File No T1848/7812 and T1850/8012

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

Canadian Association of Elizabeth Fry Societies

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Service of Canada

Respondent

- and -

Native Women's Association of Canada

Interested Party

STATEMENT OF PARTICULARS of the

NATIVE WOMEN'S ASSOCIATION OF CANADA

Dated 24 November, 2022

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Overview

1. The Native Women's Association of Canada ("NWAC") participates in this hearing to advance Indigenous women's equality rights in federal institutions.[1] Indigenous women suffer intergenerational trauma stemming from colonization. Federal policies governing Indigenous women's treatment must reflect these unique systemic and background factors. The Correctional Service of Canada ("the Respondents")'s policies governing segregation and security classification must account for Indigenous women's unique social histories to comply with section 5 *Canadian Human Rights Act* ("*CHRA*")'s equality obligations.

[1] In these submissions, where NWAC refers to Indigenous women, this term is a placeholder including Indigenous Women, Two-Spirit, Trans, and Gender-Diverse people.

2. NWAC files this Statement of Particulars pursuant to Rule 6(1) of the Canadian Human Rights Tribunal ("the Tribunal")'s *Rules of Procedure, 2021* and the Tribunal's decision in its 26 October 2022 email to grant NWAC'S March 17, 2020, Notice of Motion to File Statement of Particulars.

Chronology

3. NWAC participates in these proceedings as an Interested Party, assisting the Tribunal's assessment of the systemic discrimination issues underpinning the complaints, pursuant to the Tribunal's decision.[2]

4. The Canadian Association of Elizabeth Fry Societies (the Complainants") filed two complaints in 2011, alleging the Respondent's conduct and policies discriminate against prisoners on the bases of gender, race, religion and disability, contrary to *CHRA* s.5.[3]

    a. In 2012, the Commission referred the complaint to the Tribunal.
    b. In 2019, the Tribunal granted NWAC's motion to participate in the proceedings as an Interested Party, with conditions. In its decision, the Tribunal recognized that NWAC brings expertise with respect to Indigenous women generally and their experiences in federal institutions specifically.
    c. In 2020, the Complainants filed a motion to amend the scope of its submissions to reflect legislative amendments. These amendments included an order to discontinue administrative segregation and enact revised segregation policies and practices.
    d. On April 12, 2022, Tribunal Member Jennifer Khurana granted the Complainant and Commission's motion to file updated Statements of

[2] *Canadian Association of Elizabeth Fry Societies and Acoby v Correctional Service of Canada*, 2019 CHRT 30 at para 48.
[3] *Canadian Human Rights Act*, (*CHRA*) RSC, 1985, c H-6, s 5 [*CHRA*].

Particulars to reflect legislative and policy changes relating to one of the alleged discriminatory practices, solitary confinement.

NWAC's Position: Indigenous Women Require Substantive Equality

5. Indigenous women are overincarcerated. Within federal institutions, they suffer harms that non-Indigenous inmates do not experience in the same ways, *because* they are Indigenous. Indigenous women require a correctional framework that advances substantive equality principles within policies and practices.

Indigenous women experience federal institutions differently

6. To guarantee substantive equality, a constitutional principle, the Respondent's conduct and policies must not adversely impact Indigenous women.[4]

7. Indigenous women do not experience the Respondent's conduct and policies the same as non-Indigenous people. Indigenous women bring complex histories of intergenerational trauma and disadvantages stemming from colonization's harmful legacy.

8. The CHRA advances an intersectional approach to discrimination analyses.[5] Indigenous women experience harms particular to their intersecting Indigeneity and gender. For some Indigenous women, a mental health disability adds another layer further compounding their vulnerability to inequality harms. These intersecting grounds inform a more complete understanding of Indigenous women's experiences in federal institutions.[6]

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[4] *Fraser v Canada (Attorney General),* 2020 SCC 28 at paras 51-75 [*Fraser*].
[5] *CHRA, supra* note 3 at s 3.1.
[6] *Turner v Canada (Attorney General),* 2012 FCA 159 at para 48.

9. Indigenous women in federal institutions live colonial harm's legacies, distinguishing their experiences from non-Indigenous people. Before an Indigenous woman is sentenced to a federal institution, she is likely an abuse victim, a single mother, and/or an intergenerational trauma survivor.[7] Federal institutions serve as a last stop in a system built on colonial perspectives on justice and racism against Indigenous People.

10. Systemic racism in the criminal justice system stacks the odds against Indigenous women. Historically, police threatened and imprisoned Indigenous mothers who tried to spare their children from being forcibly taken to institutions notorious for rampant, state-sanctioned abuse.[8] Colonial harms manifest today as behaviours the justice system further criminalizes: disproportionate poverty, homelessness, violence, victimization, sexual assault, lower education and death rates.[9] The trickle-down effect from these and other state-imposed harms manifest today as Indigenous women's increased vulnerability to crime, both as victim and offender.[10]

11. Colonial harms shape the pathways leading Indigenous women to federal institutions. Correspondingly, their experiences within federal institutions will differ from non-Indigenous women. The Respondents' conduct and policies must account for these differences to advance Indigenous women's substantive equality guarantees.

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[7] House of Commons, *Indigenous People in the Federal Correctional System: Report of the Standing Committee on Public Safety and National Security* (June 2018) (Chair: John McKay) at p 24.
[8] *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (2019) at p 259 [NIMMIWG].
[9] *R v Ipeelee* at para 60.
[10] Kent Roach, "Plan B for Implementing Gladue: The Need to Apply Background Factors to the Punitive Sentencing Purposes" (2020) 67 CLQ 355.

Systemic racism informs Indigenous women's experiences in federal institutions

12. Parliament recognizes the criminal justice bears responsibility for its role shaping Indigenous women's inequality. This inequality manifests as overincarceration, disproportionate placement in segregation, and perpetual adverse impacts. Through sentencing reform, the legislature advances tools judges can use to redress Indigenous women's overincarceration. Through correctional reform, the judiciary advances approaches to reduce systemic harms against Indigenous women.

13. Though they represent four per cent of the adult female population, Indigenous women form over half the federally sentenced women's prison population.[11] Of the women classified as maximum security, 65 per cent are Indigenous.[12] When debating Bill C-5, *An Act to Repeal Certain Mandatory Minimum Sentences*, Justice Minister David Lametti told Parliament Indigenous people's overincarceration is directly linked to being "overrepresented, both as victims and as offenders in the criminal justice system. They face systemic racism and discrimination."[13]

14. Overincarcerating Indigenous women further disadvantages the next generation of Indigenous children. Most women in federal institutions are mothers.[14] Their children disproportionately enter the foster care system, perpetuating Indigenous family separation cycles, another colonial harm.[15] The Ontario Human Rights Commission referred to this harmful cycle as the "child welfare to prison pipeline."[16]

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[11] Canada, *Annual Report 2021-2022 of the Office of the Correctional Investigator*, by Ivan Zinger, (Ottawa: OCI) at p 20 [OCI Annual Report 2021-2022].
[12] *Ibid.*
[13] "Bill C-5, An Act to amend the Criminal Code and the Controlled Drugs and Substances Act", 2nd reading, *House of Commons Debates*, 44-1, No 16 (13 December 2021) at 1355 (Hon David Lametti).
[14] Canada, *Annual Report 2020-2021, Office of the Correctional Investigator*, Ivan Zinger (Ottawa: OIC), at p 42 [OCI Annual Report 2020-2021].
[15] NIMMIWG, *supra* note 8 at p 637.
[16] *R v Sharma*, 2020 ONCA 478 at para 96.

15. To redress systemic discrimination and advance substantive equality at sentencing, Parliament passed legislation in 1996 directing judges to specifically consider an Indigenous person's unique and systemic background factors.[17] This legislative amendment to the *Criminal Code* and subsequent case law are collectively known as *Gladue* principles, named after the 1999 Supreme Court of Canada ("SCC") decision in *R v Gladue*.[18] Gladue principles apply when an Indigenous person faces a restriction on their liberty, such as at bail and parole hearings, and at criminal sentencing. *Gladue* principles also apply when Indigenous women are placed in federal institutions.

16. The Respondents must respond to Indigenous women's distinct experiences under systemic racism in the criminal justice system, including corrections Failure to do so perpetuates, exacerbates, and reinforces Indigenous women's harms in federal institutions, violating *CHRA* s. 5.

Legislative and judicial background - Segregation

17. In 2019, the Ontario Court of Appeal ruled the Respondents' administrative segregation provisions, between *CCRA* ss.31 and 37, violated people in prisons' s.12 *Charter* right to be free from cruel and unusual punishment.[19] The Court found administrative segregation practices left people in social isolation without adequate monitoring, leaving people to suffer known mental health harms with no prevention backstop. The Court found the Respondents' practices and policies only addressed the harms once the person left solitary confinement.[20]

[17] *R v Gladue*, [1999] 1 SCR 688, at para21, 171 DLR (4th) 385.
[18] "Bill C-83, An Act to amend the Corrections and Conditional Release Act and another Act", 3rd Reading, *Senate Debates*, 42-1, Sitting 301 (12 June 2019) at 1555 (Hon Marty Klyne) [Bill C-83].
[19] *Canadian Civil Liberties Association v Canada,* 2019 ONCA 243 at para 6 [*CCLA*].
[20] *Ibid* at para 79.

18. Also in 2019, the British Columbia Court of Appeal ruled the Respondents' violated their obligations contained within *CCRA* ss. 31-37 to meaningfully consider mentally ill and/or disabled people's health care needs before placing or confirming their placement in solitary confinement.[21] The Attorney General ("AG") conceded the Respondents discriminated against Indigenous People specifically in over-relying on solitary confinement to manage Indigenous People's behaviour in prison settings.[22]

19. The appellate judges applied the United Nations ("the UN")'s *Revised Standard Minimum Rules for Treatment of Prisoners*, known as the *Mandela Rules* in both the *CCLA* and *BCCLA* cases. The courts upheld the "authoritative" *Mandela Rules* on solitary confinement to support holding the Respondents' administrative segregation practices violated the *Charter*.[23]

20. The SCC granted leave to hear both appeals. The parties discontinued the appeals when Parliament passed legislation prohibiting administrative segregation in June 2019.

21. Parliament passed Bill C-83, *An Act to amend the Corrections and Conditional Release Act and another Act*. Bill C-83 required the Respondents to "eliminate the use of administrative segregation and disciplinary segregation."[24]

22. The day before Bill C-83 passed, Senator Kim Pate expressed concerns Bill C-83 did not address the possibility that SIU conditions could become the same as administrative segregation units.[25] In that same session, Sen. Pate reminded Senators the Respondents had set up advisory bodies to inform CSC policies

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[21] *British Columbia Civil Liberties Association v Canada (Attorney General),* 2019 BCCA 228 at para 269 [*BCCLA*].
[22] *Ibid* at para 272.
[23] *CCLA, supra* note 19 at para 23.
[24] Bill C-83, *An Act to amend the Corrections and Conditional Release Act and another Act*, 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019).
[25] "Bill C-83, An Act to amend the Corrections and Conditional Release Act and another Act," *Senate Debates*, 42-1, vol 150, Issue 307 (20 June 2019) at 1910 (Hon Kim Pate).

pertaining to Indigenous People and women, but they either disbanded these bodies or the groups dissolved because their recommendations went unheard.[26]

23. Bill C-83 mandated Canada set up an independent corrections experts panel to oversee solitary confinement practices under the SIU program in 2019.[27] The expert panel's 2020 report found the Respondents withheld data to evaluate the SIU program.[28] With the limited data provided, the panel found Indigenous People were disproportionately placed in SIUs. The expert panel found the Respondents seldom met Bill C-83's minimum legislated requirements for "meaningful human contact" designed to offset the mental health harms associated with solitary confinement.[29] (The Respondents are required to provide four hours out-of-cell time and two hours of meaningful human interaction).[30]

24. The expert panel found "Indigenous people were transferred to SIU's at a much higher rate and were more likely to have stays longer than 15 days compared to white individuals."[31]

Gladue principles advance Indigenous women's equality

25. The *Gladue* principles offer a framework to promote Indigenous women's access to equality within federal institutions.

26. The *CCRA* requires the Respondents to consider *Gladue* principles when making decisions, including SIU placement.[32] The Respondents must provide real

[26] *Ibid*.
[27] Public Safety Canada, "Backgrounder: Bill C-83 – Members of the Structured Intervention Unit Implementation Advisory Panel" (6 September 2019), online: <https://www.canada.ca/en/public-safety-canada/news/2019/09/bill-c-83--members-of-the-structured-intervention-unit-implementation-advisory-panel.html#shr-pg0>.
[28] Anthony N. Doob & Jane B. Sprott, *Understanding the Operation of Correctional Service Canada's Structured Intervention Units: Some Preliminary Findings*, (26 October 2020), pdf online: https://johnhoward.ca/wp-content/uploads/2020/10/UnderstandingCSC_SIUDoobSprott26-10-2020-1.pdf [Doob & Sprott report].
[29] *Ibid* at pp 4-5.
[30] OCI Annual report 2020-2021, *supra* note 14 at p 17.
[31] OCI Annual Report 2021-2022, *supra* note 11 at p 17.
[32] *Corrections and Conditional Release Act*, (*CCRA*) SC 1992, c 20, s 79.1(1).

evidence demonstrating how they consider *Gladue* principles when deciding to place Indigenous women in segregation to meet this obligation.

27. When the Respondents do not meaningfully consider an Indigenous woman's unique and systemic background factors, they treat them the same as other people in prison. This is formal equality, a principle Canada's judiciary strongly denounces.[33]

28. The Senate Social Affairs committee recommend the Respondents apply *Gladue* principles. At sentencing, judges may rely on a *Gladue* report prepared on the Indigenous person's behalf by writers trained in their unique systemic and background factors. When no such report is available, the Respondents often rely on pre-sentence reports, generally prepared by correctional staff. Pre-sentence reports prepared without specific training and awareness are inadequate, and can actually undermine *Gladue* principles, perpetuating systemic discrimination.[34]

29. The Respondents' Indigenous Social History Tool ("the ISH Tool", formerly the Aboriginal Social History Tool) is a document to guide the Respondents when considering an Indigenous person's systemic and background factors.[35] The Respondents must consider these circumstances when identifying culturally appropriate and restorative treatment options. In theory, this should be a comprehensive and case-specific exercise. In practice, the ISH Tool appears to be a checklist with no related analysis.[36] The Respondents' staff told the Office of the Correctional Investigator (OCI) they are not trained to properly understand,

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[33] See e.g. *R v Kapp*, 2008 SCC 4 1 at para 15 citing *Andrews v Law Society of British Columbia,* 1989] 1 SCR 143 at para 165, 56 DLR (4th) 1; see also *Withler v Canada*, 2011 SCC 12 at para 39; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 17; *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 25; *Fraser v Canada (Attorney General),* 2020 SCC 28 at paras 41-42; and *Ontario (Attorney General) v G*, 2020 SCC 38 at paras 43 and 47.

[34] Research and Statistics Division, *Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System*, Department of Justice Canada (September 2017) at p 26, pdf online: < https://publications.gc.ca/collections/collection_2018/jus/J4-46-2017-eng.pdf>.

[35] 13 October 2020 Disclosure package, document AGC67914.

[36] OCI Report 2021-2022, *supra* note 11 at p 22.

analyze and connect an individual's ISH to their risk and case management plan.[37] This failure to adequately consider the factors leading an Indigenous woman to become involved with the criminal justice system, perpetuates a "discriminatory practice."[38]

30. Before the Respondents place an Indigenous woman in segregation, they must consult a committee mandated to oversee SIU placements. The *Corrections and Conditional Release Regulations* ("the Regulations") require a structured intervention committee consider Indigenous systemic and background factors when providing written recommendations to the Respondents. The Respondents are ultimately responsible for deciding whether to place an Indigenous woman in segregation.[39]

31. The Respondents have not disclosed any record of the committees' written recommendations or considerations to demonstrate compliance with the *CCRA* and the Regulations.

32. Indigenous women require specific consideration for their unique systemic and background factors when the Respondents place them in segregation. Failure to do so widens the disparity between Indigenous and non-Indigenous people in federal institutions.

Solitary confinement causes specific harms to Indigenous women

33. Punitive measures that are not trauma-informed compound Indigenous women's pre-existing trauma.[40] This compounded trauma is an adverse impact that harms Indigenous women in ways distinct from non-Indigenous women.

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[37] *Ibid* at p 23.
[38] *Ibid.*
[39] *Corrections and Conditional Release Regulations*, SOR/92-620, ss 20-22 and s 23.03.
[40] Michaela M McGuire & Danielle J Murdoch, "(In)-justice: An exploration of the dehumanization, victimization, criminalization, and over-incarceration of Indigenous women in Canada" (2021) 24 Punishment & Society 4.

34. Solitary segregation practices perpetuate, exacerbate, and reinforce adverse impacts for Indigenous women, especially those suffering mental health challenges. Research illustrates that segregation can cause profoundly negative impacts jeopardizing safety, such as distress particular to individuals who experienced physical or sexual abuse.[41] Indigenous women experience higher physical and sexual abuse rates, and more self-harm incidents, rendering them considerably more vulnerable to negative impacts in segregated environments.[42]

35. Canada ratified the UN's *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* on June 24, 1987.[43] The UN Special Rapporteur on Torture cautions solitary confinement can cause mental distress so acute it could be considered torture.[44] Even a few days in isolation can lead to lasting mental damages, particularly for people who suffer mental health issues or who survived trauma and abuse. Solitary confinement is even more harmful for Indigenous women, who suffer from intergenerational trauma.

36. Indigenous women's mental health issues render them particularly vulnerable to the known harms associated with solitary segregation.[45] Indigenous women housed in federal institutions needs to heal in accordance with their cultures and traditions. An over-reliance on solitary segregation in response to Indigenous women's behaviour is culturally inappropriate.

37. The Respondents have a duty to meaningfully consider and apply *Gladue* principles when deciding whether to place an Indigenous woman in solitary

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[41] Aboriginal Corrections Policy Unit, "Marginalized: The Aboriginal Women's experience in Federal Corrections" *Public Safety Canada* (2012) pdf online at: < https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/mrgnlzd/mrgnlzd-eng.pdf> at p 33.
[42] *Ibid.*
[43] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 9 December 1975, UNGA (entered into force 26 June 1987, ratified by Canada 24 June 1987).
[44] "Solitary confinement should be banned in most cases, UN expert says" UN News, (18 October 2011), online: < https://news.un.org/en/story/2011/10/392012-solitary-confinement-should-be-banned-most-cases-un-expert-says>.
[45] Lisa Kerr, "The Chronic Failure to Control Prisoner Isolation in Canada and the US, 40 Queen's LJ 2 (2015) at p 495.

confinement. The Respondents also have duties under the *CCRA* and the Regulations' SIU laws. When the Respondents fail to properly apply the governing legislation, they harm Indigenous women more than non-Indigenous people.[46] Solitary segregation increases Indigenous women's violent behaviour and criminality.[47] Once segregated, Indigenous women face higher self-harm risk and mental health harms.[48]

38. Indigenous women are over-represented in solitary segregation.[49] Not only are Indigenous women more vulnerable to the known harms associated with solitary segregation, they are also placed there more than other people.

39. Solitary segregation practices, including the SIU program, perpetuate cycles of harm for Indigenous women in federal institutions. Solitary segregation is especially harmful to Indigenous women with mental health challenges. The behaviours associated with mental health conditions often makes them a target for punitive placement in solitary segregation, where their mental health conditions erode further.[50]

> "Many women describe the feeling of being in the Secure Unit as compatible to being removed from their home communities. A placement in the Secure Unit is, in and of itself, another form of dislocation and displacement. Those women who experienced the Residential School System, or who have a family member who attended, report being especially triggered in the Secure Units. Some women talked about how prisons perpetuate colonialization, resulting in many of the same consequences."[51]

40. The Respondents misuse solitary segregation for Indigenous women when they fail to meaningfully consider *Gladue* principles. This widens the gap between

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[46] Dr. Suzanne Stewart, *Indigenous women and Canada's criminal justice system: The issues and the recommendations for change*, prepared for the Native Women's Association of Canada, May 2020, at p 9.
[47] Fran Sugar et al, "Breaking Chains," 3 CJWL 465 (1989) at p 469.
[48] *Ibid*.
[49] *Ibid*.
[50] *Ibid* at page 17.
[51] OCI Annual Report 2021-2022, *supra* note 11 at p 27.

Indigenous and non-Indigenous women in federal institutions. This adverse impact discrimination violates Indigenous women's rights to equality in *CHRA* s. 5.

Security assessment tools are inappropriate for Indigenous women

41. When the Respondents measure Indigenous women by non-Indigenous tools, they risk perpetuating their historic disadvantage. The OCI untangles the complex web informing Indigenous women's overincarceration harms, noting systematic bias and racism includes discriminatory risk assessment tools, ineffective case management, and bureaucratic delay and inertia.[52] The reasons informing this disparity are uniquely based on the women's Indigeneity/race.[53]

42. *CCRA* Part III mandates the OCI to act as an Ombudsman for people in federal institutions. The OCI is responsible for reviewing the Respondents' policies and practices to ensure systemic concerns are identified and appropriately addressed.[54]

43. A Custody Rating Scale ("the risk assessment tool') that is not appropriate for Indigenous women denies them equal treatment. The Respondents rely on risk assessment tools to quantify a person's likelihood of posing a security risk in federal institutions. This risk informs their security classification as either minimum, medium, or maximum.[55] These tools do not respond to Indigenous People's unique and systemic background factors.[56] Risk assessment scores strongly influence a person's ability to access treatment in federal institutions and being granted parole.

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[52] *Ibid* at p 20.
[53] *Ibid*, emphasis added.
[54] CCRA, *supra* note 32 at s 167(1) and Office of the Correctional Investigator, "Roles and Responsibilities" (16 September 2013), online: < https://www.oci-bec.gc.ca/cnt/roles-eng.aspx>.
[55] "Security Classification and Penitentiary Placement" *Commissioner's Directive Number 705-7* (effective 2018 01 15), online: < https://www.csc-scc.gc.ca/acts-and-regulations/705-7-cd-eng.shtml#s9>.
[56] *Ewert v Canada*, 2018 SCC 30 at para 80.

Legislative and judicial background – Risk assessment tools

44. In 2018, the SCC in *Ewert* ruled the Respondents failed to apply *CCRA* s. 24, which requires risk assessment tools be accurate for use on Indigenous People.[57]

45. In 2019, the Respondents tasked their senior research officer, Kaitlyn Wardrop, with assessing the Security Reclassification Scale for Women.[58] Dr. Wardrop's research predicted the tool *may* be valid for use on Indigenous women but concluded further assessment would be necessary once the tool was implemented in practice at an unidentified future date.[59]

Risk assessment tools and practices produce worsening outcomes for Indigenous women

46. In 2020, the *Globe and Mail* published data indicating the Respondents' risk assessment tools disproportionately assess Indigenous women as high security risks. The data indicates Indigenous women were 64 per cent more likely than white women to receive the highest security classification.[60] This followed an earlier *Globe and Mail* report finding the Respondents' risk assessment tools perpetuate systemic bias against racial minorities.[61]

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[57] *Ibid*.
[58] Kaitlyn Wardrop, *The Adjustment of the Security Reclassification Scale for Women (SRSW): Elimination of Administrative Segregation*, September 2019, Production Order 046, Document AGC67940, Disclosure.
[59] *Ibid*.
[60] Tom Cardoso, "For Indigenous women, systemic racial bias in prison leaves many worse off than men" (31 December 2020) *Globe and Mail*, online: < https://www.theglobeandmail.com/canada/article-for-indigenous-women-systemic-racial-bias-in-prison-leaves-many-worse/>.
[61] Tom Cardoso, "Bias behind bars: A Globe investigation finds a prison system stacked against Black and Indigenous inmates" *Globe and Mail* (11 November 2020), online: < https://www.theglobeandmail.com/canada/article-investigation-racial-bias-in-canadian-prison-risk-assessments/>.

47. In 2021, Martha Kahnapace, an Indigenous woman who formerly served in a federal institution, filed a class action as a representative plaintiff against the Respondents. Her action argues the Respondents knowingly use risk assessment tools to overclassify Indigenous women.[62] The Federal Court has not certified this action as of November 24, 2022.

48. In his office's most recent annual report, Dr. Ivan Zinger stated where risk assessment tools overclassify people, and restorative programming is not available at higher security levels, this perpetuates systematic discrimination.[63] Columbia University law and political science professor Bernard Harcourt's research argues when assessment tools rely on one's past and criminal history without accounting for systemic discrimination, this history becomes a proxy for race. In other words, being Indigenous becomes a risk factor.[64]

49. Failure to ensure the Respondents' risk assessment tools are appropriate for use on Indigenous women inmates will continue to harm them on the basis of their Indigeneity, violating *CHRA* s. 5. This failure does not align with Canada's goals to reconcile with Indigenous people and reduce Indigenous overincarceration.

Canada committed to reconciliation

50. Concurrent to the Respondents' responsibilities to federally incarcerated Indigenous women under the *CHRA* are the Respondents' responsibilities to seek and achieve reconciliation, extending from the government of Canada's reconciliation commitment.

51. In a background document to support Bill C-5, Canada acknowledged its responsibility to Indigenous women includes efforts to reduce their systemic over-

[62] *Kahnapace v Canada*, FC File No T-88-21.
[63] OCI 2021-2022 report, *supra* note 11 at 3.
[64] *Ibid* at p 5

representation within correctional institutions.[65] CSC Commissioner Anne Kelly reiterated the Respondents are, "strongly committed to reconciliation and continued work with Indigenous partners and Elders. A culturally appropriate approach to federal corrections, which is responsive to the unique needs, and reflective of the cultural realities of Indigenous offenders, continues to be one of our top priorities as an organization."[66]

52. In 2021, Canada enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act* ("UNDRPA"). The UNDRIPA elevates the non-binding international declaration to a universal international human rights instrument with application in Canadian law as an interpretive tool in judicial processes.[67] In addition, UNDRIPA now imposes a statutory duty to consult and cooperate with Indigenous Peoples, taking all measures necessary to make Canada's laws consistent with UNDRIP rights protections.[68]

53. UNDRIPA's Preamble and UNDRIP's Articles 2, 5, 7, 8(1). 8(2c), 12(1), 18, 19, 22 and 44, guide and bind the Respondents to affirm Indigenous Peoples' rights and redress Indigenous women's overincarceration in the spirit of reconciliation.

54. Using solitary segregation and inappropriate risk assessment tools on Indigenous women creates adverse impacts on them, including mental health harms and overincarceration. This undermines the Respondents' commitment to reconciliation with Indigenous People.

55. Reconciliation is a journey, not a destination. The Respondents' obligations in this journey include enacting policies that respond to Indigenous women's unique

[65] Department of Justice Canada, "Bill C-22: Mandatory Minimum Penalties to be repealed" (18 February 2021), online: <https://www.canada.ca/en/department-justice/news/2021/02/bill-c-22-mandatory-minimum-penalties-to-be-repealed.html>.
[66] Correctional Services Canada, "Correctional Service Canada strengthens supports for Indigenous offenders" *News Release* (28 July 2021), online: < https://www.canada.ca/en/correctional-service/news/2021/07/correctional-service-canada-strengthens-supports-for-indigenous-offenders.html>.
[67] *United Nations Declaration on the Rights of Indigenous Peoples Act,* SC 2021, c 14 at preamble, Schedule Art 5.
[68] Bill C-15, An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples, Parl 43, Sess 2 (First Reading, 3 December 2020), at Cl 4(a).

and systemic background factors. The *CHRA* and UNDRIPA oblige the Respondents to recognize Indigenous women's distinct characteristics and treat them differently. This is the bedrock of substantive equality.[69]

Remedy sought

56. If the complaints are established, NWAC takes the position that the Respondent must meet its obligations to advance Indigenous women's substantive equality to others by ceasing all conduct and policies that discriminate against Indigenous women.

DATED at the City of Ottawa, Ontario, this 24th day of November, 2022.

Sarah Niman, LSO #84609E
(613) 720-2529
sniman@nwac.ca

Allison MacIntosh, LSO #75735T
(613) 617-7791
amacintosh@nwac.ca

Legal Counsel
Native Women's Association of Canada
120 Promenade du Portage
Gatineau, QC
J8X 2K1

[69] *Fraser, supra* note 4 at para 40.

ORIGINAL TO: **Canadian Human Rights Tribunal**
Attn: Amélie Sabourin, Registry Officer
240 Sparks Street, 6th Floor West
Ottawa, Ontario K1A 1J4
Tel: (613) 996-0212
Email: registry.office@chrt-tcdp.gc.ca

COPIES TO: **Morgan Rowe/ Simcha Walfish/ Anna Rotman**
Raven, Cameron, Ballantyne & Yazbeck LLP
220 Laurier Avenue West, Suite 1600
Ottawa, Ontario K1P 5Z9
Tel: (613) 567-2908
Email: MRowe@ravenlaw.com/ swalfish@ravenlaw.com/ arotman@ravenlaw.com

Emily Coyle
Canadian Association of Elizabeth Fry Societies
190 Bronson Avenue
Ottawa, Ontario K1R 6H4
Email: ecoyle@caefs.ca

Counsel for the Complainant

Caroline Carrasco/ Brittany Tovee
Canadian Human Rights Commission
344 Slater Street, 9th Floor
Ottawa, Ontario K1A 1E1
Tel: (343) 882-8135/ (613) 943-9107
Email: caroline.carrasco@chrc-ccdp.gc.ca/ brittany.tovee@chrc-ccdp.gc.ca

Counsel for the Canadian Human Rights Commission

Vanessa Wynn-Williams/ Banafsheh Sokhansanj
Department of Justice Canada Civil Litigation Section
500-50 O'Connor Street
Ottawa, Ontario K1A 0H8

Tel: (613) 670-6285/ (613) 670-6273
Email: Vanessa.Wynn-Williams@justice.gc.ca/
Banafsheh.Sokhansanj@justice.gc.ca

Counsel for the Respondent