Detailed Position of the Native Women's Association of Canada on the Complaint Regarding the Discriminatory Treatment of Federally Sentenced Women by the Government of Canada filed by the Canadian Association of Elizabeth Fry Societies on May 05, 2003

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The Native Women's Association of Canada [the "NWAC"] is an Aboriginal women's representative organization for Aboriginal women in Canada that has been in existence since 1973. NWAC is interested in achieving sexual equality for all Aboriginal women. The NWAC is particularly interested in the human rights complaint filed by the Elizabeth Fry Societies against the Government of Canada, especially the Correctional Service of Canada [the "CSAC"] on March 08, 2001 and hopes to see changes in the five following areas:

1. Decarceration of Aboriginal women in the federal prison system;
2. Capacity-building in Aboriginal communities to facilitate reintegration of Aboriginal women prisoners back into Aboriginal society;
3. Facilitation and implementation of ss. 81 and 84 of the *Corrections and Conditional Release Act* for the benefit of criminalized Aboriginal women prisoners;
4. Compensation for Aboriginal women prisoners based on the Correctional Service of Canada's [the 'CSC"] breach of its fiduciary duty to Aboriginal prisoners; and
5. Standardization of the treatment of federal Aboriginal women prisoners in British Columbia.

The following elaboration is provided by way of summarizing the concerns of NWAC in these areas.

1. Decarceration of Aboriginal women in the federal prison system. Because of rampant racism within the criminal justice system at all levels leading to the increase in the numbers of Aboriginal women incarcerated federally—

from 15% in 1984 to 23% today—NWAC is asking for the decarceration of Aboriginal women within Canada's penitentiary system. NWAC would like to explore with CSC and other interested parties alternatives to incarceration including the use of section 81 to establish community-based healing facilities for all Aboriginal women prisoners including those classified as "maximum security".

2. Capacity-building in Aboriginal communities to facilitate reintegration of Aboriginal women prisoners' back into Aboriginal society. If Aboriginal women prisoners within the Canadian penitentiary system are to be decarcerated beginning in the near future and over a period of years—the shorter the better—Canada needs to invest financial resources at the Aboriginal community-level to build the capacities of those communities to reintegrate Aboriginal women prisoners with their communities and families. Such capacity building can use federal dollars already targeted for Aboriginal community use including job creation, training, employment, economic development, social services, health and so on. Crime prevention dollars and Department of Justice grants and contributions have also been made available to community projects. NWAC requests that some of these funds, and a new special fund aimed at Aboriginal female reintegration and community capacity-building, be aimed at Aboriginal women's representative organizations to facilitate this process.
3. Facilitation and implementation of ss. 81 and 84 of the *Corrections and Conditional Release Act* [the "CCRA"] for the benefit of Aboriginal women prisoners. NWAC has worked with CSC to implement section 81 and

section 84 of the CCRA unsuccessfully. NWAC proposes the establishment of a joint "NWAC-CSC Planning Committee on Sections 81 and 84" to set target dates for a plan of action to implement these sections of CCRA aimed at bringing Aboriginal women prisoners under Aboriginal jurisdiction for healing and reintegration back to their community roots.

4. Compensation for Aboriginal women prisoners for CSC's breach of fiduciary obligations owing to them. NWAC proposes the establishment of an office headed by an Aboriginal woman lawyer/judge/criminologist, supported by CSC staff and Aboriginal professionals to remedy the breach by CSC of its' fiduciary duty to Aboriginal women prisoners with a final report to the Minister, the Solicitor General and the Canadian Human Rights Commission for implementation.
5. Standardization of the treatment of federal Aboriginal women prisoners in British Columbia. The incarceration of federal Aboriginal women prisoners

   in B.C. facilities needs to be standardized with the treatment of federal women prisoners elsewhere within the federal system to ensure they receive adequate and meaningful programming and humane treatment without discrimination based on federal or Aboriginal status.

   Although this is not yet happening elsewhere in Canada, as evidenced by this human rights complaint, the return of federal women prisoners in B.C. to the jurisdiction of CSC and the planned move from BCCW to Sumas

Centre provides a unique opportunity in B.C. to remedy the situation and provide an improved implementation model for the rest of the country.

Those were NWAC's preliminary submissions. What follows is an elaboration on the NWAC proposals and position with respect to the Elizabeth Fry Human Rights Complaint.

CHAPTER ONE

1. Decarceration of Aboriginal women prisoners in the federal prison system,
2. Capacity-building in Aboriginal communities to facilitate reintegration of Aboriginal women prisoners back into Aboriginal society,
3. Facilitation and implementation of ss. 81 and 84 of the *Corrections and Conditional Release Act* for the benefit of Aboriginal women prisoners.

Aboriginal women are disproportionately over represented within the federal prison system. The purpose of this paper is to examine options for the decarceration of Aboriginal women once they have been arrested, tried, found guilty, and sentenced to a term of imprisonment of two-years-plus-a-day. In other words, this paper examines options for federally sentenced women as opposed to Aboriginal women serving two years less a day in prison in provincial and territorial jails. The question here is whether decarceration is an option.

While equality rights of federally sentenced Aboriginal women prisoners will be considered in detail later in this paper, it is important to note that the courts have held that the constitutional, Aboriginal and treaty rights of aboriginal peoples ought to be treated specially in light of their history and entrenched rights.[1]

As a point of departure, the *Criminal Code* of Canada [hereinafter "CCC"] provides for Aboriginal persons accused of criminal offenses to be treated fairly

[1] *Corbiere v. Canada (Minister of Indian and Northern Affairs)* (1999), 239 N.R. 1, (sub. Nom. *Corbiere v. Canada (Minister of Indian & Northern Affairs)* 173 D.L.R. (4th) 1 S.C.C. "Thus, in the case of equality rights affecting Aboriginal people and communities, the legislation in question must be evaluated with special attention to the rights of Aboriginal peoples, the protection of the Aboriginal and treaty rights guaranteed in the Constitution, the history of Aboriginal people in Canada, and with respect for and consideration of the cultural attachment and background of all Aboriginal women and men." [D.L.R. at p. 64]

by the courts in sentencing taking into account their aboriginality. Section 718.2 (e) of the CCC[2] has been dealt with by Judges in criminal trials throughout Canada in considering sentencing options for Aboriginal persons accused and convicted of criminal activity. The courts have interpreted s. 718.2(e) of the CCC as meaning Aboriginal persons should be treated differently.[3]

The *Corrections and Conditional Release Act* [hereinafter "CCRA"] already allows for the decarceration of federally sentenced Aboriginal women prisoners [hereinafter FSAWP] with consent of the offender and under agreement between the Correctional Service of Canada [hereinafter "CSC"] and an Aboriginal community at sections 81-84 of the *Act*.[4] Whether a FSAWP is sentenced to a two-year-plus-a-day term or a longer sentence[5], she may consent for a transfer in custody to an Aboriginal community willing to provide long-term supervision.

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[2] S. 718.2(e) "A court that imposes a sentence shall also take into consideration the following principles: … (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."

[3] *R. v. Gladue* (1999), 133 C.C.C. (3d) 385, 238 N.R. 1, [1999] 1 S.C.R. 688 (S.C.C.): "The remedial component of the provision consists not only in the fact that it codifies a principle of sentencing, but, far more importantly, in its direction to sentencing judges to undertake the process of sentencing Aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case. [p. 25]

[4] CCRA, s. 79. "Definitions". In sections 80 to 84, "Aboriginal" means Indian, Inuit or Metis; "Aboriginal community" means a first nation, tribal council, band, community, organization, or other group with a predominantly Aboriginal leadership; "correctional service" means services or programs for offenders, including their care and custody. S.C. 1992, c. 20, s. 79.
Programs, CCRA, s. 80. "Without limiting the generality of section 76, the Service shall provide programs designed particularly to address the needs of Aboriginal offenders." S.C. 1992, c. 20, s. 80.
Agreements, CCRA, s. 81. (1) "The Minister, or a person authorized by the Minister, may enter into an agreement with an Aboriginal community for the provision of correctional services to Aboriginal offenders and for payment by the Minister, or by a person authorized by the Minister, in respect of the provision of those services.
Scope of Agreement, CCRA, s. 81.(2) "Notwithstanding subsection (1), an agreement entered into under that subsection may provide for the provision of correctional services to a non-Aboriginal offender.
Placement of offender. CCRA, s. 81.(3) In accordance with an agreement entered into under subsection (1), the Commissioner may transfer an offender to the care and custody of an Aboriginal community, with the consent of the offender and of the Aboriginal community. S.C. 1992, c. 20, s. 81.

[5] Plans with respect to long-term supervision. CCRA, s. 84.1 "Where an offender who is required to be supervised by a long-term supervision order has expressed an interest in being supervised in an Aboriginal community, the Service shall, if the offender consents, give the Aboriginal community (a) adequate notice of the order; and (b) an opportunity to propose a plan for the offender's release on supervision, and integration, into the Aboriginal community. [Changed by 1997, c. 17, s. 15; in force 1997, August 1; under authority SI/97-84. S.C. 1997, c. 17, s. 15]

To achieve decarceration of FSAWP under supervision of an Aboriginal community, the CSC would need to put into place a policy, procedure, and budget [hereinafter "The Policy"] in consultation with its three levels of Aboriginal advisory committees [hereinafter "AAC"] locally, regionally and nationally.[6] The Policy could include Indians, Metis and Inuit FSAWP. In addition, the development and implementation of a Private Home Placement Model specific to Aboriginal offenders and particularly for Aboriginal women prisoners falls within the possibilities of ss. 81 and 84 of the *CCRA,* and given the proper resources the NWAC would be prepared to design and deliver. The decarceration of FSAWP is not outside the realm of possibilities, and is within changes introduced into the CCRA in 1992.[7]

Provisions have also been made for Aboriginal offenders to apply for parole with Aboriginal communities, provided both give their consent. With respect to FSAWP, parole opportunities within Aboriginal communities are often unavailable due to the lack of facilities, lack of trained personnel within Aboriginal communities to supervise parolees, lack of funds to put in place adequate parole programs and a host of other socio-economic problems suffered in common by isolated and rural Aboriginal communities.

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[6] Advisory Committees, CCRA, s. 82.(1) "The Service shall establish a National Aboriginal Advisory Committee, and may establish regional and local Aboriginal advisory committees, which shall provide advice to the Service on the provision of correctional services to Aboriginal offenders. Committees to Consult. CCRA, s. 82.(2) "For the purpose of carrying out their function under subsection (1), all committees shall consult regularly with Aboriginal communities and other appropriate persons with knowledge of Aboriginal matters. S.C. 1992, c. 20, s. 82.

[7] CCRA, s. 84. "Where an inmate who is applying for parole has expressed an interest in being released to an Aboriginal community, the Service shall, if the inmate consents, give the Aboriginal community (a) adequate notice of the inmate's parole application; and (2) an opportunity to propose a plan for the inmate's release to, and integration into, the Aboriginal community. S.C. 1992, c. 20, s. 84.

While FSAWP are serving time in CSC facilities—whether in women's regional prisons, provincial institutions, or men's federal prisons—they are entitled under the CCRA to specific programming for Aboriginal offenders and entitled to programs available to federally sentenced women.[8] Aboriginal female elders and spiritual leaders have been sporadically employed to provide spiritual services and guidance to FSAWP at the Healing Lodge in Maple Creek, Saskatchewan[9] and at the other four regional female correctional facilities. They have also been employed to provide some spiritual services to FSAWP serving time in provincial prisons and in men's federal prisons. The Aboriginal elders are supposedly put on much the same footing as other spiritual advisers including priests, Protestant clergy and so on who perform religious services for the general prison population. In fact, many Elders are restricted from entrance to an Institution depending on the accompanying paperwork forwarded to main security by the Aboriginal Liaison. Further the allocation of time to provide spiritual services in the form of sweat lodges, teachings, ceremonies and cultural counselling verges on minimal and inefficient at best, in most if not all institutions providing custody for Aboriginal women prisoners.

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[8] Programs for Offenders. Programs for offenders generally. CCRA, s. 76. "The Service shall provide a range of programs designed to address the needs of offenders and contribute to their successful reintegration into the community. S.C. 1992, c. 20, s. 76.
Programs for female offenders. CCRA, s. 77. "Without limiting the generality of s. 76, the Service shall (a) provide programs designed particularly to address the needs of female offenders; and (b) consult regularly about programs for female offenders with (i) appropriate women's groups, and (ii) other appropriate persons and groups
With expertise on, and experience in working with female offenders. S.C. 1992, c. 20, s. 77.

[9] The Healing Lodge at Maple Creek, Saskatchewan is built on an Indian reserve. The planning committee for the Healing Lodge consisted of representatives of CSC, national Aboriginal representatives including from the Native Women's Association of Canada, national Aboriginal female elders who had experience working in correctional facilities, local male and female elders from the Band, Band representatives and people from the town of Maple Creek. The Healing Lodge site was selected by Aboriginal elders and the lands were provided on a long-term basis to CSC for the facility. Local Band members were trained for a year to take positions within the new facility; an Aboriginal female Director was hired by CSC, and some custodial staff were provided by CSC.

It is in the field of prisoner programming and servicing that FSAWP have been discriminated against based on sex and race because they are given programs that are not geared to getting them ready for release, and they are inappropriate for them as women and Aboriginal people. This is a violation of their sexual and racial equality rights guaranteed under the *Canadian Charter of Rights and Freedoms*[10] [hereinafter the *Charter*]. The provincial prison in Burnaby, British Columbia was proud of a dog-grooming program provided for inmates, but is it relevant to preparing FSAWP for reintegration into Aboriginal and Canadian society? Aboriginal programming has been provided to federally sentenced Aboriginal men and FSAWP have had little access to those programs because of the unwillingness of CSC to put FSAWP in the same "classroom" as men. Where FSAWP are serving time in men's prisons, they have generally been isolated from the men and their programming, and have been kept in their own isolated block with little or no access to common facilities e.g. gymnasium if there is one, library if there is one, the yard if there is regular access, and so on. For these women, they are either kept in men's prisons so they may have better access to their families—which needs to be documented—or because the CSC has classified them as "maximum security" and barred their imprisonment in women's regional facilities—which also needs to be documented. The FSAWP serving hard time in federal men's prisons without adequate female programming to facilitate their reintegration into Aboriginal and Canadian society

[10] *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.

are likely having some of their *Charter* violated including s. 12 [cruel and unusual punishment], ss. 15 and 28 [right to sexual equality][11].

The fact that Aboriginal women—as well as Aboriginal men—have a right to be differentially treated in sentencing by judges has been called "reverse discrimination" by some prosecutors. This matter was laid to rest by the Supreme Court of Canada which found that s. 718.2(e) were aimed at reducing overrepresentation of Aboriginal peoples within the Canadian prison system. The Supreme Court of Canada refused to consider the constitutional validity of s. 718.2(e) and rejected the "reverse discrimination" argument.[12]

The Canadian courts and Canadian law—the *Criminal Code of Canada*, the *Corrections and Conditional Release Act*, the *Constitution Act,* and the *Charter*—have recognized that Aboriginal women are over represented within the Canadian penal system federally, and have provided legal avenues to put in place programs, services, and budgets for Aboriginal communities to provide short-term and long-term custody and treatment of Aboriginal offenders. The Aboriginal communities have also been provided in law with a right to provide custody and treatment of Aboriginal offenders—including women—for long-term

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[11] Constitution Act, 1982. R.S.C. 1985, Appendix II, No. 44, En. Canada Act 1982 (U.K.), c. 11; Am. Constitution Amendment Proclamation, 1983, SI/84-102, Schedule. 15.(1) **Equality before and under the law and equal protection and benefit of law** – Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
(2) **Affirmative Action Programs**—Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[12] *R. v. Gladue, op.cit.,* CCC at p. 420. "…the aim of s. 718.2(c) is to reduce the tragic overrepresentation of Aboriginal people in prisons. It seeks to ameliorate the present situation and to deal with the particular offence and offender and community. That fact that a court is called upon to take into consideration the unique circumstances surrounding these different parties is not unfair to non-Aboriginal people. Rather, the fundamental purpose of s. 718.2(e) is to treat Aboriginal offenders fairly by taking into account their difference. [C.C.C. at p. 420]

supervision, or in the short term for either supervision, parole or after-care services and programming.

FSAWP need to give their consent before the CSC and Aboriginal communities can sign agreements for their supervision in the short- or long-term. In order for FSAWP to give their consent they need to know the provisions of the CCRA, and have access and communication with Aboriginal communities willing to take FSAWP for supervision and programming. The CSC needs to educate FSAWP about their Aboriginal options for decarceration in federal prisons, and needs to assist Aboriginal communities financially to prepare and train Aboriginal people to provide supervision and programming within the communities. Neither of these two requirements has been consistently put in place by CSC and with current budget constraints CSC is denying transfer under these sections of the *CCRA*. In addition, it is the CSC who determines the viability of an Aboriginal community to provide for either the care and custody of an offender or for parole supervision thereby limiting the innovative and cultural validity of many communities willing to open their homes for reintegration of offenders.

The advantages of FSAWP remaining within CSC correctional facilities are: prisons are well established; a trained correctional force is already in place; CSC has a multi-million dollar budget to operate federal correctional facilities; CSC has a well-established and manned-management system to warehouse over 10,000 prisoners; and CSC has a multi-million dollar program to put in place in-house and contracted programs and services for its 10,000+ prison population. For female offenders, CSC has five regional facilities including the Healing Lodge at Maple Creek, Saskatchewan and has contracted with at least

two provinces to house their overflow of female offenders in British Columbia and Saskatchewan. There remain no facilities in the far north for Aboriginal women prisoners or any facility specific to Inuit women. For federally sentenced women, the CSC also accesses isolated space within their men's correctional facilities to house female offenders and makes available to them their Regional Psychiatric prisons for designated programs including sexual offenses and mental disorders.

The disadvantages of allowing FSAWP to remain within federal CSC correctional facilities include the failure of CSC to provide meaningful programming and services leading to reintegration into Aboriginal communities and Canadian society; the disproportionate labeling of FSAWP as "maximum security" and the harsh treatment this entails; the disproportionate housing of FSAWP in men's federal prisons with little access to common areas and meaningful female programs aimed at Aboriginal offenders; the forced long-term separation of FSAWP from their children, families and communities; and their discriminatory treatment based on sex and race within the Canadian penal system during incarceration. A disproportionately high number of FSAWP have committed suicide in prison, particularly at the old Prison for Women at Kingston, Ontario. A disproportionately high number of FSAWP have committed violent crimes—including assault, assisted suicide—while incarcerated federally leading to longer sentences. Finally, a disproportionately high number of FSAWP began their federal incarceration at a relatively young age, including some for violent crimes. By their own admission, FSAWP, like the majority of Aboriginal females in Canada, were subjected to high levels of violence within their childhood

homes, as young adults and in married—including common-law—situations. Federal imprisonment has done little to change the lives of FSAWP because of the discrimination in violence within CSC correctional facilities—by other inmates, by staff, by male prisoners and by other Aboriginal women in prison. Radical changes, including a change in the penal philosophy governing CSC, need to be developed and implemented to end race and sex discrimination against FSAWPand to habilitate them for re-entry into Aboriginal community life and Canadian society. Part of that needed change may be the development of policies, guidelines and budgets for Aboriginal communities to assume responsibility for short- and long-term supervision of FSAWP.

CHAPTER TWO—EQUALITY RIGHTS

Federally sentenced Aboriginal women prisoners have a right to equality under ss. 15 and 28 of the *Charter*. This means that FSAWP are entitled to equal treatment with the same sex regardless of race, and with prisoners of the same race but opposite sex. The Supreme Court of Canada held in *Andrews* that the approach to equality rights focuses on three elements: differential treatment; whether the differential treatment is based on an enumerated or analogous ground; and whether there is a "discriminatory" purpose or effect.[13] In examining the disadvantages of FSAWP remaining within the CSC correctional facilities as being discrimination based on sex and race, the court called equality in the constitutional context "a comparative context". In other words, to determine whether discrimination exists against FSAWP requires an analysis of their prison condition compared to other federally sentenced female offenders [hereinafter "FSW"] and a comparison to federally sentenced Aboriginal men [hereinafter FSAM"].[14] To make a determination whether FSAWP are discriminated against compared to either other FSW or FSAM can include an examination of CSC's female and Aboriginal programming and services for the

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[13] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. Quoted in *Law v. Canada [Minister of Employment and Immigration]*, [1999] 1 S.C.R. 497 at para. 23 [Quicklaw]: "McIntyre J. in Andrews adopted an approach to s. 15(1) which focuses upon three central elements: (1) whether a law imposes differential treatment between the claimant and others; (2) whether an enumerated or analogous ground of discrimination is the basis for the differential treatment; and (3) whether the law in question has a "discriminatory" purpose or effect."

[14] *Law*, op.cit. para. 24: "…equality is a comparative concept, 'the condition of which may only be attained or discerned by comparison with the condition of others in a social and political setting in which the question arises'. It is impossible to evaluate a s. 15(1) claim without identifying specific personal characteristics or circumstances of the individual or group bringing the claim, and comparing the treatment of that person or group to the treatment accorded to a relevant comparator. This comparison determines whether the s. 15(1) claimant may be said to experience differential treatment, which is the first step in determining whether there is discriminatory inequality for the purpose of s. 15(1)."

comparative group to determine whether they fail to take into account "the underlying differences" of FSAWP.[15]

The use of comparator groups associated with a formal equality analysis can be troubling and can result in further discriminatory treatment towards FSAWP for reasons raised by L.E.A.F. in their draft paper of January 26, 2003. We saw in *Lavell*, heard by the Supreme Court of Canada[16], dealing with sex discrimination under the *Indian Act* using the *Canadian Human Rights Act*[17], that when Indian married women were compared to non-Indian married women, the highest court found no sex discrimination. Women follow men in marriage! The Supreme Court of Canada used the comparator analysis to determine if Indian women who lost Indian status and band membership for marrying non-Indians were discriminated against compared to Indian men who married non-Indian women. In that case, non-Indian women gained Indian status and band membership; Indian women lost Indian status and band membership for intermarrying. The Court held the Indian women were not discriminated against when compared to Canadian married women who followed their husbands in marriage. The Court did not even compare Indian men and Indian women in the intermarriage context. Indian men and Indian women were not a comparator group used for analysis purposes by Canada's highest court.

The NWAC position is similar to LEAF's position in finding that further discrimination could result in using a simplistic approach and viewing only the formal equality perspective. However, if a comparator group analysis is used,

[15] *Law*, op.cit., para. 25: "Hence, equality in s. 15 must be viewed as a substantive concept. Differential treatment, in a substantive sense, can be brought about either by a formal legislative distinction, or by a failure to take into account the underlying differences between individuals in society."
[16] *A.-G. of Canada v. Lavell, Isaac v. Bedard* (1973), [1974] S.C.R. 1349.
[17] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

there are two comparator groups for FSAWP—federally sentenced Aboriginal men and federally sentenced women. The reason for this approach by NWAC is taken because the CCRA has specific provisions calling for the CSC to implement Aboriginal-specific programs for Aboriginal offenders and specific provisions calling for the use of special program for federally sentenced women. For reasons expounded by LEAF and other others, male-based programming is not appropriate for women. It is further NWAC's position that programs and services designed for federally sentenced women must take into account the aboriginality of FSAWP. It is the importation of the aboriginality of programming and servicing for Aboriginal men which must be transferred to programming and servicing for FSW. Hence, the need for two comparator groups.

Finding the "comparator" group against which the treatment of FSAWP could be measured is the typical and expected method to be employed. The NWAC would like to point to the need for determining the issue of discrimination and differential treatment of FSAWP *without* the expected use of a comparator group. However, as FSAWP are a select group within the CSC the following is an argument regarding the use of a "comparator" group. FSAWP are women and Aboriginal. In the context of imprisonment within CSC correctional facilities the two comparator groups would be other FSW and FSAM. Because the equality guarantee under the *Charter* is a "comparative concept", not to be considered in the abstract. Finding the comparator group "will be relevant when considering many of the contextual factors in the discrimination analysis."[18] As has been noted earlier in this paper, ss. 81-84 of the CCRA anticipate that

[18] *Law*, op.cit., para. 56.

Aboriginal offenders will be treated differently compared to other offenders, and s. 76 that there will be put in place programs for women specifically. In other words, programs and services are not to be designed for federally sentenced men and then offered to women as well as men. Women offenders may have female specific programming. Such differential treatment of Aboriginal offenders was passed into law in its final amendments in 1992 and can be justified under s. 15(2) of the *Charter*.

Where does this place programming and services for FSAWP? It means they can take advantage of female programming, but have it designed to meet the needs of FSAWP. It also means they can take advantage of Aboriginal male programming and services, but have it adjusted to meet the needs of women. The comparator groups then are FSW and FSAM. The target of a *Charter* challenge includes the CCRA provisions which guide CSC in its treatment of FSW and which guide CSC in its treatment of federally sentenced males.[19] It is the claimant who chooses the comparator group. However, where for some reason the claimant neglects to choose a group or chooses the wrong group for comparison it is not outside the realm of the court to select the appropriate group. It would be unusual for a court to evaluate a ground of discrimination "not pleaded by the parties", but a correction might be within the court's realm.[20] For

[19] *Law*, op.cit., para. 57: "Both the purpose and the effect of the legislation must be considered in determining the appropriate comparison group or groups. Other contextual factors may also be relevant. The biological, historical, and sociological similarities or dissimilarities may be relevant in establishing the relevant comparator in particular, and whether the legislation effects discrimination in a substantive sense more generally: see *Weatherall*, op.cit., pp. 877-78.

[20] *Law*, op.cit., para. 58: "When identifying the relevant comparator, the natural starting point is to consider the claimant's view. It is the claimant who generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry, thus setting the parameters of the alleged differential treatment that he or she wishes to challenge. However, the claimant's characterization of the comparison may not always be sufficient. It may be that the differential treatment is not between the groups identified by the claimant, but rather between other groups. Clearly a court cannot, *ex proprio motu*, evaluate a ground of discrimination not pleaded by the parties and in relation to which no

our purposes, two comparator groups could be selected, namely Aboriginal men prisoners and federally sentenced women.

In a *Charter* challenge, FSAWP would have to prove they were the subject of discrimination by their lack of programming or servicing, by the nature of their programming and servicing, by their incarceration in men's facilities or provincial jails, by their classification as "maximum security" disproportionate to other FSW, by their lack of treatment and habilitation, and by denial of their CCRA rights under ss. 81-84. FSAWP can challenge CSC on two grounds of discrimination based on enumerated grounds in s. 15(1) of the Charter—race and sex—according to Justice McIntype deciding in *Andrews* and reported in *Law*.[21] Once FSAWP have met the onus of showing they have been denied "equal protection" and or "equal benefit" of the law in CSC's care and custody, and show that their denial has been based on enumerated grounds of race and sex, the violation under s. 15(1) will be established.[22] The court can also consider stereotyping, prejudice, and historical disadvantage of FSAWP both as a background to their original sentencing, to their incarceration and discriminatory treatment in CSC

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evidence has been adduced: see *Symes*, op.cit., at p. 762. However, within the scope of the ground or grounds pleaded, I would not close the door on the power of a court to refine the comparison presented by the claimant where warranted.

[21] *Law*, op.cit., para. 26: "…McIntyre J. defined 'discrimination' in the following terms, at pp. 174-75: '… discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."

[22] *Law*, op.cit., para. 33: In *Miron v. Trudel*, [1995] 2 S.C.R. 418, McLachlin J. (Sopinka, Cory, Iacobucci JJ. Concurring) outlined a similar s. 15(1) framework as follows, at para. 128: "The analysis under s. 15(1) involves two steps. First, the claimant must show a denial of "equal protection" or "equal benefit" of the law, as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. If the claimant meets the onus under this analysis, violation of s. 15(1) is established.

facilities and to address positively why FSAWP should be allowed to take advantage of ss. 81-84 of the CCRA and serve their sentences, both short- and long-term—in Aboriginal care and custody.[23]

Although the cases are rare in which a person or group claims more than one ground of discrimination, it is fully possible to bring such a case. The Supreme Court of Canada addressed this point in *Symes* that "it is open to a s. 15(1) claimant to articulate a discrimination claim on the basis of more than one ground."[24] The court has been clear on the approach to be used in examining claims of s. 15(1) breaches and the evidence is likely to show that FSAWP have been discriminated against based on sex and race by CSC policies and procedures.[25] The CSC policies and procedures would constitute the main target of any *Charter* challenge brought by FSAWP, including the failure of CSC to put in policies and procedures under ss. 81-84 of the CCRA. The latest revisions to these sections Parliament took place in 1992 and has given CSC over ten years to consult Aboriginal communities and Aboriginal advisory committees on policies, procedures and budgets for FSAWP to take advantage of ss. 81-84.

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[23] *Law*, op.cit., para. 34: "Although Cory J. in *Egan v. Canada*, [1995] 2 S.C.R. 513 did not, in the passage just quoted from the *Egan* decision, specifically advert to the role of factors such as stereotyping, prejudice, and historical disadvantage in the second step of the discrimination analysis, the remainder of his analysis in that case clearly reveals the fundamental importance of such factors in accordance with the framework established in *Andrews*."

[24] *Law*, op.cit., para. 37 quoting from *Symes v. Canada*, [1993] 4 S.C.R. 695

[25] *Law*, op.cit., para. 39: "…a court should make the following three broad inquiries. First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

The failure to act is as discriminatory as if CSC put in place discriminatory policies and procedures for FSAWP.

The purpose behind s. 15(1) has been articulated by the courts as being designed to promote "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[26] Along these lines, the Supreme Court of Canada that a violation of s. 15(1) and its purpose would cause who are subject to discrimination to believe "Canadian society is not free or democratic as far as they are concerned."[27] Wilson J. of Canada's Supreme Court of Canada focused "upon issues of powerlessness and vulnerability within Canadian society, and emphasized the importance of examining the surrounding social, political, and legal context in order to determine whether discrimination exists within the meaning of s. 15(1)."[28] The Supreme Court of Canada has also held that there can be differences in treatment of male and female offenders without engaging s. 15(1). In a complaint by a male inmate that his section 15(1) were offended when he was searched by a female guard, the court dismissed his claim under the *Charter*, while upholding the right of female prisoners not to be searched by male guards. While on its face this may be discrimination against male offenders, the court held it did not offend section 15(1) of the *Charter*.[29] That

[26] *Law*, op.cit., para. 42 citing *Andrews*, op.cit., McIntyre at p. 171. "The provision is a guarantee against the evil of oppression…" McIntyre, at p. 180-81.
[27] *Law*, op.cit., para. 43 citing *Kask. V. Shimizu*, [1986] 4 W.W.R. 154 (Alta. Q.B.), at p. 161, per MacDonald J.
[28] *Law*, op.cit., para. 43.
[29] *Weatherall v. Canada (Attorney-General)*, [1993] 2 S.C.R. 872 at 877-88 cited in *Law*, op.cit., para. 45. "In suggesting these practices did not violate s. 15(1), La Forest J. explained, at 877-78, that an examination of the larger historical, biological, and sociological context made clear that the practices in question had a different, more threatening impact on women, such that it was not discriminatory in a substantive or purposive sense to treat men and women differently in this regard.

being said, the purpose of s. 15(1) is the promotion of human dignity.[30] In refining the purpose of s. 15(1) McLachlin J. of the Supreme Court of Canada held that "merit, capacity, or circumstance" would be a measure of different applications of the law rather than discrimination.[31] It is the worthiness of each individual in Canada to which s. 15(1) is directed according to the court.[32]

The Healing Lodge at Maple Creek, Saskatchewan, while a laudable experiment, houses only 30-35 FSAWP at any one time, leaving an excess of 60-120 FSAWP to be housed in psychiatric facilities built and staffed for male prisoners, or housed inappropriately in provincial jails, or housed in federal men's prisons, or segregated within the women's regional federal prisons because of their classification as "maximum security".

The court has addressed the meaning of "human dignity" and CSC would be found in breach of the *Charter* based on their definition. One of the important considerations for determining the violation of s. 15(1) right of FSAWP is determining whether their "human dignity" has been trampled by their differential and discriminatory treatment by CSC.

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[30] *Law*, op.cit., para. 47: "The purpose of s. 15(1) has been variously expressed by the members of this Court. In *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, Wilson J., writing in dissent, described the purpose of the section as both protection 'against the evil of discrimination by the state whatever form it takes' (p. 385) and the 'promotion of human dignity' (p. 391). In *R. v. Swain*, [1991] 1 S.C.R. 933, Lamer C.J. stated, at p. 992, that the overall purpose of the section is 'to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society.' In *Tetrault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, at pp. 40-41, La Forest J. referred to the stigmatizing effect of discriminatory treatment, and to the role of s. 15(1) in preventing the imposition of such stigma and the perpetuation of negative stereotypes and vulnerability."

[31] *Law*, op.cit., para. 48, "Similarly in *Miron v. Trudel*, [1995] 2 S.C.R. 418, at para. 131, McLachlin J. stated the overarching purpose of s. 15(1) as being 'to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of merit, capacity, or circumstance."

[32] *Law*, op.cit., para. 50, citing *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 63 where "Cory and Iocabucci JJ. Stated the purpose of s. 15(1) as being to take 'a further step in the recognition of the fundamental importance and the innate dignity of the individual', and in the recognition of 'the intrinsic worthiness and importance of every individual…regardless of age, sex, colour, origins, or other characteristics of a person."

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by law which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity if harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?[33]

When FSAWP are sentenced to men's prisons and caged within a confined area of those prisons with little or no access to common areas or to programs and services available to FSAM or FSW in women's prisons, does this treatment offend their self-respect and self-worth? Where FSAWP are housed in provincial jails in British Columbia and Saskatchewan, and on occasion in Manitoba, where there is an absence of long-term habilitation programs and services leading to their reintegration to Aboriginal and Canadian society, what is the impact of this treatment by CSC on their personal autonomy and self-determination? Where FSAWP are disproportionately over represented within the security classification of "maximum security" leading to isolation in men's and women's prisons by CSC, what is the impact of that treatment by CSC on their physical and psychological integrity and empowerment?

The court test for whether s. 15(1) has been offended and breached the right of FSAWP to equality is both subjective taking into account the individual whose right has been offended, and objective by considering the larger context of the legislation.[34] The court has held that:

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[33] *Law*, op.cit., para. 53.
[34] *Law*, op.cit., paras. 59-61.

> The appropriate perspective is subjective-objective. Equality analysis under the Charter is concerned with the perspective of a person in circumstances similar to those of the claimant, who is informed of and rationally takes into account the various contextual factors which determine whether an impugned law infringes human dignity, as that concept is understood for the purpose of s. 15(1).[35]

The court was clearly concerned with applying what is known as the "reasonable person" test where such person if often considered a white, middle-class male.

In bringing forward a *Charter* challenge, FSAWP should demonstrate pre-existing disadvantages in being both female and Aboriginal in Canadian society. These disadvantages usually pre-date imprisonment and continue throughout the prison experience. While it is not sufficient simply to demonstrate that FSAWP have pre-existing disadvantages, the court has held that:

> These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect, and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable.[36]

FSAWP have documented their pre-existing disadvantages in their individual courts cases, in testimony before the *Arbour Commission Inquiry into the Prison for Women*, and in published articles. There is a written record of their victimization prior to imprisonment, sometimes leading to their conviction or to their disposition with respect to criminal law. The victimization of FSAWP includes sexual and physical assault, emotional and psychological abuse by caregivers, husbands, Aboriginal men and women and by other Canadians prior to their imprisonment.

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[35] *Law*, op.cit., para. 61.
[36] *Law*, op.cit., para. 63.

There are numerous historical abuses suffered as a result of residential and mission schools, foster care and adoption, the lack of equal access to training and employment not to mention the societal oppression experienced generationally and often resulting in internalized oppression.

The definition section of the CCRA makes it clear that "Aboriginal" offenders includes Metis, Inuit and Indian. There is no distinction between Aboriginal offenders including distinctions between Indians and non-status Indians. The *Corbiere* decision of the Supreme Court of Canada recognized off-reserve Indians as an analogous group against whom discrimination is prohibited by section 15(1).[37] In *Corbiere* the court found there was no justification under s. of the *Charter* for the differential treatment of off-reserve band members in governance.

[37] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. "In this case, the exclusion of off-reserve members of an Indian band from the right to vote in band elections, pursuant to s. 77(1) of the Indian Act, is inconsistent with s. 15 of the Charter. Section 77(1) excludes off-reserve band members from voting privileges on band governance, and this exclusion is based on Aboriginality-residence (off-reserve band member status). "Aboriginality-residence" as it pertains to whether an Aboriginal band member lives on or off the reserve is a ground analogous to those enumerated in s. 15. The distinction goes to a personal characteristic essential to a band member's personal identity. Off-reserve Aboriginal band members can change their status to on-reserve Aboriginals only at great cost, if at all. The situation of off-reserve Aboriginal band members is therefore unique and immutable. Lastly, when the relevant *Law* factors are applied, the impugned distinction amounts to discrimination. Off-reserve band members have important interests in band governance, s. 77(1), perpetuates the historic disadvantage experienced by off-reserve band members. The complete denial of that right treats them as less worthy and entitled, not on the merits of their situation, but simply because they live off the reserve. Section 77(1) reaches the cultural identity of off-reserve aboriginals in a stereotypical way. This engages the dignity aspect of the s. 15 analysis and results in the denial of substantive equality.

CHAPTER THREE—FIDUCIARY TRUST OWED TO ABORIGINAL WOMEN

Compensation for Aboriginal women prisoners for CSC's breach of fiduciary obligations owing to them. NWAC proposes the establishment of an office headed by an Aboriginal woman lawyer/judge/criminologist and, supported by CSC staff and Aboriginal professionals to remedy the breach by CSC of its fiduciary duty to Aboriginal women prisoners with a final report to the Minister, the Solicitor General and the Canadian Human Rights Commission for implementation.

Before considering quantum of damages for breach of fiduciary trust duty owed by the Crown in Right of Canada to FSAWP, it is necessary to establish the basis of this trust responsibility. This paper examines the relevant case law from the Supreme Court of Canada on this issue, both generally and as it relates to Aboriginal peoples.

For FSAWP the nature of the relationship between Aboriginal women and the Crown is what gives rise to a fiduciary relationship as was established in the *Guerin* decision, one of a number of Aboriginal cases which considered the Crown's fiduciary trust relationship. As the Supreme Court of Canada held in *Guerin*, "It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed."[38]

The Supreme Court of Canada continues to refine the meaning of fiduciary obligations. While not dealing specifically with the fiduciary relationship between CSC and FSAWP, the law of fiduciary relationships generally could

[38] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 citing *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 384.

apply to their situation in the context of imprisonment. Considered wards of the state until around 1960 from the date of the first *Indian Act* in 1869, the relationship fostered between Her Majesty and her Indian subjects has withstood the test of time. Given that the fiduciary trust responsibility between the Crown and Aboriginal women in federal correctional facilities can be established through the Aboriginal cases on fiduciaries, this paper considers the law more generally in the context of imprisonment. For example, in *Frame v. Smith*, Wilson J. held the following in dissent and the majority of the court did not disagree with her assessment of fiduciary obligations. She stated:

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
> (1) The fiduciary has 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.
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[39]

Without question CSC holds all the power or discretion with respect to the treatment of FSAWP, and CSC can act unilaterally in exercising that power and discretion. This includes choosing for ten years not to implement ss. 81-84 of the CCRA, which could directly benefit any and all FSAWP. Most importantly, FSAWP are particularly vulnerable or at the mercy of CSC which determines where they will serve their short- and long-term sentences including in provincial jails, men's prisons, men's psychiatric prison facilities, regional women's prisons or the Healing Lodge at Maple Creek, Saskatchewan. The CSC may provide spiritual services of female elders to all FSAWP wherever they are serving their

[39] *Lac Minerals*, op.cit., para. 31 quoting *Frame v. Smith*, [1987] 2 S.C.R. 99 at 135-36.

sentences, or not provide these services regardless of provisions in the CCRA designed to benefit any and all Aboriginal prisoners. The CSC may, but has not done so, provide budgets for Aboriginal communities to prepare themselves to provide short- and long-term supervision of FSAWP. The CSC could foster the development of parole facilities to ensure the safe and secure release of FSAWP without the women having to serve their full sentence. Many federal prisoners are released on parole after serving two-thirds of their sentence. Dependency and vulnerability of FSAWP is one of the key considerations in determining the basis of a fiduciary relationship as was held in *Hospital Products Inc.*[40] In a fiduciary relationship, one "party is at the mercy of the other's discretion".[41] It is the condition of dependency that "moves equity to subject the fiduciary to its strictest standards of conduct."[42]

[40] *Lac Minerals*, op.cit., para. 34 quoting *Hospital Products Ltd. v. United States Surgical Corp.,* page 584, 55 A.L.R. 417 which held: "There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection [page 600] of equity acting upon the conscience of that other…"
[41] *Lac* Minerals, op.cit., para. 34, quoting Professor Weinrib quoted in *Guerin*, op.cit. at 384. Weinrib, Ernest J. "The Fiduciary Obligation" (1975), 25 U. of T.L.J. 1.
[42] *Lac Minerals*, op.cit., para. 35, quoting Professor Ong in "Fiduciaries: Identification and Remedies" (1986), 8 U. of Tasm. L. Rev. 311.

CHAPTER FOUR—ABORIGINAL WOMEN PRISONERS IN B.C.

FSAWP serving sentences at the Burnaby Correctional facility have been doing their time in a provincial facility. This facility houses mainly women serving short-term sentences and youth serving short-term sentences, meaning less than two years. The sentences may range from a few months to 24 months, probably with time off after a period of incarceration. Most notable about provincial jails is their absence of programming and services designed to prepare or habilitate offenders for release to Society. For example, a large number of male sex offenders are serving provincial time rather than federal time, and they are not required to take programming to curb their sexual appetites or relearn more socially acceptable approaches to inter-sexual behaviour. FSAWP may make up the majority of the population of FSW serving time at the Burnaby facility, and many, if not all, are from the Prairie Provinces or elsewhere in Canada.

The earlier position of NWAC on standardization of treatment of FSAWP serving time at Burnaby may have been overtaken by events. That facility is scheduled to be closed, leaving CSC with the option of moving FSW to the regional facilities, men's federal prisons, men's federal psychiatric facilities or other provincial jails. CSC has chosen to move men out of the Sumas Community Correctional Centre and convert it to a women's prison. Sumas, as it is currently known, is located on the same federal land as the Matsqui Institution for men.

CONCLUSION

The position of NWAC is clear.

1. FSAWP can be decarcerated and released for supervision to Aboriginal communities under ss. 81-84 of the CCRA if CSC would put in place policies, procedures and budget to facilitate the preparation of FSAWP and Aboriginal communities and ensure the implementation of those sections.
2. The Human Resources Development Corporation [the "HRDC"] expends millions of dollars for training of Indian, Metis and Inuit annually and has done so under contract with Aboriginal organizations for over 10 years. In cooperation with CSC, HRDC, some of these training and job creation dollars could be used by Aboriginal communities to train personnel to work with Aboriginal offenders—particularly women—within Aboriginal communities.
3. CSC has authority under ss. 81-84 to facilitate and fund capacity building in Aboriginal communities to facilitate reintegration of FSAWP back into Aboriginal society. This can include the building of facilities such as the one constructed on Indian land at Maple Creek, Saskatchewan. The initial investment of CSC in constructing the facility was in excess of $8 million, and it funds the full operation of the facility on Indian land. Another healing lodge for Aboriginal men was built using CSC funds on Indian land near Edmonton, Alberta to house at least 35 male Aboriginal offenders. Given that ten years have expired since ss. 81-84 were last amended to give FSAWP the right to consent to supervision in Aboriginal

communities, and to give Aboriginal communities notice and time to prepare plans for the reintegration of FSAWP with little being done, it is time to make those sections of CCRA operational. It is clear CSC must take a lead role in policy and procedure development, as well as planning of budgets to train personnel in Aboriginal communities to supervise FSAWP.

4. NWAC proposes the establishment of an office headed by an Aboriginal woman lawyer/judge/criminologist, supported by CSC staff and Aboriginal professionals to remedy the breach by CSC and the Crown of its fiduciary duty to Aboriginal women prisoners with a final report to the Minister, the Solicitor General, the Canadian Human Rights Commission and Parliament for Implementation.
5. NWAC requests immediate information on the status of FSAWP serving time at Burnaby provincial correctional facility and plans for their movement to other facilities when the Burnaby facility closes.