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FEDERALLY SENTENCED WOMEN:
Canada's Breach of Fiduciary Duty and Failure to Adhere to International Obligations

I. Introduction

This paper, prepared on behalf of the National Association of Women and the Law (NAWL),[1] has been developed for submission to the Canadian Human Rights Commission (CHRC) to assist in the CHRC's systemic review of the treatment of federally sentenced women.

NAWL is a national, non-profit organization dedicated to advancing women's equality through law reform advocacy, research and education. NAWL was founded in 1974 and currently has 19 local chapters, in addition to its national office. Members include lawyers, law professors, students and others who share NAWL's goal of improving the status of women in Canada. NAWL's work involves a wide number of areas of the law, including criminal law, family law, health law, equality and human rights law. The general objectives of the work NAWL does are:

- The achievement of equality for all women within law and the legal system;
- The elimination of violence against women;
- The guarantee of a decent standard of living for all women;
- The provision of guaranteed employment and equitable pay for all women;
- The removal of social and economic barriers to women's equality;
- The establishment of an equitable family law system, in particular one that provides fairly for women and their children in the event of divorce or separation; and
- The guarantee of reproductive choice.

Because colonial behaviours and racism remain prevalent in Canada, NAWL makes analysis of colonization and racism a necessary starting point for NAWL's legal and policy development work.

This paper builds on the work and analysis of other equality-seeking women's groups, as well as on the many reports documenting discriminatory legislation and administrative practices infringing the rights of federally sentenced women

[1] The paper was prepared by Kelly A. MacDonald, B.A., LL.B., LL.M, in collaboration with a NAWL Working Group which included: Bonnie Diamond, Executive Director of NAWL, Kecia Podetz, a member of NAWL's National Steering Committee, and Debra Parkes, of the University of Manitoba Faculty of Law. Kat Kinch, University of British Columbia law student, provided exceptional research assistance, under extraordinarily tight time-lines.

(FSW) in Canada.[2] NAWL submits that in addition to constituting discrimination contrary to the *Canadian Charter of Rights and Freedoms*[3] and the *Canadian Human Rights Act*,[4] the treatment of FSW amounts to breaches of fiduciary duties owed by the Canadian government,[5] including specific duties owed by the Correctional Service of Canada (CSC), to all FSW and to Aboriginal FSW in particular, as well as to violations of Canada's international human rights commitments.

NAWL puts forward three specific and somewhat discrete legal arguments on behalf of federally sentenced women (FSW):

1. that CSC has breached its fiduciary duty/obligation to FSW;

2. that CSC has breached its fiduciary duty/obligation to Aboriginal FSW/Aboriginal peoples; and

3. that CSC has failed to respect the rights of FSW enshrined in international human rights instruments to which Canada is a signatory.

The first two issues expand on an argument raised by Patricia Monture-Angus, in a background paper written for the Canadian Association of Elizabeth Fry Societies (CAEFS). Monture-Angus argued that the Crown, as represented by CSC, is in breach of its fiduciary duty/obligation to FSW (and, in particular, to Aboriginal women/peoples) for failing to remedy "obvious and known circumstances of discrimination."[6] The arguments presented on this issue build upon Monture-Angus' assertion and are founded upon a review of academic literature and jurisprudence.

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[2] See, for example, the submissions of Strength in Sisterhood (SIS), the Women's Legal Education and Action Fund (LEAF), and the Canadian Association of Elizabeth Fry Societies (CAEFS) in this systemic review process, as well as the reports listed *infra*, note 18.

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c. 11.

[4] Canadian Human Rights Act, R.S.C. 1985, c. H-6.

[5] The duties owed by the Correctional Service of Canada must not be seen in isolation, but rather, as interwoven with those owed by other government departments such as, to name a few, Indian and Northern Affairs, Human Resources and Development Canada, Health Canada and the Department of Justice. In addition, remedying the breaches of fiduciary duties and international obligations outlined in this paper will necessarily involve other government departments in capacity-building and facilitating the realization of FSW returning to their communities.

[6] P. Monture-Angus, "The Lived Experiences of Aboriginal Women Who are Federally Sentenced" (unpublished, 2002) at 63.

NAWL bases its second submission, that Canada (as represented by CSC) is in breach of its international obligations to FSW, upon a review of international instruments, reports, case law, and academic literature. The review concludes that CSC is failing to meet the international standards and obligations that enshrine the rights of FSW, and that Canada must bring its correctional laws and practices into line with its international commitments.

NAWL submits that the Canadian Human Rights Commission must consider CSC's breaches of fiduciary duty and international obligations as part of its investigation into the treatment of federally sentenced women. In particular, the CSC's fiduciary status in relation to FSW prevents it from attempting to defend breaches of its duties or to fail to remedy the many documented instances of discrimination experienced by FSW at the hands of CSC.

In formulating these submissions, NAWL critically examined the literature, case law, and statutory instruments (both domestic and international), from a feminist perspective. The issues identified and arguments presented are informed by an equality analysis of the law. This analysis incorporates an analysis of patriarchy and state oppression and includes, from an Indigenous feminist perspective, an analysis of colonization.

II. Background

> *Women have served their sentences in harsher conditions than men because of their small numbers. They have suffered greater family dislocation than men, because there are so few options for the imprisonment of women... They have had no significant vocational training opportunities… Most significantly, women offenders as a group have a unique history of physical and sexual abuse. Considerably more attention has been devoted to efforts to rehabilitate male sexual offenders than to assist women offenders whose own sexual abuse has never been addressed.*[7]

Very little has changed since Madam Justice Arbour made the above observations in her 1996 Report, in which she described the living conditions of FSW and breaches of their rights. In fact, the situation has worsened for many FSW in a variety of ways we discuss in this paper. Women continue to make up only a small percentage of federally sentenced prisoners (approximately 5%).[8]

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[7] Canada, *Commission of Inquiry into Certain Events at: The Prison for Women in Kingston*. (Ottawa: Public Works and Government Services, Canada, 1996. Justice L Arbour, Commissioner, at 200.

[8] K. Hannah-Moffat, M. Shaw, Taking Risks: Incorporating Gender & Culture into the Classification and Assessment of Federally Sentenced Women in Canada. (Ottawa: Status of Women Canada, 2001) at 2.

There are only about 358 women serving federal sentences in prison (485 are under community supervision or on bail),[9] as compared to approximately 12,430 men.[10] Aboriginal women are highly over-represented in federal prisons, comprising 27 percent of FSW in prison,[11] while only representing 2.8% of the total population of women in Canada.[12] The disturbing fact is that this proportion has almost doubled since the 1990 Task Force on Federally Sentenced Women expressed grave concerns regarding Aboriginal over-representation. The reality that Aboriginal women are the fastest growing sector of FSW prisoners is even more disturbing when one considers CSC's projections that the population of FSW prisoners will rise to 449 by December 2004.[13]

Justice Arbour and many academic commentators have highlighted the fact that the female prison population is not homogenous.[14] Therefore, attention needs to be paid to women's unique needs, cultural backgrounds, and social histories:

> …two-thirds of federally sentenced women are mothers, and 70% of these are single parents all or part of the time; 68% of federally sentenced women were physically abused; although this figure jumps to 90% for Aboriginal women; 53% of federally sentenced women were sexually abused and 61% of Aboriginal women were sexually abused; fewer than one-third had any formal job qualifications beyond basic education prior to sentence, and two-thirds had never had steady employment.[15]

Hannah-Moffat and Shaw add to Justice Arbour's observations with these additional findings regarding FSW:

> … they have limited education and are more often (than men) unemployed at the time of their offence. Many are financially dependent. Many have

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[9] CHRC, *Consultation Paper for the Special Report on the Situation of Federally Sentenced Women* (January 2003) at 4, citing Corporate Reporting System, Correctional Service of Canada (as of March 31, 2002).

[10] CSC, *Basic Facts About Federal Corrections* (as of April 29, 2001), available at www.csc-scc.gc.ca.

[11] CHRC Consultation Paper, *supra* note 9, at 5.

[12] These statistics are taken from the 1996 Census and compiled on-line at: www.statcanca/english/census96/jan13.htm (17 January 2003).

[13] CHRC Consultation Paper, *supra* note 9, at 5, citing R. Boe, *A Medium-Term Federal Offender Population Forecast: 2001 to 2004*, Research Branch, Correctional Service of Canada (February 2001).

[14] For example: Monture-Angus, *supra,* note 6, and Hannah-Moffat-Shaw, *supra,* note 8.

[15] *Supra*, note 7, at 201.

addictions to drugs or alcohol as well as physical and mental health concerns.[16]

Many incarcerated women are identified as having high levels of need for programs and services, including mental health needs.[17]

In light of the female prison population's unique and varied needs, based on, for example, gender, race, cultural background, experiences of violence and oppression, mental health and disabilities, it is surprising that CSC does not have programs and services in place to address these needs and to uphold the rights of FSW. From as early as 1938 to the present, reports have described CSC's failure to address the varied needs and concerns of FSW.[18] The administrative practices of CSC continue to discriminate against FSW on the basis of sex, disability, and race.

Subsequent reports have continued to document the discriminatory treatment of FSW by CSC. Kim Pate, Executive Director for CAEFS, outlined the more recent

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[16] *Supra,* note 8, at 14.

[17] *Supra,* note 8, at 2. While we acknowledge the high level of mental health needs among FSW, we oppose the tendency to pathologize women's resistance to imprisonment and means of coping with oppression and violence as "mental disorders" in need of secure treatment. Identifying women as having mental health needs based on their social histories satisfies a prison management objective and casts too wide a net, subjecting a women to greater degrees of control based on an attribution of mental disability. We concur in CAEFS' submission that this practice amounts to discrimination on the basis of mental disability. See CAEFS' submission to the CHRC (CAEFS, 2002) at 38-42.

[18] Madam Justice Arbour provided a chronicle of the history of these reports, noting that although historically there has been little commentary on FSW, 15 of the reports had identified serious limitations in the provision of adequate services for women prisoners. The reports listed in Arbour, *supra* note 7, at 240-241 were as follows:

1938 Royal Commission to Investigate the Penal System of Canada (Archambault);
1947 Report of General R.B. Gibson Regarding the Penitentiary System in Canada;
1957 Report of the Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice (Fauteux);
1969 Report of the Canadian Committee on Corrections (Ouimet);
1970 Royal Commission on the Status of Women;
1977 National Advisory Committee on the Female Offender (Clarke);
1977 Sub-Committee on the Penitentiary System in Canada (MacGuigan);
1978 National Planning Committee on the Female Offender (Needham);
1978 Joint Committee to Study the Alternatives for the Housing of the Federal Female Offender (Chinnery);
1978 Progress Report on the Federal Female Offender Program
1979 Canadian Advisory Council on the Status of Women
1981 Canadian Human Rights Commission
1988 Canadian Bar Association
1990 Task Force Report on Federally Sentenced Women

reports in correspondence to the Canadian Human Rights Commissioner.[19] Pate also provided examples of some of the human rights issues faced by FSW, including strip-searching in times and manners not permitted by law, shackling minimum-security women on temporary absences, housing women in segregated maximum-security units within men's prisons, and eliminating minimum-security prison conditions for FSW by adding razor wire, additional alarms, cameras and other static security measures to all regional prisons for FSW. [20]

Similarly, Amnesty International[21] and the Canadian Feminist Alliance for International Action[22] recently presented briefs to the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW).[23] Both reports highlight the continued discrimination against FSW by CSC. The following issues are identified in the reports as being of paramount concern: the classification system, the discrimination against Aboriginal women and other racialized women, discrimination on the basis of disability experienced by FSW with cognitive and mental disabilities, women being held in segregated units in men's prisons, and the lack of specific programming for women that reflects their differing needs and cultural backgrounds.

CSC's failure to address the systemic issues and discrimination faced by FSW, raised in report after report, is disturbing. The Correctional Investigator,[24] in his most recent *Annual Report of the Correctional Investigator,*[25] advised that CSC's response has been:

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[19] K. Pate, Executive Director of Elizabeth Fry correspondence to Michelle Falaradeau-Ramsay, Chief Commissioner CHRC dated March 8, 2001.

[20] K. Pate, "50 Years of Canada's International Commitment to Human Rights: Millstones in Correcting Corrections for Federally Sentenced Women" (1998) www.elizabethfry.ca/50years

[21] Amnesty International Canada, Equal Rights: A Brief to the United Nations Committee on the Elimination of Discrimination Against Women on the Occasion of the Examination of the Fifth Periodic Report Submitted by Canada. (December, 2002).

[22] Canadian Feminist Alliance for International Action, *Canada's Failure to Act: Women's Inequality Deepens*. Submission to the United Nations Committee on the Elimination of Discrimination Against Women on the Occasion of the Examination of the Fifth Periodic Report Submitted by Canada. (January, 2003).

[23] Amnesty International, *supra,* note 21.

[24] The Office of the Correctional Investigator is an independent body that attempts to redress offender complaints and to provide recommendations to both the Commissioner of the Correctional Service of Canada and the Solicitor General.

[25] Office of the Correctional Investigator, *Annual Report of the Correctional Investigator: 2001-2002* (Ottawa: Public Works and Government Services: 2002).

> …excessively delayed, overly defensive and absent any commitment to specific timely action… The observations and recommendations detailed in last year's Report have in large part been ignored.[26]

In particular, the Correctional Investigator, observed that six years after the Arbour Inquiry:

- women continue to be housed in maximum security units within male penitentiaries;
- the organizational and program changes related to the appointment of a Deputy Commissioner for Women's Corrections to support the "separate stream" for Women's Corrections have not been implemented; and
- there has been no "final response plan" issued by Correctional Services on Justice Arbour's Report.[27]

As many authors have identified, CSC's poor track record is felt most profoundly by Aboriginal women[28]:

> Imprisoned [Aboriginal] women are triply disadvantaged: they suffer 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.[29]

CSC's continued failure to address the long-standing issues, concerns, and recommendations consistently raised in reports that span several decades, violates the rights of FSW as enshrined in both domestic and international human

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[26] *Id.* at 6.

[27] *Id.* at 10.

[28] See, for example, K. Hannah-Moffat, *Punishment in Disguise: Penal Governance, Federal Imprisonment of Women in Canada*. (Toronto: University of Toronto Press, 2001); Monture-Angus, *supra* note 6, Arbour, *supra* note 7; Canada, Report of the Task Force on Federally Sentenced Women, *Creating Choices* (1990), www.csc-scc.gc.ca; S. B. Morin, *Whatever Happened to the Promises of Creating Choices: Federally Sentenced Maximum Security Women* (Ottawa: Correctional Services of Canada, 1999); Manitoba, Public Inquiry into the Administration of Justice and Aboriginal Peoples, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal Peoples*, vol. 1 (Winnipeg: Queens Printer, 1991) Associate Chief Justice A.C. Hamilton and Associate Chief Judge C.M. Sinclair, Commissioners.

[29] Canada, House of Commons, Standing Committee on Justice and Solicitor General (David Daubney, Chair) *Taking Responsibility* (Report on Its Review of Sentencing, Conditional Release and Related Aspects of Corrections), (Ottawa: Queen's Printer, 1988) at 237.

rights instruments, and is a breach of CSC's fiduciary duty to FSW. In spite of the fact that the Correctional Investigator continues to reiterate the same concerns raised by Justice Arbour and others, CSC has repeatedly failed to adequately address these concerns:

> The response to Justice Arbour's Report by the Correctional Service has been anything but public and inclusive. The clear "vision for change" of a decade ago is clouded. The impact of the top priority ascribed to Women's Corrections in 1996 is open to serious question.[30]

It is incumbent on the Canadian Human Rights Commission to demand that CSC address the continued discrimination of FSW, by ensuring that their basic domestic and international human rights are honoured and respected and that CSC fulfils its fiduciary duty to FSW.

III. Fiduciary Duty

NAWL's submission regarding the Crown's (CSC's) breach of its fiduciary duty to FSW, begins with a brief overview of the fiduciary doctrine, applies the law to CSC's duty to FSW, and then looks specifically at CSC's breach of its fiduciary obligations to Aboriginal FSW/Aboriginal peoples.

1. Introduction

> *The policy underlying the law of fiduciaries is focused upon the desire to preserve and protect the integrity of socially valuable or necessary relationships which arise from human interdependency. Fiduciary laws' preservation of relationships that come under its auspices requires that fiduciaries ascribe to a high standard of conduct*.[31]

Fiduciary relationships were first created and enforced by the courts of Equity. The terms fiduciary duty, obligation and relationship are used interchangeably in the academic literature and jurisprudence; this paper also uses the terms interchangeably. Canadian jurisprudence has developed and expanded the fiduciary concept so that it is now "universally applicable"[32] and based on flexibility and fluidity in its approach.[33] In fact, Canadian courts have been

[30] *Supra,* note 25, at 11.

[31] L.I. Rotman, "Fiduciary Doctrine: A Concept in Need of Understanding" (1996) 34 *Alberta L.R.* 821 at 826.

[32] M. Ellis and M. Vincent, eds., *Fiduciary Duties in Canada.* (Toronto: Carswell, 2002) at 1-2.

[33] *Id.* at 1-5.

identified as being at the cutting edge of developing the fiduciary doctrine, in particular as it relates to Aboriginal peoples.[34]

A fiduciary relationship requires a high standard of conduct of the fiduciary, in this case CSC. Former Chief Justice Dickson emphasized this in the *Guerin* decision:

> Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his [sic] principle.[35]

Fiduciary law requires utmost loyalty and good faith of fiduciaries. A fiduciary relationship affords protection for the rights and interests of beneficiaries in a fiduciary relationship, in addition to protection from discrimination provided by the *Charter* or human rights legislation. CSC is in a fiduciary relationship with FSW and CSC has breached that duty in the manner discussed below. Accordingly, CSC must act to remedy the breaches without delay.

CSC's breach is two-fold: numerous reports have identified several areas of discrimination that constitute primary breaches of CSC's obligations to FSW, and CSC's continuing failure to remedy the discrimination and implement the recommendations form an ongoing breach of the fiduciary relationship between CSC and FSW.

The test for determining whether a fiduciary relationship has been established was set out by Justice Wilson (as she then was) in the decision of *Frame v. Smith*:

1. The fiduciary has the scope for the exercise of some discretion or power;

2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests, and

3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[36]

The *Frame* test has been applied, and built upon, in later Supreme Court of Canada decisions. In *Lac Minerals,* Justice La Forest stated that the test did not necessarily depend on vulnerability but is determined by the facts.[37] The court in

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[34] G. Lanning, "The Crown-Maori Relationship: The Spectre of the Fiduciary Relationship" (1997) 8 *Auckland Univ. L.R*. 445.

[35] *Guerin v. R.,* [1984] 2 S.C.R. 335.

[36] *Frame v. Smith,* [1987] 2 S.C.R. 99

[37] *Lac Minerals v. International Corona Resources Ltd*., [1989] S.C.R. 574 at 672.

Hodgkinson v. Simms, however, advised that although vulnerability may not be a determining factor "it is an important *indicium*" of the existence of a fiduciary relationship.[38] The general principle of the fiduciary approach, according to Justice McLachlin (as she then was), "is founded on the recognition of the power imbalance inherent in the relationship between fiduciary and beneficiary, and to giving redress where that power imbalance is abused".[39] In *Guerin* the Supreme Court opened the door to the fiduciary doctrine's application to different relationships (including the Crown in relation to deemed "beneficiaries") and underscored that the categories of fiduciary should not be considered closed but that a determination of the existence of a fiduciary relationship will depend on the facts of a particular relationship.

The Courts in Canada have cast a wide net for those that fall within a fiduciary relationship. As Professor Rotman illuminates:

> What is truly meant by the open-endedness of the fiduciary relationship, then, is that the categories of fiduciary relations are never closed and neither are their limits.[40]

When the test in *Frame* is applied to the relationship between CSC and FSW, it is evident that a fiduciary relationship exists, particularly in light of Justice McLachlin's comments regarding the inherent power imbalance of a fiduciary relationship:

1. CSC has the scope to exercise discretion or power over FSW as set out in the *Corrections and Conditional Release Act.*[41]

2. CSC can unilaterally exercise its power or discretion so as to affect the legal interests of FSW. For example, by failing to redress the discrimination that FSW are subjected to when they are classified "maximum security" and by housing FSW in segregated units, especially when those units are in male institutions.

3. FSW are "peculiarly vulnerable" or at the "mercy of" CSC, which holds both the discretion and the power in the relationship. FSW are definitely in a vulnerable position in their relationship with CSC. CSC's daily interactions with FSW occur through the guard/prisoner

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[38] *Hodgkinson v. Simms,* [1994] 3 S.C.R. 377 at 405.

[39] *Norberg v. Wynrib,* [1992] 2 S.C.R. 226 at 289.

[40] L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) at 157.

[41] *Corrections and Conditional Release Act*, R.S.C. 1992, c. 20.

> relationship; the guard/prisoner relationship has a much more significant and blatant power imbalance than classic fiduciary relationships previously recognized by the courts such as doctor/patient and lawyer/client.

The Crown and CSC, as an agent of the Crown, are fiduciaries. The Crown has already been found, in certain circumstances, to owe a fiduciary obligation to Aboriginal peoples[42]. In addition, a number of cases outside of the Aboriginal jurisprudence have concluded that the fiduciary doctrine applies to the Crown. For example, in *Duplessis,*[43] a soldier claimed a breach of the fiduciary duty owed to him by the Department of National Defence, on the basis of the military's "callous treatment" of his complaints. The soldier argued that the military has unique scope for the exercise of power by virtue of his duty to obey. The court ruled that his claim could not be barred, as *Guerin*[44] had widened the net of fiduciary relationships and therefore the Crown could be caught within this net. Similarly, the court in *Paquet*[45] agreed with the trial judgement in *Duplessis* and did not bar a fiduciary claim brought by a member of the military against the Crown.

Certainly CSC's continued failure to address the discrimination of FSW is analogous to "callous treatment" of the women and their complaints and is therefore a breach of CSC's fiduciary duty.

A finding of a fiduciary relationship is always fact-specific, taking into account at least the specific relationship (e.g. prisoner/guard) as well as the overall situation (*i.e*., correctional regime). Thus, while courts have found that police do not owe a fiduciary duty to individuals as their duties are to the public at large,[46] the work of corrections is clearly distinguishable from that of police officers. While police duties are to the public at large, CSC owes a very specific duty to the women "in its care" who do not have a choice as to who is responsible for the quality of their lives and their care while they fall under the correctional regime.

An example of a specific duty owed to FSW is found in s.4 of the *Corrections and Conditional Release Act*,[47] which sets out the principles of the Act. In particular, s.4(h) states:

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[42] See especially: *R. v. Sparrow,* [1990] 1 S.C.R. 1075; and *Guerin*, *supra* note 35.

[43] *Duplessis v. R.,* [2000] CarswellNat 2929 (FCTD).

[44] *Guerin*, *supra*, note 35.

[45] *Paquet v. Canada (Attorney General,* [2001] CarswellOnt 1362 (S.C.J.).

[46] See for instance: *Jane Doe v. Toronto (Metropolitan) Commissioners of Police* (1998), 58 DLR (4th) 396 (HC) and *Romagnuolo v. Hoskin,* [2001] CarswellOnt 3183 (SCJ).

[47] S.C., 1992, c. 20 (the "*CCRA*").

s. 4 (h) that correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and be responsive to the special needs of women and aboriginal peoples, as well as to the needs of other groups of offenders with special requirements.

Section 5 of the *CCRA* sets out some additional responsibilities of the CSC, namely:

s. 5 [CSC]… shall be responsible for:
(a) the care and custody of inmates…

Not only does CSC owe specific duties to FSW, but due to the very nature of the administration of the correctional regime - incarceration and the loss of liberty - FSW are in an extremely vulnerable position. The high degree of control CSC exercises over the day-to-day lives of FSW, combined with the fact that prisons are closed institutions, isolated from public scrutiny,[48] are evidence of the vulnerability of FSW to CSC's discretion and power.

British Columbia Chief Justice McEachern in *Critchely,*[49] attempted to narrow the scope of the fiduciary doctrine and its application to the Crown. He added that a key element to determining whether the Crown had a fiduciary obligation was to establish whether there had been a breach of "good faith." His decision concerned the issue of the Crown's vicarious liability and did not address situations where the Crown has direct control over the matters in dispute. The facts in that case can be distinguished from the factual situation between CSC and FSW: CSC has direct control and power over FSW, and continues to allow discriminatory treatment of FSW. Thus the fiduciary obligation owed to FSW by CSC even survives the test set out in *Critchely*, a decision of the British Columbia Court of Appeal.

The fiduciary doctrine has rarely been raised in reported litigation against CSC. Only one reported lower court decision considered the issue. The New Brunswick Court of Queens Bench in *Squires*[50] recently applied the narrowed definition proposed by Chief Justice McEachern in *Critchley* in declining to find a fiduciary duty on the part of CSC. In *Squires*, an inmate was assaulted by other inmates and claimed damages against CSC, arguing that CSC breached its fiduciary duty to him. The court found as a fact that Squires had refused to go to segregation and had refused to assist correctional officers by divulging the problem he had with other inmates. This lower court decision is concerned with a narrow claim that CSC breached a fiduciary duty and owed damages to a prisoner in the context of a particular assault. The case can be distinguished and

[48] Monture-Angus, *supra*, note 6, at 16.

[49] *A.(C.) v. C. (J.W.)* (1998), 166 D.L.R. (4th) 475 (B.C.C.A.).

[50] Squires v. Canada (Attorney General), [2002] NBQB 309.

does not assist with the broader issues of whether CSC's relationship with FSW is a fiduciary one and whether CSC's treatment of FSW, along with its failure to remedy known discrimination against FSW, amount to breaches of CSC's fiduciary duty.

Based on a review of the binding jurisprudence and relevant academic literature, NAWL submits that CSC is in a fiduciary relationship with FSW, which means that for the breaches found, CSC must remedy the ongoing, documented discriminatory treatment of FSW.

2. CSC's Breach of Fiduciary Duty to FSW

> *In order to determine whether a breach of fiduciary duty has occurred, only the actions of the fiduciary are relevant. The common, core obligation pertaining to all fiduciaries within the scope of their fiduciary positions is to act in the best interests of their beneficiaries*.[51]

The substandard and discriminatory treatment of FSW by CSC demonstrates that CSC has not acted in "good faith" or in the "best interests" of the vulnerable FSW population "in its care". CSC's continuing failure to remedy the discrimination experienced by FSW and its disregard of the myriad recommendations to remedy its unacceptable treatment of FSW, is but one example of the fact that CSC has not acted in "good faith" or in "the best interests" of FSW.

A useful and obvious example of CSC's breach of its fiduciary duty to FSW is the security classification system utilized and endorsed by CSC. The application of the risk assessment factors, used to determine classification, unfairly discriminates against Aboriginal FSW as well as FSW with mental health and capacity concerns.[52] As part of the CSC's assessment the determination of risk includes a review of the prisoner's social history. Women with a limited employment history, low education level, little or no vocational training, who have been victims of violence, physical problems, mental illness or disabilities are identified as having high needs and are likely to be classified as maximum

[51] Rotman, *supra* note 31, at 181.

[52] Section 17(e) of the Regulations under the *CCRA* requires CSC to take a prisoner's mental disability into account in a manner that equates mental illness with risk. That section provides:
The Service shall take the following factors into consideration in determining the security classification to be assigned to an inmate pursuant to section 30 of the Act;
…(e) any physical or mental illness or disorder suffered by the inmate.
For a detailed analysis of the discriminatory impact of this provision, see DAWN Canada, *Federally Sentenced Women with Mental Disabilties: A Dark Corner in Canadian Human Rights* (January 2003), especially Part IV.

security prisoners as a result.[53] Aboriginal women, the most disadvantaged, constituted an alarming 41% of FSW classified as maximum security in 1997[54] (the figure rose to 49% in 2001) as noted by CSC:

> …two of every five aboriginal women offenders have a maximum security classification.[55]

According to CSC's own review of the issue:

> …decisions based on the presence or absence of factors such as employment, education or family and community support – all areas where aboriginal offenders are often disadvantaged – discriminatory results follow from ostensibly neutral processes.[56]

The Canadian Feminist Alliance for International Action recently summarized one aspect of the discriminatory impact of CSC's classification system in its submission to the United Nations:

> …Those with mental health illnesses or disabilities find themselves with higher security classifications because their illness or disability is seen as a risk. Equating mental illness or disability with risk and assigning a higher security classification is discriminatory.[57]

Hannah-Moffat and Shaw observed in their comprehensive study regarding CSC's classification system:

> …current risk-based classification systems and that used by CSC, in particular, are limited in terms of gender and diversity by:
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> - their failure to recognize the difference of gender and race;
> - their inability to view problems holistically/contextually;
> - their restriction of information to objective facts;

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[53] Canadian Association of Elizabeth Fry Societies (CAEFS), Position of the Canadian Association of Elizabeth Fry Societies Regarding the Classification and Carceral Placement of Women Classified as Maximum Security Prisoners http://www.elizabethfry.ca.

[54] Id.

[55] Correction Service of Canada, Human Rights Working Group, *Human Rights and Corrections: A Strategic Model*. (1997) htttp://www.csc-scc.gc.ca.

[56] *Id*.

[57] *Supra*, note 22. See also DAWN, *supra,* note 52.

- their underlying subjectivity;
- the dominance of one perspective on criminal behaviours; and
- the theoretical and methodological limitations of studies that seek to make claims about the validity and reliability of these tools for women.[58]

The security classification system is discriminatory on its face (in that it equates mental disability and social disadvantage with risk) and in its application which results in, for example, Aboriginal women disproportionately being classified as maximum security. Despite being aware of these problems for a number of years,[59] and the reality that the discriminatory patterns are evident in CSC's own statistics and research, CSC has not acted to remedy this discrimination. This failure amounts to a breach of CSC's fiduciary duty to FSW.

The consequences of a maximum security classification for FSW compound the discrimination and the breach. Monture-Angus has aptly called the security classification system "the window through which much of the discrimination against women flows into the structure and systems of the prison."[60] For example, since the mid-1990s, women classified maximum security have served their sentences in segregated units in men's prisons where they have limited access to programs or services, let alone gender-specific or culturally-specific programs and services.[61] In addition, because many FSW have suffered violence or abuse at the hands of men, housing them in male prisons is a particularly cruel practice.[62]

The CHRC will no doubt hear that CSC is attempting to address some of these concerns by building, at great cost, maximum security units in the regional women's prisons.[63] Rather than being a progressive measure for addressing

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[58] Hannah-Moffat and Shaw, *supra,* note 8, at 65.

[59] See, for example, the studies of classification system and its impact on women, listed in CHRC Consultation Paper, *supra,* note 9, at 10.

[60] Monture-Angus, *supra,* note 6, at 25.

[61] For an indicting, in-depth study (commissioned by the CSC) of the lack of resources and programs for Aboriginal FSW designated maximum security, see S.B. Morin, *Whatever Happened to the Promises of Creating Choices: Federally Sentenced Maximum Security Women* (Ottawa: Correctional Services of Canada, 1999).

[62] *Supra*, note 8.

[63] See, for example, CSC News Release, "Opening Ceremony of the New Secure Unit at Joliette Institution" (April 10, 2003). The maximum security units at Nova Institutional for Women and the

discrimination, this move flies in the face of the findings and recommendations of the 1990 Task Force on Federally Sentenced Women,[64] ignores the reality of the relatively low risk posed by FSW,[65] and amounts to a further breach of CSC's fiduciary duty to FSW.[66]

Other examples of CSC's breach of fiduciary duties to FSW include the utter lack of adequate programs for FSW at all security levels,[67] the fact that women designated minimum security almost never serve their sentences in minimum security conditions, unlike their male counterparts who usually serve minimum security sentences in minimum security prisons,[68] and the continued use of male guards on the front lines in women's prisons.

Overlaying these specific breaches of CSC's fiduciary duties to FSW, at a systemic level, is the fact that the Canadian government, through the CSC, has failed to remedy these and other known instances of discrimination and mistreatment of FSW which amounts to a further breach of the government's fiduciary obligations to FSW. In the context of CSC's relationship of power and

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Edmonton Institution for Women opened on January 16, 2003 and February 26, 2003, respectively.

[64] *Creating Choices* spent considerable energy addressing the problem of women's prisons being over-secure, a finding that had been made in the Ouimet Report (1969), the Report of the Royal Commission on the Status of Women (1970), and the MacGuigan Report (1977). *Creating Choices, supra* note 28, ch. IV. See also, Arbour, *supra* note 7, at 245.

[65] See, for example, M. Shaw et al., "Paying the Price: Federally Sentenced Women in Context," Ottawa: Ministry of the Solicitor General (1991), cited in CAEFS*, supra* note 17.

[66] The intensification of security at the regional women's prisons, culminating in the opening of the maximum security units and the negation of minimum security conditions, is inconsistent with the positive statutory duty set out in section 28 of the CCRA which provides that "where a person is, or is to be, confined in a penitentiary, the Service shall take all reasonable steps to ensure that the penitentiary in which the person is confined is one that provides the least restrictive environment for that person" [emphasis added].

[67] See CAEFS' Response to the Canadian Human Rights Commission's Consultation Paper for the Special Report on the Situation of Federally Sentenced Women (April 10, 2003), at 2-10. See also, Report of the Auditor General, Chapter 4 – Correctional Service of Canada – Reintegration of Women Offenders (April 2003) where Auditor General Sheila Fraser notes that the programming for FSW is inadequate. For example, she cites the lack of an adequate substance abuse program tailored to women's needs and the few meaningful work opportunities for FSW prisoners. See www.oag-bvg.gc.ca.

[68] As of April 29, 2001, there were 160 FSW classified as minimum security (not including the 25 FSW serving their sentences in provincial jails), yet there were only 13 minimum security beds (located in a facility that is scheduled for closing). The other minimum security women serve their sentences in effective medium security in the regional prisons. While NAWL strongly agrees with the submission of LEAF that a formal equality analysis (*i.e.*, comparing imprisoned women to imprisoned men) is inadequate, the fact that even such a simplistic analysis reveals discrimination is troubling.

control over the vulnerable population of FSW, CSC has failed to act in the best interests of FSW.

3. CSC'S Breach of Fiduciary Duty to Aboriginal Peoples

> *The fiduciary relationship… provides a unique opportunity to challenge the colonial underpinnings of the relationship between the criminal justice system and First Peoples.*[69]

In light of Aboriginal peoples' historic relationship with the Crown and the rights enshrined in s. 35(1) of the *Constitution Act,*[70] CSC owes a special fiduciary duty to Aboriginal people and in particular to Aboriginal people serving federal sentences. By CSC's own admission:

> ….CSC should actively try out alternative ways of tapping into, documenting – and correcting – the numerous aboriginal rights concerns that undoubtedly exist.[71]

This paper advances two key arguments regarding CSC's breach of its fiduciary duty to Aboriginal FSW. Firstly, as articulated in the previous section, CSC owes a duty to all FSW, including Aboriginal women. Secondly CSC owes a duty to Aboriginal[72] federally sentenced women and men because of the unique relationship between the Crown and Aboriginal people.

In the paragraphs that follow, the second issue is canvassed, namely that CSC is in breach of its fiduciary duty by, for example, imposing a foreign justice system on Aboriginal peoples that has been proven to discriminate against and further marginalize Aboriginal FSW, overclassifying Aboriginal FSW such that they serve their sentences in harsher conditions, and failing to negotiate agreements with Aboriginal communities that would facilitate the return of Aboriginal FSW to those communities.

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[69] Monture-Angus, *supra* note 6, at 61.

[70] *Constitution Act*, 1982 – *Canada Act*, U.K. 1982, c. 11.
> s. 35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[71] CSC, *supra,* note 55.

[72] Section 35(2) of the *Constitution Act, 1982* includes in the definition of "Aboriginal people" status Indians, Inuit, and Metis. To interpret "Aboriginal peoples" as not also protecting the rights of non-Status Indians would be discriminatory in light of the ongoing injustice and discrimination experienced by non-Status Aboriginal people at the hands of the Canadian government.

The imposition of this system on Aboriginal peoples should be seen to violate Aboriginal peoples' section 35 right to self-government in the administration of justice:

> In the case of an imposed justice system, the promises made in treaty or the objectives of a justice system form the necessary backdrop for the determination of the breach.[73]

The problems associated with the application of a foreign system to Aboriginal concepts of justice have been recognized and acknowledged by CSC itself:

> … the underlying problem remains that there is a poor fit between native concepts of crime and punishment and the essentially non-aboriginal correctional model embodied in the Act.[74]

The Supreme Court of Canada, in *Gladue*, has acknowledged the "rampant discrimination" experienced by Aboriginal people imprisoned in Canada:

> …it must be recognized that the circumstances of aboriginal offenders differs from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation and many are substantially affected by poor social and economic conditions. Moreover as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors more adversely affected by incarceration and less likely to be "rehabilitated" thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination is so rampant in penal institutions.[75]

The discrimination persists, despite the legislative enactment of section 4(h) of the *CCRA* which states that it is a principle of CSC "that correctional policies, programs and practices respect gender, ethnic, cultural and linguistic difference and be responsive to the special needs of women and aboriginal peoples, as well as to the needs of other groups of offenders with special requirements." As well, sections 79-84 of the *CCRA* obligate CSC to provide programs designed particularly for Aboriginal people and empower CSC to make agreements with aboriginal communities for the provision of correctional services, to establish an Aboriginal Advisory Committee, and to facilitate the involvement of Aboriginal

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[73] Monture-Angus, *supra,* note 6 at 63. See also, Report of the Aboriginal Justice Inquiry of Manitoba, *supra,* note 28 and discussion *infra*, text at notes 65-68.

[74] Correctional Service of Canada, *Human Rights in Community Corrections* (May 1999) http://www.csc-scc.gc.ca

[75] *Gladue v. R.,* [1999] 1 S.C.R. 688 at para. 68 (emphasis added).

spiritual leaders and Aboriginal communities in parole plans and integration into Aboriginal communities.

Judges Hamilton and Sinclair conducted a thorough analysis of the justice system and its impact on Aboriginal peoples generally and Aboriginal prisoners specifically for their Manitoba Aboriginal Justice Inquiry. The following summary of Aboriginal peoples' systems of justice prior to European contact is provided in the report:

> Law in an Aboriginal community was found in unwritten conventions before the arrival of Europeans. Although these rules were never codified, we observe that there were consistent patterns in treatment of such matters as relations with other nations, family problems, and disputes about behaviour and property. These patterns became part of Aboriginal oral tradition and were passed from generation to generation. One can easily speak about these patterns in terms of "law" and "justice".[76]

The above, as well as the evidence presented during the Inquiry and the materials that were reviewed, established for the Inquiry that Aboriginal peoples have a constitutionally protected self-government right to administer their own justice system pursuant to section 35 of the *Constitution*.[77]

In *Sparrow*, the Supreme Court of Canada tied a fiduciary obligation to the protection of Aboriginal rights and title pursuant to section 35(1) of the *Constitution Act, 1982*.[78] Many of CSC's current policies, governing legislation, and practices breach the constitutional rights of Aboriginal people serving federal sentences, pursuant to subsection 35(1), and constitute breaches of CSC's fiduciary obligation to federally sentenced Aboriginal people.

The findings of Justices Hamilton and Sinclair support this submission, particularly the following statement:

> We believe very strongly that cultural bias within the justice system represents the single greatest contributing factor among several that cause Aboriginal over-representation within the justice system. It is for that reason that we have concluded that Aboriginal aspirations for their own justice systems not only must be considered carefully, but that steps toward their implementation must be undertaken. To this point, all other efforts at reform have failed and are unacceptable to the people whom they are intended to benefit.[79]

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[76] Report of the Aboriginal Justice Inquiry of Manitoba, *supra,* note 28 at 50.

[77] *Id.*, at 260

[78] *Supra*, note 70.

[79] *Supra,* note 28, at 265 (emphasis added).

In other words, simply adding Aboriginal-specific provisions to the *CCRA*,[80] - "efforts at reform" - will not ameliorate the effects of discrimination caused by the application of a foreign justice system to Aboriginal peoples. This conclusion has only been underscored by the fact that the CSC has failed to breathe life into the provisions of ss. 79-84 of the *CCRA* for the community supervision of federally sentenced women and men, a reality which is, in itself, a breach of the government's fiduciary duty (in this case, an unfulfilled promise) to Aboriginal FSW.

As Hutchins *et al* underscore:

> The Courts have been quite clear that the Crown's obligations towards Aboriginal peoples result in positive duties… Thus the failure of governments to address Aboriginal concerns when drafting policy can by itself constitute a breach of their fiduciary duties.[81]

This assertion arguably applies to CSC and its continued failure to draft policy, and to apply existing legislation and policy in a non-discriminatory way, thereby constituting a breach of CSC's fiduciary duty to Aboriginal peoples and in particular to Aboriginal FSW. At the very least, CSC's failure to implement key provisions of the CCRA, as they relate to Aboriginal FSW, constitutes a breach of CSC's duty to Aboriginal FSW, a breach that has been ongoing. CSC has also failed to implement its own policy as it applies to Aboriginal FSW, a further and ongoing breach of the duty CSC owes to Aboriginal FSW.

Judges Hamilton and Sinclair were correct in stating that Aboriginal peoples' right to self-government is essential to the proper administration of justice:

> To enable this to be done, Aboriginal communities must have the right, as a part of self-government, to establish their own rules of conduct, to develop means of dealing with disputes (such as courts or peacemakers), appropriate sanctions (such as holding facilities or jails), and the full range of probation, parole, counselling and restorative mechanisms once applied by First Nations.[82]

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[80] *Supra*, note 47, *e.g*., sections 4(h) and 79-84.

[81] P. Hutchins, D. Schulze and C. Hilling, "When Do Fiduciary Obligations to Aboriginal Peoples Arise?" (1995) 59 *Saskatchewan L.R*. 97 at 128.

[82] *Supra,* note 28, at 260

IV. International Obligations

> *Imprisonment may take away a prisoner's freedom, but it does not nullify a prisoner's right to equal treatment under the law, and it must never be allowed to sever the ties that link a prisoner to the brother and sisterhood the Universal Declaration of Human Rights accords us all*.[83]

Canada's international obligations are becoming increasingly important to the interpretation of both the *Canadian Charter of Rights and Freedoms* and our domestic laws. For FSW, this means that the *CCRA*, along with the regulations under it, must be scrutinized in light of Canada's significant commitments to, for example, the elimination of discrimination against women, to fair treatment of prisoners, and to civil and political rights. Our discussion looks first at the increasing significance of international obligations to assessing the constitutionality and legality of domestic law and policy. We then set out a number of international instruments that have been identified as enshrining the rights of prisoners, and highlight some concrete ways in which Canada is in breach of those international obligations in its treatment of FSW.

On the importance of Canada's international commitments to *Charter* interpretation, Chief Justice Dickson (as he then was) stated in *Slaight Communications*:

> … Canada's international human rights obligations should inform not only the interpretation of the content of rights guaranteed by the *Charter*… the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective.[84]

In *Reference Re: Public Service Employee Relations,* Chief Justice Dickson again underscored that:

> The various sources of international human rights law – declaration, covenants, judicial and quasi-judicial decisions of international tribunals, customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of *Charter* provisions.[85]

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[83] M. Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas and McIntyre, 2002) www.justicebehindthewalls.net/book.

[84] Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. at 1056.

[85] *Reference Re Public Service Employee Relations Act,* [1987] 1 S.C.R. 313 at 348. These cases were positively referred to by the Supreme Court of Canada most recently in *US v. Burns,* [2001] 1 S.C.R. 283.

More recently, the Supreme Court of Canada has discussed the impact of Canada's international human rights commitments to interpreting Canadian statutes. In *Baker v. Canada (Minister of Citizenship and Immigration)*,[86] a majority of the Court held that immigration law and policy is presumed to respect the values contained in international instruments such as the *Convention on the Rights of the Child*[87] and that those values are part of a "contextual approach to statutory interpretation and judicial review."[88] As articulated by noted feminist legal scholars, Shelagh Day and Gwen Brodsky:

> Courts have held that domestic statutes should, whenever possible, be interpreted so as to be consistent with provisions of international instruments to which Canada is bound.[89]

Although there is no binding treaty that deals exclusively with the treatment of prisoners and conditions of imprisonment, the UN *Standard Minimum Rules for the Treatment of Prisoners* (SMRs),[90] endorsed by Canada in 1975, provide the blueprint for States to incorporate the SMRs into their domestic correctional regimes.

However, as witnessed by Professor Michael Jackson: "40 years after their initial adoption certain rules have not been fully implemented and remain a challenge to correctional authorities."[91]

In her 1996 Report, Madam Justice Arbour underscored that:

> While Canada, and the Correctional Service in particular, are not obliged to conform to the specific terms of the UN Rules in the management of prisons, those rules are accepted as international norms and minimum standards, and departures from them generally only occur where there is reasoned justification.[92]

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[86] [1999] 2 S.C.R. 817.

[87] Can. T.S. 1992, No. 3.

[88] *Baker, supra*, note 86, at para. 70.

[89] S. Day and G. Brodsky, Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs (Ottawa: Status of Women Canada, 1998) at 117.

[90] *Standard Minimum Rules for the Treatment of Prisoners*, Approved by the Economic and Social Council, 31 July 1957. Resolution 663C (XXIV) and 2076 (LXII) of 13 May 1977.

[91] *Supra*, note 83.

[92] *Supra,* note 7, at 11.

Canada, as represented by CSC, has actually endorsed and made a commitment to adhering to not only the SMRs but to other international human rights instruments:

> It is our view that any correctional authority should adhere to both binding and other international human rights instruments that have been approved by the state concerned before the international community. CSC should therefore consider itself bound by such instruments that have been endorsed by the Government of Canada.[93]

Professor Jackson observed that the *Charter* incorporates much of what is enshrined in international human rights instruments and that the *CCRA* must be interpreted and applied in ways that are consistent with the *Charter*.[94]

Canada has signed both the *Convention on the Elimination of Discrimination against Women* (CEDAW) and the International *Covenant on Civil and Political Rights* (ICCPR), and the respective optional protocols, which provide complaint mechanisms for violations of these conventions. Once domestic remedies are exhausted or when a complainant can provide evidence of excessive delay or other documented obstacles, complaints may be accepted by the Human Rights Committee pursuant to these instruments.

Some of the remaining international instruments (and SMRs) do not contain formal complaint processes. However, CSC has endorsed and made a commitment to adhere to these international human rights obligations.

In order to fulfil its international obligation to FSW, a particularly vulnerable population in Canada, Canada (CSC) must remedy the violations of FSW's rights, examples of which are identified below. The discussion that follows has been informed by the myriad breaches of rights, identified in the numerous reports discussed in the background section of this paper. The examples set out are not an exhaustive list of the violations of particular articles and principles. However, the articles and principles listed are comprehensive and the examples are illustrative of the ways that Canada has failed to bring its correctional practices in line with its international commitments in ways that particularly disadvantage FSW.

[93] *Supra,* note 55.
[94] *Supra,* note 83.

1. CSC's International Obligations

i) Standard Minimum Rules for the Treatment of Prisoners (SMRs)

The SMRs have been accepted by Canada and applied to its domestic correctional regime and, as the Human Rights Working Group of CSC has stated,[95] Canada should consider itself bound by these internationally sanctioned rules and principles.

Section 8, in particular s. 8(a), of the SMRs has been breached by Canada (CSC):

> s. 8 The different categories of prisoners shall be kept in separate Institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus,
>
> > (a) Men and women shall so far as possible be detained in separate institutions, in an institution which receives both men and women. The whole of the premises allocated to women shall be entirely separate (emphasis added).

The discriminatory effect of CSC's classification system, and the fact that FSW classified as maximum security, are housed in male institutions, is set out in detail in the background section of this paper. This is clearly a contravention of s. 8(a). Both Amnesty International and the Canadian Feminist Alliance for International Action described their concerns regarding this particular discriminatory practice in recent submissions to the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW).[96]

This discriminatory practice also contravenes section 67 of the SMRs:

> s. 67 The purposes of classification shall be:
>
> > (a) to separate from others those prisoners who by reason of their criminal records or bad characters, are likely to exercise bad influence.
> > (b) To divide the prisoners into classes in order to facilitate their treatment with a view to their social rehabilitation (emphasis added).

The above discussion of CSC's fiduciary duties owed to FSW highlighted the fact that the classification system is discriminatory in that it unfairly penalizes

[95] *Supra,* note 55.

[96] Amnesty*, supra,* note 21, and Canadian Feminist Alliance, *supra,* note 22.

Aboriginal women and women with cognitive and mental disabilities/illnesses because of their social histories. The classification system penalizes women because of their social disadvantage, and CSC effectively deems these women to be of "bad character" and "likely to exercise bad influence." This stereotyping cannot be justified on the basis of s. 67(a) and contravenes 67(b) because it has the effect of placing women in circumstances where they do not receive the treatment that will support their "social rehabilitation." FSW who are classified maximum security, by virtue of being housed in segregated units in men's prisons, are less likely to have adequate or appropriate programming to meet their specific needs as required by s. 67(b). These practices, separately and in their combined effect, amount to a violation of the SMRs by CSC.

The SMRs also stipulate that:

> s. 59 … the institutions should utilize all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them <u>according to the individual treatment needs of prisoners</u> (emphasis added).
>
> s. 66(1) … all appropriate means shall be funded including religious care in the countries where this is possible, education, vocational guidance and training, social casework, employment counselling, physical development and strengthening of moral character in accordance with individual needs of each prisoner, taking account of his physical and mental capacities and aptitudes, his personal temperament, the length of his sentence and his prospects after release.

CSC is failing to meet the requirements of sections 59 and 66(1). As identified by CAEFS:

> The services and programs available to federally sentenced women are designed primarily for male inmates and have been slightly adapted to suit the needs of women. Programs including drug and alcohol abuse rehabilitation are often supported and delivered by CSC staff who have little if any expertise in supporting and rehabilitating women.[97]

The CSC Working Group on Human Rights also acknowledged the limited access to appropriate programs for Aboriginal offenders [read Aboriginal FSW].[98]

Subsection 6(1) of the SMRs states:

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[97] CAEFS, *supra,* note 53. See also the 2003 Report of the Auditor General*, supra,* note 67, where the lack of adequate substance abuse programming for women is cited as an area of particular concern.

[98] CSC, *supra,* note 55.

> s. 6(1) The following rules shall be applied impartially. There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In accordance with the interpretative guidelines, set out in section 6(1), and in light of CSC's failure to provide adequate programming to FSW (which meet their varied needs, taking into account their race, gender, cultural, social backgrounds, etc.), it is evident that CSC has breached s. 59, 66(1) and 67 of the SMRs.

Finally, CSC continues to breach s. 51(3) of the SMRs which provides that "[w]omen prisoners shall be attended and supervised only by women officers."[99] After three years of monitoring and reporting on the use of male guards as front-line workers in federal women's prisons, the Cross-Gender Monitors (the "Monitors") recommended that men not be employed as front-line Primary Workers.[100] In their third and final report, the Monitors found that the number of privacy violations by male Primary Workers had increased and that the protocols instituted for the screening and training of front-line workers had not been followed and, in some cases, had been purposefully violated. The Monitors' findings make it clear that Canada continues to breach s. 51(3) of the SMRs and that CSC must, at a minimum, immediately implement the Monitors' recommendations.[101]

ii) Body of Principles and Basic Principles for the Treatment of Prisoners

CSC's Working Group on Human Rights identified two additional instruments, endorsed by Canada, which reinforce the protection of prisoner's rights:

- *Basic Principles for the Treatment of Prisoners*. Adopted and proclaimed by the General Assembly resolution 45/111 of 14 December 1990; and

[99] Section 51(3) goes on to say, "This does not, however, preclude male members of the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women."

[100] See Thérèse Lajeunesse et al., *Third and Final Report of the Cross-Gender Monitoring Project* (2002), especially Recommendation #1, available at www.csc-scc.gc.ca.

[101] The Monitors' other key recommendations include the need for women-centered training and for independent, arm's length review of sexual misconduct allegations by FSW against staff and others, among other key recommendations.

- *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*. Adopted by General Assembly resolution 43/173 of 9 December 1988.

The CSC Human Rights Working Group stated that the instruments:

> …outline provisions that are crucial to maintaining prisoner's inherent dignity as human beings, and to ensuring that they retain all rights and freedoms except those that are necessarily restricted by incarceration.[102]

In spite of this acknowledgment, CSC has violated both of these instruments in its treatment of FSW. In particular, section 2 of the *Basic Principles*:

> 2. There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The administrative practices of CSC perpetuate discrimination against FSW on the basis of sex, race, mental or cognitive disability and social history (etc.); the discriminatory results of CSC's maximum security classification based upon their means of risk assessment is a particularly powerful example of CSC's discrimination against FSW.

CSC has not applied the principles enshrined in the *Body of Principles* to FSW. For example, CSC's maximum security risk assessment contravenes the following principles:

> Principle 1: All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person (emphasis added).
>
> Principle 3: There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent (emphasis added).

CSC's lack of adequate, gender-specific and culturally appropriate programming is in violation of principle 28 of the *Body of Principles*:

> Principle 28: A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material,

[102] CSC, *supra,* note 55.

subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.

CSC has breached the rights set out in section 5 of the Basic Principles by its ongoing failure to remedy its discrimination of FSW, in spite of the several reports that have demanded that CSC change its treatment of FSW. Section 5 of the Basic Principles states that:

> 5. Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants (emphasis added).

iii) International Covenant on Civil and Political Rights

Canada is also party to the *International Covenant on Civil and Political Rights.*[103] CSC's poor administrative practices as they relate to FSW, especially the application of maximum security classification and lack of specific programming to meet the varied needs of FSW, constitute violations of articles 7 and 10 of the Covenant. According to Article 10:

> (1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
>
> (3) The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.

The United Nations Human Rights Committee has described this obligation in the following terms:

> Article 10, paragraph 1, imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7, including medical or scientific experimentation, but *neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of*

[103] *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16) 52, UN Doc. A/6316 (1966).

> *liberty*; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. *Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment*.[104]

In addition, Article 7 provides that "[n]o person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

The Human Rights Committee has commented that "prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7."[105] The conditions for FSW designated maximum security amount to *de facto* segregation, as set out earlier in this paper. The fact that these conditions continue, and the fact that Madam Justice Arbour's recommendations concerning judicial oversight of the use of segregation have not been implemented, are evidence of CSC's failure to adhere to Article 7.

Canada has signed an Optional Protocol to the CCPR, which provides a complaint process which can be used by those whose Covenant rights have been breached.

iv) Convention on the Elimination of Discrimination against Women

Amnesty International[106] and the Canadian Feminist Alliance for International Action[107] rightly concluded that CSC is in violation of Articles 2 and 3 of CEDAW:[108]

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[104] Office of the High Commissioner for Human Rights, CCPR General Comment 21 concerning humane treatment of persons deprived of liberty (Art. 10), 54th Session (1992) [emphasis added].

[105] Office of the High Commissioner for Human Rights, CCPR General Comment 20 concerning prohibition of torture and cruel treatment or punishment (Art. 7), 54th Session (1992).

[106] *Supra,* note 21.

[107] *Supra,* note 22.

[108] *Convention on the Elimination of Discrimination Against Women*, GA. Res. 34/180, UN GAOR, 34th Sess. (Supp. No. 46), 19I.L.M. 33, Can. T.S. 1982 No. 31, (concluded 18 December 1979m; in force for Canada 9 January 1982):

Article 2: State parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to the end, undertake:
(a) to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation…
(b) to adopt appropriate legislative and other measures including sanctions where appropriate, prohibiting all discrimination against women;
(c) to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

> Canada violates the rights of federally incarcerated women inmates under Articles 2 and 3 of the *Convention* by treating women prisoners incarcerated in federal institutions in ways that are inhumane and that deny to such women respect for their inherent dignity.

Both the reports of the Canadian Feminist Alliance for International Action and Amnesty International highlighted the systemic issues and discrimination discussed in the background section of this paper, as examples of the violations of Articles 2 and 3.

Canada has recently ratified the Optional Protocol to *CEDAW*, an act for which the Canadian government should be commended. However, rather than waiting for FSW to bring complaints concerning discriminatory treatment to this international treaty body, the Canadian Human Rights Commission must highlight the reality that CSC has an obligation to remedy the known discrimination without resort to adjudication under *CEDAW*.

v) Convention Against Torture

There is both a *Convention* against torture and other inhuman or degrading treatment and a Declaration. Canada is a signatory to the *Convention*:

> *Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment* Adopted and opened for signature, ratification, and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987 in accordance with article 27(1).
>
> *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975.

(d) to refrain from any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligations;
(e) to take all appropriate measures to eliminate discrimination against women by any person or organization or enterprise;
(f) to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
(g) to repeal all national penal provisions which constitute discrimination against women.

Article 3: State parties shall take all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

CSC has not adhered to Article 3 of the *Declaration*, especially with respect to the imposition of maximum security classification and the de facto segregation of maximum security women, which arguably tantamount to "cruel, inhuman and degrading" treatment of FSW:

> Article 3: No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment (emphasis added).

Furthermore, Article 6 of the *Declaration* sets out that:

> Article 6: Each State shall keep under systematic review interrogation methods and practices as well as arrangements for custody and treatment of persons deprived of their liberty in its territory, with a view to preventing any cases of torture or other cruel, inhuman or degrading treatment or punishment (emphasis added).

CSC's failure to adequately conduct a systematic review of its classification system, and in particular, CSC's failure to recognize the differences in race and gender of FSW in its provision of programs and service, constitutes "cruel and inhuman or degrading treatment" of FSW classified by CSC as maximum security prisoners, violations of both Articles 3 and 6 of the *Declaration*.

The *Convention* is substantively similar to the *Declaration.* As a signatory to the *Convention,* Canada is in violation of Articles 16 and 11 for the same reasons it has contravened Article 6 of the *Declaration*:

> Article 16 (1): Each State Party, shall undertake to prevent any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined by article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligation contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture to other forms of cruel, inhuman or degrading treatment or punishment (emphasis added).
>
> Article 11: Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture [*as per Article 16: other acts of cruel, inhuman or degrading treatment or punishment*]

vi) Declaration and Convention on the Elimination of Racial Discrimination

The United Nations enshrines State obligations for the elimination of racial discrimination in the following international instruments:

> *United Nations Declaration on the Elimination of All Forms of Racial Discrimination* Proclaimed by General Assembly resolution 1904 (XVII) of 20 November 1963.
>
> *International Convention on the Elimination of All Forms of Racial Discrimination* Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1966 in accord with Article 19.

CSC has breached Article 4 of the *Declaration* by failing to address the ongoing discrimination against Aboriginal FSW, and by failing to implement the many recommendations to ameliorate that discrimination. Once again, CSC's application of maximum security classification to FSW and its general assessment practices provide useful examples of CSC's discriminatory practices given that they affect such a significant population of Aboriginal FSW (41%):

> Article 4: All States shall take effective measures to revise governmental and other public policies and to rescind laws and regulations which have the effect of creating and perpetuating racial discrimination wherever it exists. They should pass legislation for prohibiting such discrimination and should take all appropriate measures to combat those prejudices which lead to racial discrimination.

CSC's failure to recognize the constitutionally protected right of Aboriginal peoples to administer their own forms of justice constitutes a further violation of the *Declaration,* in light of the preamble:

> Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith… in particular the necessity of bringing colonialism to a speedy and unconditional end.

vii) Summary

The following is a comprehensive list of the international instruments that CSC has violated through its discriminatory treatment of FSW and its ongoing failure to remedy the discrimination.

- *SMRs*[109]: s. 6(1), s. 8(a), s. 51(3), s. 59, S. 66(1), s. 67.
- *Body of Principles for the Treatment of Prisoners*[110]: Principles 1, 3, and 28.
- *Basic Principles for the Treatment of Prisoners*[111]: s. 2, s. 5.
- *International Covenant on Civil and Political Rights*[112]: Articles 7 and 10.
- *Convention on the Elimination of All Forms of Discrimination of against Women*[113]: Articles 2 and 3.
- *Declaration Against Torture*[114]: Articles 3 and 6.
- *Convention Against Torture*[115]: Articles 11, and 16.
- *Declaration on Elimination of Racism*[116]: Article 4.
- *Convention on Elimination of Racism*[117]: Preamble.

Canada claims to be a leader in the fields of international human rights and corrections. The examples set out above would suggest otherwise and call to the Canadian Human Rights Commission to address and redress the continued discrimination experienced by FSW in Canada.

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[109] *Supra*, note 70.

[110] As cited in full on page 27.

[111] As cited in full on page 27.

[112] *Supra*, note 103.

[113] *Supra*, note 108.

[114] As cited in full on page 31.

[115] As cited in full on page 33.

[116] As cited in full on page 33.

[117] As cited in full on page 33.

V. Remedies

CSC's breach of its fiduciary duty to FSW and Aboriginal people, and its breach of international law make it abundantly clear that the status quo cannot continue. The broad remedial mandate of the Canadian Human Rights Commission provides the foundation for the possibility of significant change in CSC's treatment of FSW. The starting point for any proposed remedy should be the implementation of the remedies sought by the Canadian Association of Elizabeth Fry Societies (CAEFS), including the full implementation of the recommendations of Justice Arbour made in 1996. These include: 1) the development of an external oversight body to enforce compliance with the law and human rights; 2) the development of a prisoner court challenges fund designed to enable prisoners to have access to avenues to remedy any further breaches of Canadian law and international obligations; and 3) compensation for past and on-going breaches of FSW's rights and the government's breaches of fiduciary duties.

VI. Conclusion

> *The history of opportunities which have been missed has touched upon virtually every issue which was directly or indirectly raised by the events under consideration by this Commission. Section 3 of the CCRA asserts that the purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society…. The society in which many women offenders live is neither peaceful nor safe. By the time they go to prison they should be entitled to expect that it will be just.*[118]

Despite the many inquiries and reports that have highlighted the discrimination faced by FSW on the basis of their sex, race, mental, cognitive disability or illness, the Canadian government, and especially CSC, continues to fail to remedy the discrimination. This paper has described how CSC's apparent refusal to implement the recommendations in the reports is a breach of its fiduciary duty to FSW. The analysis and conclusion is founded upon the issues that have been identified in the reports, including the application of discriminatory security assessment and classification methods that result in the application of maximum security designation and the consequent segregated isolation of women, including, for the past seven years, the housing of women in male prisons.

CSC, as an agent of the Crown, has a special fiduciary relationship with Aboriginal peoples and particularly with Aboriginal FSW in its care. CSC's failure to acknowledge Aboriginal peoples' self-government right to administer justice,

[118] Arbour, *supra,* note 7, at 248.

constitutionally protected in section 35(1) of the *Constitution,* is a breach of CSC's fiduciary duty to Aboriginal peoples.

The discrimination experienced by FSW – both in the primary discriminatory practices and the ongoing failure to remedy those practices - violates a number of rights enshrined in international human rights instruments to which Canada is signatory or has made a commitment to honour.

This paper is written in honour of FSW with the aim of highlighting CSC's breach of the fiduciary duty it owes to FSW, and CSC's further breaches of the international human rights of FSW. NAWL urges the Canadian Human Rights Commission to recognize the particular vulnerability of FSW as outlined throughout this paper, and as evidenced in FSW's interaction with the legal system, including human rights commissions or other bodies charged with investigating their circumstances and treatment. Due to the power imbalance between FSW and their jailers, CSC, and the marginalization most FSW have experienced both inside and outside of prison, it may be difficult for FSW to speak about their experiences and to expect a response from government bodies.[119]

CSC's continued failure to remedy discrimination against FSW must be redressed; the Canadian Human Rights Commission is strongly urged to heed the words of Professor Michael Jackson, and demand that CSC ameliorate the discrimination faced by FSW:

> *… it takes vigilance and courage, both individual and collective, to ensure that human rights are protected at those points where they become most vulnerable. Within Canada, that vulnerability is nowhere more evident than inside penitentiaries.*[120]

[119] Mistrust of the legal system is particularly prevalent among Aboriginal people. As found by the Aboriginal Justice Inquiry of Manitoba:

[I]t is clear that while Aboriginal peoples have many of the same legal problems as non-Aboriginal people, and some unique ones as well, they do not turn to the legal system to resolve them... When they do engage the legal system, or become engaged by it, the manner in which their problems are dealt with often is out of tune with their unique position as Aboriginal people. As a result, they have come to mistrust the Canadian legal system and avoid it when possible. *Supra*, note 28 at 252.

[120] Jackson, *supra,* note 83.

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