

A-94-23

Docket: ~~23-A-16~~

## FEDERAL COURT OF APPEAL

BETWEEN:

AILEEN MICHEL

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
FILED	March 23, 2023
DEPOSED	Soraya Premji
VANCOUVER, BC	1

APPELLANT

AND:

THE ATTORNEY GENERAL OF CANADA

RESPONDENT

## NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at (*place where Federal Court of Appeal (or Federal Court) ordinarily sits*).

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or, if the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

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 OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

March 23, 2023

Originally signed by:

Issued by: Soraya Premji

*(Registry Officer)*

Address of local office: \_\_\_\_\_

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TO: The Attorney General of Canada  
Department of Justice  
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## APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of the Honourable Justice Ayles dated January 11, 2023 (index as 2023 FC 32) dismissing the Appellant's application to certify an action as a class proceeding.

THE APPELLANT ASKS that:

1. The order under appeal be quashed and the application for certification remitted to the Federal Court of Canada for reconsideration in accordance with the guidance of this Court.

THE GROUNDS OF APPEAL are as follows:

1. The learned motions judge erred in finding that the pleadings did not disclose a cause of action under s.15 of the *Canadian Charter of Rights and Freedoms*;
2. The learned motions judge erred in failing to recognize that administering and relying on impugned standardized tests (i.e. the Custody Rating Scale test, Static Factor Analysis test, Dynamic Factor Identification and Analysis – Revised test, and Rehabilitation Potential test) (the "Impugned Tests") caused or contributed to the following forms of deprivation and/or harm, which are sufficient to sustain an arguable cause of action under s.15 of the *Charter*.
  - a. Denial of the benefit of the procedural safeguard enacted by s.79.1 of the *Corrections and Conditional Release Act* ("CCRA") by continuing to administer and rely on the Impugned Tests, which incorporate the *Gladue*-type factors listed under s.79.1(1)(a) to (c) and increase the assessed risk of Indigenous female inmates;
  - b. Perpetuation of false stereotypes of Indigenous inmates as presenting greater risk, being less manageable, being less trustworthy and requiring greater monitoring, and infliction of indignity by applying the impugned tests to Indigenous inmates; and
  - c. Perpetuation of false stereotypes of Indigenous inmates as presenting greater risk, being less manageable, being less trustworthy and requiring greater monitoring, and infliction of indignity by applying the impugned tests to Indigenous inmates, deliberately and knowingly, despite institutional awareness that the tests are not statistically predictive of risk, manageability or need for monitoring, and despite knowing that the tests incorporate *Gladue*/s.79.1 factors.
3. The learned motions judge erred by finding that the proposed common issues of

fact and law arising pursuant to s.15 of the *Charter* are intrinsically individualistic and could not be decided without regard to the individual circumstances of each class member.

4. The learned motions judge erred by refusing to certify the action as a class action on the basis that that individual assessments of harm and damages could be required after a determination of common issues of fact and law, contrary to Federal Court Rule 334.18(a).
5. Having erroneously failed to recognize a cause of action under s.15 of the *Charter*, the motions judge was then unable to meaningfully assess whether a class proceeding is a preferable procedure by determining, as required by Federal Court Rule 334.16(2)(a), whether the questions of law or fact common to the class members predominate over any questions affecting only individual members.
6. The learned motions judge erred by failing to consider the factors set out in Federal Court Rule 334.16(2)(b), (c), (d) and (e) in determining that a class proceeding is not the preferable procedure.
7. The learned motions judge erred by finding that a class proceeding is not the preferable procedure without identifying a preferable procedure and conducting an analysis of the costs and benefits of each procedure.
8. The learned motions judge erred by taking an overly technical approach to the sufficiency of pleadings while assessing the sufficiency of the pleadings in light of the evidence filed on the certification application, and, to the extent that the pleadings were deficient, the learned motions judge erred by denying the Appellant leave to amend her Statement of Claim to rectify those deficiencies.
9. The learned motions judge erred by taking a checklist approach to the sufficiency of the proposed litigation plan without regard to the context of the litigation, and by refusing to provide the Appellant leave to provide supplemental details of her litigation plan.

Dated this 23rd day of March 2023

By: Jason Gratl

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I HEREBY CERTIFY that the above document is a true copy of the original issued out of/ filed in the Court on the 23rd day of March 2023. Dated this 31st day of March 2023.