Court File No. 22633

IN THE SUPREME COURT OF CANADA
(On Appeal From the Federal Court of Appeal

B E T W E E N:

PHILIP CONWAY

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

THE ATTORNEY GENERAL OF QUEBEC
THE ATTORNEY GENERAL OF ONTARIO
THE ATTORNEY GENERAL OF BRITISH COLUMBIA
WOMEN'S LEGAL EDUCATION AND ACTION FUND
MINORITY ADVOCACY AND RIGHTS COUNCIL
COALITION OF PROVINCIAL ORGANIZATIONS OF THE HANDICAPPED

Interveners

FACTUM OF THE INTERVENER WOMEN'S LEGAL EDUCATION AND ACTION FUND

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PART I: FACTS

1. The Intervener, the Women's Legal Education and Action Fund ("LEAF") is a national, federally incorporated, not-for-profit organization founded in April, 1985 to secure equal rights for Canadian women as guaranteed by the Canadian Charter of Rights and Freedoms. To this end, it engages in test case litigation, research and public education.

2. LEAF adopts the facts as set out in the Factum of the Respondent, and relies on the following additional facts.

3. The issue raised by this case relates to two particular forms of routine surveillance conducted by correctional officers in federal penal institutions: pat-down frisk searches and "winds". The term "winds" refers to the random viewing of prisoners in their cells.

4. Prison cells are checked on a regular basis to ensure that inmates are alive and not engaging in prohibited conduct.

Transcript of Payne, Case on Appeal, Vol. VIII, p. 1069, l. 15 - p. 1070, 1. 3

5. The evidence establishes the following facts with respect to the attitude of male prisoners to the surveillance activities in this case:

a. They have concerns about invasions of privacy arising from searches and other forms of surveillance, regardless of the gender of the guards involved.

Transcript of Spearman, Case on Appeal, Vol. V, p. 704,11. 11-16

Transcript of Payne, Case on Appeal, Vol. VII, p. 1055, 1. 27 - p. 1056, 1. 14

Transcript of Mainwaring, Case on Appeal, Vol. VI, p. 839, 11. 6-14

Transcript of Shawver, Case on Appeal, Vol. VIII, p. 1270, 11. 16-20; p. 1299, 11. 12-24

Transcript of Beliveau, Case on Appeal, Vol. IX, p. 1445, 11. 17-24

b. There have been very few complaints relating to gender, compared to the volume of complaints relating to search/privacy issues as a whole.

Transcript of Mainwaring, Case on Appeal, Vol. VI, p. 838, 1. 19 - p. 839, 1. 14

Transcript of MacDonald, Case on Appeal, Vol. VII, p. 958, 1. 20 - p. 959, 1. 4

Transcript of Payne, Case on Appeal, Vol. VII, p. 1060, 1. 21 - p. 1061, 1. 20

Transcript of Serin, Case on Appeal, Vol. VII, p. 1104, 11. 10-19

c. Many male prisoners express a preference for female guards in the conduct of pat-down frisks because they perceive that women guards perform these duties in a more sensitive fashion.

Transcript of Ostiguy, Case on Appeal, Vol. VIII, p. 1156, 11. 17-25

d. The integration of women guards into men's prisons has generally ameliorated conditions of incarceration for male inmates.

Transcript of Payne, Case on Appeal, Vol. VII, p. 1062, 11. 23-28

Transcript of Serin, Case on Appeal, Vol. VII, p. 1108, 1. 19-1109, 1. 4

Transcript of Ostiguy, Case on Appeal, Vol. VIII, p. 1158, 1. 18 - p. 1159, 1. 20

Transcript of Shawver, Case on Appeal, Vol. VIII, p. 1272, 11. 7-22

Transcript of Beliveau, Case on Appeal, Vol. IX, p. 1427, 11. 11-27; p. 1428,.1. 27 - p. 1429, 1. 12; p. 1432, 1. 14 - p. 1434, 1. 24

Szcokyj, E., "Working in a Man's World: Women Correctional Officers in an Institution for Men", July 1989 Canadian Journal of Criminology 319, pp. 320-321

6. The reasons given by the Appellant for objecting to frisks being conducted by women correctional officers were that his girl friend objected to it and that it "feels wrong". With respect to "winds", the Appellant testified that he objected to women's employment on the cell blocks because he considered it "an invasion of privacy, natural privacy".

Transcript of Conway, Case on Appeal, Vol. V, p. 631, 11. 5 - 12; p. 634, 1. 15 - p. 635, 1. 3; p. 659, 1. 8 - p. 660,1. 11

7. Many of the reasons given through the evidence of John Hill for complaints by male prisoners about the presence and activities of women guards reflect discriminatory attitudes to the very presence of women. They include:

a. female guards cause most of the tension between guards and inmates;

b. the presence of female guards puts the inmates' lives in danger;

c. female guards are more likely to be taken hostage and raped;

d. there has been nothing but trouble since the day female guards came into mens prisons;

e. male guards dislike having to work with women and take their frustrations out on the inmates;

f. women cause disruption between inmates and staff because the male guards try to impress the female guards;

g. male prisoners resent the presence of female staff because they do not have "access" to them.

Exhibit D-28, Case on Appeal, Vol. IV, pp. 479-483, 489-491

Several of the inmates indicated that the solution would be the removal of women guards from men's institutions.

Exhibit D-28, Case on Appeal, pp. 479, 482, 483, 487 Transcript of Weatherall, Case on Appeal, Vol. V, p. 749, 11. 22-24

8. Women first entered male correctional facilities as correctional officers as a result of the repeal of certain exclusionary directives which were recognized as discriminatory. Their entry, therefore, was not the result of "affirmative action". The affirmative action program referred to in para. 6 of the Respondent's Factum has been directed towards increasing the number of women entering these facilities as correctional officers.

Transcript of Trepanier, Case on Appeal, Vol. VI, p. 890, 1. 9 - p. 891, 1. 15

9. Reactions to being viewed in the nude and performing private bodily functions vary with social, cultural and historical context, as well as individual and group "socialization" and social situation. Reactions to being seen by members of the opposite sex in these situations vary according to the same factors.

Transcript of Shawver, Case on Appeal, Vol. VIII, p. 1265, 1. 23 - p. 1267, 1. 23; p. 1286, 1. 15 - p. 1287, 1. 5; p. 1292, 1. 27 - p. 1296, 1. 18

10. The evidence establishes that the privacy needs of male prisoners in this case could be respected by various modifications to the physical environment, such as privacy screens, and by the training of male and female staff to deal with inmates in their living quarters and elsewhere with sensitivity, all without compromising security. Difficulties experienced in providing for prisoners' privacy needs vary with the age and layout of specific correctional facilities, but are not insurmountable in Collins Bay.

Transcript of Braun, Case on Appeal, Vol. VI, p. 883, 11. 3-25

Transcript of MacDonald, Case on Appeal, Vol. VII, p. 944, l. 4 - p. 946, 1. 6; p. 1014, 1. 24 - p. 1015, 1. 3

Transcript of Payne, Case on Appeal, Vol. VII, p. 1029, 1. 25 - p. 1030, 1. 1; p. 1054, 1. 18 - p. 1056, 1. 30

Transcript of Ostiguy, Case on Appeal, Vol. VIII, p. 1157, 1. 22 - p. 1158, 1. 18

Transcript of Carson, Case on Appeal, Vol. VIII, p. 1197, 11. 12-14

11. Expert evidence confirms that privacy needs can be addressed by physically modifying prison conditions. Furthermore, concerns about gender can be significantly reduced, indeed eliminated, by training and sensitive introduction of innovation into the prison system.

Transcript of Shawver, Case on Appeal, p. 1273, 11. 10-15; p. 1305,1. 23 - p. 1306,1. 18

Transcript of Beliveau, Case on Appeal, Vol. IX, p. 1435, 1. 24 - p. 1436, 1. 13; p. 1461, 1. 14 - p. 1462, 1. 19

Szcokyj, supra at 324-25

12. The evidence establishes that while it might be possible to "roster" staff at its current gender composition in such a way as to assign women to positions in which they would not be called upon to perform frisk searches or "winds", such reorganization would have the following implications for women's employment in men's prisons:

a. Limiting the duties performed by women guards could result in the positions held by them being reclassified to a lower classification and, as a result, being paid at a lower salary.

Transcript of Mainwaring, Case on Appeal, Vol. VI, p. 834,. 14-21

b. Male guards would perceive female guards as being paid the same salary but not doing the same job.

Transcript of MacDonald, Case on Appeal, Vol. VII, p. 955, 1. 5 - p. 956,1. 25

Transcript of Payne, Case on Appeal, Vol. VII, p. 1050, 11. 6-13

c. It could cause resentment between male and female guards because female guards would be perceived as getting the less stressful assignments.

Transcript of Mainwaring, Case on Appeal, Vol. VI, p. 834, 1. 22 - p. 835, 1. 9

d. It could compromise women's chances for promotion by limiting their opportunities to gain experience in important correctional functions.

Transcript of Mainwaring, Case on Appeal, Vol. VI, p. 834, 11. 5-14

Transcript of MacDonald, Case on Appeal, Vol. VII, p. 956, 1. 26 - p. 957, 1-7

Transcript of Payne, Case on Appeal, Vol. VII, p. 1048, 11. 4-9; p. 1075, 1. 22 - p. 1076, 1. 3; p. 1077, 1. 27 - p. 1078, 1. 8

PART II: POINTS IN ISSUE

13. The issue raised by this case is whether certain forms of surveillance (frisks and "winds") which are routine in the prison context violate the Appellant's Charter rights when performed by women.

14. LEAF submits that the following principles are central to the proper analysis of this issue:

a. This issue must be approached with due regard to the fundamental value this Court has attached to equality rights in Canadian society.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 185, per McIntyre J.

b. Equality in employment is fundamental as a pre-condition for social equality for women in Canadian society.

c. "The idea of human dignity finds expression in almost every right and freedom guaranteed in the Charter."

R. v. Morgentaler, [1988] 1 S.C.R. 30 at 166

d. Charter rights should be analysed not in the abstract, but in their social context.

Edmonton Journal v. Attorney-General for Alberta, [1989] 2 S.C.R. 1326 at 1352-1353, per Wilson J.

15. LEAF submits that in adopting the necessary concrete and contextual approach to this case, this Court is required to address the problem of protecting the privacy and dignity of individual inmates while taking into account, in addition to the security needs of the prison system:

a. The fact that men and women are unequally situated in society in relation to their access to power, their equality of opportunity in employment, and their experience of sexual violence and sexual exploitation.

b. The fact that the integration of women guards into men's penal institutions has demonstrably improved conditions of incarceration for male inmates as a whole, thereby promoting their dignity.

16. In resolving this issue, this Court must be mindful of the fact that this case is the Appeal of an individual inmate in a single penal institution concerning two particular forms of search in the prison context. Furthermore, this Court must be mindful of the fact that this matter was tried without representation from women prison guards or women prisoners, without the benefit of the collective views of inmates whose privacy and dignity interests may be adversely affected by a remedy which would restrict the role of women guards in men's prisons, and without regard for the social diversity of the inmate population.

PART III: ARGUMENT

A: PRIVACY CLAIMS OF APPELLANT

17. LEAF submits that the state has a constitutional obligation to respect and protect the dignity of the socially powerless within the confines of the Charter. LEAF submits that this obligation is imposed by a number of Charter provisions, including ss. 7, 8 and 15.

18. LEAF submits that prisoners are a powerless group in society and therefore have such a claim on the state. LEAF submits that privacy and dignity concerns arising in the prison context require special consideration given the degree of intrusion to which inmates have historically been subjected.

19. LEAF further submits that many prisoners experience multiple disadvantage on the basis of race, aboriginal status, disability, socio-economic circumstances and other factors which increases their vulnerability and imposes an enhanced obligation on the state and the courts to promote and protect their Charter rights.

20. LEAF submits that surveillance functions which exceed the minimum requirements for maintenance of security within a penal institution arguably violate ss. 7 and 8 of the Charter. LEAF submits that much of the surveillance revealed in the evidence in this case as a routine aspect of prison life should be re-examined in the context of the Charter's commitment to human dignity.

21. LEAF submits, however, that the Appellant has not put forward grounds for objecting to the participation of female guards in frisk searches and "winds" that provide a constitutional basis for distinguishing between these activities when performed by female and male guards.

22. LEAF submits that the trial judge grounded his findings of Charter violation with respect to "winds" not on the specific facts of the Appellant's case but on an implicit presumption that public decency demands the protection of males from being viewed or touched by women in the circumstances involved in this case.

Reasons for Judgment of Strayer J., Case on Appeal, Vol. IV, pp. 549-550

23. LEAF submits that in contexts in which women are perceived as functioning in their proper sphere and performing roles socially constructed as "women's work", such as nursing and other occupations characterized as "care-giving", contact such as that at issue in this case (touching clothed males and infrequent viewing of unclothed males) is generally not seen as remarkable or per se violative of standards of decency.

24. LEAF submits that, given that concepts of public decency are highly socialized, culturally specific and temporally variable, it is not possible to develop or articulate a general "public decency" standard, nor is it appropriate to make the attempt in response to an individual claim. This difficulty is highlighted in the context of this case by the fact that many male inmates recognize and value the changes brought about in prison conditions and administration by the presence of women guards.

paras. 5(d) and 9, supra

25. The Charter has been found by this Court to protect "a reasonable expectation of privacy".

Hunter v. Southam Inc., [1984] 2 S.C.R. 145 at 159

26. LEAF submits that in determining what is a "reasonable expectation", care must be taken to scrutinize the factual and conceptual basis of such claims to determine

whether they conflate "reasonableness" with stereotypical views about the "unnaturalness" or inappropriateness of women in certain social contexts such as non-traditional work.

B. APPELLANT'S EQUALITY RIGHTS CLAIM

i. Substantive Equality Under the Charter

27. In defining an approach to the interpretation of s.15(1) of the Charter, this Court has held that the objective of the equality guarantees is not to provide "same treatment" for individuals but to remedy social disadvantage. The purpose of s. 15(1) is not to eliminate all distinctions but only discriminatory distinctions. A distinction is discriminatory only if it functions to cause or to reinforce social disadvantage.

> Andrews v. Law Society of British Columbia, supra at 165-176, per McIntyre and 152-154, per Wilson J.
>
> R. v. Turpin, [1989] 1 S.C.R. 1296 at 1331-1332
>
> McKinney v. University of Guelph, [1990] 3 S.C.R. 229 at 390, per Wilson J.

28. This Court has explicitly recognized that "same treatment" may in fact exacerbate social disadvantage. In many cases, inequality will only be remedied by a recognition that groups socially, politically and/or economically unequal may require different treatment in order to achieve equality of results.

> Andrews v. Law Society of British Columbia, supra at 169, 171 per McIntyre J.

29. LEAF submits that the s.15 equality guarantees embodied in ss.15(1) and (2) have the same purpose, namely, the promotion of substantive, not formal, equality. LEAF submits that s.15(2) must always be considered together with s.15(1), both in examining the

substantive content of equality and other Charter rights and in applying equality values to an assessment of the application of s.1 in any case in which a Charter challenge arises in connection with programs designed to promote the equality of members of disadvantaged groups.

30. LEAF submits that the promotion of equality includes, and may require, the adoption of positive measures. Positive measures have been recognized as essential components of a public policy directed towards the amelioration of the social and economic inequality of disadvantaged groups in our society.

> Action Travail des Femmes v. Canadian National Railway Co., [1987] 1 S.C.R. 1114 at 1139
>
> Judge R. S. Abella, Report of the Commission on Equality in Employment (Ottawa, 1984), pp. 9-10

31. LEAF submits that positive measures aimed at remedying social disadvantage are integral to Charter equality guarantees. As such, positive ameliorative measures contemplated by s.15(2) should not be treated as contingent favours which are to be fitted around or subordinated to other Charter rights.

ii. Differential Rules for Women Prisoners

32. The Appellant alleges that his sex equality rights are violated by the existence of directives and policies with respect to the Prison for Women which provide that surveillance and searches of women prisoners of the type at issue in this case will be carried out only by women guards. He characterizes the asymmetrical rules with respect to cross-gender surveillance of male and female prisoners as conferring on female prisoners a benefit denied to male prisoners on the basis of sex.

33. The constitutional validity of the rules providing for same-sex surveillance in women's prisons is not an issue in this case and the Appellant has not sought to have these rules struck down or altered in any way.

34. LEAF submits that for the Appellant to make out a sex equality violation, he would have to demonstrate that male inmates suffer discrimination within the meaning of s. 15(1) of the Charter by virtue of the fact that women inmates are frisked and viewed only by women guards.

35. LEAF submits that the evidence does not establish such discrimination. There is no evidence that male inmates are affected in any way by the conditions of incarceration of female inmates.

36. LEAF further submits that limitations on the range of duties performed by male guards in women's prisons do not implicate the sex equality rights of male prisoners.

37. LEAF submits that if a challenge had been made to the rules in women's prisons, the Court would have had to examine the question of whether substantive equality principles justify or require such rules in women's prisons. In addressing that question, the Court would have to consider factors like:

a. Women's bodies and female nudity are sexualized in our society in a manner and degree which is not paralleled for men.

Smart, C., Feminism and the Power of Law (London and New York, Routledge: 1989), pp. 38-43

Wolf, N. The Beauty Myth (Toronto, Vintage Books: 1991), pp. 138-139, 153-154

hooks, b., Black Looks: Race and Representation (Boston, South End Press: 1992), pp. 61-77

b. The majority of women prison inmates have histories of childhood and adult sexual abuse at the hands of men.

Creating Choices: Report of the Task Force on Federally Sentenced Women (Correctional Services Canada, 1990), pp. 106-107

c. Women justifiably fear sexual violence at the hands of men, particularly men in positions of power.

Solicitor General Canada, Canadian Urban Victimization Study: Female Victims of Crime Bulletin 4 (1985)

MacKinnon, C., Toward a Feminist Theory of the State (Cambridge, Harvard: 1989), pp. 126-154

Stanko, E.A., Intimate Intrusions: Women's Experience of Male Violence (London and New York, Routledge & Kegan Paul, 1985), pp. 1-5, 70-82

M.(K.) v.M.(H.), [1992] 3 S.C.R. 6

Norberg v. Wynrib, [1992] 2 S.C.R. 318

d. The imbalance of power resulting from the authority which men guards would have over women inmates compounds e normal imbalance of power produced by gender relations in our society.

Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252 at 1281, 1284-1285

e. Canada is bound by an International Covenant requiring it to recognize and respect these concerns as they affect women inmates.

United Nations, Standard Minimum Rules for the Treatment of Prisoners, Article 53

38. LEAF submits that in this context the social meaning of cross-gender surveillance is different and more threatening for women than for men.

39. LEAF submits that women prisoners have an interest in being free of cross-gender surveillance which does not relate to formalistic notions of public decency, but

to a compelling interest in security of the person in the context of a sex unequal society and prison sub-culture.

40. LEAF submits that if examined from this perspective, any difference in treatment between women inmates and men inmates would be recognized as a positive measure aimed at reducing the substantive disadvantage of women prisoners rather than as a "benefit" to which male prisoners are a priori entitled.

41. The trial judge expressed concerns that arguments in support of a differential rule based on apprehensions about male violence were arguments "against the male gender" and constituted "stereotyping" of the type which s.15(1) of the Charter was designed to preclude.

Reasons for Judgment of Strayer J., Case on Appeal, Vol. IV, p. 564

42. LEAF submits that it is a formalistic error potentially devastating to the goal of promoting substantive equality to confuse the study and analysis of patterns of social disadvantage and the development of measures for remedying disadvantage on the basis of the objective facts of women's lives with "stereotyping". LEAF submits that it is not stereotyping to describe the realities of women's lives and to rely on that description as a basis for promoting women's equality.

iii. Section 15(2)

43. LEAF submits that this Court, in giving meaning to s.15(1) and s.15 as a whole, has suggested that s.15(2) functions both as an interpretative principle for s.15(1) equality rights and as a "saving provision" in certain circumstances in which equality-promoting measures may prima facie violate s.15(1).

Andrews v. Law Society of British Columbia, supra at 171, 175-176, 182, per McIntyre J.

44. LEAF submits that the question of giving s.15(2) independent force as a "saving provision" does not arise on the facts of this case. Section 15(2) could have application only to "save" the instrument alleged to have created the inequality. In this case that instrument - one which was not challenged by the Appellant - would be the differential rule for female prisoners. LEAF submits that substantive equality analysis requires that the question of whether that rule is an ameliorative measure is one properly addressed at the stage of determining whether or not it violates any right of the Appellant pursuant to s.15(1).

45. LEAF submits that while s.15(2) may function to "save" prima facie violations of Charter rights guaranteed by s.15(1) in appropriate cases, it cannot function in this way with respect to other Charter rights. Equality considerations must, of course, inform any examination of the content of other Charter rights and of s.1.

C. EQUALITY RIGHTS OF WOMEN CORRECTIONAL OFFICERS

46. Women in Canadian society are disadvantaged in employment. One of the important factors contributing to their disadvantage in employment is occupational segregation.

Judge R. Abella, Report of the Commission on Equality in Employment, at 19, 62-70

Gunderson, M., Muszynski, L. and Keck, J., Women and Labour Market Poverty (Ottawa, Canadian Advisory Council on the Status of Women: 1990), pp. 43-45, 92-97

47. Women are disadvantaged by their historical exclusion from and under-representation in positions as correctional officers in the federal penal system.

See Respondent's Factum, paras. 4-7

48. LEAF submits that this Court must guard against approaching the issue of women's employment in men's prisons from any presumption that women are alien to this workplace and should only be admitted on appropriate terms.

49. What the Appellant objects to in this case is the presence of women guards performing the full range of routine duties of prison guards. In other words, he complains that women correctional officers have not been limited in their roles and assignments.

50. The trial judge characterized the introduction of women guards into Collins Bay as part of an affirmative action program. After finding that "winds" by women infringed the Appellant's s.8 Charter rights, he asked himself whether assigning such duties to women was necessary to the affirmative action program. He found that it was not.

Reasons for Judgment of Strayer J., Case on Appeal, Vol. IV, p. 563

51. The presence of women as guards in the Collins Bay Penitentiary is not a consequence of the federal affirmative action program, but the result of the repeal of previous exclusionary policies. LEAF therefore submits that it is incorrect to characterize the issue in this case as one of weighing the benefits of "affirmative action" for women employees against the privacy rights of men prisoners.

para. 8, supra

52. LEAF submits that the trial judge's approach to the issue characterizes the presence of women guards at Collins Bay as simply a matter of beneficent federal policy, and not as a matter of right on the part of women guards. "Fixing" the inmate's problem, therefore, becomes a simple matter of modifying the affirmative action policy, or altering the

terms on which women will be permitted to enter and function within what is presumptively and "naturally" a male domain.

53. LEAF submits that a resolution to this case which dictates that women be given more limited roles and assignments as correctional officers will have negative impact on their opportunities for equal pay, equal opportunity for advancement, and equal respect and dignity in the workplace.

para. 12, supra

Belknap, J., "Women in Conflict: An Analysis of Women Correctional Officers" (1991), 2 Women and Criminal Justice 89 at 99-100

D: SECTION 1

54. This Court has described s.1 as the locus in which "the fundamental values and aspirations of Canadian society" are brought together. In particular, this Court has held that the principles underlying s.15 are integral to the s.1 analysis.

R. v. Keegstra, [1990] 3 S.C.R. 697 at 735-736, 756

55. This Court has held that where Charter challenges involve mediating the claims of different groups, the analysis under s.1 involves different considerations than where the conflict is strictly between an individual and the state as "singular antagonist".

A.G. of Quebec v. Irwin Toy, [1989] 1 S.C.R. 927 at 993-994

United States of America v. Cotroni, [1989] 1 S.C.R. 1469 at 1489-90

56. LEAF submits that if this Court finds that the assignment of women to the contested functions prima facie violates the Appellant's Charter rights, the proper constitutional question is not whether the assignment of women to these functions is necessary to

affirmative action, but whether any limitation on women's equality of opportunity is necessary to remedy the Appellant's claim.

57. LEAF submits that in examining the question of whether measures designed to promote equality can function as limits "prescribed by law" on other Charter rights, this Court should be guided by its recognition that the word "law" in s.15(1) should not be restricted to "laws", even broadly construed, but should be generously interpreted to include all measures which implicate equality rights.

> McKinney v. University of Guelph, supra at 276-278, per LaForest J. and 382-385, per Wilson J.

E: REMEDIES

58. LEAF submits that if this Court determines that the measures complained of in this case limit the Appellant's Charter rights and are not justified by s.1, the considerations urged above for s.1 analysis should inform the Court's consideration of appropriate remedies.

59. The remedy sought by the Appellant, the prohibition against women guards participating in frisk searches and "winds" at Collins Bay Penitentiary, is one which would impact fundamentally on equal employment conditions and opportunities for women, and thus on their equality rights.

60. LEAF therefore submits that any remedy which would extend the rule in women's prisons to men's prisons simply on the basis of asymmetry cannot be justified in view of its impact on women's employment in men's prisons.

61. LEAF submits that any declaration which might be granted to protect the Appellant's Charter rights should expressly require that its implementation have no detrimental impact on women's equality rights.

62. It is submitted that a number of remedies which would have no such detrimental impact would be available in this case. These remedies would include:

a. Modifying the physical environment of the prison so that the prisoners were not exposed to the view of guards while nude or when performing intimate personal functions, thereby addressing the issue of inmate dignity and privacy.

b. Providing proper training and supervision to guards so that surveillance is performed with respect for privacy and dignity.

c. Providing avenues to allow inmates to grieve and guards to be disciplined for abuse of surveillance powers.

63. LEAF submits that there is no constitutional justification for the Respondent to refuse to incur any additional cost which might be associated with providing of these alternative remedies. LEAF submits that these alternative remedies are not only consistent with but required by the Respondent's obligation and recognized commitment to promote equal employment opportunities for women correctional officers.

Singh v. Minister of Canada (Minister of Employment and Immigration, [1985] 1 S.C.R. 177 at 218-220

R. v. Schachter, [1992] 2 S.C.R. 679 at 709-712

Respondent's Factum, para. 52

64. LEAF further submits that courts should be extremely reluctant to grant a Charter remedy which would result in a violation of the Charter rights of others. LEAF submits that where the only option available to the Court in granting a Charter remedy would result in a violation of the Charter rights of others, the Court should suspend the implementation of the remedy in order to allow the affected parties the opportunity to address the issue in a manner which would not result in such a violation.

R. v. Schachter, supra at 719

PART IV: ORDER REQUESTED

65. LEAF respectfully requests that the Appellant's appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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PART V: TABLE OF AUTHORITIES

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