

e-document	T-88-21-ID 156
F I L E D	FEDERAL COURT COUR FÉDÉRALE September 08, 2025 08 septembre 2025 Charlotte Torgerson
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Court File No. T-88-21

FEDERAL COURT
PROPOSED CLASS PROCEEDING

BETWEEN:

AILEEN MICHEL

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FRESH AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the *Federal Courts Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Date _____

Issued by: _____
[Registry Officer]

Address of local office: Federal Court of Canada
Pacific Centre, PO Box 10065
3rd Floor, 701 West Georgia Street
Vancouver, British Columbia V7Y 1B6

TO: Attorney General of Canada
His Majesty the King in Right of Canada
Attn: Shalene Curtis-Micallef, Deputy Attorney General of Canada

Relief Sought

1. The Plaintiff claims on her own behalf and on behalf of the Class (as hereinafter defined):
 - a. A declaration that use of or reliance by the Correctional Service of Canada ("CSC") on the Custody Rating Scale, Static Factors Assessment test, Dynamic Factors Identification and Analysis-Revised test and the Reintegration Potential test (the "Impugned Tests") in determining the security classification and/or security placement of female Indigenous inmates infringes and is contrary to s.15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11;
 - b. An order certifying this action as a class proceeding pursuant to Rules 334.16 and 334.17 of the *Federal Courts Rules*, SOR/98-106;
 - c. An order pursuant to Rules 334.12, 334.16 and 334.17 of the *Federal Courts Rules* appointing the plaintiff as the representative plaintiff for the Class;
 - d. An order certifying the following class definition:

All female Indigenous offenders on whom the Impugned Tests were administered on or after January 11, 2015, or, alternatively, on or after January 11, 2019.
 - e. Such just and appropriate remedy as may be ordered pursuant to s.24 of the *Charter*, including an aggregate award of damages to the class for breach of s.15 of the *Charter*;
 - f. Interim, interlocutory and permanent injunctive relief preventing the Correctional Service of Canada from using the Impugned Tests in respect of Class Members;
 - g. A declaration that any Commissioner's Directive requiring the use of the Impugned Tests on female Indigenous inmates is of no force and effect as being *ultra vires* and/or contrary to s.15 of the *Charter* and of no force and effect pursuant to s.52 of the *Constitution Act, 1982*;
 - h. Pre-judgment and post-judgment interest;
 - i. Costs; and
 - j. Such further and other relief as this Honourable Court may deem just.

Nature of this Action

2. This action deals with the use of Impugned Tests by CSC to assess the security classification and security placement of female Indigenous inmates.

The Impugned Tests

Custody Rating Scale

3. The Custody Rating Scale ("CRS") is a standardized test that is used to grade or score federal inmates in the custody of the CSC. The CRS was implemented by CSC in 1991.
4. The CRS consists of an Institutional Adjustment subscale with five items and a Security Risk subscale with seven items. The scoring grid for the CRS is set out in Commissioner's Directive 705-7 ("CD 705-7") in a section entitled "Annex B – Custody Rating Scale". In accordance with the scoring grid, each of the 12 items of the CRS is assigned numerical weights. Each of the subscales generates a separate score, and the subscale with the highest score determines the security classification and security placement recommendation (minimum, medium or maximum) generated by the CRS.
5. The CRS as a whole, each of the subscales and 9 of the 12 items composing the CRS do not accurately assess the risk posed by Indigenous female inmates to the public or to staff or other inmates. The CRS as a whole, in its subscales, and in respect of 9 of the 12 items strongly tends to be inaccurate in respect of risk posed on an individual level by each Indigenous inmate. The CRS as a whole, in its subscales and in respect of 9 of the 12 items is inaccurate in respect of the aggregate risk posed by female Indigenous inmates as a group in comparison with non-Indigenous inmates.
6. The five items in the Institutional Risk subscale are labelled History of Involvement in Institutional Incidents, Escape History, Street Stability, Alcohol/Drug Use and Age (at the Time of Sentencing). The seven items in the Public Safety subscale are Number of Prior Convictions, Most Severe Outstanding Charge, Severity of Current Offence, Sentence Length, Street Stability, Prior Parole and/or Statutory Releases and Age at Time of First Federal Admission.
7. The items in the CRS subscales are characterized within CD 705-7 by the presence or absence of factors that, in respect of female Indigenous inmates, are and tend to be the product of colonial oppression by the Canadian government ("Gladue Factors", per *R. v. Gladue*, 1999 SCC 42), which oppression includes displacement from land, cultural prohibitions, forced residential school

attendance, historic physical and sexual abuse, unwarranted and abusive child apprehensions, and other government actions. The Plaintiff relies on *R. v. Ipeelee*, 2010 SCC 42, for judicial notice of the facts and circumstances of colonial oppression of Indigenous people, including the presence and significance of *Gladue* Factors.

8. *Gladue* Factors encoded into the structure of the CRS subscales include employment status and history of the inmate, the type and stability of family and relationship function and dysfunction, the inmate's level of education, the inmate's history of criminal involvement and the inmate's housing status.
9. The CRS calculates scores and makes recommendations based on the presence of *Gladue* Factors. The greater the presence of *Gladue* Factors, the higher the security classification and security placement recommendation.
10. The CRS grades, scores and recommendations significantly contribute to the assessment by CSC of the risk posed by each female Indigenous inmate to the public and to staff and other inmates.
11. During the initial period of incarceration, known as the Offender Security Level (or "OSL") period, which has a duration of up to 90 days, CRS grades, scores or recommendations are the only tool used by CSC to assign security classification and security placement to female Indigenous inmates, subject only to extraordinary discretionary override by a warden. For the OSL period, the CRS is the method used to classify female Indigenous inmates.

Static Factors Assessment Test

12. The Static Factors Assessment ("SFA") test is a standardized mechanical scoring test applied to each inmate by CSC. The SFA generates scores and risk grades that are used by CSC to assess the risk posed by each female Indigenous inmate to the public and to staff and other inmates within the institution. The SFA scoring system is set out in Commissioners Directive 705-6 ("CD 705-6"), at paragraphs 12-13 and Annex D.
13. The SFA consists of a checklist of 121 items dealing with prior involvement in the criminal justice system. One point is assigned for each item and the total score reflects the total number of points. The score is then used to generate a risk grade.
14. The SFA inaccurately inflates or elevates the risk posed by female Indigenous inmates to the public, CSC staff and other inmates. Reliance by CSC on the product of the SFA test tends to result in unjustified and inaccurate higher security classification and unjustified placement in higher security facilities for female Indigenous inmates. In the aggregate, reliance by CSC on the SFA results in higher security classification and higher security placements for female

Indigenous inmates.

15. The items on the SFA checklist represent previous involvement in the criminal justice system, which is a *Gladue* Factor. The more plentiful the instances of *Gladue* Factors, the higher the SFA score and the greater the tendency towards higher security classification and security placement.
16. The evaluation and application of SFA test results is inflexible. Test administrators are unable to meaningfully assess or weigh the significance of the presence of *Gladue* Factors. The SFA test does not allow test administrators to negate or neutralize the implications of *Gladue* Factors in the respect of the SFA test results

Dynamic Factors Identification and Analysis-Revised Test

17. Dynamic Factor Identification and Analysis-Revised (“DFIA-R”) test is a standardized mechanical scoring test applied to each female Indigenous inmate by CSC. The DFIA-R test generates scores and risk grades that are used by CSC to assess the risk posed by each inmate to the public and to staff and other inmates within the institution. The DFIA-R scoring system is set out in CD 705-6, at paragraphs 15-21 and Annex E.
18. The DFIA-R inaccurately inflates or elevates the risk posed by female Indigenous inmates to the public, CSC staff and other inmates. Reliance by CSC on the product of the DFIA-R test tends to result in unjustified and inaccurate higher security classification and unjustified placement in higher security facilities for female Indigenous inmates. In the aggregate, reliance by CSC on the DFIA-R results in higher security classification and higher security placements for female Indigenous inmates.
19. The scoring of the DFIA-R test includes *Gladue* Factors such as educational attainment, marital and intimate partner history, employment history, residence in high crime areas, “prosocial deficits” and other similar factors and generates a high, medium and low rating for each inmate, putatively ranking inmates on the basis of their need for improvement and attitude towards change in those areas. The greater the presence of *Gladue* Factors, the greater the risk score and risk recommendations produced by the DFIA-R test.
20. The evaluation of DFIA-R test results is inflexible. Test administrators are unable to meaningfully assess or weigh the significance of the presence of *Gladue* Factors. The DFIA-R test does not allow test administrators to negate or neutralize the implications of *Gladue* Factors in the respect of the DFIA-R test results.
21. DFIA-R test results are used by CSC to assess a female Indigenous inmate’s need for prison programming as well as to assess the risk posed by the inmate to

the public, staff and other inmates for the purpose of security classification and security placement.

Reintegration Potential Test

22. The Reintegration Potential ("RP") test is a standardized mechanical scoring test applied to each female Indigenous inmate by CSC. The RP test generates scores and risk grades that are used by CSC to assess the risk posed by each inmate to the public and to staff and other inmates within the institution. The RP test works by aggregating the SFA and DFIA-R test scores, and thus amplifies and extends the adverse effect of the SFA and DFIA-R tests.
23. Because the RP test relies on SFA and DFIA-R scores, the RP test implicitly relies on the *Gladue* Factors encoded into the SFA and DFIA-R tests.

The Effect of the Impugned Tests

24. CSC employees use and rely on the test scores, risk levels and recommendations derived from each of the Impugned Tests to classify inmates as minimum, medium and maximum security classification and to place inmates in minimum, medium and maximum security facilities.
25. The Impugned Tests generate or produce test scores, risk assessments and classification recommendations for female Indigenous inmates that are higher than the actual, objective and statistical risks posed by female Indigenous inmates.
26. On an individual level, the Impugned Tests result in inflated security classifications for the vast majority of female Indigenous inmates. Female Indigenous inmates tend to be classified as medium security when they should be classified as minimum security, and tend to be placed in medium security facilities when they should be placed in minimum security facilities. Female Indigenous inmates tend to be classified as maximum security inmates when they should be classified as medium and minimum security, and tend to be placed in maximum security facilities when they should be placed in medium or minimum security facilities.
27. Placement in higher security level facilities adversely affects the living conditions of female Indigenous inmates by decreasing access to social contact, decreasing mobility and decreasing access to sunlight, fresh air and physical exercise.
28. Assignment to higher security classification and placement in higher security facilities also restricts the availability of rehabilitative programming within CSC, including access to educational programs, reintegrative programs, vocational programs, access to Healing Lodges, access to Indigenous cultural programs, including the Pathways programs and individual support from Indigenous Elders.

29. Placement in higher security level facilities and classification at higher security levels decreases female Indigenous inmate access to Unescorted Temporary Absences (“UTAs”) and Escorted Temporary Absences (“ETAs”).
30. Placement in higher security level facilities and classification at higher security levels decreases Indigenous female inmate access to full and day parole. ETAs and UTAs, and completion of institutional and rehabilitative programming are generally a pre-condition of parole, and decisions about parole eligibility rely directly on the test scores, risk levels and recommendations produced by the Impugned Tests. The result is that female Indigenous inmates have longer prison sentences because they are denied parole. Female Indigenous inmates have higher rates of serving out their full sentence as they elevated rates of statutory release.
31. The use of the Impugned Tests on female Indigenous inmates results in the following individual adverse effects for the vast majority of female Indigenous inmates, which amount to adverse effects and impacts to female Indigenous inmates in the aggregate:
- a. Assignment to higher security facilities, restricting social contact restricting freedom of association, and restricting mobility within institutions;
 - b. Reduced rates of cascading to lower-security facilities;
 - c. Restricted access to Escorted Temporary Absences and Unescorted Temporary Absences, which are gateways to early release and parole;
 - d. Higher rates of incarceration until statutory release and warrant expiry;
 - e. Restricted access to reintegrative programs, especially those designed specifically to meet Indigenous needs, such as Indigenous Healing Lodges, the Pathways program and guidance from Indigenous Elders;
 - f. Restricted access to reintegrative programs, including employment programs; and
 - g. Restricted access to day parole and full parole.
32. The Impugned Tests operate in such a way that the greater the presence of colonial and post-colonial oppression, the higher the inmate’s risk profile and the more lengthy and harsh their time in custody. This is due to encoding *Gladue* Factors into the inflexible standardized structures of the Impugned Tests, where test scores increase in the presence of direct and inter-generational colonial oppression, including displacement from land, cultural prohibitions, forced residential school attendance, historic physical and sexual abuse, child

apprehensions, and other factors.

Awareness of Statutory Breach

33. CSC refers internally to *Gladue* Factors as “Indigenous Social History”. As noted above, the Impugned Tests rely on and increase test scores and make adverse recommendations for security classification and placement based on systemic factors affecting female Indigenous inmates, including factors that have contributed to involvement in the criminal justice system and an inmate’s family history.
34. As stated below, s.79.1 of the *Corrections and Conditional Release Act*, SC 1992, c.20 (“CCRA”) prohibits reliance on *Gladue* Factors or Indigenous Social History in respect of adverse security classification or security placement decisions. The Plaintiff pleads as a fact that CSC is aware that its reliance on *Gladue* Factors and Indigenous Social History factors as embedded into the Impugned Tests is contrary to s.79.1 of the CCRA, but CSC continues to rely on the Impugned Tests on female Indigenous inmates in conscious and deliberate breach of its statutory obligations.
35. CSC purports to take Indigenous Social History into account in a way that benefits female Indigenous inmates when making decisions about security classification and security placement, but it does not do so. The Impugned Tests contain no method or system for negating, neutralizing or compensating for prejudicial reliance by the Impugned Tests on *Gladue* Factors or Indigenous Social History Factors. CSC has no method, training or mechanism outside or parallel to the Impugned Tests for negating, neutralizing or compensating for the reliance of the Impugned Tests on *Gladue* Factors or Indigenous Social History factors.
36. The Plaintiff also pleads as a fact that CSC is aware that its reliance on the Impugned Tests breaches s.4(g) and 21(1) of the CCRA, but it continues to rely on the Impugned Tests in conscious and deliberate breach of its statutory obligations.

Perpetuation of Stereotypes and Discrimination

37. The Impugned Tests perpetuate false stereotypes and biases that female Indigenous inmates present greater risk, are less manageable, are less trustworthy, are more prone to violence, are more to be feared, and require greater monitoring and harsher treatment than non-Indigenous inmates. All female Indigenous inmates are negatively affected by the perpetuation of stereotypes internally within the CSC prison system.
38. Disproportionate overclassification of female Indigenous inmates contributes to the perpetuation of stereotypes and bias against female Indigenous inmates. CSC’s use of the Impugned Tests causes and contributes to the classification of

female Indigenous inmates, collectively, at higher security classifications than non-Indigenous inmates. CSC's use of the Impugned Tests causes and contributes to the placement of female Indigenous inmates at higher security facilities than non-Indigenous inmates.

39. The manifest disproportion in the number of female Indigenous inmates in medium security as compared with minimum security sends a message that female Indigenous inmates are to be treated by CSC and its staff as if they are more dangerous. This message contributes to the false stereotyping and biases against female Indigenous inmates internalized by CSC staff, non-Indigenous inmates, and by Indigenous inmates themselves. This stereotypical messaging is especially pronounced during the first 90 days of incarceration, where the differential assignments to security classification tend to be non-discretionary and automatic.
40. CSC's use of the Impugned Tests also perpetuates stereotyping and bias by increasing the overall proportion of Indigenous inmates in the prison system. Because the Impugned Tests tend to result in a deprivation of parole, they increase the duration of incarceration. Because female Indigenous inmates tend to be held longer in custody, the proportion of Indigenous inmates is higher. The appearance that there are more Indigenous inmates in custody contributes to stereotypes that female Indigenous inmates tend to commit more numerous and more serious crimes than female non-Indigenous inmates.
41. CSC promotes the Impugned Tests internally to prison staff and inmates as objective, scientific, statistically accurate and justified risk assessment tools, which entrenches and hardens the false stereotyping of female Indigenous inmates and the biases against them. CSC is aware that the Impugned Tests are not objective, scientific or statistically accurate risk assessment tools in respect of female Indigenous inmates.
42. As a consequence of the perpetuation of adverse stereotypes and biases, Indigenous inmates as a group are viewed with greater suspicion and disfavour by CSC staff and inmates. Stereotyping and biases are themselves harmful to female Indigenous inmates, collectively and individually, who suffer indignity, a decrease in self-esteem, psychological harm, negative self-image, social marginalization and, group ostracism and who are subject to implicit racialized social segregation of Indigenous from non-Indigenous inmates.
43. Perpetuation of adverse stereotypes and biases contributes to the systemically prejudicial exercise of discretionary powers by CSC staff against female Indigenous inmates, collectively. Stereotypes and biases are manifest by a tendency on the part of CSC to deprive female Indigenous inmates as a group of benefits and advantages within the prison system. In particular, adverse stereotypes and biases result in or are manifest by the following patterns of exercise by CSC staff of discretionary powers:

- a. higher rates of discretionary overrides to higher security classification and security placements than those produced or recommended by the Impugned Tests;
- b. lower rates of discretionary “underrides” to lower levels of security classification and placement than produced or recommended by the Impugned Tests;
- c. lower levels of access to discretionary amenities, including gyms, outdoor spaces and library facilities;
- d. lower levels of access to rehabilitative programming, including employment programs and educational programs;
- e. higher rates of discretionary placement into segregation;
- f. lower levels of discretionary access to ETAs and UTAs; and
- g. lower levels of discretionary recommendations for day parole and full parole.

Awareness of Prejudicial Effects

44. CSC has known since 2004 at the latest that the Impugned Tests prejudicially effect female Indigenous inmates. An independent study commissioned in 2004 by the Commissioner of CSC from three experts, Jim Bonta, Karl Hanson and Annie Yessine (the “2004 Expert Study”) concluded:

“The predictive validity of the Security Risk subscale for women, in general, is weak and non-existent for Aboriginal women”;

“[CRS] appears to be systemically biased against, and so may not be suitable for use within, the Aboriginal offender population”;

“Aboriginal women are rated as needing higher levels of security than Non-Aboriginal women ... [yet] ... [c]ompared to Non-Aboriginal women, Aboriginal women appear less likely to incur institutional infractions”.

45. The 2004 Expert Study was brought to the attention of CRS senior management, including all commissioners holding the office since 2004. The prejudicial effects of the use of CRS on Indigenous inmates has been continuously and repeatedly brought to the attention of CSC senior management by the Auditor General of Canada, the Canadian Human Rights Commission, the Canadian Association of Elizabeth Fry Societies and by the Office of the Correctional Investigator.

46. CSC is aware that it is not meeting its statutory obligation to eliminate discriminatory systems, practices, policies with respect to its use of standardized security classification and risk assessment tests. This obligation was reinforced by the Supreme Court of Canada in *Ewert v. Canada (Correctional Services)*, 2018 SCC 30 on June 13, 2018.

47. Despite knowing that its reliance on the Impugned Tests results in adverse systemic effects on the female Indigenous inmate population, and despite repeatedly having its discriminatory effects brought to its attention, and despite being reminded of its statutory obligations to avoid discrimination and avoid reliance on faulty standardized tests, CSC actively and continuously refused and refuses to modify or replace the Impugned Tests and refuses to implement an existing alternative classification system that is not systemically biased against Indigenous persons.

48. Because it is consciously aware of the problems with the Impugned Tests and the harms caused to female Indigenous inmates by the Impugned Tests, CSC's ongoing use of the Impugned Tests on female Indigenous inmates is the product of deliberate and conscious race-based adverse discriminatory treatment of female Indigenous inmates.

The Representative Plaintiff

49. The Plaintiff Aileen Michel is a former Indigenous inmate of federal correctional facilities who was harmed by CSC's use of and reliance on the Impugned Tests. The Impugned Tests were administered on Ms. Michel on numerous occasions, including in 2002, 2008, 2013, 2015/16, 2018 and 2019, upon her admission and readmission into custody, and the test results were relied on by CSC throughout Ms. Michel's incarceration to her detriment and contrary to law as set out herein.

50. Ms. Michel was repeatedly placed into maximum security facilities during her OSL assessment period (up to 90 days) based solely on her CRS Public Safety score, notwithstanding that her Institutional Adjustment score recommended minimum security.

51. In particular, the Impugned Tests detrimentally affected Ms. Michel in the following ways:

- a. Ms. Michel's scores on the Impugned Tests placed upwards pressure on her security classification and placement. She was assigned medium classification for most of her incarceration even though she should have been classified as minimum risk to other inmates and staff and minimal risk of institutional infractions.
- b. Because she was assigned a medium classification and placed in medium

security, she was told by CSC staff that she was not likely to be granted parole and would be better off delaying her applications for day parole and full parole. As a consequence of her security classification and placement, Ms. Michel waived her eligibility for a parole hearing.

- c. Because she was assigned a medium classification and placed in medium security, Ms. Michel's eligibility for escorted and unescorted temporary absences was restricted, which again influenced her eligibility for parole.
 - d. Whenever Ms. Michel breached her parole, she was automatically assigned to a medium security setting, even when her breach did not indicate any risk of institutional infraction or risk to inmates and staff.
 - e. Ms. Michel's elevated scores on the Impugned Test and resulting security classification and placement adversely affected her self-image, self-worth, and psychological well being.
 - f. CSC's use of the Impugned Tests and the stereotypes, biases and adverse messaging set out above made her falsely believe the adverse stereotypes about Indigenous persons applied to her, including stereotypes that she, because she is Indigenous, presented a greater risk and was more dangerous to other inmates and staff, was to be feared, was less manageable, was less trustworthy and required greater monitoring and harsher treatment. These false stereotypes adversely affected Ms. Michel's self-image and self-worth.
52. Ms. Michel experienced being viewed with greater suspicion and disfavour by CSC staff and inmates, and suffered a decrease in self-esteem, psychological harm, negative self-image, social marginalization, group ostracism and an implicit racialized social segregation of Indigenous from non-Indigenous inmates.

Proposed Class

53. The Plaintiff proposes the following classes and/or subclasses:

- a. The class of female Indigenous inmates on whom the Impugned Tests were administered on or after January 11, 2016, or alternatively on or after January 11, 2019.

Section 15

54. CSC's use of and reliance on the Impugned Tests in respect of female Indigenous inmates is contrary to s.15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). Section 15 of the *Charter* provides as follows:

15. Every person is equal before and under the law and has the right to

the equal protection and 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 ability.

55. The Plaintiff says that the use of the Impugned Tests on female Indigenous inmates (1) creates a distinction in its impact and effect based on enumerated or analogous grounds; and (2) imposes burdens and denies benefits in a manner that has the effect of reinforcing, perpetuating and exacerbating disadvantage: *R. v. Sharma*, 2022 SCC 39 at para.28.

Distinction Created in Adverse Impact and Effect of Impugned Tests on Female Indigenous Inmates

56. The use of the Impugned Tests on female Indigenous inmates causes and contributes in the aggregate to a distinction in its adverse impact and effect on female Indigenous inmates, on grounds protected under s.15 of the *Charter*. In particular, the enumerated protected s.15 grounds are race and national or ethnic origin.

57. The Plaintiff also relies on the analogous ground of Indigeneity as a ground of discrimination. Indigeneity is an analogous ground because Indigenous people are a discrete and insular minority, with distinct racial, cultural and political interests, with a history of political oppression and persecution. Indigeneity is an analogous ground because it is an immutable characteristic.

58. Adverse impacts and effects in the aggregate female Indigenous inmates resulting from CSC's use of the Impugned Tests include the following:

- a. Assignment to higher security facilities, restricting social contact, restricting freedom of association and restricting mobility within institutions;
- b. Reduced rates of cascading to lower-security facilities;
- c. Restricted access to Escorted Temporary Absences and Unescorted Temporary Absences, which are a gateway to early release and parole;
- d. Higher rates of incarceration until statutory release and warrant expiry;
- e. Restricted access to reintegrative programs, especially those designed specifically to meet Indigenous needs, such as Indigenous Healing Lodges, the Pathways program and guidance from Indigenous Elders;
- f. Restricted access to reintegrative programs, including employment programs; and
- g. Restricted access to day parole and full parole.

59. The nexus, or connection, between the use of the Impugned Tests and the adverse effects or impacts is found in the embedding of subscale scores and individual items scores within the Impugned Tests. The subscales and individual items are not correlated to, predictive of or representative of the relative or absolute risk posed by female Indigenous inmates to the public, other inmates or staff. In this way, the assignment in the aggregate of female Indigenous inmates to higher levels of security classification and placement into higher security facilities is based on and connected with reliance on factors that are not indicative of risk.
60. The nexus, or connection, between the use of the Impugned Tests and the adverse effects or impacts is additionally found in the use of and reliance on *Gladue* Factors within the Impugned Tests. The presence of *Gladue* Factors in respect of female Indigenous inmates increases the scores and security recommendations produced by the Impugned Tests in respect of those inmates. As noted below, this is contrary to provisions of *CCRA* ss.3, 4(g) and 79.1.
61. The distinction created within s.15 of the *Charter* is underscored by the distinctions created by statute under the *CCRA* by ss.4(g) and 79.1. These sections, on which more is said below, create positive statutory duties on CSC to protect and minimize adverse impacts specifically on female Indigenous inmates as a group. These statutory duties correlate to statutory rights for female Indigenous inmates to protection in respect of CSC policies and practices. The breach of those statutory duties by CSC contributes to a distinction in adverse impact and effect on female Indigenous inmates.
62. The differential effect on female Indigenous inmates as a group protected under s.15 of the *Charter* is not merely effects-based; the differential effect is intentional. CSC's institutional intention to impose adverse effects on female Indigenous inmates is established because CSC has been aware of the adverse systemic effects but has refused for more than 20 years to rectify those effects. When deliberately ignored, unintentional adverse systemic effects on groups protected by statute and by s.15 of the *Charter* become intentional adverse effects.

Use of the Impugned Tests Imposes Burdens, Denies Benefits and Protections and Perpetuates Stereotyping and Bias

63. CSC's use of the Impugned Tests on female Indigenous inmates imposes burdens, denies benefits and protections and perpetuates stereotyping and bias.
64. Although aspects of the security classification process is individualized, there is much about the process that is not individualized. This includes across-the-board application of the Impugned Tests to all class members, without regard to whether their administration violates statutory provisions or protected *Charter* values or rights.

Imposition of Burdens

65. The use of the Impugned Tests imposes burdens on female Indigenous inmates, including the following:

- a. Assignment to higher security facilities, restricting social contact, restricting freedom of association and restricting mobility within institutions;
- b. Reduced rates of cascading to lower-security facilities;
- c. Restricted access to Escorted Temporary Absences and Unescorted Temporary Absences, which are gateways to early release and parole;
- d. Higher rates of incarceration until statutory release and warrant expiry;
- e. Restricted access to reintegrative programs, especially those designed specifically to meet Indigenous needs, such as Indigenous Healing Lodges, the Pathways program and guidance from Indigenous Elders; and
- f. Restricted access to reintegrative programs, including employment programs.

66. The Impugned Tests also perpetuate false stereotypes and biases that female Indigenous inmates as a group present greater risk, are less manageable, are less trustworthy, are more prone to violence, are more to be feared, and require greater monitoring and harsher treatment than non-Indigenous inmates. All female Indigenous inmates are negatively affected by the perpetuation of stereotypes internally within the CSC prison system.

67. Disproportionate overclassification of female Indigenous inmates contributes to the perpetuation of stereotypes and bias against female Indigenous inmates. CSC's use of the Impugned Tests causes and contributes to the classification of female Indigenous inmates, collectively, at higher security classifications and placements than non-Indigenous inmates. The manifest disproportion in the number of female Indigenous inmates in higher security classification and placements contributes to the false stereotyping and biases against female Indigenous inmates internalized by CSC staff, non-Indigenous inmates, and by Indigenous inmates themselves.

68. Similarly, the manifest adverse treatment of female Indigenous inmates, including reduced rates of cascading to lower security facilities, restricted rates of ETAs and UTAs, reduced rates of parole, increased rates of statutory release, reduced access to education, employment and rehabilitative programs, contributes to the messaging of false stereotypes that are internalized by CSC staff and inmates.

69. CSC promotes stereotyping and biases against female Indigenous inmates by telling inmates and staff that the Impugned Tests are objective, scientific and statistically accurate and justified risk assessment tools. CSC promotion of false information about the Impugned Tests entrenches and hardens the false stereotyping of female Indigenous inmates and the biases against them.
70. As a consequence of the perpetuation of adverse stereotypes and biases, Indigenous inmates as a group are viewed with greater suspicion and disfavour by CSC staff and inmates. Stereotyping and biases are themselves harmful to female Indigenous inmates, collectively and individually, who suffer indignity, a decrease in self-esteem, psychological harm, negative self-image, social marginalization, group ostracism and who are subject to implicit racialized social segregation of Indigenous from non-Indigenous inmates.
71. Perpetuation of adverse stereotypes and biases by means of the Impugned Tests contributes to the systemically prejudicial exercise of discretionary powers by CSC staff against female Indigenous inmates, collectively. Belief in false stereotypes and adoption of biases are manifest within CSC by a tendency on the part of CSC staff to deprive female Indigenous inmates as a group of benefits and advantages within the prison system. In particular, adverse stereotypes and biases result in or are manifest by the following patterns of exercise by CSC staff of discretionary powers:
- a. higher rates of discretionary overrides to higher security classification and security placements than those produced or recommended by the Impugned Tests;
 - b. lower rates of discretionary “underrides” to lower levels of security classification and placement than produced or recommended by the Impugned Tests;
 - c. lower levels of access to discretionary amenities, including gyms, outdoor spaces and libraries;
 - d. lower levels of access to rehabilitative programming, including employment programs and educational programs;
 - e. higher rates of discretionary placement into segregation;
 - f. lower levels of discretionary access to ETAs and UTAs; and
 - g. lower levels of discretionary recommendations for day parole and full parole.
72. CSC’s reliance on the Impugned Tests erroneously pushes more female Indigenous inmates in the aggregate into higher security classification and

placements, which propagates adverse and false stereotypes and biases as set out above.

Denial of Statutory Benefit and Protection

73. CSC's use of the Impugned Tests breaches sections of the *CCRA* that confer a benefit and protection for female Indigenous inmates, contrary to s.15 of the *Charter*. For greater certainty, the Plaintiff clarifies that she is not claiming a free-standing tort of statutory breach. The Plaintiff asserts that the violation of sections of the *CCRA* breaches s.15 of the *Charter* because it denies female Indigenous inmates that protection and benefit of the law.

74. In particular, the Plaintiff says that CSC's use of the Impugned Tests violates ss.3, 4(c), 4(c.1), 4(c.2), 4(g), 24(1), 76, 77, 79, 80, 81 and 79.1 of the *CCRA*.

75. Sections 3, 4(c), 4(c.1), 4(c.2) and 4(g) of the *CCRA* provides as follows:

3 The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by

(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and

(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

4 The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:

(c) the Service uses the least restrictive measures consistent with the protection of society, staff members and offenders;

(c.1) the Service considers alternatives to custody in a penitentiary, including the alternatives referred to in sections 29 and 81;

(c.2) the Service ensures the effective delivery of programs to offenders, including correctional, educational, vocational training and volunteer programs, with a view to improving access to alternatives to custody in a penitentiary and to promoting rehabilitation;

(g) correctional policies, programs and practices respect gender, ethnic, cultural, religious and linguistic differences, sexual orientation and gender identity and expression, and are responsive to the special needs of women, Indigenous persons, visible minorities, persons requiring mental health care and other groups

76. CSC's use of the Impugned Tests infringes s.4(g) of the *CCRA* because administration and reliance on the Impugned Tests constitutes a policy, program or practice that does not respect gender, ethnic or cultural differences and is not responsive to the special needs of women or Indigenous persons or female Indigenous inmates.
77. CSC's use of the Impugned Tests tends to breach s.4(c) in respect of female Indigenous inmates because the Impugned Tests tend not to assign female Indigenous inmates, in the aggregate, to the least restrictive security classifications and placements consistent with the safety of the public, staff and other inmates. This effect is particularly pronounced during the first 90 days of incarceration.
78. CSC's use of the Impugned Tests tends to breach s.4(c.1) in respect of female Indigenous inmates because the Impugned Tests tend to restrict consideration by CSC staff of alternatives to custody in a penitentiary setting, including the alternatives referred to in sections 29 and 81, including to Indigenous healing centres and minimum security facilities that are inflected to Indigenous cultures.
79. CSC's use of the Impugned Tests tends to breach s.4(c.2) in respect of female Indigenous inmates because the Impugned Tests, by promoting and exacerbating stereotyping and bias, tend to interfere with the effective delivery of programs to female Indigenous inmates, including correctional, educational, vocational training and volunteer programs. CSC's use of the Impugned Tests also tends to breach s.4(c.2) of the *CCRA* because it restricts access by female Indigenous inmates to programs that are only available to inmates classified and/or placed as minimum security inmates.
80. CSC's use of the Impugned Tests tends to breach s.24(1) of the *CCRA* in respect of female Indigenous inmates. Section 24(1) of the *CCRA* provides as follows:
- 24 (1) The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible.
81. CSC's use of the Impugned Tests breaches s.24(1) of the *CCRA* because CSC has failed to take reasonable steps to ensure that the standardized tests used on female Indigenous inmates accurately estimates the risk posed by female Indigenous inmates to the public, staff and other inmates. In fact, and to the knowledge of CSC, the Impugned Tests do not accurately assess the risk posed by female Indigenous inmates, but CSC nonetheless continues to rely on the scores and results produced by the Impugned Tests.
82. CSC's use of the Impugned Tests tends to breach s.79.1 of the *CCRA* in respect of female Indigenous inmates. Section 79.1 of the *CCRA* provides as follows:

79.1 (1) In making decisions under this Act affecting an Indigenous offender, the Service shall take the following into consideration:

(a) systemic and background factors affecting Indigenous peoples of Canada;

(b) systemic and background factors that have contributed to the overrepresentation of Indigenous persons in the criminal justice system and that may have contributed to the offender's involvement in the criminal justice system; and ...

(2) The factors described in paragraphs (1)(a) to (c) are not to be taken into consideration for decisions respecting the assessment of the risk posed by an Indigenous offender unless those factors could decrease the level of risk.

83. CSC tends to breach s.79.1(1) of the *CCRA* by using the Impugned Tests because the Impugned Tests fail to take into account in any meaningful way the systemic and background factors affecting Indigenous peoples of Canada including those factors that have contributed to the overrepresentation of Indigenous persons in the criminal justice system and those may have contributed to the offender's involvement in the criminal justice system.

84. CSC tends to breach s.79.1(2) of the *CCRA* by using the Impugned Tests on female Indigenous inmates because the Impugned Tests are used to assess the risk posed by female Indigenous inmates. To the knowledge of CSC, systematically, in every case, rely on *Gladue* Factors (or, as CSC calls them, Indigenous Social History factors) to increase test scores and inflate the risk assessment of the inmate. Reliance on *Gladue* Factors within the Impugned Tests tends in the aggregate to elevate security classification levels and tends to result in placement in higher security facilities for female Indigenous inmates.

85. CSC also breaches s.79.1(2) of the *CCRA* in respect of all female Indigenous inmates because CSC makes no effort to determine in respect of any female Indigenous inmates whether the reliance on *Gladue* Factors in the Impugned Tests decreases inmate's assessed level of risk, increases the inmate's assessed level of risk or is neutral with respect to the inmate's assessed level of risk.

86. Section 79.1 of the *CCRA* is intended to prevent CSC from relying on the Impugned Tests in respect of Indigenous inmates. CSC is in knowing breach of s.79.1 of the *CCRA*. In this sense, CSC continues to discriminate against female Indigenous inmates despite being specifically directed by Parliament to stop.

Limitation Issues

87. The Plaintiff specifically pleads that she was unaware of the contribution the Impugned Tests made in imposing burdens on her and female Indigenous

inmates as a group, denying her benefits and denying benefits to female Indigenous inmates as a group, including the benefit of statutory protections, or perpetuating negative and false stereotyping and biases against female Indigenous inmates or the role played by the Impugned Tests in a manner that has the effect of reinforcing, perpetuating and exacerbating disadvantage.

88. The Plaintiff asserts that the causal connection between the Impugned Tests and the adverse effects on herself and other female Indigenous inmates is not subject to detection. The causal connection between the Impugned Tests and the adverse effects on female Indigenous inmates cannot be perceived or understood by persons who lack specialized statistical and criminological expertise, and female Indigenous inmates do not have this expertise. The reports calling CSC's attention to the discriminatory effects of the Impugned Tests on female Indigenous inmates were specialist publications that were not circulated amongst the public.
89. The Plaintiff asserts that CSC effectively concealed the connection between the Impugned Tests and its adverse effects on female Indigenous inmates by training and telling CSC employees that the Impugned Tests are scientific, objective and accurately assess risk for all inmates.
90. The Plaintiff says that this claim against CSC is not discoverable without the assistance of legal counsel and experts, and that no limitation periods are applicable to this claim.

Commissioner's Directives

91. Commissioner's Directives, including Commissioner's Directive 705-6 and 705-7 refer to and appear to direct employees of CSC to use the Impugned Tests on all inmates, including Indigenous and female inmates. The Plaintiff say that all Commissioner's Directives that require use of the Impugned Tests on female Indigenous inmates are:
- a. of no force and effect because Commissioner's Directives generally do not carry the force of law and are not legally binding on any staff or employees of CSC;
 - b. in the alternative, if Commissioner's Directives are generally binding in law on staff or employees of CSC, then Commissioner's Directives that require the use of the CRS on Indigenous and/or female inmates are *ultra vires* s.96 of the CCRA and of no force and effect because they are contrary to ss.3, 4(c), 4(c.1), 4(c.2), 4(g), 24(1), 76, 77, 79.1, 80 and 81 of the CCRA; and
 - c. in the further alternative, if Commissioner's Directives that require the use of CRS on Indigenous and/or female inmates are not *ultra vires* s.96 of the

CCRA, then the Commissioner's Directives themselves violate s.15 of the *Charter* and are of no force and effect pursuant to s.52 of the *Constitution Act, 1982*.

Dated this 5th day of September, 2025

(Original filed January 11, 2021)

(Amended Statement of Claim filed June 2, 2021)

(Further Amended Statement of Claim filed April 8, 2022)



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