific recollections of the discussion. She recalled that it was an ongoing conversation about the increasing count at ACCW, whether or not Corrections was the best place to be managing babies and whether Corrections could support a program that would not present significant risk to the children.

[146] Meanwhile, at some point prior to May 15, 2007, Ms. Macpherson had prepared a draft policy that provided that children would not be permitted to stay in a correctional centre. Ms. Macpherson described this exercise as “editing” Ms. Tole’s draft. Ms. Macpherson did not discuss either the original draft policy or her “editing” of that draft with Ms. Tole.

[147] Ms. Macpherson provided a copy of this “edited” draft policy to Mr. Merchant by email dated May 15, 2007. The email states:

> Brent, I have reviewed the draft policy and think that it is appropriate. The most contentious piece will be that children will not be permitted to stay in a correctional centre. If you agree with the policy, I would like to arrange for a meeting with Brenda to discuss this as I suspect that she will not agree and there may be future compliance issues. I also suspect there will be some work required to communicate this to the agencies that have previously been led to believe (by our own actions) that the current practice is supported by the Branch.

[148] Although the email suggested that the next step would be to arrange a meeting with Ms. Tole to discuss the change, no such meeting was arranged. In fact, Ms. Tole stated that no one told her that a different policy was under consideration.

[149] Mr. Merchant stated that he did not know why the draft expressly excludes the possibility of infants returning to ACCW stating “I guess it was Stephanie’s indication that that perhaps is a direction that we should look at”. Ms. Macpherson’s evidence was that the fundamental change in the policy reflected her earlier discussions with Mr. Merchant.

[150] Ms. Macpherson agreed that there was no assessment conducted by Corrections of the Mother Baby Program. She stated that her direction from spring 2007 forward was to search for alternatives to having babies in custody, looking for other ways of keeping mothers and babies together during the mother’s incarceration.

[151] Mr. Merchant testified that in 2007 a plan to address staff engagement within Corrections was undertaken. The initiative would take approximately three years. As part of that initiative he wanted to make sure that the wardens would commit to the

full three years. A number, including Ms. Tole, indicated plans to retire during that three-year term.

[152] Ms. Tole left ACCW in August 2007. During that summer she had a discussion with Mr. Merchant concerning her potential retirement. Mr. Merchant offered her a position dealing with bail reform which she accepted. Ms. Tole also continued with her responsibilities with respect to the planning of the open Monarch Unit at ACCW.

[153] Monarch was to be an open unit situated just outside the fence at ACCW. During the design phase of Monarch Unit, Ms. Tole stated that mothers and babies were considered as possible residents. Mr. Merchant testified that he never turned his mind to that issue. Monarch Unit opened in 2009, after the Program was cancelled. Monarch Unit has since closed and stands empty.

[154] In July 2007, Mr. Merchant met with Lisa Anderson. Ms. Anderson had started with the Branch in 1989. In 2007, she was the deputy warden at the Fraser Regional Correctional Centre. Ms. Anderson had extensive and varied experience in corrections but at that time had no experience managing incarcerated women.

[155] At the July meeting, Mr. Merchant asked Ms. Anderson if she would be willing to take on the position of warden at ACCW. During the course of their discussion in relation to the Mother Baby Program, he told her that he wanted to pursue a "different direction" in cases involving pregnant inmates and that the Mother Baby Program was going to be cancelled. It was Ms. Anderson's evidence that Mr. Merchant told her that he had concerns about the safety of infants in the correctional centre environment. However, he did not tell her what these concerns were and provided her with no documents in which such concerns were addressed.

[156] Ms. Anderson stated that the decision to terminate the Program was made at Headquarters. She agreed that at that meeting, Mr. Merchant wanted her to know that Headquarters was no longer going to permit babies to reside at the institution.

[157] Mr. Merchant did not recall giving Ms. Anderson a firm direction on the Program at that meeting. However, I accept Ms. Anderson's testimony with respect to that conversation as an accurate and reliable account. Ms. Anderson had a very clear recollection of the conversation. It was an occasion that would be memorable for her, whereas Mr. Merchant emphasized throughout his testimony that he had many issues to deal with in his position, the Mother Baby Program being a relatively minor one.

[158] Ms. Anderson agreed to accept the position and started as warden in August 2007. She remained in that position until February 2012, when she accepted a position as warden at the North Fraser Pretrial Centre.

[159] Ms. Anderson agreed that she understood from the time she accepted the position at ACCW that her role was to implement Mr. Merchant's decision not to have babies at ACCW and to assist in managing the issue of the timing of the disclosure of that decision both to the inmates and to the other partners in the Program.

[160] Ms. Anderson agreed with the characterization that the Mother Baby Program was a program that did not have a policy document.

[161] It was Ms. Anderson's evidence that she was never asked to conduct an assessment of the Mother Baby Program and did not do so. Mr. Merchant stated that he did ask her to assess the Program. It was his evidence that at the time Ms. Anderson commenced as warden, his main concern with the Program was that he was not given the information he asked for regarding its operation, such as advance notice of a child coming to the centre.

[162] Again, I prefer Ms. Anderson's evidence with respect to this issue. It is clear that Ms. Anderson never conducted an assessment of the Program. I have no doubt that had her superior requested she do so, she would have complied with the request. There is no evidence of Mr. Merchant ever inquiring after the assessment

which he clearly would have done had he requested an assessment that was not forthcoming.

[163] Finally, it is clear that while Mr. Merchant had expressed concerns to Ms. Tole about the lack of advance notice of babies coming to ACCW, and had also pressed Ms. Tole for production of the draft policy, there is no other evidence of Mr. Merchant making requests for information about the Program. Rather the Program was one of the topics of conversation between Mr. Merchant and Ms. Tole, and later Ms. Anderson, as a regular part of briefings with respect to the management of the institution. Both Ms. Tole and Ms. Anderson impressed me as very conscientious professionals who would have responded to requests for specific information from their superior.

[164] Mr. Merchant testified that Ms. Anderson communicated concerns in relation to the Program about screening for babysitters, the possibility for an infant to come into contact with contraband, the increase in remand inmates, and the mental health of other inmates.

[165] In approximately the first month into her service, Mr. Merchant directed Ms. Anderson by email, dated September 5, 2007, not to sign the protocol between the Provincial Corrections Service, the MCFD and the other departments. That protocol had been the subject of drafting for a long period of time and specifically contemplated babies coming back to ACCW. The email refers to the draft policy as being close to completion. Mr. Merchant confirmed that the draft policy referred to is the draft that excluded infants.

[166] It was Mr. Merchant's evidence in chief that he had not made up his mind to cancel the Program at this juncture. He stated that he did not have all the information he required at that point to make such a decision. He stated that the information he was referring to was the policy that would govern such a program consistent with his discussions with Ms. Tole, written in a manner that staff could understand. However in cross-examination he agreed that:

> Q Correct? So just reading that, it seems to me that it would be fair to summarize it as saying, We have a -- we have a policy. It may be fine-tuned a bit, but we have a policy which is taking us in a different direction, and this protocol agreement which contemplates babies in the prison is not appropriate because it's going to have to correspond with the fact we're not going to have babies in the first place. Isn't that fair?
> A Yes.

[167] As noted above, it is unlikely that if Mr. Merchant was waiting on further information from Ms. Tole, he would not have pressed her for it. There is no evidence of such a communication. Ms. Tole's evidence is to the contrary. I find that Mr. Merchant was not waiting for further information from Ms. Tole, or indeed from anyone at this time.

[168] Ms. Granger-Brown tendered her resignation at ACCW in October 2007. The reason that she gave was that everything that she believed was positive about the institution was being terminated. She was told that the Mother Baby Program would not continue along with other initiatives that were stopped. It was her evidence that she was informed that the Program would not be continued after the last baby left, prior to the official announcement of the Program's cancellation.

[169] Ms. Granger-Brown's evidence on this point is consistent with Ms. Anderson's that the decision had already been made to cancel the Program.

[170] Ms. Anderson's evidence was that after she started as warden, there was a lot of work being done to assess the best way to phase out the Program and to communicate the decision to the general population.

[171] Ms. Anderson agreed that she was not aware of any safety incidents while she was warden involving mothers and babies and that she was not aware of any actual safety incidents from before she became warden. Ms. Anderson agreed that she was never asked to assess the Mother Baby Program and she did not conduct such an assessment. She did not undertake any study of any other mother baby programs.

[172] Following her departure from ACCW, Ms. Tole was approached by a number of ACCW staff who expressed serious concerns with respect to the new management style. Ms. Tole reported these concerns to Mr. Merchant by email dated November 13, 2007. Mr. Merchant was very angry and instructed Ms. Tole not to have any contact with anyone at ACCW. She was removed from her position planning for Monarch Unit.

[173] At a meeting in January 2008, Ms. Tole stated that Mr. Merchant told her that her draft policy was 'self-serving' and 'pathetic'. He did not explain his criticisms further and did not voice any concerns with respect to the Program. He did not say anything about there not being a Program or a different draft of the policy.

[174] On November 16, 2007, inmate RN, who had given birth to a baby girl on November 14, was told that the Mother Baby Program at ACCW had been stopped and that she would not be able to bring her baby back to the institution with her. Ms. Anderson was away on sick leave at this time and Mr. Matt Lang was acting warden. Mr. Lang was supportive of the Program.

[175] Mr. Merchant's evidence was that he was not consulted prior to this information being conveyed to the inmate. It was his evidence that he had not made up his mind at that point. He stated that he could not recall when he made the decision to cancel the Program.

[176] Ms. Macpherson stated that Mr. Lang inappropriately or mistakenly shared the intentions to cancel the Program, but that at the time no such direction had been given and the decision had not been made. However, when shown her email dated December 12, 2007 to Mr. Lang, she acknowledged the decision had been made and they were at the point at which they were planning to implement that decision. The email states:

> While the Branch will be implementing policy that changes the historical practice of allowing babies to reside in custody we have not finalized the policy or had the formal discussions with MCFD and these will likely not be had until early January. It is important [that] we have these discussions and give formal notice prior to implementing the change. In the interim, we should be continuing with our existing practice, however, with the change that we are

> to exhaust all other options prior to concluding that the baby return to custody with their mother. Correctional centres are not designed, let alone mandated, to care for infants. In addition, we are not to continue with the “work program" that allows for inmates to "babysit" or provide childcare to infants while their mothers attend programs. The babies will have to attend the program with the mum. I am not sure what other practices are in place for mothers with babies at ACCW so we should discuss this in more detail. We should also draft a response to Dr Martin's email. I will have Myrna draft it and then we can discuss.
>
> When are you available to discuss this week?

[177] The email states that in the interim the practice should be continued. Ms. Macpherson was asked if at this point she had concerns about the safety of infants at ACCW. She responded that she thought it could be managed.

[178] Dr. Martin, the prison physician, sent an email dated December 9, 2007 responding to what she termed “an urgent health matter at ACCW”. This was the notification that ACCW would no longer be receiving babies. Dr. Martin summarized the success to date of the Program and noted that the separation of babies from their mothers would be detrimental to the health of the babies. She noted that she had not been consulted with respect to this change.

[179] Ms. Anderson stated that in general terms after the cancellation of the Program, Corrections’ planning around a pregnant woman involved: communication with the Crown to make sure that the court would be aware at the time of sentencing that the Program had been cancelled, working with Elizabeth Fry and other agencies to find facilities to which mothers and babies could be released on parole, enhanced case management and planning, enhanced visits, and ensuring nursing mothers could pump breast milk that would be stored and delivered.

[180] Mr. Merchant testified that in reaching his decision, he considered the practice at BCCW, his conversations with Ms. Tole and Ms. Anderson, his consultation with Ms. Macpherson and other wardens, his consultation with counterparts in corrections across Canada, his experience in Corrections, and his conversations with Dr. Diane Rothon, Director of Health Services, and Dr. Maureen Olley, Director of Mental Health. Mr. Merchant agreed that there are no documents

reflecting any of this consultation. In addition, there is no written document recording his decision.

[181] The only document that Mr. Merchant identified as having reviewed in making his decision was Ms. Tole's draft policy. In addition, the Branch had obtained a legal opinion which Ms. Macpherson had reviewed and discussed with Mr. Merchant.

[182] Mr. Merchant agreed in cross-examination that from the outset he believed the question was whether he would give his permission for there to be an option for women to return to ACCW with their baby. He agreed that in his opinion, the mandate of Corrections does not include babies.

[183] He also agreed that his decision to cancel the Program was based on the fact that he believed he could not guarantee the safety of infants in a custody setting. He stated that was a risk that he was not prepared to take. However, he also agreed that he could not guarantee the safety of anyone in any of his facilities, infant or otherwise.

[184] He agreed that no one at the Branch explored safer alternatives to the Program. No one asked whether it was safer for the infants to live at ACCW than in the general community. He agreed that he was aware of no instance in British Columbia in which an infant in a prison was exposed to any contraband and from his readings of programs in other jurisdictions, he was aware of no such occurrences elsewhere.

[185] It was his testimony that he could not recall when he made the decision to cancel the Program. He stated that he believed it was in the first part of 2008 that he finally made his mind up and then looked at the timing of the announcement.

[186] Mr. Merchant agreed that the articles Ms. Tole sent were supportive of the establishment of mother baby programs in prison and that some dealt with programs in other jurisdictions. He agreed that there are both social and medical benefits to keeping mothers and babies together, for both the parent and the child. He agreed that there is scientific and medical evidence supporting the importance of forming

attachment by the child to the primary caregiver, normally the mother, relating to the development of the infant's brain and the infant's ability to relate to the world. He agreed that inadequate attachment has been identified to be at the root of many psychosocial problems that contribute to criminal behaviour. He agreed that there are psychological benefits for the mother and that a mother baby program could help the mother develop parenting skills.

5. The Aftermath

[187] The last baby was accepted into the institution in January 2008. The last baby left the institution in February 2008. The plaintiff Amanda Inglis was the first inmate to give birth following the announcement of the decision to cancel the Program.

[188] With respect to Ms. Inglis' situation, Ms. Anderson stated that initially the MCFD had said that they would apprehend the baby, so Corrections had not anticipated any action on their part would be necessary. However, when the MCFD changed their position, the Branch needed to make alternative arrangements. Ms. Inglis had earlier applied for parole and they expressed urgency to the parole authority.

[189] In March 2008, Ms. Anderson drafted a document, at the request of Ms. Macpherson, setting out a summary of issues with the Program. This document was prepared to assist in a communications strategy with respect to the cancellation of the Program. Mr. Merchant stated that it was prepared after he made his decision. Mr. Merchant agreed that the document was not intended to identify any benefits of the Program but to be a list of concerns. Mr. Merchant agreed that there is no document in the Branch's records that addresses a balancing of the risks and benefits of the Program.

[190] The document states:

> Mothers with Babies in Custody
>
> General concerns
>
> - The profile at ACCW has changed significantly since it first opened in 2004. Counts have increased significantly - count in 2004 was in the

mid 60's and at present the count is averaging at 140. There is a 35% remand population, immigration detainees are periodically held at ACCW and women with significant charges, including those with violence, are held here.

- Being a camp type setting, offenders have access to all areas and therefore mothers with babies cannot be separated from the rest of the offenders.
- Mothers with babies are placed on one specific unit (Alder) however are not restricted to this area and regularly spend time mixing with the rest of the population.
- Offenders transferred to ACCW are not screened in relation to their ability to look after children. ACCW does not receive information from MCFD regarding women who have had children removed from them for abuse or neglect.
- Staff are not screened with respect to their ability to provide child care supervision or instruction to the offenders. At present there are very few staff who have first aid qualifications. Previously supervisors were trained in infant first aid but all their certifications have since expired.
- Staff are required to conduct visual inspections of all offender areas at minimum once per hour. There is no direct, constant supervision of mothers and babies.
- Mothers who have to attend court are not permitted to have their child accompany them as the sheriffs will not transport a baby. Judges have not permitted babies to be present when conducting video courts. As a result, a practice of hiring another offender to babysit was established. Offender babysitters are screened by a Classification Officer based on their criminal history and not their history of caring for children.
- Offenders wanting to participate in programs were using a babysitter as well. This practice has ceased.
- Raising a child in custody is an unnatural environment and does not prepare the mother for the realities of caring for a child after release. (having eighteen other women there to assist you vs. being on your own with a baby)
- Contraband is an ongoing issue within a correctional environment. A baby crawling on the floor could potentially be in contact with drugs or drug paraphernalia in addition to regular prescription drugs that the offenders are provided with for self administration.

Specific Concerns

- (no specific date but over six months ago) information provided (anecdotal) that an offender was bouncing her baby and because she thought the baby was laughing, she continued to do so to the point that she was actually shaking the baby. Control observed this and staff had to attend the unit. My understanding was that the baby was not harmed.

- January 2008 – ACCW had an outbreak of Influenza A. One of the babies in custody became ill and required transport to hospital. As staff are not able to carry or care for an offenders baby, the mother was required to attend the hospital as well. Because this was a young child (approx nine months old) the offender needed to carry her. To accomplish this, the mother was not able to be restrained in accordance with Adult Custody Policy.
- February 2008 – an offender who was housed on Alder unit where two babies were present began acting strangely. She was noted over several days to be somewhat delusional. It wasn't until several days later when we received documentation that she was required for a thirty day psychiatric assessment. While there was no threatened or actual harm to the baby this incident signifies how easily the wrong type of offender could come into contact with a baby.
- February 2008 – an offender on Alder unit approaches staff and indicates that she has to get off the unit as she cannot be near the babies. Upon further investigation, we learn that she has just had her children apprehended (reasons unknown). Many of the offenders have had their children apprehended by the Ministry at some point in time. This situation exemplifies our vulnerability in not knowing what an offender's triggers may be in regards to being in the presence of a baby.

[191] With respect to the observations in the document, Ms. Anderson acknowledged that there had been inmates on remand at ACCW during the time the Program was operating. With respect to the count, while it had increased for a period, the count had subsequently declined. She agreed that the next concerns described the existing layout and that the mixing she referred to was not contrary to any policy. She agreed that there had been no episodes involving threats to or concerns over the safety of babies being walked around the facility.

[192] With respect to the observations concerning screening, she agreed that at one point there was screening of the applicants for babysitting. She also agreed that screening could be initiated. She agreed that these were concerns that could be addressed by changes to the Program, rather than requiring its cancellation.

[193] She clarified that the concern articulated about the unnatural environment was meant to convey that the inmate would receive more assistance and support in custody than would be available in the community.

[194] With respect to contraband, she agreed that contraband has been and will always be an issue in managing a prison. However, Ms. Anderson was aware of no events in which a child came into contact with contraband drugs at ACCW.

[195] With respect to the bouncing incident, Ms. Anderson confirmed that she only knew of the incident from the reports of others. She did not review the video of the incident and she had never discussed the incident with Ms. Tole.

[196] That incident had occurred during the tenure of Ms. Tole, who did review the video of the incident and confirmed that the baby was not shaken, as that term is used in relation to protection concerns. The incident did not give rise to a safety concern. However, out of an abundance of caution, Ms. Tole had the representative of the MCFD review the tape. The incident did not give rise to any concern on the part of the Ministry.

[197] With respect to the reference to the influenza outbreak, Ms. Anderson agreed that there was nothing unique to a prison environment about an outbreak of influenza. With respect to the woman acting strangely on Alder Unit, she agreed that there was no actual or threatened harm to the baby and the incident was resolved with a transfer of the inmate.

[198] Ms. Anderson wrote to Les Boon, the Regional Executive Director of the MCFD Fraser Region on April 3, 2008 with respect to Ms. Inglis. That letter states in part:

> When Ms. Inglis is discharged [from] hospital she will be unable to bring the baby to ACCW with her so alternate arrangements are urgently required.
>
> With the suspension of the mother/baby program at ACCW and further to your conversation with Mr. Merchant, I look forward to connecting with a representative of your office to develop an enhanced visiting program for mothers and their children at ACCW.

[199] Ms. Anderson agreed that the letter as originally drafted referred to the cancellation of the Program. The language was changed at the suggestion of Lisa Lapointe from the communications branch. Ms. Anderson confirmed that Mr. Merchant made no indication of any intention to revisit or reconsider his decision

with respect to the cancellation of the Program. Mr. Merchant confirmed that the Program was not suspended. It had ceased to operate and there was no plan to re-open it.

[200] With respect to the briefing note, Mr. Merchant agreed MCFD was involved with the Program and that when considering his decision to cancel the Program he never spoke with them.

[201] Mr. Merchant agreed that the decision was controversial. Dr. Olley passed on concerns from Dr. Turnbull, the ACCW psychologist, concerning the termination. Dr. Martin, the prison physician, also expressed concerns. She was aware that senior representatives from BC Women's and Children's Hospitals were concerned about the Program closing. MCFD officials expressed concern and declined to express support for the decision. The Representative of Children and Youth expressed support for the Program.

[202] Dr. Turnbull wrote to express her concerns with the decision by letter dated April 28, 2008. Her letter states in part:

> In short, I am concerned that separating mothers and babies in the postnatal period, even with whatever enhanced visitation will be possible, will pose a serious risk for optimal development of the infants involved, and is also likely to pose a risk to the mental and emotional well-being of the mothers.
>
> ….
>
> There may also be concerns regarding the conduct of other inmates at ACCW. In this regard I can only observe that neither Ms. Slater nor I is aware of any previous negative event or threat of negative event involving other inmates and the babies.

[203] Mary Ellen Turpel-Lafond, Representative for Children and Youth, expressed her concerns with respect to the decision to the Minister of Public Safety and Solicitor General by letter dated August 18, 2008. The letter stated in part that separating babies from their incarcerated mothers potentially violates a number of convention rights pursuant to the *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3 (signed 28 May 1990; ratified 23 December 1991) [*Convention on the Rights of the Child*]. The letter summarized the research which

supports the advantages of such programs and notes that enhanced visitation is not a preferred option. Ms. Turpel-Lafond concluded the letter with a formal request that the decision to cancel the Program be reversed.

[204] Representatives of BC Women's Hospital, BC Children's Hospital and BC Mental Health and Addictions Services asked Dr. Salmon to prepare an evidence review and briefing note in response to the cancellation of the Program (the "Evidence Review Summary"). The review of the research literature noted the following:

- maintaining close physical contact between infants and mothers is considered the best practice with benefits to both babies and mothers;
- alternatives to the mother baby program do not provide an adequate mechanism to permit attachment;
- interfering with attachment puts the baby at greater risk for developmental deficits, feelings of neglect, and insecurity, all of which can have lifelong implications;
- women who are separated from their babies during incarceration have observed that the separation impedes their ability to re-integrate into society. Women who experience traumatic separations are significantly more likely to re-offend;
- separating women from babies inhibits breastfeeding, which has important health benefits for both babies and mothers;
- children who are separated from parents due to incarceration are at higher risk for anti-social and delinquent behaviour into adulthood and experience poorer educational outcomes; and
- research across North America, including the 1990 Task Force for Federally Sentenced Women, supports mother and baby programs.

[205] The Evidence Review Summary contained the following opinion and recommended the reinstatement of the Program:

> It is the opinion of the majority of prison health researchers, prison social workers, the prison doctor who worked at ACCW, staff from the Fir Square Combined Care Unit, community workers who interacted with the program, and British Columbia's Representative for Children and Youth (among others) that **the ACCW Mother and Baby program was highly beneficial to the health and social outcomes of both the mothers and babies who went through it.** They, and the women themselves, believe that the program directly contributed to high levels of post-release success seen in the mothers who participated in the program. These successes have been measured in part by low recidivism rates, reduction or elimination of problematic substance use, and community reintegration of mothers and their children.
>
> [Emphasis in original.]

[206] The Evidence Review Summary was provided to the Minister of Public Safety and Solicitor General by letter dated November 26, 2008. The letter was signed by Leslie Arnold, President BC Mental Health & Addiction Services; Elizabeth Whynot, President BC Women's Hospital and Health Centre; and Larry Gold, President BC Children's Hospital & Sunny Hill Health Centre for Children. The letter stated in part:

> …
>
> The evidence presented in this background paper supports the significant positive impacts of mother-baby programs. The benefits arise from the maximization of bonding and attachment in infancy which is best accomplished when mothers and babies have a continuous relationship beginning at birth. Failing to support this attachment can have negative long term effects on both the infant and the mother, repercussions of which affect many parts of our community and support systems in health, social services and the justice system.
>
> While we understand that corrections officials have many other concerns and must make decisions to ensure safety for all, we hope there is still an opportunity to work together, across all relevant ministries, to support this special population of women and children.
>
> Expert clinicians from our agencies and programs are available to work with your staff to develop viable alternatives, whether community or prison based, to achieve the outcomes that are described in the briefing note.
>
> Please don't hesitate to contact any of us if you would like to discuss this further.

[207] It appears that there was no response to this letter.

[208] In an effort to mitigate the impact of the cancellation, ACCW initiated enhanced visitation for mothers with babies, and acquired equipment to facilitate the pumping, storage and delivery of breast milk.

[209] With respect to the alternatives to the Program introduced in the aftermath of the cancellation, representatives of the MCFD voiced concerns to Ms. Macpherson by email dated September 9, 2008 with respect to the visitation program that ACCW had initiated after the Program was cancelled. The email notes that:

> …there are so many mothers who may find a family placement for the child, but distance would preclude the visits, impacting the child's developmental and emotional needs.

[210] A further potential alternative was addressed by Mr. Merchant, who made reference to an agreement with federal corrections that would permit a woman with a newborn to be transferred to federal custody. However, the provision has never been implemented. Further, Ms. Block's experience suggests that the timelines for classification in the federal system are such that there would be few, if any, women with provincial sentences who would be able to qualify for participation in the federal program. Indeed the Briefing Note to the Commissioner seeking approval to allow FVI and ACCW to establish an Operational Protocol for the transfer of pregnant provincially sentenced inmates to FVI in order to participate in the mother baby program at that institution notes:

> FVI does not anticipate a high demand for transfers from ACCW given that many of their offenders are serving short sentences and that they must meet the Mother-Child Program's stringent eligibility criteria.

[211] Mr. Merchant presently holds the position of Assistant Deputy Minister of the Branch, which falls within the Ministry of Justice. He has held that position since November 2010. Mr. Merchant testified that one of the key goals of the Branch is to manage all aspects of correctional supervision through the application of evidence-based, consistent and best practice standards. He noted that the Branch has its own research section. However, the facilities of the research section were never employed to undertake an evaluation of the Mother Baby Program.

[212] The Evidence Review Summary contained the following information with respect to the Program:

> The Mother and Baby program at ACCW began in 2005 as a partnership between BC Corrections and the Ministry for Children and Family Development (MCFD), with BC Women's Hospital's Fir Square Combined Care Unit (Fir Square) as the provider of medical care. The program allowed women who gave birth while incarcerated, and who were otherwise deemed by MCFD to be willing and able to provide safe and appropriate parental care, the opportunity to remain with their babies at ACCW.
>
> Thirteen babies were born to incarcerated mothers during the program's duration, nine of whom stayed in prison until their mother's release. Fifteen months was the longest stay of any infant at ACCW. Eight of these babies delivered at BC Women's Hospital at Fir Square, seven of whom were breastfed for the duration of their stay at ACCW. Seven of the nine babies born to women at ACCW continue to live with their mothers, one baby is in the care of her/his father, and one is in provincial care. Although the two year recidivism rate among the general female prison population in BC is 70% (Corrections Branch Public Safety and Solicitor General, BC 2004), all of the mothers who returned to ACCW with their babies have remained out of prison following their release.

[213] It should be noted that Exhibits 16 and 24 suggest that one of the mothers did return to ACCW following her release on a charge of breach of probation. That appears to be the mother whose infant was placed into provincial care.

[214] The Branch issued the policy 9.23 Pregnant Inmates in July 2009. The policy states in part:

> **9.23.2 Overview**
>
> 1. The Corrections Branch recognizes the special bond between mother and child, and acknowledges that experiencing pregnancy while incarcerated may be an especially difficult and complex time for female inmates. Correctional centres are unable to provide the safe and nurturing environment that newborns require. As a result, babies or children may not reside with their incarcerated mothers. The branch supports the mother/child bond in other ways that are reasonable in the circumstances.
>
> …
>
> **9.23.8 Correctional centre visits between incarcerated mother and baby**
>
> 2. Visits between the incarcerated mother and baby occur during regular visiting hours, or as approved by centre management….
>
> 3. Visits between the incarcerated mother and baby are not permitted on living units or in areas where other inmates may be present.
>
> …

5. Overnight visits at the correctional centre between the incarcerated mother and her baby are not permitted.

V. THE PLAINTIFFS

A. Patricia and Amber Block

[215] Ms. Block is 35 years old. She presently lives in Penticton with her husband and three children, Amber, who is now 4 years old, an older daughter who is 20 and her son who is 15 months. Ms. Block also has another daughter, aged 16, who is not living with her.

[216] Ms. Block had been incarcerated at ACCW in 2006, 2007 and most recently in 2008 when she was arrested for possession for the purpose of trafficking and remanded to ACCW.

[217] During her previous incarcerations, she became aware of the Mother Baby Program. She had encountered babies at the institution and resided in Alder Unit during a time when a baby was in residence. She said that she found comfort in the presence of the children. It was a community with good morale.

[218] At the time of her arrest, Ms. Block had her two older daughters living with her. After her arrest, one went to live with Ms. Block's mother and the other went to live with her partner's brother. Ms. Block was also pregnant when she was arrested in September 2008, and was due to deliver in March 2009.

[219] Upon her arrival at the institution, she was assigned to Alder Unit. Ms. Block stated that the morale in Alder Unit was very different in 2008 than she recalled from her previous incarcerations. There were no babies in the institution at the time of her 2008 arrest; the Program had already been cancelled. She learned of this when she arrived at ACCW. She was immediately very concerned about her situation and wanted to find a way to keep her child with her.

[220] The only program her counsel could find was in the federal system. Ms. Block pleaded guilty and requested a two-year federal sentence so that she would be eligible to take part in the federal mother baby program at FVI.

[221] She received a two-year sentence, but then was kept for 60 days at ACCW before being transferred to FVI. At FVI, she was told that she could not apply for the mother baby program there until she completed the intake assessment. Ms. Block phoned the MCFD and asked for their help but was told that they could not assist until the institution had completed her intake assessment.

[222] The intake assessment took 60 days. After it was complete, Ms. Block applied for the mother baby program. She was told that to qualify she would have to complete several courses. She attempted to take the required programs – first aid, substance abuse and parenting. She did not get a response until ten days before Amber was born. Ms. Block was then told that she had not been accepted into the program because she would not be able to complete the necessary programs before being released into the community.

[223] As a side note, the length of time that the initial classification occupies in the federal system is one important factor that significantly limits the practical utility of the possibility of a transfer to the federal system as an alternative for mothers with babies at ACCW, where sentences are much shorter.

[224] Marcie Bazylevich is a child protection social worker. She described the comprehensive risk assessment tool used by the MCFD to assess safety risks to children. She conducted risk assessments for FVI with respect to women who applied to its mother baby program.

[225] She screened Ms. Block's suitability for the mother baby program at FVI and also for a babysitting position at FVI. The screening involved a review of the Ministry file, the FVI intake assessment, Ms. Block's criminal record history and collateral information.

[226] She noted that Ms. Block rated high on all four risk factors that correlate with risk of abuse: namely, history of abuse or neglect as a child, alcohol/drug use, domestic violence, and abuse or neglect of her own children. Ms. Bazylevich stated that her primary concern was that Ms. Block had not established stability in her

parenting life. She had reverted back to a lifestyle of drug use, crime, domestic violence and abuse and neglect of her children.

[227] She did not approve Ms. Block for either the mother baby program at FVI or the babysitting program. She recommended that Ms. Block complete the parenting program, substance abuse program, build up a network of support, obtain counselling to address domestic violence and abuse issues and demonstrate a period of stability.

[228] The news that she had not been accepted into the program left Ms. Block distraught. Her baby was born healthy and alert at 9:30 p.m. on March 17, 2009. Ms. Block did not want to sleep so she could have every moment possible with the baby. Two social workers wanted to take the baby to the nursery but the corrections officer said she would assume responsibility for the child and the baby stayed with Ms. Block in her room at the hospital. Ms. Block was able to start breastfeeding.

[229] The next day, the baby was seized by the MCFD. Ms. Block did not know much about the foster family. Ms. Block was returned alone to FVI. At the institution she pumped and stored her breast milk. She had a visit with Amber a couple of days later. She had two one-hour visits one week, then three one-hour visits the next, and then two visits of two hours. The visits were primarily held in the regular visiting area, though some were held in the overnight visiting house. Ms. Block did not know who decided how often she was able to visit with Amber. She went to court to try to get additional visits.

[230] Prior to the birth, Ms. Block had waived parole. She had wanted to stay incarcerated long enough to complete the programs she needed to have the baby with her in the institution. Because she did not qualify for the mother baby program, she applied to reinstate her eligibility for parole. Ms. Block received parole and, with approval of the MCFD, went to a treatment facility in the lower mainland that accepted children aged three months and over.

[231] Amber was not yet old enough to reside in the facility with Ms. Block when she was released, though the visits continued. Ms. Block noted that five different people were taking care of the baby – a respite worker, the parents of the foster mother, the foster mother and the foster mother's sister.

[232] Once Amber was old enough to be accepted into the facility, she came to live with Ms. Block. Ms. Block then, again with approval from the MCFD, moved out on her own with Amber.

[233] Ms. Block reunited with Amber's father after he was released from prison. They married in August 2009 and are still together.

[234] Ms. Block's most recent pregnancy was very difficult. She experienced emotional problems stemming from the trauma of being pregnant in jail with Amber which required her to attend counselling.

[235] Last fall she struggled with post-partum depression along with financial and relationship problems. She suffered a relapse and the MCFD became involved. Ms. Block recognized the problem and sought help. The MCFD made a home visit, but were ultimately satisfied there was no risk to the children and have had no further involvement.

[236] Ms. Block has had no further involvement with the criminal justice system since her release.

B. Amanda and Damien Inglis

[237] Ms. Inglis is 27 years old and lives in Williams Lake. Ms. Inglis has five children ranging in age from 8 years old to 2 months. The youngest four of her children live with her. Her oldest child is in the guardianship of Ms. Inglis' mother. Her son Damien is 5 years old.

[238] Ms. Inglis is of Aboriginal heritage of the Shuswap nation on her father's side. Ms. Inglis was raised for a time by her mother and then was placed in foster care from age eight.

[239] Ms. Inglis entered ACCW in 2007 about six months before Damien was born. She had been arrested for robbery. On her arrest she was sent to SPT and then to ACCW. It was at SPT that she discovered she was pregnant.

[240] At the time of her arrest, Ms. Inglis had been using heroin and cocaine. After she went through detoxification, Ms. Inglis' pregnancy progressed well. She was afraid about the effects the drugs may have had on her baby but found good support at ACCW.

[241] Ms. Inglis was housed on Alder Unit. There were two babies on the unit during her stay. She said that the unit was very nice and comfortable. She never had concerns about the safety of babies on the unit and never saw any signs of drug use or any physical fights. She never knew of babies being injured in any way.

[242] Ms. Inglis was due to give birth on April 29, 2008, but went into labour early on March 24. She was taken to BC Women's Hospital to the Fir Square Unit. When she was admitted to hospital, Ms. Inglis believed that she would be able to take Damien with her back to ACCW. In preparation for this she had also worked with the native liaison officer at ACCW to find a facility that would accept infants while she was on parole. Her understanding was that she would return to ACCW with Damien, finish her sentence and then be released to Phoenix House in Prince George with her son.

[243] Damien was in the ICU for three weeks. During that time, Ms. Inglis was able to breastfeed and visit him every four hours.

[244] Approximately two weeks after giving birth, Ms. Inglis was told that ACCW was no longer accepting infants. She described her feelings of sadness upon learning that she would not be able to bring Damien back with her to ACCW. She was then hoping that all her paperwork could go through so that she could take him to Phoenix House for her parole. Meanwhile, representatives from the MCFD were there talking about placing him in foster care. The foster family would not be Aboriginal and would reside in the lower mainland.

[245] Ms. Inglis' physician at Fir Square then intervened. Before she could be returned to ACCW, the institution required that Ms. Inglis' physician provide a release from care. Dr. Abrahams declined to provide that release. Ms. Inglis remained at Fir Square for seven weeks until she obtained her parole. Damien then accompanied her to Phoenix House in Prince George. They stayed at Phoenix House until Damien was about 11 months old, after which they returned to Williams Lake.

[246] Dr. Abrahams stated that Ms. Inglis was a patient at Fir Square for delivery. He stated that while she was on the ward they learned that the Mother Baby Program had been cancelled, leaving Ms. Inglis and her son in limbo. It was his decision to keep Ms. Inglis on the ward until he was confident that she would be released with her baby into a safe environment. It had been their preference at Fir Square to release Ms. Inglis to ACCW with her baby. Keeping her in a tertiary care hospital was not optimal, but their primary motivation was to keep mother and baby together.

[247] Dr. Abrahams was asked in cross-examination if he was aware that the initial plan was not to allow Ms. Inglis to return to ACCW with her baby. He answered that in a general sense that is why Fir Square is important. Many women have been told by the Ministry that they cannot keep their babies. Fir Square assists them to turn that situation around.

[248] Dr. Abrahams stated that they had several mothers and babies who were in the same situation as Ms. Inglis when the Program was cancelled. There had been a great relationship with ACCW before that. The outcomes had been positive and the staff of Fir Square wanted the Program to continue.

[249] Kelly Martin is a social worker with the MCFD. She has been with the Ministry for 25 years. She was involved with Ms. Inglis' file when Ms. Inglis gave birth while serving her sentence at ACCW.

[250] Ms. Martin reviewed Ms. Inglis' file, which included her earlier contacts with the Ministry. At their first meeting, Ms. Martin told Ms. Inglis that the Ministry's plan was to apprehend Damien when he was born, to work with Ms. Inglis to ensure that she got the services that she needed, and to work with her to return Damien to her care once she had addressed the Ministry's concerns.

[251] The next meeting with Ms. Inglis occurred at Fir Square on March 26, 2008 after her baby was born. Ms. Inglis had investigated facilities that would accept infants for parole. Ms. Martin stated that she was receiving very positive feedback about Ms. Inglis from the hospital personnel, who reported that Ms. Inglis was an attentive, caring and appropriate mother. The Ministry decided to wait before finally settling on a plan for the infant. Ms. Martin investigated Phoenix House and made inquiries of ACCW to get more information about options. Although the initial plan had been to seize the baby, at that point the MCFD was prepared to wait to see if an alternate plan could be put into place.

[252] Ms. Martin made inquiries of ACCW in early April 2008. She wanted to make an appointment to come out to visit the site, see the housing and get more information about the Program. However, she was told that ACCW was no longer allowing mothers to have their babies at the centre. Upon learning that ACCW was no longer an option, the Ministry focused its attention on exploring Phoenix House.

[253] Ms. Martin investigated Phoenix House and concluded it was fairly safe. She agreed that every housing situation carries some risk and that the exercise is a balancing of factors to ensure the proposed residence is "safe enough". Ms. Martin stated that the goal of the MCFD is to look for the least disruptive means possible of ensuring the well-being of a child while trying to keep families together if possible. In the result, the MCFD concluded that release of Ms. Inglis with the baby to Phoenix House with a supervision order in place was the best option available. That was put in place.

[254] Ms. Inglis described her reasons for participating in the litigation as follows:

A Well, I've decided to do this because I think it matters for mothers to stay with their babies; right? You need the bonding time with your baby.
Q And that's even if they are incarcerated?
A Yes.
Q And why do you think you think that?
A Because that's the most -- that's what your baby's need is, the love of their mother; right? So regardless if you're in jail or not, they need to be with their mother; right?
Q And you yourself were in more than one foster care when you were --
A Oh, yes, I was. And I lost -- when I was in foster care, I lost pretty much all my family and friends; right?
Q Yeah.
A I never got to know them, and I still don't really know them as much as I could have; right?

VI. EXPERT EVIDENCE

A. Dr. Peggy Koopman

[255] Dr. Koopman is a psychologist with extensive experience in corrections. She was asked to give her opinion with respect to three issues.

[256] Regarding the medical, psychological and social benefits provided to pregnant women, mothers and their children in the provincial correctional system by programs such as the Mother Baby Program, Dr. Koopman stated:

> This writer's experience with mother-child programs while contracting as a psychologist at BCCW, FVI and OOHL has been positive. The children are indulged and valued by the women. Every woman's nurturing needs (most are mothers) are inherently satisfied by having a child or children in the prison. They complete caretaking programs and vie for the position of respite worker for the mothers.
>
> …
>
> Psychologists in women's prisons daily observe the results of inadequate and abandoning mothers. Many women are in abusive relationships because they so desperately need someone to love them unconditionally. Co-dependency and borderline personality disorders are prevalent issues for women in prison and contributory to criminal offending. When we look at the lives of the women with these problems we characteristically find an attachment disorder stemming from a combination of: an alcoholic mother who was not there, residence being shifted from one relative to another, feelings of being unwanted and in the way, abuse by relatives and strangers and overwhelming feelings of being worthless. These attachment disorders can be lifelong barriers to fulfilling lives.

Opinions

Benefits of Babies remaining with their Mothers in Prison

1. Assistance regarding secure bonding and attachment of baby to mother and perhaps as important, mother to baby.
2. Mothers being assisted to develop parenting skills which may also benefit other children they have or will have in the future.
3. It is easier for a mother to retain custody of a baby and be released with that baby than regain custody of the baby after release from prison.
4. Several researchers, prison officials and advocates cite that recidivism is lower in women who keep their babies while in prison. They also state that the mothers retain custody of their child in the community and frequently bring others of their children into their care.
5. While in the prison setting the women with babies appear to gain in confidence and self esteem.
6. These women engage in programming and education more readily so that they can better their lives for themselves and their baby.
7. The bonding process provides for the mother's own attachment needs especially if they have been reared in an abusive environment.
8. If a woman keeps her baby and retains custody of her other children there is a better chance for her family to stay together which has long-range positive implications for the future of the next generation. This is an example of how the cycle of criminal offending is lessened.
9. There is no evidence that babies are at risk in the prison environment. While there have been legitimate concerns about safety for these children the writer could find no evidence of a baby or child being harmed in ways that would not have happened in the community such as falling and scraping a knee etc.
10. Corrections officials, advocates and the writer's experience with women in prison indicates that nurturing a baby and developing a future with that child in a pro-social manner can be a major factor in breaking the cycle of criminality in a family constellation.

[257] It was her opinion, based upon her experience, that babies and young children are safer from physical harm in such programs than they are in the community.

[258] On whether the provincial corrections context negatively impacts any of the above benefits, Dr. Koopman stated:

> Negative Effects of Babies Being Kept by their Mothers in Prison
>
> 1. The Mother-Child programs are costly financially and in terms of intense staff involvement,
> 2. There are few children in the mother-child program at any given time and precious resources are needed at the times when the babies are present. This involves specialized training of staff and space in the prison devoted to housing the baby and mother.
> 3. There are dangerous and unpredictable persons in prison with whom the baby may have contact whereas in the community this might not occur.
> 4. In any prison from time to time there may be alcohol or drugs present. The concern is any way in which the baby could be negatively impacted by this fact.
> 5. Some individuals state that the mothers gave up their rights to freedom by committing crimes but they also believe they gave up their rights to parent while in prison and perhaps beyond in the community.
> 6. Some individuals claim that although the child is very young environmental influences regarding the offender population may have a negative effect on the developing child. While this appears to be a view held by some the writer has not seen any documentation, research or personal experience that would support this belief.
> 7. The perception of a significant number of staff members and guards in a prison that the babies should not be present because they believe it to be a dangerous and inappropriate environment can have significant consequences on the real-life experiences of the mothers and infants thus creating an environment that is restrained with regard to its potential.

[259] Finally, regarding the medical, psychological and social harms caused to pregnant women, mothers and their children in the provincial corrections system by separation at or soon after birth, Dr. Koopman stated:

> Negative Consequences of Removing Babies from Their Mother's Care in Prison
>
> 1. The mother child bond is not developed and may be difficult for the mother and child to regain in the future when the mother is released from prison especially if the child has bonded closely with a foster parent or caregiver.
> 2. Babies in care of relatives or Child and Family Services may suffer abuse, neglect and physical harm. Case loads of social workers are often very heavy making supervision on a micro-scale difficult.
> 3. Child development specialists indicate that the critical period for the development of attachment which is key to all other relationship skills is between 2-20 months. If during this time the child is unsettled, not bonded with insecure attachment the consequences to his/her future are potentially serious. If the child remains with the mother in prison

> during the mother's sentence the needs of this critical period can be monitored and met.
>
> 4. When babies are apprehended mothers in prison do not feel power or incentive to be the mother to the absent child. They may feel abandoned and a stranger to their child who may reject them on visits preferring the caregiver. Their own attachment disorders (when present) are aggravated by these events and may exacerbate their dysfunctional lifestyle.
> 5. Mothers of apprehended infants may not concentrate on programs and therapeutic interventions because of worry and separation depression thus making parole release difficult and custody thwarted.
> 6. Mothers may lose optimism and not participate in programs as they despair of having their child returned to their care. They may return to substance abuse in the community when they fail to succeed in overcoming hurdles to regaining custody or even visits with their children which [seem] endless to them. They lose hope that they can satisfy the requirements placed before them.
> 7. As a result recidivism in these women does not decrease. It may remain at the same level as when the woman was incarcerated or increase because of frustration and hopelessness. Many women returning to prison have told the writer, "I was determined to get custody of my baby. Nothing worked. That's when I gave up, used and here I am."
> 8. Exclusion of mothers convicted of violent crimes may also be unduly discriminatory if the crime did not involve danger that could affect a child. Many of women convicted of violent crimes have low recidivism rates and keeping their baby with support may be important to maintaining that rate and even reducing it.
> 9. If a baby has become closely bonded to a foster parent or caregiver removing that baby and placing it with the biological mother may cause the child traumatic stress. Consistent mothering by the child's mother with support where required is the best alternative for both mother and baby.

[260] Dr. Koopman agreed that assessing the best interests of a child is an exercise that is highly specific to the particular circumstances. She also agreed that further research is required with respect to mother baby programs generally. It was her opinion nonetheless that the Mother Baby Program has positive merits.

[261] Dr. Koopman did not believe that attachment between mother and child could occur based upon visitation where a child is in the consistent care of others. In her opinion, visits could not occur on any basis that could be beneficial to form infant attachment. Secure attachment to the mother could not be effected through visitation.

B. Dr. Ruth Martin

[262] Dr. Martin is a physician. She was the prison physician at ACCW throughout the entire duration of the Mother Baby Program. Dr. Martin had also worked at BCCW prior to joining ACCW.

[263] Dr. Martin described a discussion with Ms. Tole that took place during the planning phase of ACCW in which Ms. Tole asked if Dr. Martin would support a mother baby program at ACCW. They discussed what would need to be in place.

[264] Dr. Martin provided an expert opinion concerning the same three issues discussed by Dr. Koopman.

[265] As to the medical, psychological and social benefits provided to pregnant women, mothers and their children in the provincial correctional system by programs such as the Mother Baby Program at ACCW, Dr. Martin stated:

> Benefits provided to pregnant women, mothers and their children in the provincial corrections system by initiatives such as the Infant and Mother Health Initiative in the Alouette Correctional Centre for Women (ACCW) include:
>
> I. The benefits of providing gender sensitive and culturally sensitive approaches for incarcerated women, who will greatly benefit from these approaches;
>
> II. Normalising prison mother-infant units, which are standard practice in at least 22 countries, for women who deliver their baby while in prison;
>
> III. Benefits of breast feeding for baby;
>
> IV. Benefits of breast feeding for mother;
>
> V. Benefits of maternal-infant bonding for the baby;
>
> VI. Benefits of maternal-infant bonding for substance dependent women;
>
> VII. Benefits of familial attachments for incarcerated women's successful (re)integration;
>
> VIII. Benefits of positive mother-infant prison experiences;
>
> IX. The benefit to the ACCW context;
>
> X. ACCW health care staff provided support;
>
> XI. Women in ACCW supported each other;
>
> XII. Seven of the eight babies in ACCW were breast fed;
>
> XIII. Other incarcerated women at ACCW also benefitted;
>
> XIV. ACCW physician observations confirmed the above benefits.

[266] Dr. Martin noted:

> ***I. Benefits of gender sensitive and culturally sensitive incarceration approaches***
>
> Throughout the world incarcerated women tend to be younger than the general population; they tend to be of child bearing age and tend to be poorly educated. In addition, many women who are imprisoned have experienced physical and sexual abuse and traumatic childhoods (2). In addition to increased prevalence of all of these factors among incarcerated women in Canada, Aboriginal people are disproportionately represented among Canadian incarcerated populations, when compared with the general population. For example, in BC, various studies indicate that 25% to 35% of provincially incarcerated women are Aboriginal (3-6), compared with 3-5% in the general population (7).

[267] She also cited the *Kyiv Declaration on Women's Health in Prison*, found in the UNODC & WHO Europe's background paper *Women's Health in Prison – Correcting gender inequity in prison health* (2009) which states in part:

> When women give birth or have care of a baby while in prison, it is important to have a regime that allows the mother to nurture and bond with her child. The age until which children can stay with their mothers in prison varies widely across Europe. Three years is the most common age limit.

[268] In response to the question of whether the provincial corrections context negatively impacts the above benefits, if so how and to what extent, Dr. Martin concluded:

> … the provincial corrections context did not negatively impact any of the benefits related to breast feeding, mother-infant bonding, mother-child relationship, and the benefit of the support to incarcerated mothers and their infants provided by health care staff and by other incarcerated women. In this section, I have described some ways that the provincial correctional context potentially has a negative impact on the benefit of gender sensitive and culturally sensitive health promotion approaches, such as an Infant and Mother Health Initiative. This negative impact relates to correctional staff's varied support towards such an initiative and its participants; this negative impact could be mitigated by ministerial support for such initiatives.

[269] Discussing the medical, psychological and social harms caused to pregnant women, mothers and their children in the provincial corrections system by separation at or near birth, Dr. Martin stated that alternatives to the Mother Baby Program such as visits do not provide an adequate mechanism for attachment. She noted that

interference with an infant's attachment puts the infant at greater risk for developmental deficits, feelings of neglect and insecurity.

[270] She noted that incarcerated mothers who are separated from their children report distress, guilt, depression and suicidal ideation. Increased use of drugs and alcohol occurs as a coping mechanism. Mothers who have been separated from their children have greater difficulty re-integrating and are significantly more likely to be re-incarcerated.

[271] Dr. Martin noted that separation of infants inhibits breastfeeding. Infants who are not breastfed are at greater risk of developing diabetes and allergies, as well as gastrointestinal and respiratory infections.

[272] Finally, she noted that infants entering foster care often experience multiple placements which disrupt normal development processes. Separation due to parental incarceration places children at greater risk for anti-social and delinquent behaviours and poorer educational outcomes.

[273] Her opinion, based both on her personal experience and review of the literature, is that the benefits of the Mother Baby Program outweighed any detriments.

C. Professor Michael Jackson

[274] Professor Jackson is a professor of Law at the University of British Columbia. He has conducted extensive research in the area of correctional law, policy and practice in Canadian prisons. Professor Jackson conducted a review of the relevant literature concerning mother baby programs world-wide, which he summarized in his report.

[275] He concluded that:

> 1. Mother and child programs have a long history in many jurisdictions [around] the world and while not universal they are an important element of contemporary correctional systems. With the adoption of both international human rights instruments, particularly conventions recognizing the rights of [children] and of women-centric correctional programs, new mother child units

> are being introduced and there are calls for both increasing and enriching the scope of existing programs.

[276] In addition, Professor Jackson concluded that the ACCW population was similar to that in many of the prisons referred to in the international literature. Moreover, ACCW was a modern institution similar to prisons in the Canadian federal system, the U.S., Europe, Australia and New Zealand. This in his opinion, made:

> 2. …meeting the challenges of providing suitable accommodation for mothers and young children more manageable than most of the older cell-based institutions that exist in many other countries.

In his opinion:

> … The Canadian federal experience, dealing with in some cases with women who have been in custody on remand at ACCW, demonstrates that it is possible to develop and implement a comprehensive policy and operational framework for addressing all the problems that a correctional system must deal with to ensure that the best interest of the child are met when they are accepted for residence into a prison with their mother and that safety and security concerns are addressed. Policy frameworks in other jurisdictions, particularly where explicit reference is made to the relevant international human rights instruments, are also comparable models that can be used in the framing of British Columbia's provincial framework.

D. Dr. Carmen Gress

[277] Dr. Gress has a Ph.D. in Educational Psychology. She is currently the Director of the Research, Planning & Offender Programming at Corrections. She provided a report outlining data concerning characteristics of the population of sentenced women in the province, criminogenic risk factors and factors relating to recidivism.

[278] The information in the report is consistent with observations of other witnesses. The population of provincially incarcerated women is poorly educated, with 66% having completed Grade 11 or less, and generally unemployed, with only 7% having been in full or part-time employment before their incarceration. Aboriginal women are significantly overrepresented.

[279] Dr. Gress' report notes that approximately 35% of the population at ACCW in 2008 and 2011 was on remand and that in those years approximately 70% of inmates were serving sentences of less than 60 days. However, provincial sentences include sentences up to two years less a day, and significant numbers of inmates did receive sentences in excess of the averages up to the two-year cut-off.

[280] The average stay for inmates at ACCW from 2004 to 2011 was between 59.5 days to 82.9 days. The average daily count at ACCW has fluctuated from 55.8 in the first quarter of 2004, reaching a high of 140.4 in the first quarter of 2008, then falling in subsequent years. The average count by year was:

2004/2005 – 69.6
2005/2006 – 96.8
2006/2007 – 122.1
2007/2008 – 136.0
2008/2009 – 129.0
2009/2010 – 102.5
2010/2011 – 104.8

E. Dr. Maureen Olley

[281] Dr. Olley is a registered psychologist with a Ph.D. in clinical psychology. She has extensive experience in corrections and has held the position of Director of Mental Health Services with Corrections.

[282] Dr. Olley stated that:

> … It is my opinion that the types of mental health and behavioural problems among inmates at ACCW include a broad range of mental disorders, as well as a variety of symptoms of mental illness even if not to the degree of meeting diagnostic criteria. These problem areas include:
>
> - Substance Use Disorders, including longstanding patterns of alcohol and poly-drug misuse;
> - Mood Disorders, including depressive and manic symptoms;
> - Anxiety Disorders, including panic attacks, post-trauma reactions, obsessive-compulsive symptoms, and social anxiety;
> - Personality Disorders, including disturbances in interpersonal functioning and emotions regulation;

- Eating Disorders, primarily bulimia symptoms;
- Schizophrenia and other psychotic disorders, including drug-related psychosis;
- Attention-related disorders, such as Attention Deficit Hyperactivity Disorder; and
- Brain injuries and disorders affecting cognitive abilities, such as Fetal Alcohol Spectrum Disorder, learning disabilities, and literacy issues.

[283] She also stated that due to the uncertainty of their situation, she would expect that the remand population may experience more symptoms of anxiety or other symptoms related to a generally heightened level of stress.

[284] There is currently no system in place to collect data on mental health problems or illness among inmates and thus no way to identify trends. Dr. Olley was of the opinion that the prevalence of such problems was high, particularly when substance abuse and interpersonal problems are included.

[285] She described various symptoms associated with the mental health and behavioural problems encountered among the inmates of ACCW. It was her opinion that:

> …depending on the nature of the symptoms, individuals with the types of mental health problems noted above may pose a risk to themselves, others, and the security of the institution.

[286] Dr. Olley noted that ACCW is a medium and open security centre and therefore any individuals identified as high risk would generally be transferred to SPT. However some level of risk remains.

[287] Dr. Olley described the screening process utilized within Corrections to deal with health and mental health concerns as follows:

> 5.7.1 In response to your question #4, in BC Corrections, all newly admitted inmates are interviewed within 24 hours of the time of intake for health and mental health concerns. The mental health screening protocol used by Mental Health Screeners includes the administration of the Jail Screening Assessment Tool (JSAT), a published instrument (of which I am a co-author) that has been validated by empirical research and has been utilized by BC Corrections in various formats for over 15 years. Mental Health Screeners are trained to use the JSAT manual, which includes guidelines for conducting mental health screening

interviews, and results are documented on the JSAT form enclosed with this report. In BC Corrections, a computerized version of the JSAT is used.

5.7.2 The JSAT is used to assess mental health treatment history and current mental health status; identify risk for suicide/self-harm, violence and victimization; assess current and past substance use issues; assess social history and supports; and identify likely management needs while in custody. Inmates identified as having mental health needs are referred to the Mental Health Program through the Mental Health Coordinator (MHC), who is typically a Registered Social Worker, Registered Psychiatric Nurse, or Registered Nurse with mental health training and experience. The MHC reviews all mental health intake screenings on a daily basis, follows up individually with inmates, and triages referrals to the appropriate mental health professionals, as required.

5.7.3 When an inmate is transferred to another centre, the mental health screening is not repeated, however, the health care record is reviewed prior to transfer, and the inmate's current mental health status and treatment plan is noted. The receiving centre also reviews the health care record, and for inmates with mental health needs, a referral is made to the MHC. At ACCW, mental health screenings are not completed, unless an inmate's health care record indicated that the mental health screening was not completed at the previous centre, or otherwise incomplete. The MHC at ACCW usually reviews the completed mental health screenings on all new intakes.

5.7.4 Several other routine correctional processes and procedures were identified during which additional "screening" of inmates occurs. For example, inmate file reviews, interviews, and orientations are conducted at the time of transfer and shortly after arrival, and at later stages for longer-term and sentenced inmates. Corrections staff is trained to identify and respond to symptoms of possible mental health problems, and it was noted that corrections staff at ACCW routinely pass on observations and concerns to the MHC for appropriate follow-up.

5.7.5 Every correctional centre has at least one Mental Health Liaison Officer (MHLO), a correctional officer who is designated to provide enhanced services to inmates identified as having mental health issues. ACCW has one full-time MHLO. The MHLO receives specialized training in identifying mental health problems, and closely liaises between the Mental Health Program and corrections staff to increase the understanding of the needs of inmates with mental health concerns. MHLO areas of responsibility include case management, program delivery, individual support and crisis intervention for inmates, and release planning.

F. Dr. Michael Elterman

[288] Dr. Elterman is a clinical and forensic psychologist with a particular expertise in the evaluation of the best interests of the child in the context of child custody, child protection and parent-child attachment.

[289] Dr. Elterman provided an expert report in rebuttal to the report of Dr. Martin. The central theme of his report is that there is no general answer to the question of the best interests of children; rather the determination must be made on a case-by-case basis. He noted:

> …
>
> (1) … While counsel advises me that the threshold in the present case is risk of harm, I believe that the issue of harm is subsumed in the concept of Best Interest. I would argue that the criterion of Children's Best Interests should apply equally in the present prison context being considered here. …
>
> …
>
> (12) … In making the decision to implement a removal a social worker has to balance two potential risks to the child: The first is the risk of potential abuse which is compared to the risk of harm from the interrupted attachment. In the prison environment there needs to be the same type of risk assessment, ie. The risk of harm from potential abuse versus the risk of harm from interrupted attachment. …
>
> …
>
> (14) In summary, while there is agreement that ideally mothers and infants should be kept together, and that there is a value in attachment and breastfeeding, one has to look at the specific circumstances of the mother, the child, and the prison environment as this relates to the safety and welfare of the infant.

[290] Dr. Elterman stated that:

> There is no argument that it benefits the child to be breastfed and to form a secure attachment with the parent. Dr. Martin has concisely described the benefits to the child and mother.

[291] He emphasized that in each case there needs to be an assessment of the benefits, risks and potential costs to the infant of living in the prison environment considering factors such as:

- the mother’s history of violence and poor impulse control;

- MCFD involvement;
- the mother's history of substance abuse;
- the mother's mental health history;
- availability of alternative suitable caregivers who can provide a higher quality of care; and
- the environment at the institution.

[292] Dr. Elterman emphasized risks must be assessed in a relative manner. One must balance the costs and benefits and consider the risk of available alternatives. He agreed that he had found no report of any death of an infant in a mother baby program anywhere in the world.

[293] Dr. Elterman was of the opinion that any mother baby program at ACCW should be housed in a separate unit. He had not been told by the defendants in his instructions that there is a separate unit at ACCW, Monarch House, that is currently standing empty. Indeed he was instructed by the defendants to assume that there was no separate unit.

[294] Dr. Elterman conducted a review of the literature and agreed that he found no instance of any literature recommending against having a mother baby program at all. He agreed that the debate in the literature is not whether there should be such programs but how to structure the best possible program that balances the benefits and risks to the child.

G. Dr. Mary West

[295] Dr. West was qualified to give expert evidence in the areas of correctional operations including programs, security, physical plant and management. Her report was filed in rebuttal to the evidence of Professor Jackson. Dr. West did not visit ACCW. She was instructed by the defendants to assume for the purpose of her

report that Monarch House was not available. Her experiences in corrections have been entirely in the American context.

[296] Dr. West noted that mother baby programs are not widespread in the United States. Moreover the numbers are small and the variables large so that comparative studies have not been conducted. There are no standards established for such programs by any of the organizations that create standards for correctional institutions.

[297] Dr. West agreed that there is a body of research that shows a benefit to both mothers and children from such programs. For example, she cited research showing that mothers involved in such programs have fewer misconduct reports and lower recidivism rates. She agreed that contemporary design of prison nursery programs largely recognizes the need for a stimulating environment for the children and that this was an element of design that should be recognized.

[298] It was her opinion that based on her experience in the United States, the operational problems with implementation of such programs include intense staffing requirements, physical space requirements, and the need to keep children separate from violent and predatory offenders.

[299] She stated that if there is to be a mother baby program, there must be a safe environment with adequate medical, social and psychological support for the mothers and the babies. She believed that more research is required on how best to structure such programs. There needs to be an evaluation of existing programs in order to learn from them. Dr. West would advocate for the separation of mothers and babies into their own unit.

H. Dr. Richelle Mychasiuk

[300] Dr. Mychasiuk was qualified to give expert opinion evidence in the field of perinatal developmental neuroscience. Her report was filed in rebuttal to the reports of Drs. Martin and Koopman. Dr. Mychasiuk has no experience with prisons and never visited ACCW.

[301] Dr. Mychasiuk noted at the outset of her report that:

> When analyzing the relevance, validity and accuracy of the expert reports, given the circumstances surrounding the mother, I considered the primary focus of the investigation to be the best interests of the child….
>
> When deciding what the best interests of the child are, all circumstances need to be examined within the context of the whole picture, not taken and analyzed as individual items.

[302] Dr. Mychasiuk concluded that ACCW was a high risk and unpredictable environment based upon other reports and a review of literature on prison populations. Her conclusion that the environment was unpredictable was based in part on the fact that the population was transient with short sentences.

[303] The research Dr. Mychasiuk drew upon to support her conclusions concerning high risk environments were not prison studies. She did not review studies discussing the safety records of children in the community. She made no comparison between the risks in prison nurseries and the risks in the community, including foster care.

[304] In my view, there were many aspects of Dr. Mychasiuk's opinion and testimony that did not reflect a full appreciation of her role as an independent expert for this Court. For example, she was critical of Dr. Martin's endorsement of breastfeeding; however the papers that she cited make the same recommendations as Dr. Martin. Dr. Mychasiuk did not acknowledge this in her report. Dr. Mychasiuk suggested that Dr. Martin's opinion was dangerous because she recommended bed sharing when in fact Dr. Martin recommended rooming in without bed sharing, which is exactly the recommendation of the study cited by Dr. Mychasiuk. In addition, Dr. Mychasiuk was not aware of the ACCW policy which reflected that recommendation – rooming in without bed sharing.

[305] Dr. Mychasiuk criticized the plaintiffs' reports for failing to provide empirical/peer reviewed evidence with respect to the effects of mother baby programs. She then stated that on the basis of the review of the literature she conducted, the most positive long-term outcomes for children was a report that

indicated there were no adverse effects. In fact, however, the full quote from the passage she cited was:

> **Research shows that these programs benefit mothers and children.**
>
> - When adequate resources are available for prison nursery programs, women who participate show lower rates of recidivism, and their children show no adverse [effects] as a result of their participation.
> - By keeping mothers and infants together, these programs prevent foster care placement and allow for the formation of maternal/child bonds during a critical period of infant development.

[306] Thus her quote misrepresents the import of the passage. When this was put to Dr. Mychasiuk in cross-examination, she disagreed that her summary was not fair. Her evidence in this respect is to be contrasted with that of Dr. Elterman, who was also called by the defendants.

I. Dr. Tonia Nicholls

[307] Dr. Nichols is a professor of psychiatry at UBC. She was qualified as an expert in the examination of the application and adequacy of violence risk assessment instruments. She also provided a rebuttal report discussing recidivism.

[308] The recidivism report emphasized that family stability would only be one of several variables considered relevant in a risk assessment for recidivism. The most significant variables being: anti-social attitudes, anti-social associates, anti-social history, anti-social personality, problematic circumstances of home (family and marital), problematic circumstances of school/work, problematic circumstances of leisure and substance abuse. There is little evidence to suggest that there are significant differences between men and women in relation to these factors.

[309] Dr. Nicholls provided an extensive summary of the field of risk assessment. In that regard, she noted that the vast majority of research had been conducted with men, with very few studies having considered women and fewer still examining the risk of violence in women.

[310] Dr. Nicholls noted that:

> Correctional institutions in North America routinely evaluate new inmates for suicide risk and mental disorder. Considerably less attention has been paid to risk for violence, self-harm, and being victimized at admission to correctional institutions.
>
> BC Corrections is quite unique in that they have a long history of *screening* all new inmates for mental disorder as well as all of these risks (violence, suicide, self-harm, being victimized) (see Jail Screening Assessment Tool).

She noted that such assessments are not full violence risk assessments.

[311] She stated that there is no research addressing the risk of violence to unrelated infants in prisons and no measure to assess that risk. She found no evidence of adverse events involving infants in the published or unpublished literature. She contacted an international expert in the field who was not aware of any incident of violence occurring in mother baby units.

[312] She noted that studies of violence in women in correctional institutions found that women committed violence at substantially lower rates than men and that the nature of such violence was less serious.

J. Evelyn Wotherspoon

[313] Ms. Wotherspoon is a clinical social worker who has specialized in infant mental health and early childhood development. Her report was submitted as a rebuttal to the reports of Drs. Martin and Koopman. Prior to writing her report, Ms. Wotherspoon had never visited ACCW nor seen the environment while the Program was in operation. She was given no assumptions with respect to the role of the MCFD in relation to the Mother Baby Program. She never reviewed any social worker's assessment of the safety of the Program for a child, any documents that reflected any assessment of risk for babies placed in the Program, or any documents with respect to an assessment by a social worker of the comparative risks to placement in the Program as compared to being removed from the mother's care.

[314] Ms. Wotherspoon was not provided with assumptions or instructions regarding the criteria for participation in the Program or the conditions or rules for participation, other than the mothers were required to be non-violent.

[315] Ms. Wotherspoon emphasized that the standard of practice for social programs in the past decades has favoured evidence-based practice, meaning programs with defined goals, a rationale shaped by outcome research, and mechanisms for evaluation and reporting outcomes. She noted that there had been no such evaluation of the Program at ACCW. She was critical of the reports of Drs. Martin and Koopman because their conclusions were not drawn from a rigorous evaluation of the Program. However, it is also the case that the decision to cancel the Program was made without a foundation in any evaluation of its outcomes. No one, including the research arm of the Branch, was asked to conduct an evaluation of the Program.

[316] With respect to this issue, it is somewhat noteworthy that Ms. Wotherspoon makes no reference in her report to any of the research on mother baby programs that has been conducted.

[317] Ms. Wotherspoon noted the problem of confirmation bias, which she defined as “a tendency to seek out evidence or opinions that confirm a position that is already held and overlook or dismiss opinions and evidence that may counter that position.” She contrasts this to results of a “systematic or impartial survey”. She addressed this criticism to testimonials referred to by Dr. Koopman.

[318] I think the danger of confirmation bias is present as well in much of the evidence presented by the defendants. A clear example of the problem can be seen in the evidence with respect to the attitudes of the staff to the Program. Witnesses who have a positive view of the Program by and large reported positive reactions from staff. Conversely, Mr. Merchant, who had clearly soured on the Program, and Ms. Anderson, who had been told first that the Program was being cancelled and then asked to assemble concerns to be used in a communications strategy, reported mostly negative reactions from staff.

[319] In the result, to the extent to which attitudes of staff are a relevant consideration, they are unknown. Despite the Branch's commitment to evidence-based practice as described by Mr. Merchant, no one was ever commissioned to obtain a "systematic or impartial survey" of the staff's attitudes to, or experience with, the Mother Baby Program.

[320] Ms. Wotherspoon correctly points out that participation in a mother baby program is not the only factor that could improve rates of recidivism. I do not read any of the plaintiffs' experts as suggesting the contrary. She suggests that there could be other programs that reduced recidivism and achieved other positive outcomes, such as dog training programs. Again, no one on the plaintiffs' side suggested that the Mother Baby Program was the only type of program that could achieve positive results. That is however, for the purpose of this litigation, beside the point.

[321] Ms. Wotherspoon concluded that ACCW is a stressful household on the basis of a sampling of entries from the prison logs and the description of the characteristics of the population. However, many of the references she selects: a baby crying, a pregnant mother feeling stressed, a mother who is tired because her baby has been crying, or a colicky baby, are not uncommon outside of the prison context.

[322] Ms. Wotherspoon agreed that as a social worker making a placement decision about a child, the decision would be made on an individual not a generalized basis.

VII. FINDINGS OF FACT

A. Matters that were not Contentious

[323] For the most part, there were few disagreements with respect to the facts in this case. The following matters were essentially common ground or not seriously contested.

1. Characteristics of the Population of Women Incarcerated in Provincial Institutions

[324] Women constitute a small percentage of the provincially incarcerated prison population. Women offenders are significantly less violent, both in the institution and in the community, than male offenders.

[325] These female prisoners are a vulnerable population. They have relatively low levels of education and employment. A high proportion of women who are incarcerated in provincial institutions have issues with substance abuse. Many have mental health issues. A high proportion of the women have been victims of abuse, both as children and as adults. Women incarcerated in provincial institutions have more significant health issues and require greater medical care than do male offenders.

[326] Many of the women are mothers of dependent children. A high proportion of these mothers are the primary caregivers for their children. Many are single mothers.

[327] Aboriginal women are significantly overrepresented in the population of women incarcerated in provincial institutions. For example, in 2003, 37.1% of provincially sentenced admissions and 34.8% of remanded women admitted to provincial institutions were Aboriginal women. In 2010/2011, Aboriginal women accounted for 42% of sentenced admissions and 29% of remand admissions while accounting for 4.8% of the general population.

2. Rooming In

[328] The immediate post-partum period is critical for the development of mother-baby relations and for the promotion of parental capacity. Rooming in with the mother from birth is considered the best practice associated with health and social benefits to both mothers and infants.

3. Benefits of Breastfeeding

[329] There is a consensus of international health experts that babies should be exclusively breastfed until age six months and that they continue to breastfeed on

demand until age two. Breastfeeding provides health and nutritional benefits to the infant. It is also important for the infant's psychosocial development. Infants who are not breastfed often have weakened immune systems and are at increased risk for diabetes and allergies, as well as gastrointestinal and respiratory infections.

[330] There is also evidence that breastfeeding provides health benefits to the mothers. Breastfeeding is associated with significantly lower rates of breast and ovarian cancer and Type II diabetes. Breastfeeding has also been associated with a reduced risk of post-partum depression.

[331] Separation of mothers from infants during incarceration has, predictably, been found to inhibit breastfeeding.

4. Attachment

[332] One of the most important developmental tasks during infancy is the attachment of the infant to his or her primary caregiver, usually but not necessarily the mother. The critical period for the formation of attachment is six months to two years. Infants will attach to an adult who is sensitive and responsive during social interactions and who acts as a consistent caregiver.

[333] Secure attachment assists in the infant's psychological and social functioning. Attachment is necessary for the infant's normal neurobiological function. Successful attachment is related to the ability to form future intimate relationships, the ability to retain emotional balance, the ability to find happiness and satisfaction being with others and the ability to rebound from disappointment and misfortune.

[334] Interfering with the formation of attachment puts the baby at greater risk for developmental deficits, insecurity, feelings of neglect and can have lifelong implications. For example, adults who experienced faulty attachment as infants will often experience difficulty understanding their own emotions and those of others. Their ability to build or maintain relationships is often impaired.

5. Emotional Well-being of Mothers

[335] Separation of incarcerated mothers from their infants has been associated with depression and suicidal ideation, increased use of alcohol and drugs and increased criminal activity.

B. Matters in Contention

[336] The following are matters that were the subject of controversy.

1. Program or *Ad Hoc* Practice

[337] The defendants submit that:

> The decision which is before the court is not, as the plaintiffs would have it, a decision to cancel a "mother-baby program" and deny mothers and infants the benefits of early bonding and breast-feeding. What is before the court is a decision to end an *ad hoc* practice of allowing new-born infants to live with their mothers in ACCW, and replace it with a formal policy.

[338] The defendants submit that while the plaintiffs have characterized the practice as a program and the decision to end the practice a cancellation of a program under the *Correction Act Regulation*, B.C. Reg. 58/2005 [the *Regulation*], this is a mischaracterization of the nature of the decision. The defendants submit that allowing inmates to reside with their infants was not part of a formal program or policy but a practice amounting to a series of individual decisions of the warden.

[339] I have concluded that the plaintiffs are correct to characterize what occurred as a program. In that regard I note the following:

(a) both the *Correction Act* and the *Regulation* make reference to programs but without definition of the term. Section 38 of the *Regulation* is the particular provision at issue in this litigation. It provides:

> 38 (1) The person in charge must establish programs for inmates, including religious and recreation programs.

(b) while Mr. Merchant stated that he drew a distinction between a practice and a program based on whether or not there was a formal policy in place,

the legislation does not require that the person in charge obtain approval from the Director of Adult Custody before establishing a program, nor does the legislation state that having a formal policy is a requirement for a program established by a person in charge pursuant to the *Regulation*;

(c) Ms. Tole, the relevant "person in charge" at the time the Program was initiated, did identify this as a program at the time, see for example:

(i) email from Brenda Tole to AG, ACCW, All Staff August 26, 2005; Subject: Mother and Child Program:

> Just an update on our planning around this program…

(ii) ACCW Baby Bulletin, September 13,2005:

> …soon there will be a new mother and baby living with us at ACCW. This is an important first step for all of us in the opening of the Mother and Child Program.

(iii) Mother Guidelines – Mother Child Program;

(d) the elements that one would expect of a program, as distinct from a series of *ad hoc* decisions, were present – there were criteria for admission, conditions for participation, rules with respect to contact with the infants, screening, and the roles and participation of other agencies were addressed;

(e) Ms. Anderson, who replaced Ms. Tole as the relevant "person in charge" agreed that this was a program that lacked formal policy; and

(f) there is reference to this as a program within Corrections' own documents, see for example:

(i) Briefing Note to the Commissioner, March 28, 2013:

> **Issue:**
>
> Seeking your approval to allow Fraser Valley Institution (FVI) and the Alouette Correctional Centre for Women (ACCW) to establish an Operational Protocol for the transfer of pregnant provincially-sentenced inmates to Fraser Valley Institution in order to participate in CSC's Institutional Mother-Child Program.

> **Background:**
>
> ACCW approached FVI to develop a process to transfer pregnant provincial inmates to CSC to afford them the opportunity to participate in CSC's Institutional Mother-Child Program. A protocol of this nature would allow ACCW to respond to the needs of their population. ACCW previously offered a mother-baby program however it was suspended in February 2008 by the incoming warden. Current and former inmates from ACCW have filed a lawsuit against the Minister of Public Safety and Solicitor General of British Columbia, the Attorney General of British Columbia and Lisa Anderson, former Warden of ACCW for cancelling the program. In their lawsuit they argue that mothers and babies have constitutional rights to remain together. A judgment has not yet been rendered. [Emphasis added.]

(ii) Email from Stephanie Macpherson to Bert Phipps, cc Bruce Bannerman, Steve Dix, Brent Merchant; December 19, 2008:

> I received a call from Alan Markwart this a.m. indicating the SG and his minister had jointly received a letter from the BC Civil Liberties Association advocating for the return of the baby program…

(iii) Email from Diana Baerg to Lisa Anderson; May 2, 2008:

> During the time that the mother/baby program was operating at ACCW the process for selecting babysitters by organized by the sentence management coordinator.

2. Decision to Cancel or Policy

[340] The plaintiffs take the position that the government action that is the central issue in this litigation is the decision to cancel the Mother Baby Program. The defendants submit that the relevant government action is the adoption of a comprehensive policy for pregnant women in BC Correctional centres.

[341] I find that it was the decision to cancel the Mother Baby Program that is the government action at issue in this litigation. In that regard I note the following:

(a) as noted above, the governing legislation does not make reference to any requirement for programs to be accompanied by or manifested in formal policies; and

(b) the implementation of the decision to cancel the Program predated the adoption of the policy. It was decided to delay implementation of the decision until the last infants who were already in the institution left ACCW. That occurred at the end of February 2008. Following that, in March 2008, Ms. Inglis was told that the Program had been cancelled. No further babies were admitted to ACCW thereafter. However, the policy was not adopted until July 2009, after the commencement of this litigation. The policy merely reflects the decision that had already been made and implemented.

3. Timing of the Decision to Cancel the Program

[342] The plaintiffs submit that Mr. Merchant had reached his decision to cancel the Program sometime in the spring or early summer of 2007, before the meeting in July 2007 when he spoke with Ms. Anderson about accepting the position as warden of ACCW. The defendants submit that Mr. Merchant made his decision sometime in the spring of 2008.

[343] I have concluded that Mr. Merchant made the decision to cancel the Mother Baby Program in the period after March 2006 when he requested Ms. Tole to produce a policy to deal with female inmates and their children and before his meeting with Ms. Anderson in July 2007. The implementation of the decision was delayed until babies that were currently in the Program left the facility. In that regard I note the following:

(a) Ms. Macpherson produced a draft of a policy dated May 15, 2007 that excluded infants from returning with their mothers to ACCW – effectively entailing a cancellation of the Program. Neither Ms. Macpherson nor Mr. Merchant gave what I found to be a plausible account of the genesis of this policy. Mr. Merchant suggested that it was “something Ms. Macpherson came up with” while Ms. Macpherson suggested that it was part of an exercise of editing Ms. Tole’s draft. What is significant is that from this time forward there was never a draft reflecting any other possibility and no document reflecting that any other alternatives were being considered;

(b) Mr. Merchant told Ms. Anderson in July 2007 that Headquarters was no longer interested in housing babies at ACCW. She understood that from this point on her role was to implement this decision and to assist in managing the disclosure of the decision to inmates and other partners involved;

(c) Ms. Anderson stated that from this point forward there were ongoing discussions between herself and Mr. Merchant about when to disclose to others what had already been decided;

(d) Mr. Merchant agreed that he directed Ms. Anderson not to sign the protocol agreement in September 2007 because any protocol would need to reflect the fact that there were not going to be any babies at the institution;

(e) the defence witnesses offered no credible explanation why one mother (RN) was refused entry by the acting Warden, Matt Lang and separated from her infant in November 2007 on the basis that the Program was cancelled, and why another (LK) was similarly told in November 2007 that the Program was cancelled, and only had her infant admitted to the institution after threatening a "grievance" and meeting with Mr. Lang. The defence witnesses suggested there was a "misunderstanding" with Mr. Lang. However, the defendants did not call Mr. Lang. Moreover, the only evidence in the record is consistent with the Program having been cancelled, see for example:

(i) Email between the MCFD regarding call from Matt Lang, November 19 2007:

> I received a call from Matt Lang….He advised that he has been told by "headquarters" that due to "liability" issues the prison will not be accepting any babies to return with their mothers. The mother and baby program will no longer be in [existence].

(ii) Client Log of RN, 2007.11.16 entry by Diana Baerg:

> R was told that the mother/baby program at ACCW has been stopped at this time.

(iii) Client Log of LK, 2007.11.28 entry by Janet Blackmore:

> Spoke with L this afternoon and confirmed with her that we are not currently offering the Mother/Child program here at ACCW…

(f) Ms. Macpherson's email to Matt Lang dated December 12, 2007 states that the Branch "will be" implementing policy, in this case the decision to cancel the Program;

(g) Mr. Merchant testified that he had not made up his mind at various junctures and that he was waiting for information. However, there is no evidence that he requested any information and no record of any deliberative process; and

(h) Ms. Granger-Brown tendered her resignation in October 2007 after being told that the Program was being cancelled.

4. Reason for the Decision to Cancel

[344] The plaintiffs submit that Mr. Merchant decided to cancel the Program because he came to the conclusion that the custody of infants was outside the Corrections mandate and he was not prepared to extend that mandate. The defendants submit that Mr. Merchant decided to cancel the Program because he concluded that the warden could not manage the risks to infants at ACCW.

[345] I have concluded that Mr. Merchant did not cancel the Program because he concluded that the warden could not manage the risks to infants. I find that he concluded that the custody of infants was not within the mandate of Corrections and that he was not prepared to assume any risk in that regard. In my view, that is the import of Mr. Merchant's testimony.

[346] In addition, there is no evidence of the sort of inquiries that one would expect to see if there had been a considered deliberation with respect to risk and whether it could be managed. This is consistent with the decision being one arising from mandate rather than an evaluation of risk management. I note in particular:

(a) Mr. Merchant's evidence was clear that he decided to cancel the Program because he could not guarantee the safety of infants;

(b) he stated that the custody of infants was not within Corrections' mandate;

(c) he agreed that Corrections could not guarantee anyone's safety in any facility;

(d) that the decision was one based upon mandate is consistent with the absence of any assessment or evaluation of the Program or its risks undertaken prior to the decision being made;

(e) there were no documented or actual incidents affecting the safety of infants that had come to Mr. Merchant's attention and he did not commission any review of the prison logs to determine if there were any such incidents;

(f) there is no evidence of any deliberation with respect to what risk there was to infants, its nature and magnitude or of how any such risk could be managed; and

(g) it is clear that infants remained at ACCW after the decision had been made to cancel the Program. It was determined that the announcement of the decision was to be made after the last infant left the facility. It is also clear that none of the persons in authority concluded that the risk could not be managed at that time. If they had so concluded, it is my view that those infants would not have been permitted to stay. Indeed Ms. Macpherson, when asked about her assessment of the risk at that time, stated that her view was that it could be managed.

VIII. BASIS FOR CHARTER REVIEW

[347] Corrections has statutory jurisdiction to run ACCW and to provide programs for inmates. The starting point with respect to the legislative context is the *Correction*

Act. The power to make regulations is provided to the Lieutenant Governor in Council by s. 33.

[348] The authority to run the Mother Baby Program is found in ss. 1, 38(1) and (2) of the *Regulation*, which provide:

> **1**
>
> …
>
> "person in charge" means the person in charge of a correctional centre;
>
> **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.

[349] The Mother Baby Program was established by Ms. Tole pursuant to her statutory duty and authority under s. 38 of the *Regulation*. The Mother Baby Program was terminated by Ms. Anderson at the direction of the Provincial Director, Brent Merchant, pursuant to the same statutory authority.

[350] One of the remedies sought by the plaintiffs is a declaration pursuant to s. 52(1) of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [the *Constitution Act, 1982*], that s. 38(2) of the *Regulation* is inconsistent with ss. 7, 12 and 15 of the *Charter* and is therefore of no force and effect to the extent of the inconsistency.

[351] The choice of which programs to establish at ACCW is a matter of discretion. Likewise the decision to cancel the Mother Baby Program was the result of an exercise of discretion, specifically the discretion of Mr. Merchant. The decision was subsequently formalized into a policy.

[352] The first question is whether the alleged breaches arise from the impugned legislation itself or from the actions of entities exercising decision-making authority

pursuant to the legislation: see *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 22 [*Eldridge*].

[353] In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 [*Slaight*], the Court held that legislation conferring a discretion must be interpreted consistently with the *Charter*, insofar as that is possible. Justice Lamer stated at 1078:

> As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so.

[354] In the present case, I am satisfied that the impugned provisions of the *Regulation* are capable of being interpreted in a manner consistent with the *Charter*. The breach, if any, lies in the exercise of discretion.

[355] In *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para. 117 [*PHS*], Chief Justice McLachlin, for the Court, confirmed that an exercise of discretion taken pursuant to a statute must conform with the *Charter*:

> 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.

[356] As Justice La Forest concluded in *Eldridge* at para. 20:

> 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*.

[357] Accordingly, the questions for this Court are whether Mr. Merchant's exercise of discretion in cancelling the Mother Baby Program complied with ss. 7, 12 and 15 of the *Charter* and if not, what remedy is appropriate and just in the circumstances.

IX. LEGISLATIVE AND SOCIAL CONTEXT

[358] The analysis of rights under the *Charter* must be contextual, giving appropriate consideration to the legislative and social context of the provision at issue: see *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48 at para. 71 [*K.L.W.*].

A. International Instruments

[359] A consideration of this context is informed by international instruments. Our Court of Appeal has affirmed the principle that international instruments, although not part of the domestic law of Canada, should inform the interpretation of the meaning and scope of the rights under the *Charter* and the principles of fundamental justice: see *Victoria (City) v. Adams*, 2009 BCCA 563 at para. 35 [*Adams*].

[360] This principle was also recently affirmed by the Supreme Court of Canada in *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 [*Divito*]. At paras. 22 and 23, Justice Abella, for the majority, repeated statements by the Court that the *Charter* should in general be presumed to provide protection at least as great as is found in the international human rights documents ratified by Canada:

> [22] Canada's international obligations and relevant principles of international law are also instructive in defining the right: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292. In *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, Dickson C.J., dissenting, described the template for considering the international legal context as follows:
>
>> The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of "the full benefit of the *Charter*'s protection". I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by

> similar provisions in international human rights documents which Canada has ratified. [p. 349]
>
> [23] More recently, in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, McLachlin C.J. and LeBel J. confirmed that, "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified" (para. 70). This helps frame the interpretive scope of s. 6(1).

[361] The following international instruments are of particular significance to the issues in the present case:

(a) *Universal Declaration of Human Rights*, G.A. Res. 217 (III), UNGAOR, 3d Sess., Supp. No. 13, UN Doc. A/810, (1948) 71:

> *Article 16(3)*
>
> The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
>
> …
>
> *Article 25(2)*
>
> Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

(b) *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 (accessioned 19 May 1976):

> *Article 10*
>
> The States Parties to the present Covenant recognize that:
>
> 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. …
>
> 2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. ….
>
> 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. …

(c) *Declaration of the Rights of the Child*, G.A. Res. 1386 (XIV), UNGAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354 (1959) 19:

> 1. The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.
>
> 2. The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.
>
> …
>
> 4. The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care. The child shall have the right to adequate nutrition, housing, recreation and medical services.
>
> …
>
> 6. The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.

(d) *Convention on the Rights of the Child:*

> *Preamble…*
>
> Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

…

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals [legally] responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

…

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

…

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.

…

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

(e) *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*, G.A. Res. 41/85, UNGAOR, 41st Sess., UN Doc. A/RES/41/85 (1986):

> *Article 3*
>
> The first priority for a child is to be cared for by his or her own parents.

(f) *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/295, UNGAOR, 61st Sess., Supp. No. 49, UN Doc. A/RES/61/295 (2007):

> *Preamble*
>
> *Recognizing 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,

(g) *Basic Principles for the Treatment of Prisoners*, G.A. Res. 45/111, UNGAOR, 45th Sess., UN Doc. A/RES/45/111 (1990) (cited as a relevant international norm in *Bacon v. Surrey Pretrial Services Centre*, 2010 BCSC 805 at para. 272 [*Bacon*]):

> *Basic Principles for the Treatment of Prisoners*
>
> 1. All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.
>
> …
>
> 4. The responsibility of prisons for the custody of prisoners and for the protection of society against crime shall be discharged in keeping with a State's other social objectives and its fundamental responsibilities for promoting the well-being and development of all members of society.
>
> 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.

[362] The plaintiffs submit that the contextual analysis should be informed by both the domestic legislation and international instruments pertaining to the rights of children and their mothers. These instruments and enactments, the plaintiffs submit, illustrate the recognition of the importance of keeping families together, with the state's support should that prove necessary.

[363] The defendants acknowledge that the use of international instruments to aid the interpretation of the *Charter* is well established. However, it was the defendants' submission that in the present case the international conventions do not support the conclusion that there has been an infringement of *Charter* rights. In particular, the defendants note that the international instruments in general do not guarantee that mothers and children will never be separated and do not deal specifically with the context of separation as a result of incarceration of the mother. Finally, the defendants note that the *Convention on the Rights of the Child* explicitly contemplates that parents and children may be separated because of imprisonment.

[364] In my view the following important themes are reflected in the international instruments and are relevant to the analysis of the issues in the present case:

(a) the acknowledgment of the family as the fundamental social unit that as such is entitled to protection by the state;

(b) that special protection should be afforded to mothers, before and after childbirth, and children;

(c) that the best interests of the child shall be a primary consideration in all actions taken by the state concerning children;

(d) that a child shall not be separated from his or her parents against their will except with due process and where it is necessary in the best interests of the child;

(e) that except for those limitations that are demonstrably necessitated by the fact of incarceration, incarcerated persons retain their residual rights and freedoms; and

(f) that the state's responsibilities with respect to prisoners shall be discharged in keeping with its fundamental responsibilities for promoting the well-being and development of all members of society.

B. Legislation

[365] As noted earlier, the decision that is at issue is governed by the provisions of the *Correction Act* and *Regulation.* Neither the *Correction Act* nor the *Regulation* contains any legislative statement of purpose. The defendants submit that the *Correction Act* and *Regulation* have two purposes:

> (a) The dominant purpose is to provide Corrections officials with the authority to ensure the safety of individuals in the provincial correctional centres, including inmates and Corrections employees, and the public, by ensuring that the court's warrant of committal is carried out, and the inmate remains separated from society.
>
> (b) A second purpose of the [*Correction*] *Act*, which is subject at all times to the first, is to provide inmates with adequate living standards and an opportunity to rehabilitate and prepare for their return to society. This is reflected, in particular, by s. 2 of the *Regulation,* which provides that, subject to safety concerns, the Warden must ensure that an inmate is given certain fundamental privileges such as food, clothing, exercise, reading materials and access to visits, and s. 38 of the *Regulation*, which provides that, as far as practical, the Warden must establish programs designed to assist inmates to improve their education and training and reduce the risk they present to the community.

[366] Except for the suggestion that matters such as food can be characterized as privileges, there is little quarrel with this as a general statement of purpose.

[367] Another important document to flesh out the legislative context is the Statement of Philosophy. Ms. Tole stated that its purpose was to set out the guiding principles for Corrections in its management of women offenders. It provides:

STATEMENT OF PHILOSOPHY – CORRECTIONAL SERVICE FOR WOMEN

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 responsive to the needs of women offenders in both community and institutional settings. The Statement of Philosophy provides:

In delivering services and programs to woman offenders, we are committed to the following beliefs, values and principles:

1. *The significance of gender should be acknowledged in the design and operation of all facilities, services and programs.*
2. *The experiences and needs of men and women offenders are different. One important difference is that most women offenders have experienced victimization or exploitation, most often by men, and they continue to be vulnerable.*
3. *Facilities, programs and services must recognize these distinctive factors and provide an environment that is respectful, safe and constructive for both women offenders and the staff who work with them. Because privacy and dignity are fundamental for women in the custodial environment, living units are staffed by women officers only.*
4. *To most effectively address criminogenic needs in custody and community settings, techniques and materials which are demonstrated to support women's learning and behaviour change should be incorporated in supervision, case management and programming.*
5. *All staff providing direct service to women offenders should understand the significance of gender in their work, including the experience and perception of authority by women, and the dynamics of cross-gender supervision and care.*
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.*
7. *Women offenders who are members of any minority group may face additional challenges, which should be acknowledged and addressed as effectively as possible.*
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 specifically for women in every location, but every effort should be made to meet the distinct needs of women offenders.*

[368] The plaintiffs submit that an important aspect of the legislative context is the *CFCS Act* and in particular the following provisions:

> **Guiding principles**
>
> **2** This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:
>
> (a) children are entitled to be protected from abuse, neglect and harm or threat of harm;
>
> (b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;
>
> (c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;
>
> (d) the child's views should be taken into account when decisions relating to a child are made;
>
> (e) kinship ties and a child's attachment to the extended family should be preserved if possible;
>
> (f) the cultural identity of aboriginal children should be preserved;
>
> (g) decisions relating to children should be made and implemented in a timely manner.
>
> **Service delivery principles**
>
> **3** The following principles apply to the provision of services under this Act:
>
> (a) families and children should be informed of the services available to them and encouraged to participate in decisions that affect them;
>
> (b) aboriginal people should be involved in the planning and delivery of services to aboriginal families and their children;
>
> (c) services should be planned and provided in ways that are sensitive to the needs and the cultural, racial and religious heritage of those receiving the services;
>
> …
>
> **Best interests of child**
>
> **4** (1) Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child's best interests, including for example:
>
> (a) the child's safety;
>
> (b) the child's physical and emotional needs and level of development;
>
> (c) the importance of continuity in the child's care;

> (d) the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship;
>
> (e) the child's cultural, racial, linguistic and religious heritage;
>
> (f) the child's views;
>
> (g) the effect on the child if there is delay in making a decision.
>
> (2) If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests.

[369] The defendants submit that the only relevant pieces of legislation are the *Correction Act* and *Regulation.* They submit that the *CFCS Act* has no application to the present circumstances. The defendants submit further that absent specific language in the governing legislation whereby the state accepts the best interests of the child as the governing standard, the concept of the best interests of the child is not the applicable or indeed even a relevant standard. In that regard the defendants cite *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 at paras. 10-12 [*Canadian Foundation*], as authority for the proposition that the concept of the best interests of the child is not a principle of fundamental justice.

[370] I agree that pursuant to *Canadian Foundation*, the concept of the best interests of the child is not a principle of fundamental justice. I did not understand the plaintiffs to assert the contrary. However, it does not follow from that conclusion that the principle of the best interests of the child is irrelevant to the analysis in the present case. In that regard I note:

(a) as acknowledged by the Court in *Canadian Foundation*, Canada has ratified the *Convention on the Rights of the Child*, Article 3 of which provides that in all state actions concerning a child, the best interests of the child shall be a primary consideration;

(b) as noted earlier, the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified: see *Divito;*

(c) this case involves state action with respect to the infant children of incarcerated mothers;

(d) in 2006, the Ministry of Public Safety and Solicitor General and ACCW signed the protocol Agreement which incorporated and adopted the Guiding Principles set out in s. 2 of the *CFCS Act*. Thus, prior to the decision to cancel the Program, the placement of the infants in question was determined in accordance with a judgment concerning their best interests;

(e) with the decision to cancel the Mother Baby Program, decisions with respect to babies of women incarcerated at ACCW are no longer made based on the consideration of the best interests of the child because the blanket exclusion of children from the institution removes the option of placement with the child's mother, the option presumed to be preferable at law; and

(f) Dr. Elterman and Dr. Mychasiuk, expert witnesses who were called by the defendants, placed considerable emphasis on the importance of decisions relating to the placement of children being made based upon the best interests of the individual child.

[371] For these reasons, I have concluded that the concept of the best interests of the child and the *CFCS Act* do form an important part of the context in this case. The defendants submit that Corrections is entitled to make decisions that will inevitably result in children being seized by the state without any consideration of the best interests of the children affected. In my view the state cannot be permitted, through such compartmentalization, to avoid its obligations under the *CFCS Act* and the values and rights represented in that statute or to sidestep the principle that in all state actions concerning a child, the best interests of the child shall be a primary consideration.

X. SECTION 7

A. General Principles

[372] Section 7 of the *Charter* provides:

> **7.** 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.

[373] As stated by the majority in *K.L.W.* at para. 70, s. 7 of the *Charter* requires the following two-step analysis to determine whether legislation or other state action infringes a protected *Charter* right:

> (1) Is there an infringement of the right to "life, liberty and security of the person"?
>
> (2) If so, is the infringement contrary to the principles of fundamental justice?

[374] The s. 7 analysis must be contextual, taking into account the social and legislative context as well as the seriousness of the violation at issue: see *K.L.W.* at para. 71; *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9 at para. 22 [*Charkaoui*]. In that regard, I note the principles referred to in the previous section drawn from the international instruments and legislative context.

[375] An additional relevant principle of interpretation is that equality interests should be considered in the interpretation of the scope and content of the s. 7 rights. In *J.G. v. New Brunswick (Minister of Health and Community Services)*, [1999] 3 S.C.R. 46 [*J.G.*], the concurring reasons of L'Heureux-Dubé, Gonthier and McLachlin JJ. stated at paras. 112 and 115:

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

> interpretive lens of the equality guarantee should therefore influence the interpretation of other constitutional rights where applicable, and in my opinion, principles of equality, guaranteed by both s. 15 and s. 28, are a significant influence on interpreting the scope of protection offered by s. 7.
>
> ….
>
> Thus, in considering the s. 7 rights at issue, and the principles of fundamental justice that apply in this situation, it is important to ensure that the analysis takes into account the principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15. The rights in s. 7 must be interpreted through the lens of ss. 15 and 28, to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society. [Emphasis added.]

[376] In *J.G.*, issues of gender equality were found to be engaged because women, and especially single mothers, are disproportionately and particularly affected by child protection proceedings. In addition, L'Heureux-Dubé J. noted at para. 114 that fairness in child protection hearings also has particular importance for the interests of parents who are members of other vulnerable groups, particularly visible minorities, Aboriginal people and the disabled.

[377] In the present case, the claimants and those that they represent are likewise members of disadvantaged and vulnerable groups – women, frequently single mothers, many suffering from addiction or mental illness, infants, and Aboriginal people. The s. 7 analysis in this case must be informed by the principles and purposes of the equality guarantee to ensure the law responds in an appropriate way to the needs and circumstances of these disadvantaged individuals.

[378] In my view, of particular importance in this regard is that a central purpose of the equality provision is to protect historically disadvantaged individuals and groups and to ameliorate their positions of disadvantage: see *R. v. Turpin*, [1989] 1 S.C.R. 1296 [*Turpin*]; and *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 66 [*Eaton*].

B. Is there an Infringement to the Security of the Person?

1. General Principles

[379] The starting point for the purposes of this case is the principle that an incarcerated person retains all of her civil rights, other than those expressly or impliedly taken from her by law: see *Solosky v. The Queen*, [1980] 1 S.C.R. 821. In particular, an inmate retains a residual right to security of the person: see *Bacon*.

[380] The right to security of the person has been held to protect both the physical and psychological integrity of the individual: see *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 173 (per Wilson J.); *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123 at 1173-1174; and *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 587-88 [*Rodriguez*].

[381] The interests of mothers and infants to remain together has been recognized and protected by the courts as an aspect of the security of the person in the context of s. 7. In *J.G*, the Court concluded that indigent parents have a constitutional right to be provided with state-funded counsel when the government seeks a judicial order suspending such parents' custody of their children.

[382] Chief Justice Lamer, writing for the majority, concluded that the right to security of the person is engaged in child protection proceedings, stating at para. 61:

> I have little doubt that state removal of a child from parental custody pursuant to the state's *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent. The parental interest in raising and caring for a child is, as La Forest J. held in *B. (R.)*, *supra*, at para. 83, "an individual interest of fundamental importance in our society". Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as "unfit" when relieved of custody. As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.

[383] The Chief Justice concluded that while not every state action which interferes with the parent-child relationship will restrict a parent's right to the security of the

person, in the case of child protection proceedings the constitutional rights of the parent are engaged, stating at paras. 63 and 64:

> Not every state action which interferes with the parent-child relationship will restrict a parent's right to security of the person. For example, a parent's security of the person is not restricted when, without more, his or her child is sentenced to jail or conscripted into the army. Nor is it restricted when the child is negligently shot and killed by a police officer: see *Augustus v. Gosset*, [1996] 3 S.C.R. 268.
>
> While the parent may suffer significant stress and anxiety as a result of the interference with the relationship occasioned by these actions, the quality of the "injury" to the parent is distinguishable from that in the present case. In the aforementioned examples, the state is making no pronouncement as to the parent's fitness or parental status, nor is it usurping the parental role or prying into the intimacies of the relationship. In short, the state is not directly interfering with the psychological integrity of the parent *qua* parent. The different effect on the psychological integrity of the parent in the above examples leads me to the conclusion that no constitutional rights of the parent are engaged.

[384] In *K.L.W.*, both the majority and dissenting judgments acknowledged that the removal of a child from a parent's custody by the state infringes the parent's right to the security of the person: see para. 5 *per* Arbour J. and paras. 85-87 *per* L'Heureux-Dubé J.

[385] Justice Arbour noted that the child's interest in being protected against undue state interference was an aspect of the child's security of the person interest, stating at paras. 12-15:

> In my view, not only should the Court recognize the child's interest in being protected from harm, but we must also recognize the interest of a child in being nurtured and brought up by his or her parent. While the appellant's apprehended child was not independently represented on the appeal, nonetheless, arguments relating to <u>a</u> child's interest in being protected against undue state interference in the parent-child relationship were made in the appellant's written submissions, at paras. 73-76.
>
> 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 her parents and that harm may come to the child from precipitous and misguided state interference. Lamer C.J. explicitly recognized the child's security interest where the parent's custody of the child is removed by the state in *G. (J.)*, *supra*, at para. 76:

> 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. [Emphasis added.]

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. Further, his comments at pp. 169-71 of the same article speak directly to the concerns I have with the disposition of the current appeal:

> In the rush to "increase" protection, I worry that we may lose sight of important concerns about over-intervention that the reforms of the 1970s and 80s were intended to address. Recently a number of Ontario Children's Aid Societies have responded to the increased awareness of abuse and coroners' reports by being more aggressive about interpreting the 1984 Child and Family Services Act to emphasize child safety (citing Henry Hess, "Foster care overflows to college dorm" The Globe & Mail (19 June 1998) A1). This has already resulted in substantially more children coming into care in some agencies, straining foster care resources. It also illustrates that agency practices and interpretations play a very large role in how any legislative scheme is actually implemented, and raises questions about whether dramatic legislative reforms are needed.
>
> ...
>
> We must respond to the inadequacies of the child welfare system, including those in legislation and the court system, hopefully to achieve the best balance possible and not to "overeact". Unnecessarily intrusive intervention can be harmful to children, disrupting their relationships with primary caregivers, family, friends and schools, and resulting in a series of placements in foster homes and other facilities that may be less than ideal. While the recent inquiries have focused on situations where agencies have failed to intervene aggressively enough, there are also cases in which inexperienced and inadequately supervised child protection workers have been inappropriately aggressive and made unfounded allegations of parental abuse. (See e.g. *B. (D.) v. Children's Aid Society of Durham (Region)* (1996), 136 D.L.R. (4th) 297, 30 C.C.L.T. (2d) 310 (Ont. C.A.).)

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.
>
> [Emphasis in original.]

[386] Finally, in *Re R.T.*, 2004 SKQB 503 [*Re R.T.*], the court concluded that the s. 7 rights to security of the person of children were infringed by a policy adopted by the Department of Community Resources and Employment which provided that First Nations children would not be placed for adoption without the consent of the child's band and First Nations agency, if any existed. The court cited *J.G.* and *K.L.W.* and concluded at para. 67:

> By analogy, impairment of the right to security of the person can be extended to children apprehended pursuant to child protection legislation. Removal of a child from parental custody constitutes a serious interference, not just with the parent's psychological integrity, but with the child's as well. Children are deeply impacted by their removal from their homes. Not only is such removal a traumatic experience, but if that removal lasts for an extended period of time, it may adversely affect the child, causing behavioural issues and affecting their feelings of self-worth and their ability to cope. In very young children, it may affect their ability to form relationships and their development of self-identity.

[387] Ryan-Froslie J. noted that the policy at issue had been applied arbitrarily and without regard to the individual circumstances or needs of the children and concluded that it was clear that the children's s. 7 rights to security of the person had been infringed by the policy.

2. <u>Submissions of the Plaintiffs</u>

[388] The plaintiffs submit that the medical, psychological and social benefits to a mother from personally caring for her infant and to her infant from receiving such care are each an element of security of the person protected under s. 7 of the *Charter*, each of which is infringed by the risk of separation occasioned by the decision to cancel the Program.

3. Submissions of the Defendants

[389] The defendants advanced a number of submissions in support of their contention that the decision to cancel the Program did not infringe the security of the person of either mothers or babies.

i. Is this a claim for a positive right?

[390] The defendants assert first that s. 7 is not engaged because the plaintiffs' claim is in substance a claim to a positive obligation under s. 7. Counsel submits that no such positive obligation has been acknowledged by the courts, noting that s. 7 of the *Charter* speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice.

[391] The defendants submit that nothing in the jurisprudence suggests that s. 7 places a positive obligation on the state to ensure that inmates enjoy a quality of life, liberty or security of the person in prison which is analogous to what they might have enjoyed had they not been sentenced to incarceration. Rather, counsel submits that s. 7 has been interpreted as restricting the ability of corrections authorities to deprive inmates of their residual liberties or security of the person, except in accordance with the principles of fundamental justice, citing *Cunningham v. Canada*, [1993] 2 S.C.R. 143 at 148-150; *Fieldhouse v. Canada* (1995), 98 C.C.C. (3d) 207 at paras. 14-15 (B.C.C.A.); and *R v. Jerace*, 2011 ABQB 50 at paras. 83-87.

[392] The defendants submit that because the state would have to expend resources to provide for the infants in the program, what the plaintiffs are in effect seeking is a form of positive content to s. 7 that no court has recognized.

[393] Dealing with the last point first, I note that the fact that the state might be required to expend some resources does not transform the claim into one alleging a positive obligation. In *J.G.*, the Court explicitly held that s. 7 entailed a positive right to state-funded counsel in the context of an apprehension hearing.

[394] Moreover, in the present case it is clear that the state action at issue is the involuntary separation of mothers and newborns caused by the cancellation of the

Mother Baby Program. This is a deprivation. As the Admission of Fact filed as Exhibit 23 states in part:

> Due to the cancellation of the Mother-Baby Program (as that term is defined in the Amended Statement of Claim), children of mothers incarcerated at the ACCW have been separated from their mothers.
>
> ….
>
> In the case of children of mothers incarcerated at ACCW for whom there are no child protection concerns, the Mother-Baby Program was formerly available to avoid intervention by the Director due to the separation of mothers and child.

ii. Is there serious state-imposed psychological stress?

[395] The defendants' next submission is that for a deprivation of security of the person to be made out, the impugned state action must have a serious and profound effect on the inmate's physical or psychological integrity. There must be "serious state-imposed psychological stress" before security of the person is implicated. The effects of the state interference must be assessed objectively, with a view to the impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but it must be greater than ordinary stress or anxiety: see *J.G.* at paras. 59-60; *Rodriguez* at 587; and *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at para. 57 [*Blencoe*].

[396] The defendants submit that the state action in this case does not rise to the level of impairing the security of the mother's person because there is no implication that the mothers are unfit to parent. The defendants submit that it is the stigma of unfitness, absent in the present circumstances but present in the apprehension cases, that elevates the psychological stress to the level required.

[397] I agree that the defendants have correctly stated the test that the Supreme Court of Canada has articulated; however I do not agree that the circumstances in the present case do not meet that test.

[398] The defendants' submission derives, at least in part, from the language of Chief Justice Lamer in *J.G.*, who noted that not all state actions which interfere with

the parent-child relationship will restrict a parent's right to security of the person. The defendants submit that because the infants were separated from their mothers due to the cancellation of the Mother Baby Program, rather than because the state has pronounced the mothers unfit parents, the state has not interfered with the parent's security of the person.

[399] In my view there are two difficulties with this submission. First it is clear that the interference Chief Justice Lamer describes is not limited to that causing stigma. Further, in the present case, the state is usurping the parental role and prying into the intimacies of the parental relationship such that the state is interfering with the psychological integrity of the parent *qua* parent. Second, *J.G.* deals with the interests of the security of the person of parents; this case, however, engages as well the interests of the security of the person of the infants.

[400] The defendants submit that the disruption in the mother-child relationship does not rise to the level of serious state-imposed psychological stress required to engage the constitutional right because of the measures that the institution has taken to ameliorate the disruption. These measures are: encouraging the Crown and courts to impose community-based sentences, enhanced visitation, facilities for pumping, storing and delivering breast milk, and the possibility of transfer to the federal institution.

[401] I was not persuaded by this submission. As evidenced by the Admission of Fact, there are mothers and infants who have been and will be separated because of the cancellation of the Program. Further, while the fact that a woman is pregnant or has a young infant is a factor that can be taken into account in sentencing, by virtue of provisions in the *Criminal Code*, R.S.C. 1985, c. C-46 [the *Criminal Code*], prescribing mandatory minimum sentences and restricting the offences for which a conditional sentence order is available, it is clear that a community disposition is not available for all women who are pregnant or with young infants.

[402] I accept the evidence of Drs. Martin and Koopman that visitation, even enhanced, does not afford an adequate opportunity for the infant to attach to the

mother. I note as well the practical limitations inherent in pumping and storing breast milk. The possibility of transfer to a federal institution remains a theoretical possibility only; one which, given the comparatively shorter length of sentences of women sentenced to provincial institutions, would only ever be available to a very small number of such women.

[403] In addition, I am mindful of the testimony of Ms. Inglis and Ms. Block, who provided very emotional testimony of the depth of distress caused by the decision to cancel the Program. In all of the circumstances, even with the measures to ameliorate, I am satisfied that the decision to cancel the Program resulted in 'serious state-imposed psychological stress' sufficient to engage the s. 7 interest in security of the person for the mothers who are or will be affected.

[404] Finally, the defendants submit that the plaintiffs, who bear the onus of proving a deprivation, have not demonstrated a serious interference with the physical or physiological integrity of the infants sufficient to engage security of the person. In my view, this contention cannot be maintained in light of the expert evidence. The infants who are separated from their mothers because of the decision to cancel the Mother Baby Program are deprived of the ability to breastfeed regularly and are placed at an enhanced risk of not being fed breast milk. They are also deprived of secure, uninterrupted bonding with their mothers and are placed at an enhanced risk for insufficient attachment and the problems associated with that condition. In my view these deprivations amount to a serious interference with their physical and psychological integrity.

iii. Is the deprivation the result of the impugned state action?

[405] The defendants submit further that s. 7 is not engaged because the separation of mother and infant is not caused by the cancellation of the Mother Baby Program; rather it flows from the custodial sentence. In this regard, the defendants cite *Southerland v. Thigpen*, 784 F 2d 713 (1986) [*Southerland*], a decision of the United States Court of Appeals for the Fifth Circuit, dismissing a claim brought by a female inmate who sought an injunction to prevent corrections authorities from

interfering with her breastfeeding relationship with her infant son. The court concluded that:

> …[It] is evident to us that the existence of a *right* such as that here asserted on the part of a convict duly sentenced to confinement is "fundamentally inconsistent with imprisonment itself" and "incompatible with the objectives of incarceration."

[406] In my view the defendants' contention cannot be sustained. First, the *Southerland* decision is distinguishable on its facts. In *Southerland*, the plaintiff sought an injunction to prevent her from being returned from the hospital to prison to serve out her sentence in order to breastfeed her infant. The case did not deal with prison nurseries. In addition, care must be taken with American decisions because of both the different constitutional protections in that country and the adoption by the American courts of a "levels of scrutiny" analysis that has not been accepted in Canadian jurisprudence.

[407] Moreover, there is nothing in the criminal law, policy or objectives that requires the separation of mothers and infants as a consequence of a criminal sentence. Further, the position is unsound on the evidence. The Branch's own experience from 1973 to the decision to cancel the Program demonstrates that separation need not occur for the sole reason of the mother's incarceration. In addition, the experience of prison nursery programs elsewhere, including the Canadian federal system, demonstrates that separating mothers and their infants is not a necessary incident of a custodial sentence.

[408] The assertion is analogous to the assertion of Canada in the *PHS* decision that the negative health risks drug users would suffer if Insite was prevented from providing its services would result from drug use, not the state action. This contention was rejected by the Court at paras. 97-106. I likewise conclude in the present case that the deprivation arises not from the sentence to incarceration but from the decision to cancel the Mother Baby Program.

[409] The defendants finally submit that the nature of the injury of which the plaintiffs complain does not engage s. 7 because the mothers retain their legal rights

with respect to their infants to the extent compatible with incarceration, including custodial rights. Counsel submits that if any mother loses her custodial rights, it is because the MCFD has apprehended the infant, pursuant to the process authorized by the *CFCS Act*.

[410] In my view, this is a re-statement of the argument that the deprivation arises from the sentence. It is clear from the experience in this province between 1973 and the cancellation of the Mother Baby Program and from experience in other jurisdictions with prison nursery programs that such programs are not incompatible with incarceration. Thus, it is not the case that there are rights incidental to the care of the infants that are necessarily incompatible with incarceration.

[411] Moreover, where it would be in the best interests of a child to reside with its mother at ACCW, and no alternative arrangements are available, the reason the MCFD must seize the child is the cancellation of the Mother Baby Program. But for the cancellation of the Program, those infants would not have been seized.

4. Conclusion re Security of the Person

[412] I find that the interest of mothers and infants to remain together is one aspect of the security of the person of each that falls within the scope of s. 7. The decision to cancel the Mother Baby Program removed one important option, the one presumed at law to be favourable, from the process of determining the best interests of the child. As a result, infants have been and will be separated from their mothers during the critical formative period of their life, interfering with their attachment to their mother, and depriving them of the physical and psychological benefits associated with breastfeeding. The mothers have already and will continue to suffer the adverse consequences of separation from their infants. The decision to cancel the Mother Baby Program was state action that constituted an infringement of the s. 7 rights to security of the person of both mothers and babies.

C. Is the Infringement Contrary to the Principles of Fundamental Justice?

1. General Principles

[413] The next issue is whether the infringement is contrary to the principles of fundamental justice. In *Canadian Foundation* at para. 8, Chief Justice McLachlin described the three criteria for a principle of fundamental justice as follows:

> First, it must be a legal principle ... Second, there must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice" ... The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice. Third, the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results.

[414] The plaintiffs submit that the principles of fundamental justice include a substantive element, and are not limited solely to procedural guarantees: see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 512-13 and 521-22. The plaintiffs argue that the decision to cancel the Program was contrary to the principle of fundamental justice that laws should not be arbitrary. The intervenors adopted that submission and also advanced the argument that the decision was also contrary to the principles that laws should not be overbroad or grossly disproportionate to a legitimate government interest. Finally, the intervenors submit that the Court should rule that equality is a principle of fundamental justice and that it was violated by the decision.

[415] At the time this case was argued, both *PHS* and *Adams* treated arbitrariness, overbreadth and gross disproportionality as doctrinally distinct. In *Carter v. Canada (Attorney General)*, 2013 BCCA 435 [*Carter C.A.*], both the reasons for the majority by Newbury J.A. and the dissenting reasons of Finch C.J.B.C. discuss the evolving jurisprudence concerning these three principles. The judgments highlight the degree of overlap between the three principles and discuss recent decisions that suggest that at least overbreadth and disproportionality are not distinct principles.

[416] As to whether those two principles are distinct, both Newbury J.A. (for the majority) and Finch C.J.B.C. cited Chief Justice McLachlin's majority decision in *R. v. Khawaja*, 2012 SCC 69 at para. 40 [*Khawaja*], McLachlin C.J.C. stating:

> For the purposes of this appeal, I need not decide whether overbreadth and gross disproportionality are distinct constitutional doctrines. Certainly, these concepts are interrelated, although they may simply offer different lenses through which to consider a single breach of the principles of fundamental justice. Overbreadth occurs when the means selected by the legislator are broader than necessary to achieve the state objective, and gross disproportionality occurs when state actions or legislative responses to a problem are "so extreme as to be disproportionate to any legitimate government interest": *PHS Community Services Society*, at para. 133; see also *Malmo-Levine*, at para. 143. In order to address the appellants' s. 7 constitutional challenge, I will (1) examine the scope of the law (2) determine the objective of the law and (3) ask whether the means selected by the law are broader than necessary to achieve the state objective and whether the impact of the law is grossly disproportionate to that objective. Thus, I will examine both overbreadth and gross disproportionality in a single step, without however deciding whether they are distinct constitutional doctrines.

[417] After citing this passage in *Carter C.A.*, Newbury J.A. went on to state at para. 310:

> The Chief Justice went on to consider the two principles together without any substantive distinction: see paras. 62-3. Whether her remarks and analysis were intended as a tentative endorsement of a unified overbreadth/disproportionality approach is unclear, although it is difficult to escape the notion that lower courts should apply the test as a single inquiry for the time being.

[418] Accordingly, I will apply that test as a single inquiry with respect to the concepts of overbreadth and gross disproportionality in the present case.

2. <u>Arbitrariness</u>

i. The Test

[419] One principle of fundamental justice that has been acknowledged in the jurisprudence is that laws should not be arbitrary. A law is arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind [it]" (*Rodriguez* at 619-620). To determine whether this is the case, it is necessary to consider the state

interest and societal concerns that the provision is meant to reflect: see *Rodriguez* at 594-95.

[420] When considering whether a deprivation is arbitrary, the first step is to identify the objectives of the impugned law or state action. The second step is to identify the relationship between the state objective and the impugned law, or, in this case, the impugned decision: see *PHS* at paras. 129-130.

[421] The nature of the required relationship between the state objective and the impugned law is not completely settled. In *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 [*Chaoulli*], three justices (*per* McLachlin C.J. and Major J.) asked whether a limit was "necessary" to further the state objective (at paras. 130-32). An equal number of justices (*per* Binnie and LeBel JJ.), applied the definition of arbitrariness from the majority decision in *Rodriguez*, asking whether "[a] deprivation of a right ... bears no relation to, or is inconsistent with, the state interest that lies behind the legislation" (at para. 232). In *PHS*, the Court found it unnecessary to decide between the approaches because the decision at issue was found to be arbitrary under either approach.

[422] In *PHS*, the Chief Justice endorsed a statement from *R. v. Malmo-Levine*, 2003 SCC 74 [*Malmo-Levine*], that a law is not arbitrary if it is "rationally connected to a reasonable apprehension of harm". The Court found, based on findings of fact by the trial judge, that the Minister's decision undermined the very purposes of the legislation. Information was available to the Minister that the risk to injection drug users of death and disease was reduced when they injected under the supervision of a health professional, and that in the five years it operated under an exemption, Insite saved lives and furthered the objectives of public health and safety: *PHS* at paras. 130-32.

[423] In *Chaoulli*, the Court noted that in order not to be arbitrary, the limit must have not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The reasons of Chief Justice McLachlin and Justice Major state at para. 131:

> In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.

ii. Submissions of the Plaintiffs

[424] The plaintiffs submit that two possible state objectives or justifications for the cancellation have been advanced. The first, which the plaintiffs have submitted was the reason for the decision to cancel the Program, was Mr. Merchant's conclusion that Corrections' mandate to provide for the safe and secure custody of inmates did not include providing the same for the newborns of such inmates. The second is the objective advanced by the defendants, the safety of the infants; specifically, the Branch's determination that it could not guarantee or ensure the safety of infants within the corrections system. In this regard, the plaintiffs note that on cross-examination, Mr. Merchant identified the inability to guarantee safety as core to his decisions. The plaintiffs submit that on either justification, the cancellation was arbitrary.

[425] The plaintiffs submit that if the cancellation was based on a mandate that required the safe custody of women and mothers, but not infants, then the cancellation and its effect, the exclusion of infants from a correctional centre, is not necessary, bears no relation to, or is inconsistent with such a state objective. Providing for custody of these mothers' newborns is a natural requirement and obligation of recognizing the rights of liberty and security of the person attaching to such mothers and their infants. The presence of infants within the facility does not endanger its other occupants. It is not necessary for Corrections to exclude infants to provide for safe custody of incarcerated mothers and women, and there is no relation or consistency between the state action and such an objective. The plaintiffs submit that it follows that the action was arbitrary under the *Charter*.

[426] The plaintiffs submit, in the alternative, that if the state objective was infant safety, then the cancellation was equally arbitrary on several different levels. First, the decision to cancel was based on an impossible standard – that safety must be "guaranteed" or "ensured", a standard which is not applied to any other person within the corrections system. Second, even assuming that the state objective was the safety of the infants generally, rather than a guarantee, the evidence established that the cancellation was still arbitrary because it was made without any investigation into whether cancelling the Program and the resulting alternative measures of community placements, foster care, or the like, were actually safer or likely to be safer than the prison environment.

[427] The plaintiffs note that the defendants never contacted anyone about the actual experience of the Program. They obtained no professional assessment or evaluation of the associated safety risk and benefits. They made their decision on an undocumented and uncertain basis. The calls for reconsideration and review were ignored and a stubborn refusal to consider other viewpoints prevailed after the decision was made. The justifications for the cancellation were created after the fact and primarily for their appeal to a general audience, rather than on the basis of the facts known to the defendants.

[428] The plaintiffs further submit that going beyond the process of the defendants' decision to cancel, the record also demonstrates that even if the defendants had investigated the matter, the decision to cancel would still be arbitrary. The evidence demonstrated that:

(a) the environment at ACCW during the Program's operation was safe and nurturing for the infants, with no actual safety incidents during the three years that the Program was in operation;

(b) according to the inquiries of the defendants' own expert, Dr. Nicholls, there have been no reported safety incidents in any mother baby programs; and

(c) risks in the community likely outweighed those in the prison environment at ACCW, or mother baby programs generally based on the international experience.

[429] The plaintiffs submit that the defendants' position that a child's s. 7 right to life and health "outweighs" the benefits of allowing mothers and infants to remain together while incarcerated has no merit based on this evidentiary record. This is particularly so because no such "weighing" in fact occurred either as part of the cancellation or in the context of this litigation by the defence experts.

[430] The plaintiffs note that in the individual context, the Supreme Court of New York, Queens County, quashed a decision made by the Warden of Rikers Island Correctional Facility rejecting a mother's application for enrollment in Rikers Nursery Program as the denial was based solely upon a criminal charge against her and infractions. The court held that the Warden failed to articulate how such circumstances bore upon the welfare of the child, and the decision was therefore arbitrary, capricious and an abuse of discretion. The plaintiffs submit that here, the defendants' absolute and blanket exclusion of all mother-baby pairs, without any specific articulation of any effect on the welfare of such infants, is equally arbitrary under our *Charter*: see *Duarte v. New York,* 2011 NY Slip Op 31223(U) (New York Supreme Court), aff'd on appeal 91 AD3d 778 (2012), aff'd 20 NY3d 1067 (2013).

[431] The plaintiffs submit that on the evidentiary record before the Court, the cancellation was not necessary to further the objective of infant safety, guaranteed or otherwise, and in fact is inconsistent with such an objective. In the plaintiffs' submission, the cancellation and its effect, the separation of mothers and their infants solely by reason of the mother's incarceration, was and remains arbitrary, and therefore not in accordance with the principles of fundamental justice.

iii. Submissions of the Defendants

[432] As noted above, the defendants submit that the *Correction Act* and the *Regulation* have two purposes. The dominant purpose is to provide Corrections officials with the authority to ensure the safety of individuals in provincial correctional

centres, including inmates and Corrections employees, and the public, by ensuring that the court's warrant of committal is carried out, and the inmate remains separated from society. A second purpose of the *Correction Act*, which is subject at all times to the first, is to provide inmates with adequate living standards and an opportunity to rehabilitate and prepare for their return to society.

[433] The defendants submit that the policy on pregnant inmates is fully consistent with both. Counsel submits that the policy seeks a balance between the safety of infants in provincial correctional centres and support for the bond between incarcerated mothers and their newborn. In this regard, it is submitted that it is not necessary for the government to show actual harm done to any infant; it is enough that there is a reasonable apprehension of harm and the limits Corrections policy imposes are rationally connected to that apprehension. Put another way, it is legitimate for Corrections authorities to proactively attempt to prevent harm to any infant. Corrections authorities are entitled to take preventative measures and are not limited to reacting once harm occurs: see *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at paras. 1188, 1190 and 1195 [*Reference re: s. 293*].

[434] The defendants submit that the question for this Court is whether Mr. Merchant considered the health and safety of the infants in the context of the objectives of the *Correction Act*, in particular the duty to provide for the safety and security of individuals within the correctional centre. They submit that the concept of the best interest of the child is not applicable and that Mr. Merchant was not obliged to consider or to attempt to maximize the best interests of the children affected by his decision. The defendants also submit that Mr. Merchant is entitled to deference with respect to his assessment of the factual basis for his decision.

[435] It was the defendants' submission that the policy on pregnant inmates supports the mother-infant bond by:

(a) advising the courts of the cancellation of the previous practice of allowing newborn infants to live in prison and advising Crown counsel of an inmate's pregnancy so that fact is before the court on sentencing;

(b) transferring a woman and her infant to FVI where possible;

(c) working within the restraints of the custodial sentence to allow for probation or discharge to a transition house so that separation does not occur or to reduce the length of separation;

(d) allowing for the opportunity to bond and breastfeed through its Enhanced Visitation Policy; and

(e) supporting parenting capacity by addressing prerequisites to parenting, such as substance abuse treatment, anger management and life skills.

[436] The defendants submit that at the same time, the policy seeks to ensure the safety of infants by:

(a) holding individualized case conferences to establish an appropriate visitation plan;

(b) not permitting visits in living units or in areas where other inmates may be present; and

(c) not allowing overnight visits.

[437] It was the defendants' submission that without these limits being in place, there is a reasonable apprehension of harm to the infants. The defendants submit that while Ms. Tole testified that there were never any incidents involving harm coming to an infant, the prison logs display repeated incidents of "low-grade harms". Counsel submitted that the defendants' witnesses spoke of the real possibility of harm to infants in the ACCW environment.

[438] It was the defendants' submission that the operation of a mother baby program that is reasonably safe and effective presents significant obstacles which the Branch cannot overcome in the environment of ACCW. One example given by counsel was the short-term stay of most women, particularly those on remand, which does not allow for assessment and effective programming. Another was the resource-intensive nature of the Program, which counsel asserted entailed the disproportionate re-allocation of operational resources, such as full-time medical staff, staff trained in infant care and infrastructure itself, away from programs with proven effectiveness that serve larger groups within the correctional system.

[439] It was submitted by the defendants that the limits imposed on the rights of incarcerated mothers are rationally connected to a reasonable apprehension of harm. It cannot be said that the deprivation, if there is any, of the liberty or security interests of incarcerated mothers or their infants "bears no relation to, or is inconsistent with, the objective that lies behind the legislation." It was the defendants' submission that, on the controlling test, the Corrections policy is not arbitrary. Even on the alternate test stated by three justices in *Chaoulli*, the limits are necessary to further Corrections' objective of ensuring the safety of the infants. The defendants submit that, accordingly, on either definition, Corrections' policy on pregnant inmates is not arbitrary.

iv. Discussion

a. What is the Objective of the Legislation?

[440] As noted above, the defendants submit that the purposes of the *Correction Act* and *Regulation* are first, to carry out the court's warrant of committal and second, to provide inmates with adequate living standards and the opportunity to rehabilitate and prepare for their return to society.

[441] Neither the *Correction Act* nor the *Regulation* contains a statement of purpose or guiding principles. Mr. Merchant testified that the Branch's most important responsibility is to supervise the orders of the court in a manner that provides safety. He stated that the core mandate of Corrections is the safe and secure custody of

adult offenders. Mr. Merchant referred to the Strategic Plan for BC Corrections 2010-2013 (the "Plan"). This document states:

> B.C. Corrections protects communities through the safe control and behavioural change of adults. It provides correctional services and programs to individuals 18 years or older who are:
>
> - Supervised while on a bail order awaiting trial or serving a community sentence; or
> - Held in custody while awaiting trial or serving a jail sentence of less than two years.

[442] The Plan identified five goals of Corrections as follows:

> 1. Supervise and enforce custody and/or community orders of adult offenders in a safe manner.
>
> 2. Manage all aspects of correctional supervision through the application of evidence-based, consistent, and best practice standards.
>
> 3. Encourage learning and development for all members of BC Corrections.
>
> 4. Adhere to high standards in research, program development and evaluation, and technology.
>
> 5. Collaborate with other ministries, academic institutions, and non-profit associations and organizations.

[443] In a section entitled "What Success Looks Like" the Plan states:

> We use reoffending rates as a baseline to determine the effectiveness of our programs, case management, specialized training, and reintegration initiatives.

[444] Another document adopted by the Branch that elaborates on the objectives of Corrections is the Statement of Philosophy, the purpose of which is to:

> …provide a foundation for identifying gender-based differences and the establishment of correctional practices that are responsive to the needs of women offenders in both community and institutional settings.

[445] The Statement provides in part:

> 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.

b. What is the Relationship between the Impugned Decision and the Objectives of the Legislation?

[446] As discussed in the section headed Findings of Fact, I have concluded that Mr. Merchant made the decision to cancel the Program on the basis of his view of the mandate of Corrections; namely he concluded that, the custody of infants was not within the mandate of Corrections and given that, he was not required to house infants, he was not prepared to take on any risk in relation to infants.

[447] Addressing first the decision in relation to what the defendants submit is the dominant purpose of the *Correction Act* and the *Regulation* from the perspective of the mothers, I note that there is no suggestion here that the Mother Baby Program impaired, was in any way incompatible with or outside of the parameters of any orders of the court. There is no suggestion that the Program impaired, or was incompatible with the safety of inmates or staff at ACCW. There is no suggestion that the Program in any way compromised Corrections' ability to maintain the segregation of the inmate from the community during the course of her sentence. In short, from the perspective of the mothers, the decision to cancel the Program bears no relation to the dominant purpose identified by the state that lies behind the legislation.

[448] Moreover, it is clear that from the perspective of the mothers, the decision to cancel the Program is inconsistent with the secondary purpose identified by the state – behavioural change. The available evidence supports the conclusion that the Program assisted mothers in improving their parenting skills and bonding with their infants. In terms of recidivism, the measure that Corrections identifies as its benchmark for success, the available research supports a conclusion that prison nursery programs reduce recidivism rates.

[449] There is little evidence that either Mr. Merchant or any of the Corrections personnel who worked on the drafting of the policy ever reviewed the available research. Certainly no documents reflect such a review. During the course of the litigation, the defendants were critical of the research. However, while it is clear that more research would be helpful, the available research is consistent in this finding.

[450] Further, it is also clear that Mr. Merchant's decision to cancel the Program did not emanate from an evidence-based approach: the Program was never evaluated, there was no effort undertaken by Corrections to measure the success of the Program, and research from other programs was not considered.

[451] With respect to Corrections' goal of cooperation with other agencies and Ministries, it is clear that such cooperation was at play during the time the Program operated. The decision to cancel was made without seeking the input of other interested agencies. When the other agencies expressed concern over the decision, they were ignored.

[452] Finally, in my view it is clear that the decision to cancel the Program was profoundly incompatible with the Statement of Philosophy. Far from supporting the relationship between mothers and children, the decision enforced a separation.

[453] Turning then to the decision from the perspective of the infants, first it is clear that the decision was contrary to the best interest of infants who, with the concurrence of the MCFD, would otherwise have been housed at ACCW with their mothers. The safety of those infants would have been a consideration since the *CFCS Act* requires the Ministry to consider safety as part of the assessment of the best interests of the child.

[454] As noted, the defendants contend that Mr. Merchant was not required to consider the best interests of the children affected by his decision, arguing that this standard had no application in the context of decisions made pursuant to the *Correction Act*. I do not agree. An inescapable consequence of Mr. Merchant's decision was that the state would place in care some infants who but for the decision to cancel the Program would have stayed with their mothers at ACCW. As stated earlier, Mr. Merchant cannot circumvent the requirement to consider the best interests of the children affected by relying on the fact that a different arm of the state would be actually seizing the children.

[455] It is clear that Mr. Merchant adopted a standard that was impossible to meet – a guarantee of safety. He acknowledged that such a standard could never be met by Corrections, and that it was not a standard applied by Corrections in any other situation. A guarantee of safety is a profoundly different standard from what the defendants suggested in the litigation was the protection from a "reasonable apprehension of harm".

[456] Moreover, given that it is the infringement of the constitutional rights of mothers and babies to security of the person at issue, it is clear that the standard he adopted was not appropriate. An instructive decision with respect to the issue, albeit in the context of the analysis under s. 1, is *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, in which the issue was the wearing of a kirpan, a ceremonial dagger worn as an article of the Sikh faith, at school. The majority's *Charter* analysis remains instructive despite the Supreme Court's recent decision discussing the appropriateness of such an analysis in the administrative context: see *Doré v. Barreau du Québec*, 2012 SCC 12.

[457] The evidence in that case was that there had never been an incident of violence involving a kirpan in a Canadian school. However, the respondents argued that there was a safety risk that the kirpan could be used for violent purposes, either by the student wearing the kirpan or someone taking it from him. The respondents, like the defendants in the present case, had maintained that freedom of religion could be limited in the absence of evidence of a real risk of significant harm, since it was not necessary to wait for harm to occur before remedying the situation. Justice Charron, for the majority, rejected that submission, stating at para. 67:

> Returning to the respondents' argument, I agree that it is not necessary to wait for harm to be done before acting, <u>but the existence of concerns relating to safety must be unequivocally established for the infringement of a constitutional right to be justified.</u> Given the evidence in the record, it is my opinion that the respondents' argument in support of an absolute prohibition -- namely that kirpans are inherently dangerous -- must fail.
>
> [Emphasis added.]

[458] In *Bacon*, the adoption of a standard that was impossible to meet by the warden was found by Mr. Justice McEwan to be contrary to the principles of fundamental justice. He states at para. 322:

> With respect to his incarceration, *per se*, the petitioner's liberty has been taken from him in accordance with the principles of fundamental justice. He is incarcerated awaiting trial on a serious charge which requires him to show cause why he should be released (and he has not attempted to do so). He complains of the added restrictions to his liberty imposed on him by the prison administration (see *May*). Apart from solitary confinement these include the additional threats to the security of his person in the form of the psychological stress caused by the additional isolating deprivations the respondent has imposed for an improper purpose. In implementing restrictions based on police suspicions, the respondent negated any meaningful resort to due process by effectively substituting new and much more onerous tests than those she was required to apply under the *Correction Act Regulation*. There, the mandate focuses on harm to the institution or others on the basis of actual behaviour in, or emanating from, the institution. The restrictions the respondent imposed made it impossible for the petitioner to demonstrate adherence to the appropriate standard, which meant he had no means to improve his situation. When the basis for deprivation is "the police believe you might try something", and paper reviews are conducted on the mantra that "they still think so", there can be no semblance of fundamental justice.

[459] With respect to the defendants' submission that the government is entitled to be proactive in responding to a reasonable apprehension of harm, I note that it is also clear that no investigation was undertaken at the time to determine whether there was such an apprehension. I agree with the submission of the defendants that Corrections was entitled to be proactive. I also agree that the decision would not be arbitrary if it was based upon a reasonable apprehension of harm and the limits it imposed were rationally connected to that apprehension. However, as emphasized in *Chaoulli*, there must be an actual relation between the facts of the case and the state's action.

[460] I have concluded that in this case, the state acted on the basis not of reasonable apprehension of harm but from the imposition of an impossible standard – a guarantee of safety. That the state acted without determining whether there was reasonable apprehension of harm is clear from the fact that the decision to cancel the Program was made without any evaluation of the safety risks

associated with the Program, or of possible means to minimize such risks. There was no analysis of the risks posed by the environment at ACCW as compared to those of alternative placements such as foster care. In short, the decision was made without any investigation of whether there was a reasonable apprehension of harm. It follows that the decision to cancel was arbitrary as it infringed the constitutional right to security of the person without any consideration as to whether there was a reasonable apprehension of harm.

[461] During the course of the litigation, the defendants proffered evidence that was never considered at the time the decision was made to attempt to retroactively support the cancellation by identifying a reasonable apprehension of harm. I am not persuaded that such retrospective justification is appropriate; however, on the assumption that it is, I have concluded that the evidence does not support the submission that there is or was a reasonable apprehension of harm.

[462] First, while the defendants have submitted that Mr. Merchant is entitled to deference with respect to his assessment of the factual basis for his decision, I have found that his decision was based upon a conclusion about mandate and not any assessment of the evidence. In any event, it is noteworthy that in *Chaoulli*, the Chief Justice and Major J. emphasized that it was the court's responsibility to evaluate s. 7 issues in light of the evidence. At para. 153, they concluded that the evidence did not support the government's contentions and on that basis held that the provision at issue jeopardized the rights to life, liberty and security of the person in an arbitrary manner and was therefore not in accordance with the principles of fundamental justice.

[463] The defendants' witnesses did speak of the possibility of harm to infants. It is the case that there is a risk that harm could come to an infant in the Program. However, there is also a risk of harm to infants in virtually any environment. Certainly there is a risk of harm associated with placement in foster care as well as with relatives in the community. The issue is whether there is a reasonable apprehension

of harm. Consideration of that question must address the nature and magnitude of risk. In that regard:

(a) there was no evidence presented of any infant actually suffering any harm, either at ACCW, BCCW, Twin Maples or indeed anywhere in the world in a prison nursery;

(b) there was no evidence presented of any infant at ACCW coming into contact with contraband;

(c) the consensus of the available research supports prison nurseries as safe and supportive environments for infants; and

(d) what the defendants have proposed as constituting “low grade harms” do not stand up to scrutiny:

(i) babies sleeping with their mothers. It is the case that on the basis of medical advice that it was best practice for infants not to sleep in the same bed as their mothers, the Program had a rule that the infants were to sleep in their cribs. This rule was generally obeyed, although it was broken from time to time. However, it is also the case that the practice is widespread in the community and throughout the world. It is a common experience of mothers who are breastfeeding to fall asleep with their infants. To the extent to which this is a risk to an infant, it is not a risk associated with or arising from the environment at ACCW or prison in general;

(ii) persons other than mothers and designated babysitters touching the babies. ACCW had adopted a rule in the interests of the infants that only mothers and designated babysitters could touch the babies. This rule was enforced and from time to time broken. Again, that this occurred is hardly an indicator of harm or risk. It certainly cannot be said that in the community or in foster care that only mothers or approved caregivers would touch infants;

(iii) there was evidence that Alder House was from time to time noisy. Ms. Smith testified that when this occurred she would caution the women to be quieter. There is no evidence that the environment was harmful to the infants housed there. Indeed the evidence from those who had actual experience with the environment and the infants was to the contrary; and

(iv) Ms. Wotherspoon and Dr. Mychasiuk suggested that the prison was a stressful or high risk environment. However, neither had any actual experience with either prisons in general or ACCW in particular. The prison research does not in my view support this conclusion. Further, as noted above, I had concerns about the objectivity of Dr. Mychasiuk that caused me to place little weight on her opinion. Their evidence was contrary to the evidence of those who had actual experience with the environment and whose evidence I accept.

[464] The defendants submitted that ACCW was somehow uniquely unsuitable for a prison nursery program. This submission is belied by the Program's actual record of success. ACCW is said by the defendants to be different due to the presence of a remand population, the short length of average sentences, the varying levels of security and the open campus.

[465] However these features are also present in prison nursery programs operating in other jurisdictions. There are several prison nursery programs in other jurisdictions also housing remanded prisoners and with varying levels of security:

(a) Rikers Island Jail in New York houses both sentenced women and women awaiting transfer to Bedford Hills. These women can be placed in the mother-baby unit which can house up to 15 mothers and 16 infants. The infants can stay for up to 12 months with their mothers.

(b) in New Zealand, the *Corrections (Mothers with Babies) Amendment Act 2008* (N.Z.), 2008/88, amended the *Corrections Act 2004* (N.Z.), 2004/50

to provide that every child under 24 months of age whose mother is imprisoned is entitled to be accommodated in the prison in which his or her mother is imprisoned for the purpose of breastfeeding and bonding. It is required that female prisons have appropriate facilities for the accommodation of children aged under 24 months. This two-year period is based on the World Health Organization's adoption of the World Health Assembly's resolution regarding the appropriate period for continuation of breastfeeding. The amendment is designed to ensure that all women who are remanded in custody will have the opportunity to keep their babies with them, as well women with a higher classification level;

(c) in Germany, there are several prisons which have prison nurseries, including Hessen Prison, where mothers and babies can either be housed in an open regime or a closed regime. While it is unusual for women awaiting trial to be accommodated with their child in the mother and baby unit, approval from a judge and the Guardianship Court can be given to allow them to remain together;

(d) in Australia, Adelaide Women's Prison houses high, medium and low risk security prisoners and remand prisoners. Four units are provided for nursing mothers in the Living Skills Unit (open unit for minimum security) and one in the Mainstream unit;

(e) in Denmark's Ringe prison, a high security prison, prisoners can have their children with them in prison until the age of three. Prisoners can use the grounds freely during the day; and

(f) in Sweden, there are no separate mother-baby units. Rather, babies live in prison with their mothers among the general population.

[466] The defendants have argued that there are certain aspects of the prison environment that are said to constitute risks to infants. For example, the presence of inmates who had committed violent offences, had problems with impulse control,

were suffering from mental health conditions or were suffering from substance abuse issues, as well as the presence of contraband. All of these factors are common to the prison environment and are relied upon by the defendants in support of the argument that a reasonable apprehension of risk of harm to infants is inherent in the prison environment.

[467] However, while such factors are common to the prison environment, as Dr. Elterman confirmed, the research literature supports mother baby programs. Indeed, as noted earlier, Dr. Elterman found no instance of a recommendation against having a mother baby program; rather the debate in the literature was as to how best to structure such programs to balance benefits and risk. Further, while such factors are present, there was no evidence that the potential for harm has materialized in any prison nursery program.

[468] Moreover, there is no suggestion that these risk factors would not be present in federal institutions. Yet the defendants rely upon the possibility of transfer to federal institutions as mitigating the harm caused by the cancellation of the Program. This suggests to me that, notwithstanding submissions made in the litigation, Corrections recognized that the prison environment is not necessarily incompatible with a safe and nurturing environment for infants.

[469] The defendants contrasted the design of BCCW, where the mothers and babies were housed in the OLU, with the campus-style design of ACCW, submitting that the design of ACCW rendered it unsuitable for the Program. This does not account for the fact that Headquarters initially approved of the Program at ACCW. Moreover, the defendants instructed their expert witnesses to ignore Monarch House in preparing their reports. Yet Monarch House is an open living unit, separate from the campus space of the rest of the institution. It was considered as a site for mothers and babies in its initial design. To the extent to which the campus-style design of ACCW is problematic, Monarch House would appear to offer an obvious solution.

[470] Finally, I conclude that the behaviour of Ms. Anderson and Mr. Merchant was consistent with a belief that there was no reasonable apprehension of risk to the infants because infants were permitted to stay at ACCW during Ms. Anderson's tenure after the decision was made to cancel the Program until that decision was announced. In my estimation, both Mr. Merchant and Ms. Anderson are capable professionals who are mindful of the safety of all those in their charge. If either or both truly believed that there was a reasonable apprehension of harm that could not be managed, those infants would not have been permitted to stay at ACCW. As noted earlier, Ms. Macpherson testified that it was her view that the risks could be managed during this period.

[471] In their submissions, the defendants appear to suggest that there was an aspect of cost consideration or allocation of scarce resources at issue in the decision. However, this stands in stark contrast to the evidence of Mr. Merchant that cost was not a factor in his decision. The submission was also inconsistent with the evidence with respect to the low cost of the Program. There was no evidence that the Program entailed a 'disproportionate reallocation of operational resources' or indeed any reallocation of operational resources. Nor was there any evidence that the operation of the Program diverted resources from other programs in the institution.

[472] The decision in *Re R.T.* provides another approach to the question of whether the decision to cancel the Program was in accord with the principles of fundamental justice. As noted above, the issue in *Re R.T.* was the decision by the relevant Ministry to adopt a policy that adoptions of Aboriginal children would occur only with the permission of the First Nations agency, if any existed. Ryan-Froslie J. found that the children's interest in the security of the person was infringed by the policy and then considered whether the infringement was contrary to principles of fundamental justice. Like the provisions of the *CFCS Act* in this province, the *Child and Family Services Act*, S.S. 1989-90, c. C-7.2, provided for a process culminating in a court order in protection cases. The court noted that at para. 71:

> Section 37(4) of the *Act* states that in making an order, the court must consider the best interests of the child and s. 4 of the *Act* sets out a number of factors the court shall take into account in determining those best interests. One of those factors is a child's emotional, cultural, physical, psychological and spiritual needs. The hearing process set out in *The Child and Family Services Act* complies with the principles of fundamental justice.

[473] Ryan-Froslie J. then concluded that the existence of the policy flew in the face of the provisions and rendered the process meaningless, stating at para. 72:

> The policy flies in the face of these provisions. It usurps the hearing process and renders it meaningless insofar as permanent orders for First Nations children are concerned. The effect of the policy is to abdicate the Minister's responsibility under the *Act* to a child's band and/or agency, if any. A hearing is necessary to protect the children's rights to liberty and security of the person. Bands and agencies have the ability to participate fully in such hearings. In this case, the NASC Agency which is also the band's designated representative, was served with notice of the Department's applications with regard to these children, even those applications for temporary placements. Service was made on the Agency by registered mail in December of 2000, July of 2002, January of 2003 and November of 2003. NASC was also served with the March 19, 2004 order which required a hearing to determine the proper placement of these children. Neither NASC nor the chief of the Sturgeon Lake band chose to participate in any of the proceedings until the issue of legal counsel for the children was raised. The proper forum for the band and/or the agency to be heard is in the context of the protection hearing. It is not appropriate for them to assume "veto power" through a policy that denies aboriginal children their s. 7 rights without recourse to the principles of fundamental justice.

[474] In the present case, the provisions of the *CFCS Act* provide for a process dealing with protection matters. As noted above, two of the foundational principles of the *CFCS Act* are the preservation of the family unit (s. 2(b), (c) and (e)) and the best interests of the child (s. 4). However, as in *Re R.T.*, the effect of Mr. Merchant's decision to cancel the Program is to entirely disregard these provisions as they apply to mothers who are incarcerated at ACCW and who wish to keep their infants with them. Prior to Mr. Merchant's decision, those mothers and their infants enjoyed the full benefit of the *CFCS Act.* Now instead of a decision based on the best interest of the child following a consideration of all relevant factors, including the importance of continuity in the child's care, the quality of the relationship the child has with a parent and the effect of maintaining that relationship, there is a blanket exclusion that takes into consideration neither the needs and circumstances of the mother nor those of

the child. The inevitable result is that mothers and babies who would otherwise have resided together at ACCW will now be separated.

[475] In summary, I have concluded that the decision to cancel the Program was arbitrary. The decision was inconsistent with the objectives of the *Correction Act* concerning the custody of the mothers. With respect to the question of the safety of infants, it was based upon a standard that was impossible to meet and inappropriate in the context of an infringement of the security of the person. The decision was not based upon a reasonable apprehension of harm. In the absence of a reasonable apprehension of harm, the question of the relation of the means chosen to that apprehension does not arise.

3. Overbreadth and Gross Disproportionality

i. The Concepts

[476] Overbreadth is the principle that restrictions on life, liberty and security of the person must not be more broadly framed than necessary to achieve a legislative purpose. In both *R. v. Heywood*, [1994] 3 S.C.R. 761 and *R. v. Demers*, 2004 SCC 46, the Supreme Court of Canada stated that the principles of fundamental justice will be violated where the state uses means that are broader than necessary to accomplish a legitimate objective. However as Newbury J.A. noted in *Carter C.A.* at para. 302, in *R. v. Clay*, 2003 SCC 75, overbreadth appeared to be linked at least in part with gross disproportionality and to an extent to arbitrariness.

[477] The principle of gross disproportionality was identified as a principle of fundamental justice in *Malmo-Levine* at paras. 141-143:

> Having rejected the appellants' contention that Parliament is without authority to criminalize conduct unless it causes harm to others, as well as their claim that criminalization of marihuana is arbitrary and irrational, we proceed to the next level of their argument, namely that even if it is not arbitrary and irrational, criminalization is nevertheless disproportionate to any threat posed by marihuana use.
>
> In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 47, the Court accepted that the means taken to achieve an objective can be so disproportionate to the desired end so as to offend the principles of fundamental justice:

> Determining whether deportation to torture violates the principles of fundamental justice requires us to balance [under s. 7] Canada's interest in combatting terrorism and the Convention refugee's interest in not being deported to torture. Canada has a legitimate and compelling interest in combatting terrorism. But it is also committed to fundamental justice. The notion of proportionality is fundamental to our constitutional system. Thus we must ask whether the government's proposed response is reasonable in relation to the threat. In the past, we have held that <u>some responses are so extreme that they are *per se* disproportionate to any legitimate government interest</u>: see *Burns, supra*. We must ask whether deporting a refugee to torture would be such a response. [Emphasis added.]

See also *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 78.

In short, after it is determined that Parliament acted pursuant to a legitimate state interest, the question can still be posed under s. 7 whether the government's legislative measures in response to the use of marihuana were, in the language of *Suresh*, "so extreme that they are *per se* <u>disproportionate</u> to any legitimate government interest" (para. 47 (emphasis added)). As we explain below, the applicable standard is one of gross disproportionality, the proof of which rests on the claimant.

[Emphasis in *Malmo-Levine*.]

[478] As noted above, in *Khawaja*, the Court addressed these concepts together, applying the following test:

> In order to address the appellants' s. 7 constitutional challenge, I will: (1) examine the scope of the law; (2) determine the objective of the law; and (3) ask whether the means selected by the law are broader than necessary to achieve the state objective and whether the impact of the law is grossly disproportionate to that objective.

ii. Discussion

[479] The scope of the decision in the present case is a blanket prohibition on infants residing with their mothers who are incarcerated in any provincial institution. The prohibition covers all mothers and infants and all provincial institutions and allows for no exceptions.

[480] The discussion at the second stage of the inquiry, the objective of the impugned provisions, has typically proceeded on the basis of a legitimate state objective. For example, in *Khawaja*, the objective of the provisions was determined to be to prosecute and prevent terrorism, which was acknowledged to be a

legitimate state objective. In the present case, I have concluded that Mr. Merchant's decision was based upon his view that infants did not fall within the mandate of Corrections. He concluded that Corrections did not have to take on any risk in relation to the infants and that he was not prepared to do so. The defendants have stressed that in making this decision he was not required to consider the best interests of the children who would be affected. It is clear that he did not do so.

[481] In my view, given the s. 7 security of the person interests of both the mothers and the infants affected by this decision, that was not a legitimate objective. The decision was made without consideration of the constitutional issues that were engaged. Mr. Merchant was required to consider these interests in making decisions with respect to the continuation of the Mother Baby Program. It was not in accord with the principles of fundamental justice to decide to cancel the Program without taking these interests into account.

[482] I will next address the questions of whether the means adopted were broader than necessary and whether the impact is grossly disproportionate. I will do so from the perspective that the safety of the infants formed at least an aspect of the objective of the decision at issue.

[483] In the present case, Mr. Merchant adopted a standard, that of a "guarantee", that he acknowledged was impossible to meet. To accept such a standard would be to do what the Court in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*], cautioned against, to effectively immunize the decision from scrutiny.

[484] Such a standard is particularly inappropriate in the present case since the babies affected by the decision have to be placed somewhere and anywhere they are placed is associated with some level of risk. In particular, some of the babies affected who would otherwise have lived with their mothers at ACCW will now be placed in foster care. In that regard I note that in the case of all of the mothers who testified in the present case, the fathers were either not involved or not available to care for the infants and none had parents or other family members who were

available, willing and appropriate to take the babies. This is consistent with the situation of many of the mothers who would be eligible for the Program.

[485] Jane Morely, Q.C. and Dr. Perry Kendall's "Joint Special Report – Health and Well-Being of Children in Care in British Columbia: Report 1 on Health Services Utilization and Mortality" (September 2006), a joint publication of the Child and Youth Officer for British Columbia and the Provincial Health Officer [the *Joint Special Report*], identifies certain risks for children in government care in this province including:

- children in care were more likely to be diagnosed with a health condition and required more services to treat that condition than were children in the general population (at 15-20);
- children in continuing care were prescribed mental health-related drugs at a much higher rate than were children who had never been in care, 8.5 to 12 times higher for Ritalin type medications and 5.5 to 8 times higher for anti-depressants, tranquilizers and anti-psychotics (at 24);
- children in care were admitted to hospital more frequently and for longer periods of time than were children in the general population (at 25);
- children in care had higher rates of injury than children in the general population (at 37);
- children in care are nearly four times more likely to be diagnosed with a mental disorder than a child in the general population (at 42); and
- between 1986 and 2005, 281 children died while in government care; those who died from natural causes did so at a rate four times the rate for children in the general population, and those dying of external causes did so at a rate three times higher than that of children in the general population (at 54-56).

[486] This is not to condemn the foster care system. I agree that foster care placement can, in appropriate circumstances, be the choice that is in the best interests of a particular child. It is, however, to underscore the very real risks that are associated with a type of placement that will now be required for some of the infants who would otherwise have been part of the Program. Such risks make the “zero tolerance standard” proposed by Mr. Merchant particularly inappropriate.

[487] The defendants argued that the decision did not suffer from overbreadth because it is an inherently all or nothing proposition. The institution will either accept infants or it will not. Moreover, in the defendants’ submission, Corrections is under no obligation to consider how it could ensure infants’ safety because to do so injects the best interests of the child into the equation. It was the defendants’ position that Corrections was under no obligation to give any consideration to the best interests of the children affected by its decision. As noted above, I have concluded that Corrections was required to give consideration to the best interests of the children affected.

[488] It is certainly the case that when Mr. Merchant decided that he was not prepared on any basis to continue the Program, he effectively created an all or nothing situation since the decision, as I have found, was based upon his view of the mandate of Corrections and his refusal to accept any risk.

[489] However, I do not agree that the decision was necessarily an all or nothing proposition. Indeed, in my view, since the decision involved the constitutionally protected security of the person interests of both mothers and babies, Corrections was required to conduct an assessment of the risks, to determine whether there was a reasonable apprehension of risk and if so, determine whether there were steps that could reasonably be undertaken to mitigate that risk. Corrections did none of those things.

[490] I agree with the submission of the intervenors that the decision to cancel the Program violated the principles of fundamental justice by being overly broad. Mr. Merchant adopted a standard that was impossible to meet. That is not the

appropriate measure to use to assess the need for an absolute prohibition. On a review of the evidence, I am satisfied that the plaintiffs have met their burden to establish that an absolute prohibition is not required to address any reasonable apprehension of harm. The evidence supports a conclusion that the Program at ACCW provided a safe and secure environment for the mothers and babies. To the extent to which safety could be improved by a separation of mothers and babies from the rest of the population, Monarch House is available and was in part designed with that function in mind.

[491] With respect to the question of whether the impact of the decision is grossly disproportionate to the objective, the defendants reiterated that the standard is gross disproportionality. Counsel submitted that avoidance of harm is a legitimate state interest. Counsel submitted that the evidence demonstrates a reasoned apprehension of harm. Accordingly the state's response was proportionate to the risk.

[492] I agree that the state has a legitimate interest in protecting the safety of infants. The Mother Baby Program with its case-by-case decision-making based upon the best interests of the individual children permitted the state to protect the safety of the infants of provincially incarcerated mothers while at the same time preserving the parent-child bond and the integrity of the family unit where possible. The decision to cancel the Program removed that option.

[493] As I have discussed at length above, the plaintiffs have established that there was no evidence of a reasonable apprehension of harm. Moreover, a reasonable apprehension of harm was not the basis for the decision.

[494] I am satisfied on the basis of the evidence in the record that the decision to cancel the Program resulted in a significant infringement of the security of the person interests of mothers serving provincial sentences of incarceration and their infants who would otherwise have been eligible for the Program. The effect of the cancellation is grossly disproportionate to the interest in safety.

4. Equality as a Principle of Fundamental Justice

[495] The intervenors submit that this Court should recognize equality as a principle of fundamental justice within the meaning of s. 7 of the *Charter* and conclude that the decision to cancel the Program constituted a breach of that principle. The intervenors submit that there is a need to recognize the unintended consequences of the criminal justice system on vulnerable groups. Recognizing substantive equality as a principle of fundamental justice is, in the intervenors' submission, 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. The intervenors submit that this recognition 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.

[496] The intervenors cite *Philippines (Republic) v. Pacificador* (1993), 14 O.R. (3d) 321 (C.A.), leave to appeal ref'd [1993] S.C.C.A. No. 415 [*Pacificador*], in support of that proposition. In *Pacificador*, the appellant had been arrested on a warrant of apprehension. The requesting state sought his extradition on a number of charges, including murder. The appellant argued that it is a principle of fundamental justice that all persons must be treated equally before the law, except to the extent to which distinctions in their treatment can be justified by some reasonable or rational legislative policy. It was submitted that this principle was violated because the *Fugitive Offenders Act* and the *Extradition Act* subjected the fugitive to different tests when determining whether the evidence warranted a committal for surrender.

[497] Mr. Justice Doherty, speaking for the court, states at 337:

> I have no doubt that the equality rights created by s. 15 are principles of fundamental justice.

However, he also concluded that because the claim advanced was a comparative one, it fell to be determined under the tests established by the s. 15 jurisprudence.

He concluded that s. 7 does not create an equality right distinct from that found in s. 15 of the *Charter*.

[498] The defendants' position is that the equality claims in this case should be analyzed pursuant to the provisions of s. 15 and not imported into the s. 7 analysis. This appears to be consistent with the view expressed by the court in *Pacificador.*

[499] The point was argued in *Carter v. Canada (Attorney General)*, 2012 BCSC 886 [*Carter S.C.*], but Smith J. declined to address those submissions because it was unnecessary to do so given her other findings. In my view the same response is appropriate in the present case.

5. Conclusion re Principles of Fundamental Justice

[500] I have concluded that the decision to cancel the Mother Baby Program was arbitrary, overbroad and grossly disproportionate and therefore contrary to the principles of fundamental justice. I note in particular:

(a) the decision was based upon a consideration of mandate that did not take account of the constitutional rights of the mothers and infants affected. As such there was no legitimate state objective;

(b) Mr. Merchant adopted a standard that he acknowledged was impossible to meet, one that was inappropriate given the constitutional issues implicated by the decision;

(c) there was no investigation to determine whether there was a reasonable apprehension of harm;

(d) the evidence does not support a conclusion that there was a reasonable apprehension of harm; and

(e) the decision revoked an individualized process founded upon a determination of the best interests of the infants and replaced it with a blanket exclusion.

D. Conclusion re Section 7

[501] I have concluded that the decision to cancel the Mother Baby Program infringed the right to security of the person of the mothers and babies affected by the decision. I have concluded further that the infringements are not in accord with the principles of fundamental justice. I have concluded that the decision's basis in a determination of mandate is, in the circumstances, not a legitimate objective and further that the decision is arbitrary, overbroad and grossly disproportionate to a concern with respect to safety of the infants.

XI. SECTION 12

[502] Section 12 of the *Charter* provides:

> **12.** Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

[503] It is clear that s. 12 applies not only to sentences but to the conditions of imprisonment for both sentenced offenders and those held on remand: see *Bacon*. As stated in *R v. Ferguson*, 2008 SCC 6 at para. 14, the test for s. 12 is whether the sentence is "grossly disproportionate" or "so excessive as to outrage standards of decency".

[504] One aspect of a court's consideration of the issue is the extent to which there is an international consensus with respect to a particular punishment or treatment: see *Bacon* at paras. 312 and 313. While prison nursery programs are widespread throughout the world, they are not universal. As Professor Jackson notes, "there is a growing call for both increasing and enriching the scope of existing programs". However, it cannot be said at this juncture that there is an international consensus that such programs should be required.

[505] While this section was pleaded in the statement of claim, the plaintiffs did not press the issue in submissions. I agree with the submission of the defendants that the stringent requirements to establish a breach of s. 12 are not met in the circumstances of the present case.

XII. SECTION 15

[506] Section 15 of the *Charter* provides:

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

A. General Principles

[507] In the years since this section was proclaimed, there have been many changes to the analytical framework that the Supreme Court of Canada has applied to the analysis of s. 15 claims. However, certain propositions appear to be settled by virtue of the most recent decisions of that court.

[508] The central concern of s. 15 is substantive and not formal equality. Formal equality means to treat likes alike. Substantive equality requires that the court look beyond formal equality and consider the impact of the law in the social and economic context in which it operates: see *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 165-71 [*Andrews*]; and *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 2 [*Withler*]. As Justice McIntyre stated in *Andrews* at 168:

> Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which will arise from case to case are such that it would be wrong to attempt to confine these considerations within such a fixed and limited formula.

[509] One purpose of s. 15 is to prevent discrimination arising from prejudice or stereotyping. A second purpose is to ameliorate the position of groups within our society who have suffered disadvantage: see *Eaton* at para. 66; and *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 51 [*Law*].

[510] Section 15 does not apply to every distinction but only to differential treatment based upon enumerated or analogous grounds: see *Andrews*; and *Withler* at para. 33. An analogous ground is one based on "a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity": see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 13 [*Corbiere*].

[511] However, not all distinctions based upon enumerated or analogous grounds are contrary to s. 15. In order to fall afoul of s. 15, the distinction must amount to discrimination: see *Withler* at para. 31. Discrimination was defined by Justice McIntyre in *Andrews* at 174 as follows:

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

[512] Thus, as summarized in *Law* at para. 30:

> In summary, then, the *Andrews* decision established that there are three key elements to a discrimination claim under s. 15(1) of the *Charter*: differential treatment, an enumerated or analogous ground, and discrimination in a substantive sense involving factors such as prejudice, stereotyping, and disadvantage. Of fundamental importance, as stressed repeatedly by all of the judges who wrote, the determination of whether each of these elements exists in a particular case is always to be undertaken in a purposive manner, taking into account the full social, political, and legal context of the claim.

[513] It is clear from this passage that s. 15 protects against not only intentional discrimination but also the unintended adverse effects of legislation or governmental conduct. The issue is to be addressed in the social, political and legal context and not restricted to the provisions at issue. As Wilson J. stated in *Turpin* at 1331-32:

> Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular

> context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.

[514] In *R v. Kapp*, 2008 SCC 41 at paras. 17 and 18 [*Kapp*], the majority phrased the test as follows:

> The template in *Andrews*, as further developed in a series of cases culminating in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, established in essence a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?
>
> In *Andrews*, McIntyre J. viewed discriminatory impact through the lens of two concepts: (1) the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds; and (2) stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant's or group's actual circumstances and characteristics.

[515] The Court, in *Kapp*, noted at para. 24 that the four contextual factors identified in *Law* continue to have relevance as a means of revealing discrimination. Those factors are discussed in *Law* at paras. 63-74 as follows:

> *(a) Pre-existing Disadvantage*
>
> [63] As has been consistently recognized throughout this Court's jurisprudence, probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group[citations omitted]. These factors are 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 characterization, and will have a more severe impact upon them, since they are already vulnerable.
>
> …
>
> *(b) Relationship Between Grounds and the Claimant's Characteristics or Circumstances*
>
> [69] …One factor in some circumstances may be the relationship between the ground upon which the claim is based and the nature of the differential treatment.
>
> …

> *(c) Ameliorative Purpose or Effects*
>
> [72] Another possibly important factor will be the ameliorative purpose or effects of impugned legislation or other state action upon a more disadvantaged person or group in society. As stated by Sopinka J. in *Eaton*, *supra*, at para. 66: "the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society". An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation. I emphasize that this factor will likely only be relevant where the person or group that is excluded from the scope of ameliorative legislation or other state action is more advantaged in a relative sense. Underinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination: see *Vriend*, *supra*, at paras. 94-104, *per* Cory J.
>
> …
>
> *(d) Nature of the Interest Affected*
>
> [74] A further contextual factor which may be relevant in appropriate cases in determining whether the claimant's dignity has been violated will be the nature and scope of the interest affected by the legislation...

[516] The application of this test received additional clarification in the two subsequent decisions of *Withler* and *Quebec (Attorney General) v. A*, 2013 SCC 5 [*Quebec v. A*]. In *Withler* at paras. 35-38, the Court described the application of the test as follows:

> [35] The first way that substantive inequality, or discrimination, may be established is by showing that the impugned law, in purpose or effect, perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1). <u>Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group</u>. Thus judges have noted that historic disadvantage is often linked to s. 15 discrimination. In *R. v. Turpin*, [1989] 1 S.C.R. 1296, for example, Wilson J. identified the purposes of s. 15 as "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society" (p. 1333). See also *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, at pp. 1043-44; *Andrews*, at pp. 151-53, *per* Wilson J.; *Law*, at paras. 40-51.
>
> ….
>
> [37] Whether the s. 15 analysis focusses on perpetuating disadvantage or stereotyping, <u>the analysis involves looking at the circumstances of members</u>

> of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.
>
> [38] Without attempting to limit the factors that may be useful in assessing a claim of discrimination, it can be said that where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered. Where the claim is that a law is based on stereotyped views of the claimant group, the issue will be whether there is correspondence with the claimants' actual characteristics or circumstances. Where the impugned law is part of a larger benefits scheme, as it is here, the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis.
>
> [Emphasis added.]

[517] The focus of the analysis, following decisions such as *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, was on the identification of an appropriate comparator group; that is, a group that mirrors the characteristics of the claimant except for the personal characteristic associated with an enumerated or analogous ground. However, the strict adherence to an analysis based upon comparator groups proved to be problematic, particularly in cases involving allegations of adverse treatment on the basis of multiple personal grounds.

[518] In *Withler* at paras. 56-59, the Court identified several significant problems with the comparative group analysis. The definition of the comparator group may effectively determine the outcome of the litigation, essentially eliminating or marginalizing the factors going to discrimination. As such, the quest to find the “correct” mirror comparator group can take on a level of importance that ultimately reduces the inquiry into a search for sameness rather than disadvantage, thereby obscuring the real issue s. 15 was intended to address. Further, reliance on a mirror group may prove unhelpful where the claimant alleges they have been disadvantaged based on multiple intersecting grounds of discrimination. Finally, finding the “right” comparator group may place an unfair burden on the claimant, as finding such a group may be impossible and it may be difficult to determine what characteristics must be mirrored.

[519] The Court concluded that the role of comparison in a substantive equality analysis is not captured by the relatively formal analytical tool of the comparator or mirror comparator group. Comparison may help to address the test, but the nature of the comparison will vary depending on context.

[520] With respect to the question of whether the law creates a distinction based upon an enumerated or analogous ground, the Court confirmed at paras. 62 and 63:

> [62] The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).
>
> [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.

[521] In *Quebec v. A*, Abella J., whose judgment with respect to s. 15 was agreed with by the majority of the Court, provided the clarification that at the second step of the analysis, the question is whether the distinction discriminates by perpetuating disadvantage or prejudice or by stereotyping, stating in part at paras. 327 and 332:

> [327] We must be careful not to treat *Kapp* and *Withler* as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them. Such an approach improperly focuses attention on whether a discriminatory *attitude* exists, not a discriminatory impact, contrary to *Andrews*, *Kapp* and *Withler*. In explaining prejudice in *Withler*, the Court said: "[W]ithout attempting to limit the factors that may be useful in assessing a claim of discrimination, it can be said that where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered" (para. 38). [Emphasis in original.]
>
> …
>
> <u>[332] The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such</u>

> discrimination should be curtailed. 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.
>
> [Emphasis added.]

B. Threshold Issues

[522] The defendants identified two threshold issues in relation to the analysis of the equality claim. The defendants submit the first is that this claim does not relate to the "benefits and burdens of the law" and thus is outside the scope of s. 15. Their second submission is that the plaintiffs' claim is in reality a demand that the state create a benefit for them, a demand the defendants submit is outside the scope of s. 15.

1. Is this a Claim of Unequal Treatment by or under the Law?

[523] The defendants submit that, as a threshold issue, the plaintiffs have failed to establish that there has been discrimination "before or under the law", noting that in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 at para. 27 [*Auton*], Chief Justice McLachlin stated that the "specific promise [of s. 15(1)]…is confined to benefits and burdens 'of the law'". The defendants submit that therefore, the plaintiffs must show unequal treatment by or under the law – more specifically, the plaintiffs must demonstrate that they failed to receive a benefit that the law provided to others, or that they were saddled with a burden the law did not impose on someone else.

[524] I note first that any exercise by government of a statutory power or discretion constitutes "law" for the purpose of s. 15: see *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 276-78. In my view the decision to cancel the Mother Baby Program was an exercise of discretion that constitutes law for the purpose of s. 15.

[525] I note the discussion of *Auton* by Smith J. in *Carter S.C.*, in which she stated at para. 1064:

> In my view, the need to focus on substantive equality, emphatically reaffirmed in *Kapp* and *Withler*, is not limited to cases where a "benefit provided by the law", in the sense of access to a government benefit program, has been

> denied. The Supreme Court of Canada dismissed the claim in *Auton*, among other reasons, because the plaintiff in effect was seeking to compel the government to expand a benefit program. The Court in *Auton* did not state that s. 15 only encompasses claims for benefits conferred by the law. Section 15, and the substantive equality approach, also encompass claims for the removal of burdens imposed by the law where those burdens are based on characteristics (such as disability) specified in s. 15 or analogous to them.
>
> [Emphasis in original.]

[526] While her decision was ultimately overturned by the majority of our Court of Appeal, it was on the basis that she was bound by the principle of *stare decisis*. The Court in *Carter C.A.* did not comment upon this aspect of the trial decision.

[527] In my view, the decision did deny the claimants the benefit of the law and imposed upon them a burden or disadvantage not shared by others. At common law, the natural parents of a child are entitled to custody. The state will interfere with that fundamental natural relation only when required by the best interests of the child. In *Hepton et al. v. Maat et al.*, [1957] S.C.R. 606 at 607, Justice Rand stated:

> It is, I think, of the utmost importance that questions involving the custody of infants be approached with a clear view of the governing considerations. That view cannot be less than this: *prima facie* the natural parents are entitled to custody unless by reason of some act, condition or circumstance affecting them it is evident that the welfare of the child requires that that fundamental natural relation be severed. As *parens patriae* the Sovereign is the constitutional guardian of children, but that power arises in a community in which the family is the social unit. No one would, for a moment, suggest that the power ever extended to the disruption of that unity by seizing any of its children at the whim or for any public or private purpose of the Sovereign or for any other purpose than that of the welfare of one unable, because of infancy, to care for himself. The controlling fact in the type of case we have here is that the welfare of the child can never be determined as an isolated fact, that is, as if the child were free from natural parental bonds entailing moral responsibility -- as if, for example, he were a homeless orphan wandering at large.

[528] These twin concepts of the fundamental nature of the family unit and that the state will intervene only in the best interests of the child, as noted above, are two of the animating principles of the *CFCS Act.* This is the legislation pursuant to which the state acts in relation to the claimants. It is conceded that in cases involving children of mothers incarcerated at ACCW, where the MCFD determined that it was in the best interests of the child, the Mother Baby Program permitted the mothers

and infants to stay together and to avoid intervention by the MCFD. Thus while the Program existed, the mothers incarcerated at ACCW and their babies enjoyed the protections afforded to other mothers and babies at common law and pursuant to the *CFCS Act*. It is also conceded that due to the cancellation of the Program, mothers and children have been separated and children have been taken into care. The mothers affected by the cancellation are separated from their infants based on considerations other than the best interests of the child. As such, the effect of the decision is to deny these mothers and infants the benefits of both the common law and the *CFCS Act*, and to impose upon them the burden of separation in circumstances in which other members of society would not face such a deprivation.

2. Is this a Demand for a Positive Benefit?

[529] The defendants submit that the plaintiffs do not seek equal access to a benefit provided by law, nor do they challenge a burden imposed by the law in issue. The defendants submit that what the plaintiffs really seek is the imposition of a positive obligation on the Legislature or Corrections to mitigate the consequences of incarceration for expecting mothers so as to provide an equal opportunity to experience the benefits of motherhood. The defendants submit that this is not within the purview of s. 15 of the *Charter*.

[530] The defendants submit that there is no obligation on the state to create a benefit. It was submitted that it is up to the Legislature to determine what benefits to bestow, so long as it does not confer those benefits in a discriminatory fashion. Thus, the defendants submit, while s. 15(1) may require that the adult custody policy be applied in a way that does not discriminate on enumerated or analogous grounds, it does not require the Branch to create new programs or extend privileges to mothers of newborn infants, or Aboriginal mothers of newborn infants, which are not available to other inmates.

[531] The defendants' contention is that the claimants are not entitled to demand that the state create a program not offered to other inmates to benefit them. I note that one of the guiding principles of the *CFCS Act* is that:

> 2. This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:
>
> …
>
> (c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;

[532] However, what the decision to cancel the Mother Baby Program means in effect is that the state has decided to deprive these claimants of support that it had previously made available. In this regard, I note that there has been no contention in this case that cost had any bearing on the decision to cancel the Program. This is not a case about the allocation of scarce resources. Moreover, for those children seized as a consequence of the cancellation, the state will be expending resources in a manner that does not conform with the guiding principles of the *CFCS Act*.

[533] In any event, in *Eldridge*, the Court rejected the defendants' contention that s. 15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independent of state action. Justice La Forest, for the Court, stated at para. 73:

> In my view, this position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence.

[534] In the result, in *Eldridge*, the government's failure to fund sign language interpretation in relation to the provision of medical services was found to constitute a violation of the s. 15(1) rights of deaf persons. In the present case, the defendants have argued that *Eldridge* stands for the proposition that if the state chooses to provide a benefit it must do so without discrimination.

[535] Counsel for the defendants submits that there is no application of the equality provision to the present case because the state has chosen not to provide the benefit to anyone. This, however, ignores the fact that, pursuant to s. 2(c) of the *CFCS Act*, the state has committed to provide benefits to keep family units together that it refuses to provide to the claimants. In addition, the defendants' submission

ignores the fact that by virtue of the cancellation, the claimants are deprived of the benefit of the application of the guiding principles of the *CFCS Act* concerning the placement of the children.

[536] The importance of these principles was highlighted in *Re R.T*. As noted above, the court in that case concluded that the policy adopted by the Ministry constituted a breach of the children's s. 7 rights under the *Charter*. In addition, the court concluded that s. 15 was infringed, stating at paras. 92 and 93:

> The effect of the policy is to deny these children permanent homes and stable, long-lasting relationships. These things are necessary for the children to develop relationships, form a strong sense of self-identity and positive feelings of self-worth. Self-worth is not dependent solely on culture but also on the very basic need to be loved and valued and that basic need knows no colour.
>
> As Justice Iacobucci stated at para. 53 of the *Law*, *supra*, decision: "... Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits." The policy in issue here is blind to the individual needs, capacities and merits of the children to which it is applied. As such, it harms their human dignity. Implementing the policy has the potential of destroying the child's self-identity and self-worth, the very things it was established to protect.

3. Conclusion re Threshold Issues

[537] In the result, the defendants have not established that the scope of the present claim is outside the scope of s. 15. I have concluded that the claim does fall within the scope of s. 15.

C. What is the Distinction?

[538] The first question to be addressed is what the distinction at issue is in the present case. The *CFCS Act* is the legislation of general application that applies to the state's assessment of actions taken in relation to child protection. Prior to the cancellation of the Mother Baby Program, infants born to mothers incarcerated at ACCW could be permitted to reside with their mothers at ACCW if the MCFD approved. In considering whether to grant approval for the baby to return to ACCW, the Ministry applied the provisions of the *CFCS Act*, which incorporated as

foundational principles the preservation of the family unit and an assessment of the best interests of the child.

[539] With the cancellation of the Program, mothers and their infants were deprived of the benefit of the provisions of the *CFCS Act*. The defendants do not suggest that Mr. Merchant considered the best interests of the child in reaching his decision; indeed the defendants submit that standard is irrelevant to his decision. Nonetheless, it is clear both from the *CFCS Act* and the MCFD's practice that the best interest standard is to be applied on a case-by-case basis. Mr. Merchant's decision was a blanket exclusion that prohibited a case-by-case consideration.

[540] Thus the distinction at issue in these proceedings is that for other mothers and infants, the MCFD will make decisions regarding placement based on a case-by-case determination of the best interests of the child. The decision to cancel the Program deprives the babies and mothers affected of the option to remain together, the option favoured by the legislation, and removes one fundamental option from the consideration of the best interests of the child. As a consequence, babies of mothers incarcerated at ACCW will be separated from their mothers even where the MCFD would otherwise conclude that it would be in the best interests of the child for them to remain together.

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

[542] The intervenors submit that the cancellation of the Program had the opposite effect: it sent a powerful, demeaning message to the mothers whose babies were now being apprehended that they are not safe to be around and that their babies must be protected from them. Many of the mothers come from backgrounds of broken attachment. Apprehending their babies re-opens these wounds from the

past, disrupting the mother-baby bond and creating severe and potentially insurmountable hurdles to establishing attachment.

D. Is the Distinction Based on an Enumerated or Analogous Ground?

[543] The affected groups in this case are:

(a) provincially incarcerated mothers, whether on remand or serving sentences, who wish to have their baby remain with them while they serve their sentence; and

(b) the babies of those mothers.

1. Submissions of the Intervenors

[544] The intervenors submit that the cancellation of the Program falls into the category of indirect discrimination, that is it causes a disproportionately negative impact on a group that can be identified by factors relating to enumerated or analogous grounds. The intervenors submit that the evidence establishes that the claimants are female, disproportionately Aboriginal, with present and historical experiences of addiction and abuse, mental health issues, poverty, foster or institutional care and child apprehension. It was submitted that, in relation to the inmates, this constellation of characteristics related to the enumerated grounds of race, ethnicity, disability and sex; for the babies, it related to the analogous ground of family status. The cancellation has a disproportionate impact on Aboriginal women who are overrepresented in the prison population and whose status as mothers is burdened by the history of colonialism, displacement and residential schooling.

[545] It was submitted that comparisons between the claimants and others cannot fully capture the true negative impact of the cancellation because of the complex ways in which these s. 15 characteristics intersect. However, the adverse impact on the claimants can be partially illustrated though comparisons with other groups, including:

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

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

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

[546] The intervenors submit that 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 v. A* at para. 354*,* the Court stated that heterogeneity within the claimant group does not defeat a claim of discrimination. Writing for the majority, Justice Abella cited *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 at 1288-89 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.
>
> [Emphasis in *Quebec v. A*.]

[547] In this case, the intervenors submit 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.*, [1989] 1 S.C.R. 1219 [*Brooks*], Chief Justice Dickson, writing for the Court, recognized that pregnancy is unique to women and discrimination on the basis of pregnancy is discrimination on the basis of sex. It was 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 the physical and emotional vulnerabilities that arise post-partum. These effects should be recognized.

[548] Second, the claimants are disproportionately impacted because women are typically primary caregivers. 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 biologically unrelated caregiver and because these women will disproportionately feel primarily responsible for their child's well-being.

[549] Female prisoners are different than male prisoners. They are less violent, their histories tend to be marked by abuse and they tend to have greater health needs. Many have turned to abusing substances, an abuse related to their multiple hardships. The intervenors submit that the needs of female prisoners are often not well understood or accommodated.

[550] 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, Maple Ridge and Prince George. This distinguishes female prisoners from male prisoners, who are more likely to be imprisoned closer to their families.

[551] In British Columbia as noted above, a disproportionate number of prisoners are Aboriginal. 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. 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.

[552] As for the affected infants, the 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 historical practice of, through different mechanisms, separating Aboriginal families. Such mechanisms have included the use of displacement or residential schools. Today, these practices continue to have repercussions on B.C.'s Aboriginal people.

[553] To summarize, the intervenors submit that because of pregnancy, the different vulnerabilities of female prisoners and the increased likelihood of sole parenting for female prisoners, separation of mother and infant is 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.

2. Submission of the Defendants

[554] The defendants submit that the s. 15 claim rests on a flawed comparator group. Counsel submits that although the Supreme Court of Canada has cautioned against over-reliance on "mirror comparator groups" to the exclusion of other factors, a properly conceived comparator group remains essential, particularly in the first stage of the analysis: see *Withler* at para. 62.

[555] The defendants submit that the plaintiffs seek to be compared with mothers and pregnant women who are not incarcerated, or with mothers and pregnant women who receive conditional sentences or serve their sentences in the community. They submit that the fundamental flaw in this comparison is that the

difference between the plaintiffs, on the one hand, and the women in the proposed comparator groups, on the other, is not based on personal characteristics that fall within the enumerated or analogous grounds of s. 15(1). The difference is that the claimants were in prison when they gave birth. The women to whom they seek to be compared were not in prison when they did so. Incarceration is not an enumerated or analogous ground under s. 15(1). The plaintiffs cannot be compared, for the purposes of s. 15, with women who have not been convicted of a crime or women who received a lesser sentence.

[556] The defendants submit that the *Regulation* and policy do not create a distinction based on an enumerated or analogous ground. The defendants acknowledge that the decision to cancel the Mother Baby Program may have created a distinction between incarcerated mothers and mothers in the community. However, the defendants submit that, although the policy on pregnant inmates may only apply to women, and the benefits of breastfeeding may only be experienced by women, limiting the amount of time that an incarcerated woman can spend with her infant does not create a disadvantage or withhold a benefit based on her sex. The defendants submit that female inmates are not denied the full benefits of bonding with their infants because they are women; they are denied those full benefits because they are incarcerated. That distinction, the defendants submit, is not based on any enumerated or analogous ground but on the fact that the women were incarcerated when they gave birth.

[557] The defendants cite in support of this proposition the case of *Turner v. Burnaby Correctional Centre for Women*, [1994] B.C.J. No. 1430, 1994 CanLII 1218 (S.C.) [*Turner*]. The s. 15 issue in *Turner* was that the petitioner was an inmate at BCCW who was not eligible to keep her infant with her at the institution because she was classified for secure custody. Infants were only permitted in the open or minimum security unit. Mr. Justice Low, as he then was, concluded that the petitioner had not been discriminated against, stating at para. 28:

> In comparison, to whom is the petitioner discriminated against? The answer given in argument is that the comparison group is male prisoners, that this is a case of sex discrimination. But this logic breaks down very quickly if one

> assumes that the administrators of provincial gaols for men do not permit inmates to have their children living with them. The administrators at the women's gaol recognize that it is appropriate for inmates to have their infants with them if they meet certain criteria. All female inmates are treated in a similar way and female inmates in secure custody are treated no differently than male inmates in any kind of custody. There is no discrimination to be found by comparing treatment of male inmates to treatment of female inmates in the situation of the petitioner.

3. Discussion

i. Mothers

[558] In my view the defendants' assertion that the plaintiffs' claim rests upon a flawed comparator group analysis is not responsive to the primary submission of the intervenors, which is that due to the multiple and intersecting grounds at issue in the present case, a comparator approach is not appropriate and, following *Withler*, no longer required. The defendants' submission also ignores the fact that there is a mother baby program in the federal corrections system. Therefore, women who receive federal sentences of more than two years are eligible to keep their infants with them during their incarceration.

[559] Moreover, in my view, *Turner* does not assist the defendants since it did not involve a claim by the infant. In addition, the issue was the criteria for eligibility to the program, unlike the claim in the present case. There is no suggestion made by the claimants in the present case that *Turner* was wrongly decided. However, it is of limited assistance in resolving the issues in the present case.

[560] Moreover, it is not necessary for all persons possessing the characteristics identified in the enumerated or analogous ground to be affected by the impugned provision if it disproportionately affects the claimant group on the basis of the ground. In *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 at paras. 75 and 76, Justice Gonthier, for the Court, stated:

> The relevant potential ground of discrimination in this case is "physical disability", a ground expressly included in s. 15(1). The question here is whether the differential treatment of chronic pain sufferers is truly based on this enumerated ground. While the Attorney General of Nova Scotia concedes that it is, the Board argues that since both the claimants and the

> comparator group suffer from physical disabilities, differential treatment of chronic pain within the workers' compensation scheme is not based on physical disability. Rather, argues the Board, the differential treatment must derive from some other basis.
>
> In my view, this argument is without merit. This Court has long recognized that differential treatment can occur on the basis of an enumerated ground despite the fact that not all persons belonging to the relevant group are equally mistreated. This issue first arose in the context of employment discrimination claims under provincial human rights statutes. In *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, Dickson C.J. held that sexual harassment in the workplace constituted sex discrimination. He responded to the argument that, since harassers choose their targets on the basis of physical attractiveness, a personal characteristic, rather than gender, a group characteristic, sexual harassment did not amount to sex discrimination. He stated, at pp. 1288-89, that:
>
>> While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than on the basis of the individual's personal characteristics, 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... . 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.
>
> Likewise, in *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, the employer argued that the exclusion of pregnancy from a group health insurance policy did not amount to sex discrimination, because it did not affect all women but only those who were pregnant. Dickson C.J. rejected this argument too, holding that, since only women could become pregnant, distinctions based on pregnancy could be nothing other than distinctions based on or related to sex. Thus, he concluded, the exclusion of pregnancy from the list of compensable conditions constituted sex discrimination.

[561] The defendants have argued that the distinction is based upon incarceration, not on an enumerated or analogous ground. In the first place, this submission is premised on the incorrect assumption that there is a fundamental incompatibility between incarceration and participating in the full benefits of bonding with infants. The history of the mother baby programs in this province and of prison nursery programs both in Canada and elsewhere belie this proposition. Second, the submission is, in my view, directly analogous to the reasoning rejected in *Brooks* that discrimination on the basis of pregnancy was not discrimination on the basis of

sex. Finally, the submission ignores the claims of the infants who are denied the benefits of the Program and who are not incarcerated.

[562] I have concluded, for the reasons advanced by the intervenors and adopted by the plaintiffs, that the decision to cancel the Program in the case of mothers created a distinction based upon the enumerated grounds of race, ethnicity, disability and sex.

ii. Infants

[563] As noted above, the intervenors submit that the cancellation of the Program infringes the s. 15 rights of the babies based on their ethnicity and family status as a child born to an incarcerated mother. While “family status” is an enumerated ground in the *Humans Rights Code*, R.S.B.C. 1996, c. 210, it has not yet been recognized expressly as an analogous ground under s. 15 by the Supreme Court of Canada.

[564] In her dissenting opinion in *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, Justice McLachlin, as she then was, concluded that an individual’s status as a separated or divorced custodial parent was an analogous ground within the meaning of s. 15, noting at 722:

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

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

[566] Children of incarcerated parents are described as the “invisible victims” of crime and the corrections system. These children have violated no laws, yet suffer the stigma of criminality as a result of their parent’s actions; see Oliver Robertson,

"Collateral Convicts: Children of incarcerated parents", Quaker United Nations Office (March 2012) [*Robertson*]. As described in *Robertson* at 2:

> Unfortunately, children of incarcerated parents are too easily ignored in the criminal justice system, which deals with identifying and responding to individual guilt or innocence. Children interacting with the criminal justice system (for example when visiting incarcerated parents) are "reduced to a security risk assessment, [while] within the broader community they are silent and silenced." Only rarely do ministries responsible for children see them as a group exposed to particular challenges, meaning children of incarcerated parents often fall into the gaps between government agencies.

[567] I find that the status of the claimant babies in this case as children of incarcerated mothers is an immutable characteristic of historic disadvantage, analogous to the grounds listed in s. 15, and as such they are worthy of protection from discrimination based on the status of their mothers; see *Corbiere* at para. 13.

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

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

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

[571] Following the cancellation of the Program, the claimant babies' best interests no longer determine their right to remain with their mothers. The policy absolutely prohibits infants remaining with their mothers at ACCW, even if the MCFD determines that this would be in the best interest of the baby. As described in

Robertson, these babies are reduced to a "security risk." Their interests and personhood are not considered. Thus, cancellation of the Program creates a distinction based on the analogous ground of their family status as children of incarcerated mothers.

E. Is the Differential Treatment Discriminatory?

1. Submissions of the Intervenors

[572] The intervenors submit 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. Instead it exacerbates the difficulties the infants will face as persons born into marginalized groups.

[573] The intervenors submit that the cancellation of the Program perpetuates the stigmatizing assumption that the mothers – as a result of their incarceration and classification within the corrections system – are incapable of providing the security, love and care that their babies require. They are seen as the archetype of the "bad mother," the sort of person that is very likely to harm her baby. It is assumed that vigilant state oversight and intervention are necessary to protect these babies from their "bad mothers".

[574] The intervenors submit that this stereotype has a further severe negative impact on the Aboriginal claimants who, after the history of colonialism and the displacement that was imposed on them, are presumed to be unable to care for themselves or their families.

[575] The intervenors made the following submissions with respect to the *Law* factors as part of the contextual inquiry concerning whether or not there is discrimination.

i. Pre-existing Disadvantage

[576] The intervenors submit that 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.

[577] Counsel submits that all of the prisoners are women and, as noted in *Brooks*; and *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872, the Supreme Court of Canada has recognized that women have been historically disadvantaged.

[578] 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*, 2012 SCC 13 [*Ipeelee*], the majority of the Supreme Court held, *per* LeBel J., that courts must take judicial notice of systemic and background factors affecting Aboriginal people in society, stating at para. 60:

> 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...

[579] In *R. v. Gladue*, [1999] 1 S.C.R. 688 [*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. 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.

[580] In *Ipeelee*, the Court noted that problems with the overrepresentation and alienation of Aboriginal peoples in the criminal justice system have only worsened since *Gladue.*

[581] The intervenors note that the female prisoner population in B.C. is clearly marked by the 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. 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.

[582] The intervenors stressed that in regards to the 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 *Aboriginal Peoples and the Criminal Justice System* (Report for the Ipperwash Inquiry (2003-2007), undated), was cited as a helpful summary of some elements of that state conduct. It states at 26:

> 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.

[583] The BCCLA cited *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, 2013), a recent special report of the Provincial Health Officer, which 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, stating at 3:

> 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 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".

[584] The intervenors submit that, as is clear by their enumeration in s. 15 of the *Charter,* women are a disadvantaged group in Canadian 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.

ii. Correspondence

[585] The intervenors submit that the decision to cancel the Program does not correspond to the characteristics of either the mothers or the babies. Rather, in each case, their interests are best furthered through the continuation of the Program. The alternatives proposed as accommodation are inadequate. Visitation is not sufficient to permit babies to attach to their mothers when their primary needs are being met elsewhere. Not all women are eligible for temporary absences. Few residential placements accept infants. The possibility of transfer to FVI remains only a theoretical option and the evidence of Ms. Block illustrates the practical limitations of such an option given the length of time required for classification in the federal system and the comparative shortness of most provincial sentences. The pumping and storage of breast milk does not permit breastfeeding.

iii. Ameliorative Effects

[586] The intervenors submit that this factor has no relevance because 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.

iv. Nature of the Interest Affected

[587] The intervenors submit that the nature of the interests affected is significant. The interests at stake are fundamental, going to the heart of a mother's ability to nurture and care for her infant and the right of a baby to receive his or her mother's care. Counsel submitted that the importance of these interests is reflected in the international instruments, the common law tradition and the governing principles of the *CFCS Act*. The deprivation caused by the cancellation of the Program has significant short and long-term consequences for both mothers and infants. The impact is particularly profound in the case of Aboriginal mothers and babies in light of the historical experience and continuing pattern of state separation of Aboriginal families. The *Joint Special Report* notes, at viii, that there is a significantly disproportionate number of Aboriginal children in state care – 49% of the total

number of children in care in this province despite comprising only 7% of the general population of children.

2. Submissions of the Defendants

[588] The defendants submit that the policy is not discriminatory because, while it may seem on its surface to perpetuate the disadvantage of Aboriginal women who want to keep their children, it does so based on the woman's actual circumstances, rather than on any assumption regarding the abilities of Aboriginal women to raise a happy and healthy family. Counsel submits that the work of redressing the historical disadvantages faced by Aboriginal peoples cannot be done by s. 15(1) of the *Charter* in the absence of a law that provides an opportunity to other people. The purpose of s. 15(1) is to provide Aboriginal peoples with a ramp to the benefits enjoyed by other members of society in comparable circumstances. Counsel submits that because no other women in prison are entitled to fully access the benefits of motherhood while incarcerated, there is no discrimination against Aboriginal women. In other words, the new policy does not deny Aboriginal women access to benefits of motherhood they would otherwise enjoy but for their Aboriginal heritage.

[589] The defendants submit that the Corrections policy on pregnant inmates and infants in prison is not based on a stereotype about women in prison. The defendants submit that the decision to cancel the previous practice and implement the new policy was based on a concern for the safety of infants in prison. Counsel notes that there is no evidence that the decision was based on an assumption that all women who receive custodial sentences are unfit to be mothers or pose a risk to their own infants. The new policy applies equally to all women who give birth in prison, regardless of their parenting abilities or capacities.

[590] The defendants cite the *Hutterian Brethren* decision, in which the Court rejected all allegations of discrimination. Chief Justice McLachlin, for the majority, stated at para. 108:

> Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is no discrimination within the meaning of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, as explained in *Kapp*. The Colony members' claim is to the unfettered practice of their religion, not to be free from religious discrimination. The substance of the respondents' s. 15(1) claim has already been dealt with under s. 2(a). There is no breach of s. 15(1).

[591] The defendants submit that the same is true in this case. Assuming that the plaintiffs could show the policy on pregnant inmates creates a distinction on the enumerated ground of sex or any analogous ground, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice regarding the safety of infants in prison.

[592] The defendants submit that the plaintiffs have failed to demonstrate any causal relationship between the issue of overrepresentation of Aboriginal women in prison and the policy. Counsel submitted that, for example, in order to show discrimination, the plaintiffs would have to establish that the lack of a Mother Baby Program caused the overrepresentation of Aboriginals in prison. Counsel submitted further that in order to establish causation it was not sufficient that there be evidence that the Mother Baby Program resulted in lower rates of recidivism. The plaintiffs would need to adduce evidence that the impact was greater on Aboriginal women in order to establish the necessary causal link.

[593] The defendants cite *R. v. Nur*, 2011 ONSC 4874 [*Nur*]. In that case, Code J. rejected a challenge based on s. 15 to mandatory minimum sentences established by s. 95 of the *Criminal Code*. The claimants had submitted that the legislation has a disproportionate impact on black males and therefore discriminatory effects.

[594] Code J. cited *Symes v. Canada*, [1993] 4 S.C.R. 695 [*Symes*], in which Justice Iacobucci, for the majority, stated at 764-65:

> If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or are contributed to, by

> an impugned provision, and those social circumstances which exist independently of such a provision.

[595] Code J. then concluded that the applicants had failed to establish that the sentencing provisions are discriminatory, stating at para. 82 of *Nur*:

> I am not satisfied that the sentencing provisions in s. 95 are the cause of any discriminatory effect or disproportionate impact on blacks. Those causes and effects exist independently of the legislative provisions. Accordingly, the s. 15 *Charter* argument must be rejected.

3. Discussion

[596] I am in substantial agreement with the submissions of the intervenors with respect to the issue of whether the decision to cancel the Program constituted discrimination for the purposes of s. 15. In particular, I agree that the cancellation of the Program exacerbated the disadvantage suffered by the women and the difficulties the infants will face as persons born into marginalized groups.

[597] With respect to the application of the *Law* factors, I note in particular:

(a) Pre-existing disadvantage – I agree that the claimants are a vulnerable group who have experienced historical disadvantage. In that regard, I agree that the historical disadvantage of Aboriginal people is of particular relevance in light of the overrepresentation of Aboriginal people in the incarcerated population and the history of state removal of Aboriginal children;

(b) Correspondence – I agree that the decision to cancel the Program does not correspond to the characteristics of either the mothers or babies and that the ameliorative alternatives proposed are inadequate. The defendants have not suggested that the decision to cancel the Program corresponds to the mothers' needs. Instead they suggest that the decision related to the safety of infants. However, I have found that the decision in fact was one of mandate, not safety. In fact, as noted earlier, there was no assessment of the risk to infants, its nature or quality, no assessment of the extent to which the risk could be managed, no assessment of the relative risk compared with

options in the community, no assessment of the risk compared with the Program's benefits and no assessment of whether the cancellation was in the best interests of the infants. In fact, the cancellation prevented infants from being placed in accordance with the MCFD's assessment of their best interest; and

(c) Interest affected – I agree that the nature of the interests affected is significant. Indeed as I have concluded in the discussion concerning s. 7, the impacts of the decision are so significant they engage the constitutionally protected rights to the security of the person of the mothers and infants.

[598] The defendants have argued that the decision to cancel the Program was not discriminatory because it was based upon the women's actual circumstances and because it treated all provincially incarcerated women the same in that none were permitted to have their children reside with them at the institution. This submission, in my view, relies upon a formal equality analysis that the Supreme Court of Canada has consistently rejected, starting with *Andrews*. It is clear that s. 15 can be violated by a law that treats everyone equally but produces a disproportionate impact. As stated by Chief Justice Lamer in *Rodriguez* at 549:

> Even in imposing generally applicable provisions, the government must take into account differences which in fact exist between individuals and so far as possible ensure that the provisions adopted will not have a greater impact on certain classes of persons due to irrelevant personal characteristics than on the public as a whole. In other words, to promote the objective of the more equal society, s. 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons.

[599] While Lamer C.J.C.'s statement in *Rodriguez* was made in dissent, his approach was endorsed by the Court in *Eldridge* at para. 64.

[600] Further, by reference to the "actual circumstances" of the women, the defendants' submission is rooted in the premise that permitting mothers to have their infants with them is fundamentally incompatible with incarceration. However, as the federal experience, prior history of the programs in the provincial system and

experience with prison nurseries elsewhere in the world demonstrates, this is not the case.

[601] Finally, the submission overlooks the fundamental submission of the intervenors, which is that there are intersecting grounds in the present case, sex being but one of them. To that submission, it is no answer to say that no women are permitted to have their babies with them.

[602] I agree that the decision to cancel the Program was not based upon a stereotype that all incarcerated mothers are unfit to parent or pose a risk to their infants. As noted earlier, I have found that the decision to cancel the Program was based upon mandate, not an evaluation of risk. The decision was not one rooted in stereotypical thinking; however that is not the end of the analysis. In *Quebec v. A*, the majority rejected the assertion that a distinction may be found to be discriminatory only if it causes disadvantage through prejudice or stereotyping. As Justice Abella stated at para. 333:

> An emphasis at this stage on whether the claimant group's exclusion was well motivated or reasonable is inconsistent with this substantive equality approach to s 15(1) since it redirects the analysis from the *impact* of the distinction on the affected individual or group to the legislature's *intent* or *purpose*.
>
> [Emphasis in original.]

[603] With respect to the defendants' reliance upon the *Hutterian Brethren* decision, I note first that there are important factual distinctions between the *Hutterian Brethren* case and the circumstances in the case at bar. In that case, the Court concluded that the law did not deprive the Hutterian claimants of a meaningful choice as to their religious practice. Rather, it imposed a burden, one which was possible to mitigate. The Court concluded that the Colony members' claim was to the unfettered practice of their religion, not to be free from religious discrimination. However in the present case, the mothers and babies have no ability to mitigate the detrimental impacts of the decision to cancel the Program. Moreover, the claim advanced is to be free from discrimination.

[604] The short answer to this submission is that I have concluded that the decision to cancel the Program was a decision based upon mandate and not “a neutral and rationally defensible policy choice” regarding the safety of infants. The decision bore none of the hallmarks of an assessment of the safety of infants. As noted above, I agree that the decision to cancel the Program was not based upon a stereotype of incarcerated women as unfit to mother. However, that is not the end of the inquiry.

[605] Finally, with respect to the defendants’ submission with respect to causation, it is my view that the defendants have advocated an overly restrictive test of causation, one that is not in line with the jurisprudence nor with the liberal interpretation that is to be given to *Charter* rights.

[606] In order to establish a breach of their s. 7 rights, a claimant challenging government action must establish that there is a sufficient causal connection between the impugned action and the deprivation that ultimately occurred. Such a causal connection can be established by showing the government action was a necessary precondition to the deprivation, and that the deprivation was an entirely foreseeable consequence of that action: see *Suresh v. Canada (Minister of Citizenship and Immigration*), 2002 SCC 1 at para. 54.

[607] There must be a significant connection between the harm and the impugned action in order to give rise to a remedy under the *Charter*: see *Blencoe* at para. 70. A claimant need not, however, prove that the government action is the sole cause of the deprivation: see *Adams* at paras. 86-89.

[608] In order to establish adverse effect discrimination under s. 15 of the *Charter*, the claimant must show that the discriminatory effects alleged are caused or contributed to by the impugned government action: see *Symes* at 764-65. In *Symes*, the appellant challenged the constitutionality of certain provisions of the *Income Tax Act*, R.S.C. 1952, c. 148, relating to the characterization of childcare expenses. She alleged that the legislation had an adverse effect on her by virtue of her sex, and so violated s. 15(1). Iacobucci J., writing for the majority, held at 765 that the appellant

had “failed to demonstrate an adverse effect created or contributed to by [the impugned provision]”.

[609] It is my view that in the present case the evidence does establish a sufficient causal link between the decision to cancel the Program and a discriminatory effect. The decision has the effect of exacerbating the disadvantage of the claimants, thereby contributing to the discrimination they suffer. I note that in *Symes* at 769, the Court determined that in a s. 15 *Charter* analysis a finding of ill-treatment against a subgroup of individuals is sufficient to warrant a finding of discrimination. Justice Iacobucci explained that:

> …[If] I were convinced that s. 63 [the impugned provision in *Symes*] has an adverse effect upon <u>some</u> women (for example, in this case, self-employed women), I would not be concerned if the effect was not felt by <u>all</u> women. That an adverse effect felt by a subgroup of women can still constitute sex-based discrimination appears clear to me from a consideration of past decisions: [citations omitted].
>
> [Emphasis in original.]

[610] One of the fundamental purposes of the equality provision is the amelioration of disadvantage. It is that purpose, in my view, that is most engaged by the circumstances of the present case. The decision to cancel the Mother Baby Program undoubtedly had the effect of exacerbating the disadvantage of a marginalized and vulnerable group.

4. <u>Conclusion</u>

[611] The Mother Baby Program was a program that respected the family unit and bond between mother and infant, both aspects of the rights of security of the person. Infants were placed based upon a determination by the MCFD of their best interests, consistent with the provisions of the *CFCS Act.* It was a program that was consistent with the themes identified earlier in the international treaties and conventions and with the principles developed in the common law concerning state intervention in the family unit.

[612] Provincially sentenced mothers and their babies are members of a vulnerable and disadvantaged group. In that regard the circumstances of Aboriginal mothers and their infants are of particular concern given the history of overrepresentation of Aboriginal women in the incarcerated population and the history of dislocation of Aboriginal families caused by state action. The Mother Baby Program represented a significant step forward in the amelioration of the circumstances of the mothers and their babies who qualified.

[613] The cancellation of the Program infringed upon the interests of the security of the person for both affected mothers and infants. It resulted in the separation of mothers and infants who would otherwise have been able to stay together, thereby depriving each of the benefits associated with the Program and exposing each to the risks associated with separation. The cancellation increased the disadvantage experienced by this vulnerable population. I find that it constituted discrimination. As Justice Abella stated in *Quebec v. A* at para. 332, "[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."

[614] In the result, I have concluded that the decision to cancel the Mother Baby Program violated the s. 15 right to equality of the members of the affected groups; namely provincially incarcerated mothers who wish to have their baby remain with them while they serve their sentence and the babies of those mothers.

XIII. SPECIFIC CLAIMS OF THE INDIVIDUAL PLAINTIFFS

A. Amanda Inglis

[615] Ms. Inglis was pregnant at the time of her arrest. After her transfer to ACCW, she was housed in Alder Unit at a time when there were babies residing on the unit. She was aware of the Mother Baby Program. Prior to her delivery, Ms. Inglis wanted to be able to take her child back with her to ACCW after she gave birth. Her understanding was that she would return to ACCW with her baby, complete her sentence and then be released to Phoenix House in Prince George with her child.

[616] Prior to Damien's birth, the MCFD's first plan was to seize the infant and work with Ms. Inglis to ensure that she got the services she needed to address the Ministry's concerns. However, Kelly Martin, the MCFD social worker who was assigned to the case received very positive reports about Ms. Inglis from hospital personnel after Damien was delivered. The Ministry decided to investigate further before concluding on a plan for Damien. To that end, Ms. Martin was in the process of making arrangements to visit ACCW to get more information about the Program and to visit the site when she was told that the Mother Baby Program had been cancelled.

[617] Ms. Inglis was very distressed when she learned that the Program had been cancelled and that as a result, it was no longer an option for Damien to return with her to ACCW. The plaintiffs submit that the infringement of Ms. Inglis' rights was complete upon the cancellation of the Program, at which point the option that could have given effect to her choice, to keep her baby with her at ACCW, was removed.

[618] The defendants note that Ms. Inglis was never separated from Damien. Because Dr. Abrahams decided to keep Ms. Inglis in the Fir Square Unit until he was confident that she would be released with her baby into a safe environment, the pair remained together at the hospital until Ms. Inglis was granted parole and released to Phoenix House with Damien. It is the defendants' position that the cancellation of the Program did not infringe Ms. Inglis' rights because the decision to cancel the Program did not result in a separation and there was no interference with the opportunity to bond and breastfeed.

[619] I agree with the submission of the plaintiffs that the infringement of Ms. Inglis' rights was complete upon the cancellation of the Program when her preferred option to keep her baby with her at ACCW was eliminated. I note that in *J.G.*, threatened removal of the child was found to be sufficient to engage the mother's s. 7 rights. Furthermore, Ms. Inglis suffered considerable distress after she was informed of the cancellation while her situation remained unsettled. This distress was particularly

acute given Ms. Inglis' personal experience of having lost all her family and friends while in foster care.

[620] I have concluded that the cancellation of the Mother Baby Program infringed Ms. Inglis' rights under s. 7 of the *Charter*.

B. Patricia and Amber Block

[621] The plaintiffs submit that the cancellation of the Program infringed Ms. Block's security of the person in that it removed the option of remaining together in a provincial facility. It constituted state interference in the relationship of Ms. Block and her child. In addition, the cancellation caused Ms. Block to seek a longer federal sentence which represented the only option that would permit her to stay with her child. This directly engaged her liberty interests which are protected under s. 7.

[622] Finally, the plaintiffs submit that the separation that resulted when Ms. Block was not accepted into the federal program constituted an infringement of the rights to equality and security of the person of both Amber and Ms. Block. The plaintiffs note that Ms. Block was caught in a "Catch 22" situation in which her sentence of two years was still too short to accommodate the programming length and general delays in the federal sphere, forming part of the basis for her denial of entry into the federal program.

[623] The defendants note that Ms. Block gave birth to Amber while in custody as a federally sentenced inmate. FVI and the MCFD did not support Ms. Block's application to participate in the federal program, and as a result Amber was removed from her care. It was the defendants' submission that the decision to cancel the Mother Baby Program did not result in the separation of Ms. Block and Amber and therefore did not infringe the s. 7 rights of either Ms. Block or Amber.

[624] As with the situation of Ms. Inglis, in my view the infringement of Ms. Block's rights was complete upon the cancellation of the Program when her preferred option to keep her baby with her at ACCW was eliminated. The elimination of that option

caused her to seek a longer sentence of incarceration in the federal system as the only option to keep her baby with her during her sentence.

[625] However with respect to Amber, I have concluded that there is not a sufficient connection between the harm, in this case separation from her mother, and the government action. I note Ms. Bazylevich's evidence concerning the risk assessment that she conducted concerning Ms. Block, the result of which was that she did not recommend Ms. Block for either the mother baby program at FVI or the babysitting program at that institution. I am not able to conclude that it was likely that Ms. Block would have been accepted into the Program at ACCW.

[626] I conclude that the cancellation of the Mother Baby Program infringed Ms. Block's rights under s. 7 of the *Charter*. I dismiss Amber Block's personal claim.

XIV. SECTION 1

A. General Principles

[627] Section 1 of the Charter provides:

> **1.** The *Canadian Charter of Rights and Freedoms* 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.

[628] As recently set out by the Supreme Court in *Hutterian Brethren*, the analysis under s. 1 proceeds through the following steps:

(1) Is the purpose for which the limit is imposed pressing and substantial?

(2) Are the means by which the legislative purpose is furthered proportionate?

(a) Is the limit rationally connected to the purpose?

(b) Does the limit minimally impair the *Charter* right?

(c) Is the law proportionate in its effect?

B. Prescribed By Law

[629] The first issue is whether the decision by Mr. Merchant to cancel the Mother Baby Program is a limit prescribed by law. The intervenors submit that Mr. Merchant's decision, later reflected in a policy adopted by Corrections, is not a limit prescribed by law because it was not expressly provided by statute or regulation, citing *R. v. Therens*, [1985] 1 S.C.R. 613 at 645. The defendants submit that it is a limit prescribed by law because what is challenged is a policy enacted pursuant to a delegated rule making authority, citing *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 [*Canadian Federation of Students*].

[630] It is clear from *Canadian Federation of Students* that some government policies or rules satisfy the "prescribed by law" requirement and some do not. I think that it is fair to say that the dividing line is not clear. I note that in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, the Court was divided on whether the rules at issue met the standard.

[631] In the two decisions arguably closest to the present circumstances, *PHS* and *Eldridge*, the Court assumed without deciding that the "prescribed by law" requirement was met. The Court made the same determination in *J.G.* Given my conclusions with respect to the balance of the s. 1 analysis, that is the course I adopt in this case; that is I assume without deciding that Mr. Merchant's decision and the policy that was later created that reflected that decision, are limits prescribed by law.

C. Section 7

[632] I have concluded that the decision and subsequent policy infringed the s. 7 rights of provincially incarcerated mothers and their infants. As noted by Chief Justice Lamer in *J.G*. at para. 99, infringements of s. 7 rights will be found to be justified under s. 1 only in exceptional circumstances:

> Section 7 violations are not easily saved by s. 1. In *Re B.C. Motor Vehicle Act*, *supra*, at p. 518, I said:
>
> > Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases

> arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.
>
> This is so for two reasons. First, the rights protected by s. 7 -- life, liberty, and security of the person -- are very significant and cannot ordinarily be overridden by competing social interests. Second, rarely will a violation of the principles of fundamental justice, specifically the right to a fair hearing, be upheld as a reasonable limit demonstrably justified in a free and democratic society.

[633] In the present case there are no such exceptional circumstances and the infringement of the claimants' s. 7 rights cannot be justified. However, I will consider the balance of the s. 1 analysis given my findings with respect to s. 15.

D. Pressing and Substantial Objective

[634] The defendants submit that the objective was to prevent harm to infants in provincial corrections centres and that this was clearly a pressing and substantial objective. I have found that the objective was not infant safety but a concern with the mandate of Corrections – a conclusion that Corrections was not required to accommodate the infants and that it was not prepared to take on the responsibility. In light of the fact that the constitutional rights of both mothers and infants are engaged, this is not a pressing and substantial objective.

E. Proportionate Means

1. Rational Connection

[635] Chief Justice McLachlin described the rational connection requirement in *Hutterian Brethren* at para. 48 as follows:

> To establish a rational connection, the government "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic": *RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199, at para. 153. The rational connection requirement is aimed at preventing limits being imposed on rights arbitrarily. The government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so.

[636] Assuming, for the moment, that there was a pressing and substantial objective, the standard required to be met in this case is a reasonable apprehension of harm: *R v. Sharpe*, 2001 SCC 2 at para. 85. The defendants submit that the

government need not prove a causal connection between the previous practice of allowing mothers to raise their infants in the ACCW and a risk of harm to the infants. Once it has been established that there is a reasonable apprehension of harm – which the defendants submit there was in this case – measures aimed at preventing that harm will almost always be rationally connected to the legislative objective: *Reference re: s. 293* at para. 775.

[637] The difficulty with that submission is that even if the decision was made on the basis of safety, it was not designed to address a reasonable apprehension of harm, but rather the lack of a guarantee of safety. Such a guarantee was acknowledged to be impossible to attain and therefore cannot be considered proportionate in light of the infringement of rights. Moreover, I have concluded that the decision was not made on the basis of a reasonable apprehension of harm, nor does the evidence establish that there is or was any such reasonable apprehension. Thus the rational connection between the decision and the objective is not made out.

2. Minimal Impairment

[638] In *Hutterian Brethren* at para. 53, Chief Justice McLachlin described the question to be addressed under minimal impairment this way:

> The question at this stage of the s. 1 proportionality analysis is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit. Another way of putting this question is to ask whether there are less harmful means of achieving the legislative goal. In making this assessment, the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives.

[639] The Chief Justice added, at para. 55:

> I hasten to add that in considering whether the government's objective could be achieved by other less drastic means, the court need not be satisfied that the alternative would satisfy the objective to *exactly* the same extent or degree as the impugned measure. In other words, the court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunize the law from scrutiny at the minimal impairment stage. The requirement for an "equally effective" alternative measure in the passage from *RJR-MacDonald*, quoted above, should not be taken to an impractical extreme. It includes alternative measures that give sufficient protection, in all the circumstances, to the

> government's goal: [*Charkaoui*]. While the government is entitled to deference in formulating its objective, that deference is not blind or absolute. The test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner. ...
>
> [Italic emphasis in original; underline emphasis added.]

[640] The defendants submit that the alternative proposed by the plaintiffs – a return to what the defendants characterize as the *ad hoc* practice at the existing ACCW facility prior to the change in policy – would not achieve the government's objective "in a real and substantial manner." Counsel submits that while the risk to infants may have been low, when it comes to the possibility of harm to an infant there can be no room for error.

[641] The difficulty with this submission is that it is based upon the same inappropriate standard – a guarantee of safety that is impossible to meet in any circumstances. Moreover, the submission overlooks the fact that under the provisions of the Mother Baby Program, no infant was approved to return to ACCW with his or her mother unless and until the MCFD had concluded that was in the best interest of the child as that term is defined in the *CFCS Act.* Safety of the child is one of the factors to be considered in that assessment. Thus the reinstatement of the Mother Baby Program would ensure that the best interests of the child were addressed on a case-by-case basis, including a consideration of whether there was a reasonable apprehension of harm.

[642] The defendants submitted that in theory, with unlimited resources, the Branch could design, construct and staff a facility that accommodates mothers and infants in an environment that adequately minimizes the risks to the infants. However, counsel submits that resources are not unlimited, and the alternatives against which the government's response is measured must be those which are realistically available.

[643] There are several difficulties with this submission. First, at no time did Mr. Merchant advance cost as a factor in his decision. Further, the evidence shows that such a separate facility already exists at ACCW, in the form of Monarch House, which currently sits unused. Finally, the government has failed to establish that there

is or was a reasonable apprehension of harm in the existing environment at ACCW even in the absence of the utilization of Monarch House as a site for the Program.

3. Proportionality

[644] The inquiry at this stage is to ask whether the benefits of the impugned provision are worth the costs of the infringement. The defendants have argued that the benefit is the enhanced safety of infants. It was submitted that the infringement is modest.

[645] The defendants submit that in this case, the Corrections policy does not eliminate the opportunity for mother-baby bonding or breastfeeding. Both are allowed in accordance with an approved case plan. The only deleterious effects are that overnight visits are not permitted, and visits are not permitted in living units or the general population. Counsel submits that the benefits of enhanced infant safety are worth these small costs in maternal liberty.

[646] With respect to the alleged benefits of the cancellation, it must be noted that there was no effort made to compare the risks to which the infants are exposed at ACCW with those to which they would be exposed in the community, either placed with relatives or in foster care. Therefore it cannot be said that the exclusion of the infants from ACCW did in fact result in an increase in their safety. As noted earlier, there is no evidence that there was a reasonable apprehension of harm to the infants associated with the Program.

[647] In addition, the submission proposes a false equation – an enhancement of infant safety at the price of a reduction in maternal liberty. However, this ignores the very real costs to the infants associated with a separation from their mothers; the deprivation of the health, social and psychological benefits of uninterrupted breastfeeding and rooming in with their mothers. In addition, the separation of mothers and infants is not only an infringement of the mothers' liberty but also deprives the mothers of the health, social and psychological benefits of breastfeeding and rooming in with their infants.

[648] At any rate, this submission cannot be sustained in light of the evidence. First, it is clear from the evidence that I have accepted that visitation is not a sufficient basis for attachment to the mother where the primary care of the infant comes from another. While it may be that the infants will form an attachment, this will not be to the mother. While the infant may subsequently form an attachment to the mother, the process will have been interrupted. Breastfeeding is no longer possible. What is possible in some cases is the pumping, storage and delivery of breast milk.

[649] Ms. Block's testimony illustrated the significant deficiencies of visitation. In particular, Ms. Block testified that:

> (a) while in prison, Amber's visits were infrequent and were based on the availability of the foster mother. Amber visited two times per week for an hour, which increased to three times per week or two visits per week for two hours if the foster mom was available;
>
> (b) there were as many as five different people caring for Amber while they were separated. Several different people brought Amber to visit Ms. Block while in the community residence in Peardonville, including the foster mother, the foster mother's sister, Amber's grandparents, and the parent support worker; and
>
> (c) she tried to continue to breastfeed Amber while in prison, but had difficulties in doing so. At one point, the foster mother stopped feeding Amber the breast milk that Ms. Block had pumped because she worried it "wasn't good milk." Ms. Block had to inform the MCFD, who then ordered the foster mother to provide the breast milk to Amber.

[650] The decision substituted a case-by-case determination of the best interests of the child with a blanket exclusion that significantly infringed upon the rights of both mothers and children. The benefits are speculative at best. The harms are significant and well established.

[651] In the result the decision is not justified.

XV. REMEDY

[652] As noted earlier, the plaintiffs Patricia and Amber Block and Amanda Inglis advance personal claims for relief pursuant to s. 24(1) of the *Charter* arising from the challenge to government action. In addition, all of the plaintiffs were granted public interest standing to advance the claims on behalf of all those affected by the decision.

[653] The plaintiffs sought a remedy pursuant to s. 52(1) of the *Constitution Act, 1982.* However, because I have concluded that the impugned legislation is constitutionally valid, no remedy lies under s. 52. Rather, where the concern is with a government decision that is inconsistent with the *Charter*, as is the present case, s. 24(1) applies and allows the court to fashion an appropriate remedy: see *PHS* at para. 144.

[654] Section 24(1) of the *Charter* provides:

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

[655] I have concluded that the decision to cancel the Mother Baby Program violated the rights of Ms. Inglis and Ms. Block under s. 7 of the *Charter*, in that it deprived them of security of the person in a manner not in accordance with the principles of fundamental justice and was not a reasonable limit under s. 1. There will be a declaration pursuant to s. 24(1) of the *Charter* to that effect.

[656] In addition, pursuant to the conclusion that the decision to cancel the Mother Baby Program violated the ss. 7 and 15 rights of provincially incarcerated mothers and their infants, there will be the following declarations:

(a) The decision to cancel the Mother Baby Program violated s. 7 of the *Charter* in that it deprived provincially incarcerated mothers who wish to have their baby remain with them while they serve their sentence and the babies of those mothers of security of the person in a manner not in accordance with

the principles of fundamental justice, and is not saved by s. 1 of the *Charter*; and

(b) The decision to cancel the Mother Baby Program violated s. 15 of the *Charter* in that it deprived provincially incarcerated mothers who wish to have their baby remain with them while they serve their sentence and the babies of those mothers of the equal protection and equal benefit of the law without discrimination and is not saved by s. 1 of the *Charter*.

[657] The decision to cancel the Mother Baby Program, together with the policy that embodies that decision is set aside. I direct the government of British Columbia to administer the *Correction Act* and *Regulation* in relation to this issue in a manner consistent with the requirements of ss. 7 and 15(1) as those requirements have been described in these reasons.

[658] The remedies will be suspended for six months to provide an opportunity for the government to correct the unconstitutionality of the present situation and comply with the Court's direction.

[659] The parties are at liberty to make submissions with respect to costs.

"Ross J."