C.A. No. 5038

IN THE COURT OF APPEAL FOR SASKATCHEWAN

B E T W E E N :

THE ATTORNEY GENERAL OF CANADA

APPELLANT
(INTERVENER)

- and -

CAROL MAUREEN DANIELS

RESPONDENT
(APPLICANT)

- and -

WOMEN'S LEGAL EDUCATION AND ACTION FUND

RESPONDENT
(INTERVENOR)

FACTUM OF THE RESPONDENT/INTERVENOR WOMEN'S LEGAL EDUCATION AND ACTION FUND

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I. FACTS

1. By fiat rendered by Gerwing J.A. and delivered the 22nd of May, 1991, The Women's Legal Education and Action Fund ("LEAF") was granted leave to file written submissions relating to the issues in this appeal.

2. LEAF adopts the statement of facts submitted by the Appellant and the Respondent in their factums and relies as well on the facts outlined below.

A. INTRODUCTION

3. The Prison for Women at Kingston, Ontario, opened in 1934 as the sole federal penitentiary for women. Four years later, in 1938, it was deemed unsuitable for the purpose of incarcerating women by the Archambault Commission. Recognizing that incarceration serves the dual purpose of custody and rehabilitation, the Archambault Commission was strongly of the view that the Prison for Women, while enforcing an excessive and unnecessary level of security, failed to provide adequate access to rehabilitative programming. Most striking to the Commissioners reporting in 1938, was the fact that women from across Canada were housed in one central facility, thereby impeding contact with communities and families whose contact was acknowledged as essential to the rehabilitation process and to post-release reintegration into the community. The conclusion of the Commission

was that the Prison ought to be closed and that federally sentenced women should be permitted to serve their terms of imprisonment in their home provinces. Pending closure of the prison and the relocation of the women in their home provinces, the Commissioners recommended the interim provision of upgraded facilities for recreation and exercise, improvements in the living environment and the provision of education and vocational training.

> Royal Commission of the Penal System of Canada (Archambault Report) April, 1938, Supplementary Materials, vol. II, tab 1.

4. In the years since 1938, the criticisms voiced by the Archambault Commission, as well as its recommendation for closure of the prison and reform of the penal regime imposed on women, have been echoed and amplified in subsequent task forces, Government commissions and ministry studies and reports. The 1990 Report of the Task Force on Federally Sentenced Women notes that:

> "...[s]ince 1934, all but one of the nine major Government commissions and task forces who have looked at the problems of federally sentenced women have recommended closure of the Prison for Women, and a greater move towards regional and/or community facilities and services. In fact, the first call for the closure of the Prison for Women came only four years after it was opened, from the 1938 Royal Commission on the Penal System (Archambault Commission)."

And further:

> "Official reports and briefs prepared since the completion of the Prison for Women in 1934 have uniformly identified the Prison for Women as inadequate. In 1977, the Parliamentary Sub-Committee Report on the Penitentiary System in Canada (MacGuigan Report) said it was 'unfit for bears, much less women'."

Creating Choices: The Report of the Task Force on Federally Sentenced Women, April 1990, Appeal Book, Vol II, p. 181 at pp. 227-228.

And see: Report of General R.B. Gibson: Regarding the Penitentiary System of Canada (1947), Supplementary Materials, vol. II, tab 2, p. 10

Report of the Royal Commission on the Status of Women in Canada, (September 1970), Supplementary Materials, vol II, tab 3, p. 384

Report to Parliament (The MacGuigan Report) 1976-77, Supplementary Materials, vol II, tab 5, p. 138

Taking Responsibility: Report of the Standing Committee on Justice and Solicitor General (The Daubney Report)(August 1988), Supplementary Materials, vol. II, tab 8, pp. 239-240

Evidence of Miller-Ashton, pp. 17-20

5. In 1991, the Prison for Women remains the sole federal facility for women sentenced to terms of imprisonment of two years or more. Attempts at amelioration in the conditions of incarceration for federally sentenced women have been undertaken and promised sporadically or experimentally. It is the present position of the Government, in adopting the recommendations of the April 1990 Report of the Task Force on Federally Sentenced Women, that, notwithstanding potential renovations and expenditures, the Prison for Women could never be upgraded or altered to meet the needs and problems of women. In fact the only capital improvement announced since the release of the Task Force Report, is the addition of lighting for the outdoor exercise yard in the hope that women will be able to take some exercise at night. It is conceded on behalf of the Government that women presently incarcerated at the Prison for Women are disadvantaged in relation to male inmates

and are subject to facilities and programming that do not meet their needs and circumstances.

> Affidavit of J. Miller-Ashton, sworn February 26, 1991, paragraph 3
> Evidence of J. Miller-Ashton, pp. 10; 25-26; 42-43; 57; 66-67; 88-89,
> Evidence of Mary Cassidy, Warden at Prison for Women, sworn February 26, 1991, para. 12

6. The present position of the Government also recognizes that the Prison for Women has failed to meet its mandate in relation to Native women. Because of the increased likelihood they will be separated by greater distances from their communities and families and because of their unique cultural and societal circumstances, Native women suffer an additional burden in being deprived of programmes and training designed to conform and assist with their particular needs and circumstances. The Daubney Report, in a passage approved in the 1990 Task Force Report, comments on the uniquely disadvantaged position of the federal Native inmate:

> "Thus, it may be seen, imprisoned Native women are triply disadvantaged: they suffer the pains of incarceration common to all prisoners: in addition they experience both the pains Native prisoners feel as a result of their cultural dislocation and those which women prisoners experience as a result of being incarcerated far from home and family."
>
> Evidence of Miller-Ashton, p. 38, pp. 52-55
> Taking Responsibility (Daubney Report), August 1988, vol. II, tab 8, p. 237

7. While the Government forecasts the closure of the Prison for Women by 1994 and its replacement by regional facilities with suitable programming and a Healing Lodge for Native inmates, it

concedes that those women who remain at the Prison for Women in the intervening years will continue to be disadvantaged vis-a-vis male inmates as well as suffering the effects of geographic dislocation.

Evidence of J. Miller-Ashton, pp. 42; 57; pp. 73-74; 89

B. SUMMARY OF INADEQUACIES OF THE PRESENT SYSTEM

8. In general terms, the focus of criticism and suggestions for reform of the present system in place for federally sentenced female offenders have arisen as a response to the following problems:

(a) the maintenance of a sole federal facility and the resulting geographical and social dislocation;

(b) excessive security and the de facto imposition of a single level of security in a multi-level facility;

(c) the absence of women-centred programming;

(d) the absence of adequate programming and facilities to meet the particular needs and circumstances of Native women, including gender and culturally specific programming.

B.1 Sole Federal Facility:

9. Unlike their male counterparts who may be housed in approximately 41 federal penitentiaries across the country, federally sentenced women, unless they are the subject of an Exchange of Services Agreement between their province and the federal Government, serve their sentences at the Prison for Women in Kingston, Ontario. The 1990 Task Force on Federally Sentenced Women notes that almost all provinces that have such agreements will not house women sentenced to lengthy terms of imprisonment and conversely, do not offer programmes suitable to the needs of long-term inmates. In contrast to a federally sentenced male, the federally sentenced woman, if eligible under the Exchange of Services Agreement, is forced to choose between geographical proximity with no suitable programming, or some degree of long-term programming in a distant location. Further the use of Exchange of Services agreements have been rejected by the Government as an alternative to closing the Prison for Women, with the exception of women from the Territories who will thereby be housed close to their homes and cultures.

> The Report of the Task Force on Federally Sentenced Women, loc. cit., pp. 76-78
>
> Evidence of Miller-Ashton, pp. 43-45

10. Similarly, co-corrections, whereby male and female federal inmates would share facilities, although suggested as a possible solution in at least one Government committee report (the Chinnery

Report, infra), has been firmly rejected as a suitable option for women, many of whom have been the victims of physical and sexual abuse. In addition, it has been recognized that a real risk exists that the needs of the small population of federally sentenced women would be further ignored if they were to be housed in a facility serving a much larger number of male inmates. As stated by the Appellant's witness, Ms. Miller-Ashton, co-corrections were rejected as a model because:

> "...If you were to add women onto a male facility then in all likelihood they would again represent the minority and that again would experience or likely experience some of the same problems that they experience in the larger picture...And then there's the problem of the fact that we found out that so many of the women are -- have been -- have experienced serious abuse in their lifetimes, sexual, physical and mental abuse in their childhood or in their adult relationships...and that central to our model is recovery from those histories of abuse.
> If we are to focus on that and to that in a proper way, and at the same time we're to put the women in an environment with men, who might even be the perpetrators of such abuses, it might be very difficult for the women to recover. And it was felt that for the purposes of a proper environment for recovery that the facility should be a separate facility.
> ...We did reject it [co-corrections] for the incarceral period."
>
> Report of the Joint Committee Studying the AlterNatives Re The Housing of Federal Female Offenders (The Chinnery Report)(October 1978), p. 13
>
> Evidence of Miller-Ashton, pp. 64-65

11. The consensus in 1991, as stated in the 1990 Task Force Report and the Government's stated intention of replacing the Prison for Women with regional facilities for the housing of women, is that women, like men, ought to be able to serve their terms of

imprisonment near their home communities, in facilities and with programmes designed for them and their needs. Pending completion of the proposed regional facilities, women presently incarcerated or sent to the Prison for Women continue to suffer the effects of geographic dislocation and isolation from their families, communities and culture.

Evidence of Miller-Ashton, pp. 33-34

12. Mothers who are incarcerated at the Prison for Women and are separated form their children have experienced substantial difficulties in maintaining a relationship of any kind with their children. The cost and difficulties of travelling to Kingston, Ontario, particularly difficult with small children, has meant the loss of relationships and, consequently, loss of post-release structures. Native women in particular suffered a higher loss in their relationships with their children. The 1990 Task Force Report conducted a study that concluded:

> "The [Native] women spoke of the loss of links to the outside world which could help them heal. The women told of being located far from their families who could not afford to visit them. Twenty-six of the women in the study are mothers, and all of them reported negative impacts on their relationship with their children. Such an impact is not surprising to mother-child relationships. Their children are placed in foster care, juvenile detention centres, or were moved between family members. Twenty-five of the twenty-six women who are mothers had difficulty being mothers on resuming their relationships with their children after release, and only 17 were reunited with their children."

Report of the Task Force, loc.cit., pp. 64-65

Evidence of Miller-Ashton, p. 97

13. As a result of housing women in one federal facility, not only are women subject to the pain of separation, but in addition, and of potentially greater concern to the community, both pre-release and post-release planning are substantially impaired by physical obstacles in establishing and maintaining contacts with the community of release from the distance of the Prison for Women. As early as 1947 a Royal Commission recommendation asserted that "women should not be confined in a central penitentiary but that their custodial care and reformative treatment should be undertaken in reformatories closer to their homes and their families and relatives." Numerous studies and reports confirm that successful reintegration into the community requires that ties with family and community be maintained during incarceration and prior to release. Unlike men, federally sentenced women at the Prison for Women who do not reside in Eastern Ontario, have been denied the opportunity of maintaining those links essential to their successful reintegration into society.

Report of General R.B. Gibson: Regarding the Penitentiary System in Canada (1947), vol. II, tab 2, p. 10

And See: Report of the Royal Commission on the Status of Women, vol. II, tab 3, pp. 382-383

Report of a Committee Appointed to Inquire Into the Principles and Procedures following in the Remission Service of the Department of Justice of Canada, (1956), vol II, tab 4, ch. V

Report to Parliament of the Sub-Committee on the Penitentiary System in Canada 1976-77, vol. II, tab 5, p. 136.

B.2 SECURITY

14. The security regime imposed on women at the Prison for Women is described in the 1990 Task Force Report as follows:

> "The Prison for Women was completed in 1934. A multi-level facility, it was constructed on the same design as maximum security facilities for men. Although capital improvements have been made to the Prison, (including two programming facilities, the Activities Building in 1982 and the Private Family Visiting Unit in 1983), the problems associated with the original maximum security design remain.
>
> Numerous studies and reports have concluded that, because of the inflexibility of the design, the majority of women are confined in higher security than they require. The addition, in 1981, of a solid, high perimeter wall at a cost of approximately two million dollars underscores the fortress aspects of the prison. The physical separation from the community imposed by the wall creates a corresponding psychological separation - the women in the Prison are not only separated from, but invisible to, the community.
>
> Inside, the prison environment is noisy, inadequately ventilated, and has insufficient or inappropriate space for community interaction and program delivery. The limited capital improvements in the living environment cited above makes clear that the conclusion of the Parliamentary Sub-Committee on the Penitentiary System in Canada can still be supported.
>
> Namely, that the Prison for Women is unfit for bears, much less women."

The result of housing women in one facility is that women at the Prison for Women are subject to a level of security that is generally greater than required for a given individual which imposes unwarranted restrictions on the majority of women inmates. The Daubney Report notes that women are detained in higher security than most would be subjected to if they were men. Women inmates generally do not pose the security risks presented by male inmates

and are not viewed as dangerous to others. Consequently, a security model based on the male offender is generally not appropriate to the federally sentenced female.

Task Force Report, loc.cit. p. 73 and see pp. 107-111
Evidence of Miller-Ashton, p. 13, 18, pp. 22-24 and p. 28
Daubney Report, loc.cit. p. 233

15. The impact of security classifications is particularly disproportionate on Native inmates. The Task Force's finding that current security criteria are "not culturally relevant" and therefore adversely affect Native women underscores the heightened penalization of Native women under inflexible security guidelines developed for men.

Task Force Report, loc.cit., p. 110
Evidence of Miller-Ashton, p. 16

16. The security system in force in a single multi-level institution means that women face an additional burden in pre-release planning because they, unlike male inmates, do not have the option of gradually working their way through lower security institutions other than if they are able to gain access to an 11-bed minimum security unit outside the prison walls. Thus, the system that allows men to "cascade" down through various facilities offering different levels of security, and thereby demonstrate their progress and suitability for release, is simply not available to women who are confined to the Prison for Women.

Evidence of Miller-Ashton, pp. 34-35

17. The difficulties in pre-release and post-release planning for women, as opposed to men, is exacerbated by the absence of adequate numbers of half-way houses, particularly for Native women wishing to return to Native communities. That factor, in combination with the disadvantage women inmates face as opposed to male inmates, in obtaining temporary releases passes, both escorted and unescorted, means that a woman, and a Native woman in particular, could end up serving a longer portion of her sentence than her male counterpart in a multi-level facility that operates, in reality, as a maximum security prison.

Evidence of Miller-Ashton, pp. 57-59

B.3 PROGRAMMING

18. Despite a long tradition of recognizing the essential rehabilitative potential of education, vocational training and counselling in a system of incarceration, the Government has failed to provide adequate programming within those areas to the federal female population. Current programming is subject to two criticisms; a) present programming reflects norms developed for male inmates and it is inappropriate to transpose that model onto female inmates whose life experiences and goals are probably very different from male inmates, and b) the programming that is provided is premised on a paternalistic conception of what women

need and what opportunities ought to be provided to them. In its 1970 report, the Royal Commission on the Status of Women found that "[m]ost planning seems geared to male inmates and adapted for female inmates.", and further that, as of 1968, the only vocational courses offered at Prison for Women "were commercial, home economics and hairdressing which lead only to jobs traditionally considered "female occupations". The same situation prevailed at the time of the 1990 Task Force Report.

Status of Women Report, loc.cit., p. 382-383

Task Force Report, loc.cit., pp. 53-54

19. The 1990 Task Force's recommendation that programs are to be "women-centred" is a response to the criticisms that programming currently in place, while improved in recent years, fails to adequately address the needs of women. The need for a new model premised on women's experiences and needs is at the core of the Government's proposed programming strategy within the new facilities.

Task Force Report, loc.cit., pp. 102-104

Evidence of Miller-Ashton, pp. 37-41; 91

20. The Government has also accepted that it is a huge element of any successful programming initiative that programming take place in a facility close to home, family and culture. Until that

happens women inmates will be disadvantaged as compared to men inmates.

Evidence of Miller-Ashton, p. 57

B.4 NATIVE PROGRAMMING

21. In addition, Native women at the Prison for Women are further discriminated against in relation to the provision of culturally specific programmes provided to male inmates. The absence of such programming compounds the isolation of Native women serving their terms of imprisonment far from their home communities. The current federal proposal to build a Healing Lodge for Native inmates recognizes and confirms the importance of providing culturally sensitive models of rehabilitation for Native people.

Task Force Report, loc.cit., pp. 54-55

Evidence of Miller-Ashton, pp. 97-106

II. ISSUES

22. The issues raised in this Appeal have been set out in the Factums of the Appellant and the Respondent

III. ARGUMENT

A. THE RIGHT OF APPEAL

23. LEAF makes no submissions on this issue.

B. JURISDICTION

24. LEAF adopts the submissions of the Respondent with respect to this issue.

C. CHARTER VIOLATIONS

25. LEAF adopts the submissions of the Respondent with respect to this issue and makes the following additional submissions.

C.1 IS THE EVIDENTIARY BASE FOR PROVING CHARTER VIOLATIONS ESTABLISHED

26. The witness tendered by the Appellant, Jane Miller-Ashton, was the head of Native and Female Offender Programming for Corrections Canada, was the co-chair of the Working Group in charge of preparing the Task Force on Federally Sentenced Women and is now in charge of implementing the Government's initiative with respect to Federally Sentenced Women, an initiative directed at implementing the recommendations of the Task Force. It is respectfully

submitted that her evidence should be regarded as conclusive in providing a minimum recognition of the discriminatory conditions of confinement faced by Native women from the prairie provinces. Furthermore, her evidence confirms the evidence of the other witnesses called, including the evidence of the Appellant's witness, Andrew Rollo.

Affidavit of Miller-Ashton, sworn February 26, 1991, paragraph 1

27. Ms. Miller-Ashton, in her evidence, also identified and proved the Task Force Report and its contents. She confirmed that to the extent it was factual it contained no serious errors and that to the extent it contained judgment or opinions, they were in no way misleading. In light of this fact no serious issue as to the admissibility of the Task Force Report remains.

Evidence of Miller-Ashton, p. 10

28. It is respectfully submitted that the Government's conduct in beginning to act upon the recommendations of the Task Force on Federally Sentenced Women constitutes an admission that the criticisms contained in the Task Force Report were valid and that it was the Government's responsibility to correct the problems raised. That this is the position of the Government is confirmed by the Appellant's witness, Jane Miller-Ashton.

Evidence of Miller-Ashton, p. 67

C.2 SECTION 12 OF THE CHARTER

29. It is respectfully submitted that the assertions contained in paragraphs 52 and 54 of the Appellant's Factum have no foundation in the evidence forming the record in this case. Indeed, they are in their entirety contradicted by the evidence offered by the Appellant through its own witnesses, Andrew Rollo and Jane Miller-Ashton. These assertions are:

(a) that a thorough review of placement options occurs in relation to all federally sentenced females; and

(b) that the class of federally sentenced females sentenced to Prison for Women embraces only those with particular high-risk security concerns or other particular individual needs, rehabilitative or otherwise.

30. In fact the evidence in this case establishes that the Federal Commissioner of Corrections, who receives all federally sentenced female inmates, while he appears on the face of the legislation and regulations to have a discretion to be exercised in placing federally sentenced women from Saskatchewan serving a sentence of more than five years in reality this discretion is illusory. Therefore, no thorough review of placement options takes place.

Evidence of Neustaedter, Appeal Book, Vol I, p. 51

Evidence of Rollo, Appeal Book, Vol I, p. 133

31. With respect to women serving sentences of between two to five years, the Commissioner of Corrections does not have any placement options within the Federal system except for Prison for Women. He

may request of the provincial institutions that they accept a federally sentenced female offender. He has no power to compel such acceptance.

Evidence of Rollo, Appeal Book, Vol. I, p. 140

32. It is respectfully submitted that it is impossible for the Appellant to allege that there are any meaningful criteria applied to the transfer of federally sentenced female offenders to the Prison for Women. Transfer of these women occurs by virtue of their membership in a class, a class defined by their sex and their length of sentence alone. As such this class is created without regard to the offender's individual security, rehabilitative or other needs.

33. The evidence tendered by the Appellant also establishes that as a result of the fact that no individualized assessment takes place, the present population at Prison for Women is ill suited to the maximum security environment provided at Prison for Women. Jane Miller-Ashton confirmed that a large number of women offenders are detained in higher security than they require and than most of them would be subjected to if they were men.

Evidence of Miller-Ashton, p. 18

34. The assertions contained in paragraphs 52 and 54 of the Appellant's Factum imply that there is a need for a maximum security facility for federally sentenced female offenders. In

fact, the evidence of the Appellant's own witness casts grave doubt on this assertion. As confirmed by Jane Miller-Ashton:

> "Most federally sentenced women are not a risk to society. Where they do present risks, these risks tend to be to themselves."; and
>
> "There are only a very small number of women who have come to rely on violence in order to survive overwhelming abuse throughout their lives. It is believed that these women will respond well to a more supportive environment."

Because of the above Ms. Miller-Ashton rejected the need for a traditional maximum security institution to house federally sentenced female offenders.

Evidence of Miller-Ashton, pp. 12-13

C.3 SECTION 15 OF THE CHARTER

35. It is respectfully submitted that the assertions contained in paragraph 59 of the Appellant's Factum have no foundation in the evidence forming the record in this case. These assertions are:

(a) that women are not necessarily discriminated against by being incarcerated far from home because men also get incarcerated far from home because of special security concerns; and

(b) that the programmes and services available to female inmates, while not being identical to those available to men, are of comparable utility and are similarly suited to the particular problems and needs of female inmates.

36. It is incomprehensible how the Appellant could imply that the situation for female inmates is no different than that of male inmates in the face of the testimony of its own witnesses that:

(a) There is a recognition in the men's federal prison system that it is very important for men to be situated and imprisoned at a locality close to their home.

Evidence of Rollo, Appeal Book, Vol. I, p. 142

and;

(b) That only a very small number of federally sentenced women serve their sentence close to their home communities. This is unlike federally sentenced men who are incarcerated close to home, unless exceptional considerations of security dictate otherwise.

Evidence of Miller-Ashton, pp. 33-34

37. It is also incomprehensible how the Appellant could assert that the programs available to federally sentenced females are of comparable utility to those available to federally sentenced males in the face of its own witness, Jane Miller-Ashton, confirming that programmes for women are poorer in quantity, quality and variety than those for men prisoners. This is due to the existence of only one institution, limiting the range of programmes that can be provided. This is also due to small numbers which means that the same resources and same priority are not given to federally sentenced women. Current correctional programming strategies were also developed with a male orientation and females were fitted into that orientation, rather than having programming which was specifically directed to their needs. In the current structure, i.e. Prison for Women and Exchange of Service agreements, the kind of programming that is necessary to meet the needs of women cannot be put in place. Maintaining the current structure only

"perpetuates the discrimination with respect to programmes, resources and proximity to home that women already experience."

Evidence of Miller-Ashton, pp. 37-41 and p. 43

38. To the extent that there is sex specific programming, it is stereotyped and perpetuates job segregation and female poverty.

39. The Supreme Court of Canada has given a purposive approach to section 15, describing its purpose as the promotion of equality of socially disadvantaged groups. Through its use of examples, and its post-Charter interpretation of human rights legislation, it has also recognized that women are a group disadvantaged on the basis of sex.

Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84, at pp 89-92 per La Forest, J.

Action Travail des Femmes v. C.N.R., [1987] 1 S.C.R. 114, at pp. 1142-1145, per Dickson, C.J.C.

Andrews v. Law Society of British Columbia, [1989], 1 S.C.R. 143, at pp. 170-175, per McIntyre, J.

Brooks v. Canada Safeway, [1989] 1 S.C.R. 1219, at pp. 1237-1238; 1241-1250, per Dickson, C.J.C.

Janzen v. Platy Enterprises, [1989] 1 S.C.R. 1252, at pp. 1276-1282; 1284-1285, per Dickson, C.J.C.

R. v. Turpin, [1989] 1 S.C.R. 1296, at pp. 1330-1333, per Wilson, J.

40. In the R. v. Sparrow case the Supreme Court of Canada has also recognized that Native people are a group disadvantaged on the basis of race.

R. v. Sparrow, [1990] 1 S.C.R. 1075 (S.C.C.)

41. The same Court has recognized that the promotion of equality has a large remedial component, necessitating as part of its purpose the alleviation of the effects of discrimination. Discrimination involves a distinction, whether intentional or not, but based on grounds relating to personal characteristics of the individual group, which has the effect of imposing burdens, obligations or disadvantages or which withholds or limits access to opportunities, benefits and advantages available to other members of society.

> Law Society of British Columbia et al v. Andrews et al, supra, at 171-173, per McIntyre, J.
>
> Brooks v. Canada Safeway Limited, [1989] 1 S.C.R. 1219, at 1238, per Dickson, C.J.C.

42. It is respectfully submitted that in this case, there is no discrimination arising on the face of the legislation, regulations and directions being challenged. However, section 15 requires that a subfacial analysis be done of a challenged law. Such an analysis requires going beyond the text of a law, to examining its consequences or impact upon a particular person or group of people. Whether such discriminatory impact is intentional is irrelevant.

> Law Society of British Columbia et al v. Andrews et al, [1989] 56 D.L.R. (4th) 1 at 17, per McIntyre J.

43. It is respectfully submitted that in this case the burdens and disadvantages imposed upon the Respondent and other federally

sentenced female offenders of Native ancestry from the Prairie provinces are significant and affect fundamental interests to which women are constitutionally guaranteed equal access.

44. The seriousness of the burdens and disadvantages imposed upon the Respondent and other Native federally sentenced female offenders from the Prairie provinces is made manifest when one considers the interests they impair. These interests are fundamental and in other contexts have attracted Charter protection. They include the following:

A. LIBERTY INTEREST

(i) The only federal facility available to house female offenders is maximum security in design.

(ii) As a result, federally sentenced female offenders classified as medium or minimum security and housed at the Prison for Women are subjected to deprivations of liberty inconsistent with their security classification.

(iii) The imposition of a male focused system of classification results in the over classification of female offenders. Based on male criteria women are classified as dangerous to others when they are not in fact dangerous.

(iv) Unlike men, women, particularly Native women, serve a greater proportion of their sentence in a maximum security type facility.

(v) Women offenders have access to fewer escorted and unescorted temporary release passes into the community than are available to men.

R. v. Swain May 2, 1991 (S.C.C.)
Steele v. Mountain Institution (Warden) (1990), 60 C.C.C. (3rd) 1 (S.C.C.)

Martineau v. Matsqui Institution Disciplinary Board (No. 2) (1979), 50 C.C.C. (2d) 353 Where Dickson J. adopts the notion of a "prison within a prison"

Miller v. The Queen (1985), 23 C.C.C. (3d) 97

Cardinal and Oswald v. Director of Kent Institution (1985), 23 C.C.C. (3d) 118

B. HARSHER CONDITIONS OF CONFINEMENT

(i) The inability to effectively provide adequate programming for Native Women from the prairies at the Prison for Women subjects these women to harsher conditions of confinement.

R. v. Gamble (1988), 45 C.C.C. (3d) 204 (S.C.C.)

Cardinal v. Matsqui Institution Disciplinary Board (No. 2), supra

C. FAMILY DISRUPTION

(i) Women, because of the geographical dislocation caused by their sentences, are unable to keep contact with their families, particularly their children. This causes damage to both the mother and the child.

(ii) The current system for the treatment of federally sentenced female offenders make no accommodation for the social reality that women are the ones who bear children and that women are usually the primary care givers and nurturers of children.

Mills v. The Queen (1986), 26 C.C.C. (3d) 481 (S.C.C.)

R. v. Askov (1990), 59 C.C.C. (3d) 449 (S.C.C.)

Smith v. The Queen (1987), 34 C.C.C. (3d) 97 (S.C.C.)

D. CULTURAL DEPRIVATION

(i) Native female offenders are isolated from their Aboriginal cultural and language with consequent increased threat to their emotional and spiritual well-being.

R. v. Chief (1989), 51 C.C.C. (3d) 265 (Y.T.C.A.)

E. REDUCED OPPORTUNITIES FOR REHABILITATION

(i) Because federally sentenced women are incarcerated so far from their homes and communities their opportunities for successful rehabilitation and integration into society are reduced when compared to men.

Steele v. Mountain Institution, supra

45. Systemic discrimination, the effects of which are set forth in paragraph 44, has been recognized to have two consequences. The first is the creation of obligations and penalties for the group adversely affected. The second is that the discrimination itself reinforces the belief within and outside the system that the discrimination is "natural". The Appellant argues that some federally sentenced women must be placed at Prison for Women because of their particular rehabilitative or security needs. Such a result is the type of discriminatory treatment that the courts have found adversely affects women because of its impact as well as its perpetuation of the belief that federally sentenced women are reasonably subjected to such disadvantage.

Action Travail des Femmes v. C.N.R (1987), 40 D.L.R. (4th) 193 at 209-210, per Dickson C.J.C.

46. To argue that not all Natives and not all women will be discriminated against by the application of the challenged laws does not make them any less discriminatory. So long as unequal treatment is based on membership in a disadvantaged group(s) Section 15 of the Charter is violated even when not all members of an identifiable group are affected.

> Brooks v. Canada Safeway Limited (1989), 59 D.L.R. (4th) 321, at 341-342, per Dickson C.J.C.

47. It is respectfully submitted that the failure of the Correctional Service of Canada to recognize and provide for the social reality that women are the child bearers and most often the child nurturers and caregivers it itself discriminatory treatment on the basis of sex.

48. The Supreme Court of Canada has recognized the validity of approaching the elaboration of legal doctrine in a manner that recognizes the realities of women's lives in R. v. Lavallee. That decision was based upon a recognition that it is predominantly women who experience spousal abuse and that, in the interests of equality, legal doctrine had to be made to respond to women's experience of threats to life or health within the context of an abusive relationship. It was not necessary to assume that all women shared these experiences to conclude that the adaptation of legal doctrine was appropriate.

> R. v. Lavallee (1990), 108 N.R. 321, at pp. 342-347, per Wilson, J.

Tremblay v. Daigle, [1989] 2 S.C.R. 530 at pp. 536-537

49. The concept of the failure to make reasonable accommodation as itself constituting discriminatory treatment has been recognized by this Court and by the Supreme Court of Canada.

Re Saskatchewan Human Rights Commission et al and Canadian Odeon Theatres Ltd. (1985), 18 D.L.R. 93 (Sask. C.A.)

Central Alberta Dairy Pool v. Alberta (Human Rights Commission), [1990] 2 S.C.R. 489 (S.C.C.)

50. Not only has equality not occurred when that is what is constitutionally mandated, federal incarceration has been made worse for women than for men.

C.4 SECTION 1 AND SECTION 28 OF THE CHARTER

51. It is respectfully submitted that the Appellant has offered no evidence in relation to Section 1 of the Charter. Rather the Appellant seeks to utilize Section 1 justification in the entirely inappropriate context of relief to be granted by this Court.

52. In any event LEAF respectfully submits that Section 28 of the Charter, which applies "notwithstanding anything in this Charter", must be interpreted to control the balancing of interests under Section 1 in favour of promoting equality. Otherwise, Section 28 is meaningless.

53. In addition, it is respectfully submitted, that in deciding on the proper balancing of interests under Section 1 of the Charter,

this Court must be guided by the values and principles essential to a free and democratic society. These include, inter alia, respect for the inherent dignity of the human person, commitment to social justice and equality, and respect for cultural groups and identify.

> R. v. Oakes (1986), 26 D.L.R. (4th) 200 at 225, per Dickson C.J.C. (S.C.C.)

D. REMEDIES

54. It is LEAF's position that the appropriate and just remedy for this Court to consider is:

(i) sustaining the declaration of invalidity made by the Learned Trial Judge both as to Carol Daniels and as to Native women from the Prairie provinces;

(ii) sustaining the order of the Learned Trial Judge endorsing the Warrant of Committal concerning Carol Daniels that Carol Daniels is not to serve any part of her sentence at the Prison for Women in Kingston, Ontario;

(iii) and in addition it is LEAF's position that based on the evidence of changed circumstances this Court should also make an order by this Court endorsing the recommendations of the Task Force on Federally Sentenced Women as one constitutional option for alleviating the discrimination experienced by federally sentenced Native female offenders from the prairies;

(iv) an order by this Court remitting the matter back to the Learned Trial Judge for further consideration of the present unconstitutional effect of her orders and the need for a constitutional interim option for both the Respondent, Carol Daniels and for other federally sentenced women of Native ancestry from the Prairie provinces;

D.1 DID THE LEARNED TRIAL JUDGE ERR IN GRANTING A REMEDY IN THE FORM OF A DECLARATION AND IN EXTENDING THIS DECLARATION TO OTHER WOMEN OF NATIVE ANCESTRY FROM THE PRAIRIE PROVINCES?

55. It is respectfully submitted that the declaration made in this case falls within the inherent powers of a superior court and the flexible and practical use of declarations to resolve real disputes.

> Soloksy v. The Queen, [1980] 1 S.C.R. 821 at 832
>
> Re Lavigne and OPSEU (1987), 41 D.L.R. (4th) 821 aff'd 56 D.L.R. (4th) 474 (Ont. C.A.) leave to appeal granted (S.C.C.., June 8, 1989)
>
> R. v. Gamble, [1988] 2 S.C.R. 595 at 648-9

56. Section 52(1) of the Constitution Act, 1982 through its terms contemplates that a declaration of invalidity can be tailored to the extent that any law of Canada is inconsistent with the supreme law of Canada. Thus it is appropriate to declare a law invalid with respect only to a particular individual or particular group or only to the extent that it actually precipitates a violation of the Charter.

> R. v. Chief (1990), 74 C.R. (3d) 57 at 69-72 (Y.T.C.A.)
>
> A. Manson "The Charter and Declarations of Invalidity" (1990) 74 C.R. (3d) 105

57. In giving meaning to the terms of s. 24(1) of the Charter, this Court has recognized that although only one individual may apply for a Charter remedy, a court should consider the effect of

the remedy on others and devise a remedy that is just to all concerned.

> "To be just a remedy must be fair to all who are affected by it. That group may well include persons other than the person whose right was violated."
>
> Saskatchewan Human Rights Commission v. Kodellas (1989), 60 D.L.R. (4th) 143 at 162 per Bayda C.J.S. (emphasis in original)
>
> "The meaning of "juste" contains within it an element of "justice" and "equite" and conveys the sense of fairness and respect for the rights of others."
>
> ibid at 187 per Vancise J.A.
>
> "'Just' as it is used in s. 24(1) should be given a broader meaning to refer not only to the interests of the individual but to the interests of maintaining fairness in the legal processes being employed."
>
> ibid at 201 per Wakeling J.A.

58. It is respectfully submitted that a violation of the equality guarantee by its very nature involves discrimination based on a group characteristic. This inevitably leads to a consideration of the class of individuals who share the characteristic.

59. In R. v. Swain, the Supreme Court of Canada held that s. 542(2) of the Criminal Code providing for automatic and indeterminate detention of those acquitted on the grounds of insanity violated ss. 7 and 9 of the Charter. Because of particular circumstances, the Court entered a stay of proceedings in Owen Swain's case. The Court also, however, devised an interim

remedy that did not apply to the accused, but did apply to the group similarly situated to the accused, i.e. those acquitted on grounds of insanity. It is submitted that a similar approach in this case would justify the Learned Trial Judge ordering a remedy with respect to those in the same position as the Respondent Carol Daniels, i.e. women of Native ancestry from the Prairie provinces eligible for incarceration at the Kingston Penitentiary for Women by virtue of s. 731 of the Criminal Code, s. 15 of the Penitentiaries Act and supplementary regulations and declarations.

R. v. Swain, May 2, 1991 (Supreme Court of Canada)

60. It is respectfully submitted that the purposes and interests that the rights violated are meant to protect should guide the exercise of the discretion to award appropriate and just remedies in Charter cases.

> "A purposive approach should, in my view, be applied in the administration of Charter remedies as well as to the interpretation of Charter rights."
>
> R. v. Gamble, [1988] 2. S.C.R. 595 at 641

61. It is respectfully submitted that the Supreme Court of Canada has used the interests and purposes that rights were intended to protect as a guide for determining appropriate and just Charter remedies.

(a) In Rahey v. the Queen the Court recognized that the remedy for the violation of the right to be tried within a reasonable time could not itself violate that right by

forcing the accused on to trial in the face of unreasonable delay.

Rahey v. the Queen, [1987] 1. S.C.R. 588 at 614-615 per Lamer J.; at 617-618 per Le Dain J.; at 501 per Wilson J.

(b) In R. v. Morgentaler, Justice Beetz after determining that the therapeutic abortion committee provisions in ss. 251(4)-(6) of the Criminal Code violated s. 7 of the Charter decided to strike down the entire abortion provisions on the basis that the

> "The violation of pregnant women's security of the person would be greater, not lesser, if s. 251(4) was severed leaving the remaining subsections of s. 251 as they were in the Criminal Code."

R. v. Morgentaler, [1988] 1 S.C.R. 30 at 125

62. It is respectfully submitted that the importance of remedies reflecting the interests and purposes of the Charter invoked right is especially important in the context of the rights recognized in s. 15.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 21

Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219

Schachter v. the Queen (1990), 66 D.L.R. (4th) 635 (Fed C.A.)

N. Duclos and K. Roach "Constitutional Remedies As Constitutional Hints: A Comments on R. v. Schachter" (1991) 36 McGill L.J. 1

63. In R. v. Hebb, Kelly J. of the Nova Scotia Supreme Court Trial Division held that s. 718(10) of the Criminal Code violated the equality rights of the accused because it only required the court to obtain a report concerning the means of the accused to pay a fine if the accused was between 16 and 22 years of age. In

fashioning a remedy, Kelly J. extended this protection to all accused persons. He stated:

> "Where the result is the removing of a protection that is constitutionally encouraged - that is, judicial consideration before incarceration - as opposed to the enlarging of such a protection, it is submitted that the court should favour a result that would expand the group of persons protected rather than remove the protection completely."
>
> R. v. Hebb (1989), 69 C.R. (3d) 1 at 21

64. In Schachter v. the Queen, the Federal Court of Appeal fashioned a remedy of extending parental leave benefits given to adoptive parents to biological parents. They reasoned that such a positive remedy protecting the entire group that suffered discrimination and not just the applicant was in accord with a purposive understanding of equality rights. Heald J.A. stated:

> "A mere declaration of invalidity is inadequate in the circumstances at bar, because it would not guarantee the positive right conferred pursuant to s. 15(1). That positive right can only be guaranteed by fashioning a positive remedy."
>
> Schachter v. the Queen (1990), 66 D.L.R. (4th) 635 at 644 (Fed C.A.)

65. It is respectfully submitted that a concern with the interests and purposes of ss. 15 and 28 of the Charter and in particular the protection of disadvantaged groups under that section, justifies the trial judge crafting the declaration to protect a disadvantaged group vulnerable to systemic discrimination: federally sentenced women of Native ancestry from the Prairie provinces where the only

federal penitentiary available for their incarceration is the Prison for Women in Kingston, Ontario.

Andrews v. Law Society of British Columbia [1989] 1. S.C.R. 21

R. v. Turpin [1989] 1 S.C.R. 1296

D.2 IS THIS A PROPER CASE TO STAY OR TEMPORARILY SUSPEND THE DECLARATION OF INVALIDITY UNTIL THE APPELLANT CAN REMEDY THE SITUATION CAUSING THE CHARTER VIOLATIONS?

66. Section 1 of the Charter is designed both to guarantee the rights and freedoms set out in the Charter and to provide for prescribed, reasonable and demonstrably justified limits on such rights. It is respectfully submitted that it is not designed for "temporary application to the remedial powers set out in either s. 24(1) of the Charter and s. 52(1) of the Constitution Act, 1982.

> "It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the Constitution Act, (1982) against which limits on those rights and freedoms must be measured."
>
> R. v. Oakes, [1986] 1 S.C.R. 103 at 135

67. It is respectfully submitted that the Learned Trial Judge was in the best position to balance the affected interests when crafting a remedy and that an appellate court should not, absent a finding that is unreasonable, substitute its opinion as to the appropriate and just balance of interests.

R. v. Duguay, [1990] 1 S.C.R. 93 at 98

68. It is respectfully submitted that there are no grounds in this case for the exercise of the extraordinary power of temporarily suspending a declaration that a statute is invalid because of its inconsistency with the supreme law of the land. This extraordinary power should, it is submitted, be used only in circumstances where the court has characterized the effects of allowing the declaration of invalidity to take effect as amounting to an emergency which threatens the very basis of a free and democratic society.

Manitoba Language Reference, [1985] 1 S.C.R. 721 at 747-752

69. In Dixon v. British Columbia, McLachlin C.J.B.C. applied the same strict criteria as in the Manitoba Language Reference to temporarily suspend the invalidity of provisions of British Columbia's Constitution Act setting out electoral districts. She stated:

> "The absence of machinery necessary to conduct an election in a system where in theory an election can be required at any time, qualifies as an emergency of the magnitude of suspension of all provincial legislation."
>
> Dixon v. British Columbia (1989), 59 D.L.R. (4th) 247 at 283 (B.C.S.C.)

70. No similar order was made when this Court recently found that the boundaries set out in the Representation Act, 1989 S.S., 1989, c. R-20.2 were unconstitutional.

In the Matter of a Reference Relating to the Constitutional Validity of Provincial Electoral Boundaries March 6, 1991.

71. It is respectfully submitted that the effect of the declaration of invalidity challenged here does not raise an emergency threatening the rule of law or the basis of a free and democratic society whereas the effect of suspending the declaration of invalidity would risk irreparable and life-threatening harm to the group it is designed to protect. As Wedge J. noted in distinguishing the present case from the Manitoba Language Reference:

> "No legal vacuum would result from preventing a few women, half a dozen at the most, from serving federal time in Kingston, and there are alternatives which could be made available by the federal Government."
>
> Sentencing Transcript, Appeal Book, Vol. I, p. 176

72. It is respectfully submitted that the circumstances of allowing the declaration of invalidity to take effect in this case are not as exceptional as those in R. v. Swain. In Swain Lamer C.J. stated:

> "If, based on the reasons given above, s. 542(2) is simply declared to be of no force or effect pursuant to s. 52(1) of the Constitution Act, 1982, it will mean that as of the date this judgment is released, judges will be compelled to release into the community all insanity acquitees, including those who may well be a danger to the public. Because if the serious consequences of finding s. 542(2) to be of no force or effect, there will be a period of temporary validity which will extend for a period of 6 months. During this period, however, any detention ordered under s. 542(2) will be limited to 30 days in most instances, or to a maximum of 60 days where the Crown establishes that a longer period is required in the particular circumstances of the case.

73. Unlike in Swain the declaration in this case would not compel judges to release women of Native ancestry from the Prairie provinces sentenced to more than 2 years imprisonment.

74. In Swain, the Supreme Court gave temporary validity to s. 542(2) of the Criminal Code while at the same time amending the detention it permitted from indeterminate to 30 to 60 days. Given the geographic isolation of the Prison for Women at Kingston, Ontario, it is submitted that the declaration of invalidity cannot, as in Swain, be suspended while ancillary remedies mitigate the unconstitutional effects that the legislation would have on Carol Daniels or others in her position.

75. It is respectfully submitted that a suspension of the declaration of invalidity in this case would subject a disadvantaged group to irreparable and life-threatening harm while its continuation would not threaten fundamental social interests such as the rule of law. The Appellant admits in paragraph 82 of its Factum that the deadline set by the Solicitor-General for closure of the Prison for Women—and reform of the federal correctional system for women is the fall of 1994. This may not be "too long" from the Appellant's perspective, but we submit that it is "too long" from those women that the Learned Trial Judge's remedy protects from unconstitutional confinement in the Prison for Women. Paragraph 4 of the Respondent's Factum indicates that since July 16, 1990, three other Native women, Coreen Daigneault, Marie

Ledoux and Lorna Jones, have committed suicide at the Prison for Women and one women, Johnny Bear (Neudorff) is still in a coma having attempted to commit suicide.

76. It is respectfully submitted that there is reason to believe that the period it will take to reform the correctional system for women as promised by the Government may be longer than until the fall of 1994. The stage the Government is now at in this initiative is awaiting approval from the Minister as to a recommended list of geographical locations for the new facilities. According to the "Project Schedule" developed by the Government for their initiative this approval was to have been obtained in January of 1991. This delay, even though it is only of a few months duration, is of concern because if the facilities are to be open for the fall of 1994, the schedule as developed was already a tight one.

Evidence of Miller-Ashton, pp. 80 and 82

"Federally Sentenced Women Facilities Development (Generic - For Four Facilities) Project Schedule"

77. It is respectfully submitted that there is no basis for finding that a transitional period is appropriate when one considers the rights under section 7, 12, 15 and 28 of the Charter that the Trial Judge found to be violated in this case.

(a) Both sections 7 and 12 contain fundamental rights that should not be subject to qualification through transitional periods.

Reference Re. B.C. Motor Vehicles, [1985] 2, S.C.R. 486

R. v. Smith, [1987] 1 S.C.R. 1045

(b) There already has been a three year transitional period with regards to the introduction of s. 15 of the Charter.

The Canadian Charter of Rights and Freedoms s. 32(2)

(c) It is respectfully submitted that section 28 of the Charter should not be subject to a transitional period. It was intended to provide for the immediate and unremitting protection of gender equality with respect to the rights and freedoms set out in the Charter and it applies "notwithstanding anything in the Charter."

Re Boudreau and Lynch et al (1984), 16 D.L.R. (4th) 610 (N.S.C.A.)

Red Hot Video (1985), 18 C.C.C. (3d) 1 (B.C.C.A.)

78. Even if the above rights could be subjected to a transitional period, the conditions of confinement in the Kingston Penitentiary for Women are notoriously substandard. It is submitted that any transitional period should have ended long before the Learned Trial Judge awarded the remedy now subject to appeal. In the alternative, it is submitted that any transitional period should have ended with the three suicides and one attempted suicide of Native women since the decision of the Learned Trial Judge.

Canada, Report on the State and Management of the Female Prison, 1921

Canada, Report of the Royal Commission to Investigate the Penal System of Canada, (1938) at pp. 314-315

R. v. Smith, [1987] 1 S.C.R. at 1087 per MacIntyre J.

Marchand v. Simcoe County Board of Education (1986), 29 D.L.R. (4th) 596 at 619 (Ont. H.C.)

Canada, Report of the Task Force on Federally Sentenced Women (1990)

79. It is respectfully submitted that a stay or temporary suspension of the declaration of invalidity is not necessary to preserve an appropriate relationship between the judiciary and the Government. All the present declaration does is prohibit one clearly unconstitutional option--sending Prairie women of Native ancestry to the Kingston Penitentiary for Women. Consistent with an appropriate institutional division of labour between the courts and Government, it is now up to the Appellant and the appropriate penitentiary officials to select among a range of both temporary and permanent constitutional options. It is permissible, however, for the court to indicate that one or more options would be constitutional. The Appellant has indicated in paragraph 83 of its Factum that "the best remedy for the problems identified by the learned trial judge" is the implementation of the proposals of the Task Force on Federally Sentenced Women. We submit that this Court should endorse these proposals as one constitutional option.

Dixon v. British Columbia (1989), 59 D.L.R. (4th) 293 at 308-9 (B.C.S.C.)

Hon. B. McLachlin "The Role of the Court in the Post-Charter Era: Policy Maker or Adjudicator" (1990) 39 U.N.B.L.J. 43 at 61-63

Re Hoogbruin (1986) 24 D.L.R. (4th) 718 at 722-3 (B.C.C.A)

D.3 PRESENT EFFECT OF THE REMEDY ON NATIVE WOMEN FROM THE PRAIRIE PROVINCES

80. It is also respectfully submitted that while the first responsibility is on the Government to devise adequate interim and

permanent measures, it is permissible for courts to intervene if, at any time, the steps taken to remedy unconstitutional conditions are inadequate and in themselves unconstitutional as a result of changed circumstances since the original order.

> "It is not the role of the court to specify in exact detail how and where the instruction will be provided...If the province fails to act or acts in a manner which appears inadequate, the appellants may return to the court to determine the adequacy of the action taken by the province in complying with the declaration that should be issued."
>
> Lavoie v. Nova Scotia (1989), 58 D.L.R. (4th) 293 at 308-309 (N.S.C.A.)

81. In this case the evidence shows that as a result of the Learned Trial Judge's order women of Native ancestry are being incarcerated in Saskatchewan Penitentiary, a maximum security facility for men. Thus, the effect of the Learned Trial Judge's order is in itself unconstitutional for the reasons described by the Appellant's own witness, Jane Miller-Ashton, as set out in paragraph 10, supra. As a result, what we now have is a form of "equality with a vengeance" which ignores the need to promote equality.

> Evidence of Miller-Ashton, pp. 115-116
>
> See arguments at paragraphs 86 to 90 below
>
> Andrews v. Law Society of British Columbia, supra
>
> Schachter v. The Queen, supra

82. This Court may not have before it all the options available to either devise an interim remedy for confinement of federally sentenced women or even to indicate what interim remedies may be

constitutional It would be appropriate to remit to the Learned Trial Judge the matter of devising a temporary interim remedy to deal with women of Native ancestry from the prairie provinces sentenced to more than two years in prison while affirming her original declaration that imprisoning them at the Kingston Prison for Women is clearly unconstitutional.

D.4 WAS THE REMEDY GRANTED BY THE LEARNED TRIAL JUDGE AN APPROPRIATE AND JUST REMEDY IN THE CIRCUMSTANCES OF THE CASE AS IT AFFECTS CAROL DANIELS?

83. It is respectfully submitted that the declaration of invalidity and the order endorsed on the Warrant of Committal directing that Carol Daniels shall not serve any part of her sentence at the Kingston Penitentiary for Women was an appropriate and just remedy at the time it was made.

Mills v. the Queen, [1986] 1 S.C.R. 863 at 965

84. It was an appropriate remedy in that it was tailored to the specific circumstances that Carol Daniels found herself in at the time of the sentencing and was designed to make the declarations of invalidity efficacious.

> "Appropriateness connotes efficaciousness and suitability from the standpoint of the violation itself - a remedy `to fit the offence' as it were. It suggests a remedy that, from the perspective of the person whose right was violated, will effectively redress the grievance brought about by the violation."
>
> Saskatchewan Human Rights Commission v. Kodellas (1989), 60 D.L.R. (4th) 143 at 162 per Bayda C.J.S.

85. It was a just remedy because it sought to prevent an accused from suffering the constitutional wrong of being subject to detention in the Kingston Penitentiary for Women and it was addressed to the officials who would in the absence of the declaration of invalidity and the order on the warrant of committal would have the power to send Carol Daniels to that prison.

D.5 PRESENT EFFECTS OF THE REMEDY ON CAROL DANIELS

86. It is respectfully submitted that circumstances have changed since the remedy was first ordered which no longer make it appropriate and just given the effects that its implementation presently has on Carol Daniels. This is clear from the following:

(a) Paragraph 4 of the Respondent's Factum indicates that after having spent time at the Regional Psychiatric Centre in Saskatoon, Carol Daniels is presently incarcerated in Saskatchewan Penitentiary, a maximum security facility for men. This is an option that was not apparently considered by the Learned Trial Judge at the time of ordering the remedy appealed from. Counsel for the Appellant indicated in argument that Carol Daniels would be incarcerated at an institution for female offenders. The warrant of committal is endorsed that Carol Daniels is to be conveyed "safely to a correctional facility for women." Contrary to the Warrant of Committal Carol Daniels is now incarcerated in a male prison.

Factum of the Respondent paragraph 4

Sentencing Transcript, Appeal Book, Vol I, p. 160 and p. 162

Warrant of Committal upon Conviction, Appeal Book, Vol. I, p.7

Report on the Task Force on Federally Sentenced Women

(b) In her reasons, the Learned Trial Judge referred to life skills, work placement and literacy training available at Pinegrove Correctional Facility for Women as well as access to Native elders, frequent family visits and time to care for children in the daytime hours available at that institution. We submit that this indicates that the Trial Judge's intention was to formulate a remedy that closely as possible approximated the proposals of the Task Force on Federally Sentenced Women, which we respectfully submit presents a constitutional scheme for the imprisonment of federally sentenced women.

Sentencing Transcript, Appeal Book, Vol. I, p. 175

87. It is respectfully submitted that courts are responsible for ensuring that the remedies they fashion or sustain do not in themselves violate Charter rights.

Daigle v. Tremblay, [1989] 2 S.C.R. 530 at 549-550

Rahey v. the Queen, [1987] 1 S.C.R. 588

R. v. Swain, May 2, 1991 (Supreme Court of Canada)

88. In Schachter v. the Queen, Strayer J. rejected a request for a remedy ordering that fathers could share maternity benefits with women on the ground:

> "[t]he position of the father cannot be 'equalized' by depriving the natural mother of the benefits the rationale for which can only be applied to her."
>
> Schachter v. The Queen (1988), 52 D.L.R. (4th) 525 at 551

89. Strayer J. also refused to extend parental leave provisions only to fathers and instead extended them so that they could be claimed by either biological mothers or fathers.

> "I am giving the declaration in the form described above because I believe it is the one which is most consistent with ss. 15(1) of the Charter and which does not create new inequalities as between natural parents and adoptive parents."
>
> ibid at 550

90. In affirming the remedy devised by Strayer J., the Federal Court of Appeal also suggested that the exercise of remedial discretion should accord with other provisions in the Charter including s. 15.

> Schachter v. the Queen (1990), 66 D.L.R. (4th) 635 at 643-648

91. It is respectfully submitted that this Court may not be in a position to ensure that the remedy remains appropriate and just in light of changed circumstances and that the matter should be remanded to the Learned Trial Judge in order to ensure that the remedy is appropriate and just. On such a remand, the Appellant would be able to present to the court all the information and

options available for the confinement of Carol Daniels and other women of Native ancestry from the Prairie provinces. The Learned Trial Judge would also have an opportunity on the remand to exercise her discretion to order any remedy considered appropriate and just in the circumstances.

D.6 ALTERNATIVE POSITION OF LEAF

92. The Appellant asks this Court to stay the operation of the declaration of invalidity and to refrain from making any further order until the Correctional Service of Canada has had a reasonable opportunity to remedy the Charter defects. It is respectfully submitted that this requires that the Correctional Service of Canada be given a stipulated time to remedy the Charter defects and to come back before the Court to ensure, as the Appellant suggests, that the defects have in fact been remedied. Moreover, this Court should, as in Swain, order other remedies that mitigate the unconstitutional effects of this transitional period. It is submitted that such remedies should be fashioned in a way which is particularly mindful of the recent deaths of Native women at the Prison for Women.

Appellant's Factum, para 67

R. v. Swain, supra

Manitoba Language Reference, supra

Dixon v. British Columbia, supra

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

MARLYS EDWARDH

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Legal Education and Action Fund