IN THE HIGH COURT OF THE DOMINION OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N :

CLAUDETTE TINIO on her own behalf

and as litigation guardian of LILY TINIO

Appellants

- AND -

CANADA (ATTORNEY GENERAL)

Respondent

FACTUM OF THE APPELLANTS

COUNSEL FOR THE APPELLANTS

TEAM 10

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PART I – OVERVIEW

[1] This appeal concerns the Mother-Child Program ("the Program"), which protects the continuity of mother-child relationships during the mother's incarceration. Section 18.1 of the Directive, which establishes the Program, fundamentally damages this relationship. Any inmate convicted of an offence involving violence (such as Claudette) is prevented from applying for admission to the Program, irrespective of the child's best interests. Claudette seeks to be considered for admission to the Program, which is granted to other mothers in prison.

> Commissioner's Directive Number 768, enacted pursuant to the *Corrections and Conditional Release Regulations*, SOR/92-620 [Directive].

[2] Section 18.1 violates section 15 of the *Charter* by discriminating against mothers who have committed an offence involving violence. It harms an already disadvantaged group by destroying the mother-child relationship central to Claudette's rehabilitation. Lily is also discriminated against – unlike all other Canadian children, Lily's best interests are no longer considered. Her healthy emotional, social, and behavioural development is disrupted.

> *Canadian Charter of Rights and Freedom*s, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 7, 15 [*Charter*].

[3] By stigmatizing Claudette as an unfit mother and forcibly removing her daughter, section 18.1 violates Claudette's section 7 rights under the *Charter*. These deprivations are not in accordance with the principles of fundamental justice and are not saved under section 1. A complete exclusion is an unnecessary and excessive response to concerns about children's safety.

> Official Problem, Wilson Moot 2015 at para 22.

[4] Section 18.1 replaces a tailored program with a blunt exclusion that sabotages the best interests of the child and subverts the purpose of the Program – keeping families together.

PART II – STATEMENT OF FACTS

1. Factual Background

[5] Claudette seeks to apply for admission to the Program. She, like many mothers, wishes to nurture a loving bond with Lily by residing with her.

[6] Claudette is of Filipina descent. She experienced a turbulent upbringing and was abused as a child by her mother. In her youth, Claudette was diagnosed with bipolar disorder and began using narcotics. This resulted in several minor criminal convictions.

Official Problem, *supra* para 3 at paras 1, 4-7.

[7] As Justice Lazier found at trial, Claudette participated in counseling and education programs from 2009-2010. She began taking stabilizing medications to treat her bipolar disorder – medications which she could not previously afford. Claudette has been successfully participating in Alcoholics Anonymous meetings since 2010. Despite facing a number of obstacles, Claudette was "determined to leave her old life behind."

Official Problem, *supra* para 3 at paras 5, 8, 9.

[8] Claudette's current conviction arose when she refused to traffic narcotics. In December 2012, a former acquaintance demanded that Claudette transport narcotics. When Claudette refused, the acquaintance attacked her. An altercation ensued. Although Claudette claimed self-defence, she was convicted of assault with a weapon in July 2013.

Official Problem, *supra* para 3 at paras 10, 18.

[9] Due to overcrowding, Claudette was placed at Maplehurst Women's Penitentiary in Milton, Ontario in August 2013. Lily was born in October 2013 during Claudette's incarceration. Due to section 18.1, Claudette was unable to apply for admission to the Program. Lily was

apprehended within 12 hours and taken from Claudette. She now resides with Emily, Claudette's half-sister, in Calgary.

Official Problem, *supra* para 3 at paras 18-19.

[10] The separation has been traumatic for Claudette and Lily, especially because they have only seen each other four times since Lily's birth. They cannot benefit from more frequent visits. Lily resides in Alberta while Claudette is in Ontario. Further, Emily is overwhelmed by the demands of raising four children with limited support while working part-time as a nurse.

Official Problem, *supra* para 3 at paras 3, 20-21.

[11] The need for the Program is well-documented by Dr. Courtney Tegame's expert evidence. Children who fail to form secure attachments are at a higher risk of intellectual deficits, behavioural issues, and mental health issues. Forced separation of a child and mother is always traumatic. This is especially so when the mother, like Claudette, experiences mental health and addiction issues. A mother who is separated from her child is more likely to be depressed, less likely to re-establish their relationship upon release, and more likely to reoffend.

Official Problem, *supra* para 3 at para 22.

2. Legislative History

[12] The Program has existed since 1999. With the exception of section 18.1, no amendments to the Directive have been made since 2003.

Official Problem, *supra* para 3 at para 16.

[13] In April 2013, there was a public outcry over a high-profile offender who pleaded guilty to four counts of manslaughter and was permitted to enroll in the Program. At a Press Conference in May 2013, the Federal Government announced the need for reforms to the Program. Minister of Public Safety and Emergency Preparedness Mason Jennings emphasized

the need to "put an end to Club Fed" and reinforce the punitive nature of prison sentences. When asked, Minister Jennings suggested that prison is not an appropriate place for children.

Official Problem, *supra* para 3 at paras 13-15.

[14] Despite conducting no studies or risk assessments, the government enacted section 18.1, which states that "[w]omen convicted of any crime of violence, regardless of whether the crime involved a child, are not eligible to participate in the program." Section 18.1 imposes a blanket restriction on all mothers who have been convicted of an offence involving violence, with no individualized assessment of the child's best interests.

Official Problem, *supra* para 3 at para 17.
Directive, *supra* para 1, section 18.1.

3. Procedural History

[15] In March 2014, Justice Lazier found that section 18.1 violated sections 15 and 7 of *Charter*. He found discrimination against Claudette on the grounds of gender, race, ethnicity, and disability. He also found discrimination against Lily but declined to decide whether family status is an analogous ground. Further, he held that section 18.1 deprived Claudette of security of the person in a manner that was overbroad and grossly disproportionate. He found the amendment was not minimally impairing and the deleterious effects outweighed the salutary effects.

Official Problem, *supra* para 3 at 9.

[16] The Federal Court of Appeal allowed the appeal in September 2014. Writing for the majority, Justice Chan found no distinction on an enumerated ground and declined to recognize any of the suggested analogous grounds. Justice Chan found that section 18.1 did not offend the principles of fundamental justice. The dissent adopted the reasoning of Justice Lazier at trial.

Official Problem, *supra* para 3 at 9-10.

PART III – STATEMENT OF POINTS IN ISSUE

[17] The present appeal raises the following four issues:

1. **Does section 18.1 of the Commissioner's Directive infringe Claudette Tinio's rights under subsection 15(1) of the *Charter*?**

   The Appellants' position is that section 18.1 creates a distinction on (i) the analogous ground of offender status, and (ii) the enumerated grounds of race, ethnicity and disability. Section 18.1 is discriminatory and violates subsection 15(1) of the *Charter*.

2. **Does section 18.1 of the Commissioner's Directive infringe Lily Tinio's rights under subsection 15(1) of the *Charter*?**

   The Appellants' position is that section 18.1 creates a distinction on the analogous ground of family status. Section 18.1 is discriminatory and violates subsection 15(1) of the *Charter*.

3. **Does section 18.1 of the Commissioner's Directive infringe Claudette Tinio's rights under section 7 of the *Charter*?**

   The Appellants' position is that section 18.1 deprives Claudette of liberty and security of the person in a manner that is arbitrary, overbroad, and grossly disproportionate.

4. **If the answer to issues 1, 2, or 3 is "yes," is the infringement demonstrably justified in a free and democratic society under section 1 of the *Charter*?**

   The Appellants' position is that section 18.1 is not rationally connected to the objective, is not minimally impairing, and its deleterious effects outweigh its salutary effects.

PART IV – ARGUMENT

Issue 1: Section 18.1 of the Commissioner's Directive infringes Claudette Tinio's rights under subsection 15(1) of the Charter

[18] The test for discrimination is a two-part inquiry. "(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?" (*Kapp*). Section 18.1 creates a distinction on the analogous ground of offender status and the enumerated grounds of race, ethnicity, and disability. It increases the disadvantage experienced by inmates and their children. The test for discrimination outlined in *Kapp* and reaffirmed in *Quebec* is met.

> *R v Kapp*, 2008 SCC 41 at para 17, [2008] 2 SCR 483 [*Kapp*].
> *Quebec (Attorney General) v A*, 2013 SCC 5 at para 324, [2013] 1 SCR 61 [*Quebec*].

1. Section 18.1 draws a distinction on the analogous ground of offender status

[19] Section 18.1 creates a distinction based on an immutable personal characteristic, offender status, which should be recognized as an analogous ground. As per *Corbiere*, an analogous ground is based on "a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity." It may be "actually immutable, like race, or constructively immutable, like religion" (*Corbiere*).

> *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13, 173 DLR (4th) 1, McLachlin and Bastarache JJ [*Corbiere*].

[20] Claudette cannot change her status as an inmate convicted of an offence involving violence. For the relevant period of her incarceration, when the Program is otherwise available, her status is immutable. It will remain immutable after release. Claudette's criminal record will persist as an illegitimate and demeaning proxy for decision-making every time she applies for

work or housing. Nevertheless, she is denied Program benefits by virtue of her offender status – a status outside of her control.

[21] Offender status is similar to marital status, which the Supreme Court recognized as an analogous ground in *Miron*. In both cases, supposed elements of choice are actually beyond the claimant's control.

Miron v Trudel, [1995] 2 SCR 418 at para 2, 124 DLR (4th) 693 [*Miron*].

[22] In *Miron*, Justice L'Heureux-Dubé, in her concurring reasons, recognized that "notions of 'choice' may be illusory" in the context of marital status (*Miron,* affirmed in *Quebec*). Justice McLachlin (as she then was), echoed this reasoning, finding that "marital status often lies beyond the individual's effective control." A myriad of factors prevent partners from marrying. Despite the immutability of marital status existing in an "attenuated form", it was nonetheless recognized as an analogous ground (*Miron*).

Miron, supra para 21 at paras 102, 153.
Quebec, *supra* para 18 at para 376.

[23] Offender status is similar to marital status in its immutability. For Claudette, notions of choice are equally illusory. Claudette's current conviction is not the product of considered choice. As Justice Lazier found, it arose out of her unwillingness to traffic drugs. Further, the Supreme Court in *Gladue* found that imprisonment "flows from a number of sources." Criminal behaviour is influenced by systemic societal factors which "explain in part the incidence of crime and recidivism for non-aboriginal offenders" (*Gladue*). Here, such influences include mental illness, substance abuse, and childhood abuse. Together, they render Claudette's conviction beyond her "effective control", despite a finding of *mens rea* at trial (*Miron*).

Official Problem, *supra* para 3 at paras 4-7, 10, 28.
R v Gladue, [1999] 1 SCR 688 at paras 65, 68, 171 DLR (4th) 385 [*Gladue*].
Miron, supra para 21 at para 153.

[24] Alternatively, choice does not preclude a finding of offender status as an analogous ground. First, choice does not protect a finding of discrimination (*Quebec*). Second, "the fact that a person could avoid discrimination by modifying his or her behaviour does not negate the discriminatory effect" (*Lavoie*).

Quebec, *supra* para 18 at para 336.
Lavoie v Canada, 2002 SCC 23 at para 5, [2002] 1 SCR 769 [*Lavoie*].

2. Section 18.1 draws a distinction on the enumerated grounds of race, ethnicity, and disability

[25] Section 18.1 infringes three enumerated grounds, which requires the Court to undertake an intersectionality analysis. It disproportionately impacts (i) racialized women, (ii) women with mental illnesses, and (iii) women who struggle with substance abuse. All three groups are "significantly over-represented in Canadian prisons compared with the general population." Further, "such women are more likely to be serving time for violent offences than Caucasian women and women without mental health or substance abuse issues."

Official Problem, *supra* para 3 at para 28.

[26] Claudette's person connects enumerated grounds listed in section 15 that are targeted by section 18.1. Claudette's mental illness and substance abuse constitute mental disability (*Tranchemontagne*). As a Filipina, Claudette is a racialized woman. This constellation of characteristics produces a unique experience of discrimination under section 15.

Official Problem, *supra* para 3 at paras 1, 5, 6.
Director, Ontario Disability Support Program v Tranchemontagne et al, 2010 ONCA 593 at para 2, 102 OR (3d) 97 [*Tranchemontagne*].

[27] Courts will apply an intersecting grounds analysis if it advances the fundamental purpose of section 15 (*Law*, *Withler*). The overarching purpose of section 15 is substantive equality (*Kapp*). In *Andrews*, the Supreme Court defined substantive equality as the "promotion of 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." A flexible approach to intersecting grounds "accords with the essential purposive and contextual nature of equality analysis" (*Law*).

> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 93, 170 DLR (4th) 1, Iacobucci J [*Law*].
> *Withler v Canada (Attorney General)*, [2011] SCC 12 at para 63, 1 SCR 39 [*Withler*].
> *Kapp*, *supra* para 18 at paras 14-16, 20.
> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at para 34, 56 DLR (4th) 1, McIntyre J dissenting in part [*Andrews*].

[28] Substantive equality would be achieved by recognizing the intersecting grounds of race, ethnicity, and disability. Making the Program available to all inmates would ensure the well-being and healthy development of incarcerated mothers and their children. Section 18.1 is a degrading provision that assumes inadequate parenting ability due to the nature of mothers' convictions. Without section 18.1, inmates convicted of an offence involving violence would be granted the same "concern, respect and consideration" as inmates who have not committed an offence involving violence (*Andrews*).

> *Andrews*, *supra* para 27 at para 34.

3. Section 18.1 establishes a distinction that creates disadvantage and is discriminatory

[29] As a preliminary matter, it must be noted that the Supreme Court has rarely deferred to the legislature in the context of total exclusions from a legislative scheme, as shown in *Eldridge*, *Tétrault-Gadoury*, and *Vriend*. The same suspicion with respect to the total exclusion of a particular group from the benefits of a government program applies here. Following *Eldridge*, once the state provides a program, it must do so without discrimination. By adding section 18.1, the government is now providing the Program in a discriminatory fashion contrary to section 15 of the *Charter*.

Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624 at para 51, 151 DLR (4th) 577 [*Eldridge*].
Tétrault-Gadoury v Canada (Employment and Immigration Commission), [1991] 2 SCR 22, 81 DLR (4th) 358 [*Tétrault*].
Vriend v Alberta, [1998] 1 SCR 493, 156 DLR (4th) 385 [*Vriend*].

[30] Section 18.1 establishes distinctions that create disadvantage in two ways. First, it perpetuates prejudice and disadvantage. Second, it perpetuates false stereotypes. Since section 18.1 perpetuates prejudice and disadvantage against Claudette and is based on stereotype, it violates section 15 of the *Charter* (*Withler*).

Withler, *supra* para 27 at paras 34-36.

a) Section 18.1 perpetuates prejudice and worsens disadvantage

[31] As Justice Abella stated in *Quebec*: "[i]f the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory." Section 18.1 widens the gap between inmates who have committed an offence involving violence and the rest of society by worsening Claudette's disadvantage.

Quebec, *supra* para 18 at para 332.

[32] This appeal is strikingly similar to *Inglis*, where the British Columbia Supreme Court held that the cancellation of a Mother and Baby Program violated section 15 of the *Charter*. The Court held that the cancellation of the Program worsened disadvantage for incarcerated mothers and their infants. The same reasoning animates this appeal. Both the cancellation of the Program in *Inglis* and section 18.1 send demeaning messages to mothers and their infants and create potentially insurmountable hurdles to establishing mother-child bonds.

Inglis v British Columbia (Minister of Public Safety), [2013] BCSC 2309 at para 573, 298 CRR (2d) 35 [*Inglis*].

[33] Section 18.1 inflicts harmful effects on Claudette. Dr. Tegame is a psychologist specializing in female prisoners. In her expert affidavit, Dr. Tegame notes four harmful effects

flowing from an inmate's separation from her child. First, Claudette is more likely to re-offend upon release. Second, she will lose the opportunity to bond with her daughter. Third, the trauma of Claudette's separation from Lily is exacerbated by her pre-existing mental disabilities. Fourth, she is more likely to be depressed and face difficulties re-establishing a bond with Lily post-release. Claudette loses the opportunity to sever a cycle of dysfunctional behaviours stemming from childhood abuse, drug addiction, and mental health issues by nurturing a loving and healthy bond between herself and Lily.

Official Problem, *supra* para 3 at paras 4-5, 22.

b) Section 18.1 engages in false stereotyping

[34] Claudette suffers a loss of substantive equality through the "stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance" (*Miron*). Section 18.1 is a result of stereotypes that do not correspond with Claudette's actual circumstances and characteristics. In *Inglis*, the Court held that the cancellation of the Program perpetuated the stereotypes that female inmates cannot adopt a proper parenting role and that "vigilant state oversight and intervention are necessary to protect these babies from their 'bad mothers'" (*Inglis*). The same stereotypes are at play here. Through section 18.1, the federal government applied two stereotypes to inmates convicted of an offence involving violence. First, they are not fit to raise their children. Second, they do not deserve the "privilege" of keeping their infants while serving their sentence. No evidence supports either finding.

Miron, *supra* para 21 at para 131.
Official Problem, *supra* para 3 at paras 14-15.
Inglis, *supra* para 32 at para 573.

[35] First, all evidence demonstrates that emotional and health benefits accrue to both mother and child if their union is preserved during incarceration. Claudette's status as an inmate

convicted of an offence involving violence bears no impact on her parenting skill or ability to provide a safe and healthy environment for Lily. That sole fact excludes her from benefits under the Program. However, there is no evidence demonstrating that she poses a risk of harm to Lily.

[36] Second, prisoners do not lose all constitutional rights following incarceration. In *Sauvé*, the Supreme Court upheld prisoners' rights under the *Charter*. The same principle applies to inmates' parenthood, which is not reduced to an unmerited privilege upon incarceration. Section 18.1 declares inmates convicted of an offence involving violence not as deserving of Program benefits as other offenders. That denies substantive equality by relying on a false stereotype that situates such inmates as second-class citizens incapable of safe and proper parenting.

> *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519 [*Sauvé*].

Issue 2: Section 18.1 of the Commissioner's Directive infringes Lily Tinio's rights under subsection 15(1) of the Charter

1. Section 18.1 creates a distinction on the analogous ground of family status

[37] Family status ought to be recognized as an analogous ground in the *Charter* context. It is recognized as a prohibited ground of discrimination in the *Canadian Human Rights Act* though it is not defined therein. It relates to the bond between parent and child but "may arise in many different situations" (Halsbury's, *Seeley*). For example, it has been broadly interpreted to include childcare obligations in *Seeley* and *Johnstone.*

> *Canadian Human Rights Act*, RSC 1985, c H-6 section 3(1) [*Canadian Human Rights Act*].
> Halsbury's Laws of Canada, "Discrimination and Human Rights", (2013) at section 3(7)(c) [Halsbury's].
> *Johnstone v Canada (Border Services)*, 2014 FCA 110 at para 102, [2014] FCJ No 455 [*Johnstone*].
> *Canadian National Railway Co v Seeley*, 2014 FCA 111 at para 49, [2014] FCJ No 542 [*Seeley*].

[38] Lily is discriminated against because of the identity of her parent – a prohibited ground of discrimination under the *Canadian Human Rights Act*. In *B v Ontario*, the Supreme Court found that adverse treatment based on the identity of one's spouse, child, or parent is prohibited under the *Canadian Human Rights Act*. In *Andrews*, the Supreme Court stated that "[i]n general, it may be said that the principles which have been applied under the *Canadian Human Rights Act* are equally applicable in considering questions of discrimination under s.15(1)." *Andrews* supports its recognition since human rights jurisprudence may inform a *Charter* analysis.

> *B v Ontario Human Rights Commission*, 2002 SCC 66 at para 60, 3 SCR 403 [*B v Ontario*].
> *Andrews*, *supra* para 27 at para 38.

[39] Family status has the requirements of an analogous ground under the *Charter*. As per *Corbiere*, the "thrust of identification of analogous grounds […] is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law." Family status is fundamental to identity and development. It is changeable only at "unacceptable cost to personal identity" (*Corbiere*). Surrendering a relationship with Claudette bears unacceptable costs to Lily's personhood and proper development.

> Official Problem, *supra* para 3 at para 22.
> *Corbiere*, *supra* para 19 at para 13.

[40] In *Thibaudeau*, a majority of the Supreme Court left open the possibility of recognizing family status in a different case. In *Inglis*, the Court acknowledged that the cancellation of a similar Program created a distinction on the ground of family status. The court invoked Justice McLachlin's (as she then was) dissenting opinion in *Thibaudeau*, where she stated that "the individual's freedom to form family relationships touches on matters so intrinsically human,

personal and relational that a distinction based on this ground must often violate a person's dignity."

Inglis, *supra* para 32 at para 567.
Thibaudeau v Canada, [1995] 2 SCR 627 at para 207, 124 DLR (4th) 449, McLachlin J dissenting [*Thibaudeau*].

2. Section 18.1 creates a distinction that discriminates against Lily

[41] Lily is disadvantaged as the child of an incarcerated mother who has committed a violent offence. She is deprived of a relationship with her mother because of her family status. The court in *Thibaudeau* found that social, personal, and emotional challenges facilitated identification of disadvantaged minorities. Similarly, Lily faces social, personal, emotional, and developmental challenges due to her status as a child of an offender excluded from the Program. She belongs to a disadvantaged minority – infants of offenders. These infants are the "'invisible victims' of crime and the corrections system" (*Inglis*).

Official Problem, *supra* para 3 at para 22.
Thibaudeau, *supra* para 40 at para 209.
Inglis, *supra* para 32 at para 566.

a) Section 18.1 deprives Lily of the best interests of the child analysis

[42] The blanket exclusion of inmates convicted of an offence involving violence from the Program fails to ensure the best interests of the child. Under section 3 of the Directive, the best interests of the child is defined as the "safety and security" of the child along with her "physical, emotional and spiritual well-being." Yet it is impossible to assess Lily's best interests because Claudette was excluded outright from the Program.

Directive, *supra* para 1, section 3.
Official Problem, *supra* para 3 at para 22.

[43] The best interests of the child analysis is guaranteed to all children internationally and domestically. The *Convention on the Rights of the Child* guarantees that "the best interests of the

child shall be a primary consideration" and recognizes the right of children not to be discriminated against on the basis of the status or activities of their parents. In *King,* the Supreme Court set out the considerations for the best interests of the child which involve choosing "the course which will best provide for the healthy growth, development and education of the child so that [s]he will be equipped to face the problems of life as a mature adult." The Court stressed the bond between parent and child is "essential to the child's development and of great significance even in the very early months of the infant's life."

> *United Nations Convention on the Rights of the Child*, 20 November 1989, 1557 UNTS 3, arts 2(2), 3(1), Can TS 1992 No 3 (entered into force 2 September 1990, ratification by Canada 31 December 1991) [*Convention on the Rights of the Child*].
> *King v Low*, [1985] 1 SCR 87 at paras 32, 101, 16 DLR (4th) 576, McIntyre J [*King*].

[44] Section 18.1 denies consideration of the best interests of the child for Lily. As Dr. Tegame asserted in her expert affidavit, the detrimental effects of Lily's separation from Claudette are substantial. Lily stands to lose a proper and secure attachment to her mother, which promotes healthy brain functioning, social development, and emotional security. She will be at a higher risk of intellectual deficits, behavioural difficulties, and mental health issues. The most crucial period is right now. Lily is one year old and the most important period for a child's development is from 12-24 months. Lily's best interests might be served if she remained with Claudette. Their union might "best provide" for her "healthy growth [and] development" (*King*). Yet section 18.1 denies examination of her best interests even though every other child has the benefit of having his or her life decided by such considerations.

> Official Problem, *supra* para 3 at para 22.
> *King*, *supra* para 43 at para 101.

[45] Lily has already lost the benefits of being breastfed because of the changes to the Program and the distance between Emily's home and the prison – both factors entirely out of her control. The Canadian Pediatric society recommends exclusive breastfeeding for the first 6 months of life and the continuation of breastfeeding with other food sources for up to 18 months after that. Lily is already a year old; such benefits are lost.

Official Problem, *supra* para 3 at paras 27, 22.

[46] Prisons are not incompatible with a Mother-Child Program or the best interests of the child. The Program already incorporates several safeguards and measures to continually ensure the best interests of children. These include: supports for mothers, requiring a Parenting Agreement that mothers must adhere to, ongoing monitoring and reviews, child welfare authorities' involvement, and assisting inmates with preparation for community reintegration upon release, and off-site age-appropriate activities and programs. Now, the best interests of children of inmates convicted of offences involving violence cannot be assessed. Section 18.1 replaces the previous nuanced approach with a blunt regime that separates infants from their mothers.

Official Problem, *supra* para 3 at para 22.
Directive, *supra* para 1, sections 1, 9, 10, 11, 12, 14, 26, 80, 81, 88, 89.

Issue 3: Section 18.1 of the Directive infringes Claudette Tinio's rights under section 7 of the Charter

[47] Section 18.1 of the Directive violates section 7 of the *Charter*. To establish a violation of section 7, there must a deprivation of the right to life, liberty, or security of person and that the deprivation must not be in accordance with any of the principles of fundamental justice (*Charkaoui*). Section 18.1 prevents Claudette from being able to reside with her daughter, depriving her of liberty and security of person in a manner inconsistent with the principles of fundamental justice.

Charter, *supra* para 2, section 7.
Charkaoui v Canada, 2007 SCC 9 at para 12, [2007] 1 SCR 350 [*Charkaoui*].

1. The context of the section 7 analysis supports a finding of deprivation

[48] The section 7 analysis must be a contextual one (*KLW*). The context is informed by the violation of equality rights, since section 18.1 does not impact every mother (*Inglis*). Rather, these deprivations are isolated to a specific group of mothers who are already disadvantaged.

Winnipeg Child and Family Services v KLW, 2000 SCC 48 at para 71, [2000] 2 SCR 519 [*KLW*].
Inglis, *supra* para 32 at paras 375-377.

[49] These deprivations are even more severe for Claudette because she has no other alternatives to form a relationship with Lily. As a result of overcrowding, Claudette is forced to reside in a women's prison in Ontario. Lily resides with Emily in Alberta. This distance severely limits Claudette's ability to see Lily, as well as provide her with nutritious breast milk.

Official Problem, *supra* para 3 at paras 3, 20, 27.

[50] Section 7 must provide at least as great protection to rights as that offered by international law (*BC Health*). Article 16(3) of the *Universal Declaration of Human Rights* emphasizes that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Article 25(2) highlights the importance of the mother-child relationship, which requires "special care and assistance" (*UDHR*).

Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia, 2007 SCC 27 at para 70, [2007] 2 SCR 391 [*BC Health*].
Universal Declaration of Human Rights, GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71 [*UDHR*].

[51] Prisoners are also guaranteed rights set out in international and domestic law. Section 5 of the *Basic Principles for the Treatment of Prisoners* states that "[e]xcept for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the

human rights and fundamental freedoms set out in the Universal Declaration of Human Rights" (*Basic Principles*). The Supreme Court has also emphasized that "[t]he rule of law must run within penitentiary walls" (*Martineau*, cited with approval in *Ferndale*).

> *Basic Principles for the Treatment of Prisoners*, GA Res 45/111, UNGAOR, 45th Sess, UN Doc A/RES/45/111, (1990) [*Basic Principles*].
> *Martineau v Matsqui Institution*, [1980] 1 SCR 602 at para 59, 106 DLR (3d) 385 [*Martineau*].
> *May v Ferndale Institution*, 2005 SCC 82 at para 25, [2005] 3 SCR 809 [*Ferndale*].

2. Section 18.1 deprives Claudette of security of person

[52] Section 18.1 deprives Claudette of her security of person because it causes her severe psychological stress by disrupting her relationship with Lily. Security of person protects both the physical and psychological integrity of the individual (*Morgentaler*, approved in *G(J)*). Ordinary stress is not sufficient to constitute psychological interference. Instead, the "state action must have a serious and profound effect on a person's psychological integrity" (*G(J)*).

> *R v Morgentaler*, [1988] 1 SCR 30 at para 245, 44 DLR (4th) 385 [*Morgentaler*].
> *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at paras 58-60, 177 DLR (4th) 124, Lamer CJ [*G(J)*].

[53] Forcible removal of a child from parental custody constitutes serious interference with the psychological integrity of the parent (*G(J)*). In *KLW*, the Court found "[t]he mutual bond of love and support between parents and their children is a crucial one and deserves great respect. Unnecessary disruptions of this bond by the state have the potential to cause significant trauma to both the parent and the child". Lily was apprehended from Claudette within 12 hours of her birth and taken from Claudette to live with Emily. This terrible feeling of having her daughter "ripped out of [her] arms" is repeated during every visit when Lily must eventually leave.

> *G(J)*, *supra* para 52 at para 61.
> *KLW*, *supra* para 48 at para 72.

Official Problem, *supra* para 3 at para 20.

[54] The forcible removal of Lily from Claudette is very similar to the removal of a child pursuant to child custody proceedings. In *G(J)*, the Supreme Court found this constituted a serious deprivation and interference with psychological security for two reasons. First, child custody proceedings are a "pronouncement as to the parent's fitness or parental status", which results in stigmatization. Second, custody proceedings involve "usurping the parental role or prying into the intimacies of the relationship", which constitutes interference with one's status *qua* parent (*G(J)*).

G(J), *supra* para 52 at paras 61-64.

[55] These same considerations are engaged in the present case. First, this amendment is based on the stereotypical and unproven assumption that all mothers who commit violent offences (including Claudette) are unfit parents and a potential danger to their children. Claudette's conviction alone does not demonstrate she is an unfit parent. The incident only occurred because Claudette refused to traffic narcotics. Second, as in child custody proceedings, the forced removal of Lily from Claudette directly usurps Claudette's parental role and permanently impacts her ability to form a relationship with Lily.

Official Problem, *supra* para 3 at paras 10, 17, 22.

3. Section 18.1 deprives Claudette of liberty

[56] Liberty is more than freedom from physical restraint. Instead, liberty encompasses the right to make fundamental personal decisions without interference from the state (*Malmo-Levine*). Properly understood, liberty grants the individual the autonomy to make decisions of fundamental personal importance (*Morgentaler*, affirmed in *Godbout*).

R v Malmo-Levine, 2003 SCC 74 at para 85, [2003] 3 SCR 571 [*Malmo-Levine*].
Morgentaler, *supra* para 52 at para 230.

Godbout v Longueuil (City), [1997] 3 SCR 844 at para 65, 152 DLR (4th) 577 [*Godbout*].

[57] Decisions with respect to one's children constitute fundamental personal decisions that are protected by section 7. The Supreme Court in *B(R)* held that parents have a liberty interest and protected sphere of decision-making when making choices affecting their children. Furthermore, Justice L'Heureux-Dubé (concurring in *G(J)*) held that removing a child from his or her parent engages the parent's liberty under section 7 (*G(J)*).

B(R) v Children's Aid Society of Metropolitan Toronto, [1995] 1 SCR 315 at para 85, 122 DLR (4th) 1 [*B(R)*].
G(J), *supra* para 52 at para 118.

[58] Section 18.1 deprives Claudette of the ability to make personal decisions about her daughter. Although Claudette can express her wishes to Emily, this is limited. There are many situations where Claudette will not be able to exercise her liberty to make decisions. For instance, Claudette is unable to decide what activities Lily will participate in, what her diet will be, and eventually, which school she will attend. Most significantly, Claudette is unable to decide whether Lily will reside with her.

[59] The choice of residence engages fundamental liberty interests. This choice has been recognized by the Supreme Court as "a quintessentially private decision going to the very heart of personal or individual autonomy" (*Godbout*). Claudette wishes to apply for a program that will allow her to make an important decision with respect to her daughter. This decision is inherently personal. It will also have a significant impact on Claudette and Lily's lives and the quality of their relationship.

Godbout, *supra* para 56 at para 66.
Official Problem, *supra* para 3 at para 22.

4. The deprivations are not in accordance with the principles of fundamental justice

[60] Neither of these deprivations of liberty or security of person is in accordance with the principles of fundamental justice since section 18.1 is arbitrary, overbroad, and grossly disproportionate (*Charkaoui*). Under the principles of fundamental justice analysis, the question is "whether the law's purpose, taken at face value, is connected to its effects and whether the negative effect is grossly disproportionate to the law's purpose" (*Bedford*).

> *Charkaoui*, *supra* para 47 at para 12.
> *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 125, [2013] 3 SCR 1101, McLachlin CJ [*Bedford*].

a) Section 18.1 is overbroad

[61] Section 18.1 is overbroad because it "uses means which are broader than is necessary to accomplish that objective" (*Heywood*). Section 18.1 permanently and completely bans a particular group of mothers from the Program. This blunt exclusion is not necessary or justified.

> *R v Heywood*, [1994] 3 SCR 761 at para 49, 120 DLR (4th) 348, Cory J [*Heywood*].

[62] First, the plain meaning of section 18.1 is overbroad because its exclusion is permanent (*Rizzo Shoes*). Section 18.1 would exclude a woman who committed a violent offence at any point in her life from participating in the Program. A mother who was convicted of a violent offence twenty years ago would not be entitled to participate in the Program, even if her current conviction was a narcotics charge. This is overbroad. It permanently excludes many women from the Program, with absolutely no evidence of a present risk to the child.

> *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at para 20, 154 DLR (4th) 193 [*Rizzo Shoes*].

[63] Second, section 18.1 is overbroad because it replaces a carefully tailored program with a blanket exclusion. Some children's best interests will be served by residing with a mother who has committed an offence involving violence. Many children were previously admitted to the

Program, even though their mother committed a violent offence. This is because residing with their mother was determined to be in the child's best interests.

Official Problem, *supra* para 3 at para 25.
Directive, *supra* para 1, sections 3, 9(a).

[64] Decisions with respect to a child's best interests require an individualized assessment. In discussing child custody and access decisions, Justice Bastarache noted that "[c]ase-by-case consideration of the unique circumstances of each child is the hallmark of the process" (*Edwards*). Section 18.1's blanket exclusion is much broader than is necessary to ensure that the best interests of children are protected.

Van de Perre v Edwards, 2001 SCC 60 at para 13, [2001] 2 SCR 1014, Bastarache J [*Edwards*].

[65] Claudette's situation presents one instance where an individual assessment is necessary to determine Lily's best interests. All the evidence demonstrates that Claudette is able and willing to look after her daughter - Claudette talks to Lily, hugs her, plays with her, and generally cares for her whenever she visits. Although Emily is doing her best with Lily, she is overwhelmed by the physical, emotional, and financial demands of raising four children. Since there is no possibility that Lily may reside with Claudette, regardless of Lily's best interests, section 18.1 is overbroad.

Official Problem, *supra* para 3 at paras 20-21.

b) Section 18.1 is arbitrary

[66] When a law is arbitrary, "there is no connection between the effect and the object of the law" (*Bedford*). As Professor Hogg has emphasized, "[i]f the policy instrument is not a rational means to achieve the objective, then the law is dysfunctional in terms of its own objective" (Brilliant Career of Section 7). Section 18.1 is dysfunctional. The purpose of the Program is to provide a supportive environment that fosters and promotes stability and continuity for the

mother-child relationship, with the best interests of the child as the pre-eminent consideration. Rather than furthering this purpose, section 18.1 actually undermines it.

Bedford, *supra* para 60 at para 98.
Peter W Hogg, "The Brilliant Career of Section 7 of the Charter" (2012) 58 SCLR (2d) 195 at 209 [Brilliant Career of Section 7].
Directive, *supra* para 1, sections 1, 3.

[67] First, there is no evidence that residing in prison with mothers who committed violent offences is harmful to the safety and security of children. There were no studies undertaken prior to amending the Program and only limited anecdotal evidence from Nishant Patel, a senior administrator at Maplehurst. It is unclear whether these two incidents involved women who had been convicted of violent offences. The government is entitled to rely on a reasoned apprehension of harm when there is conflicting or inconclusive social science evidence (*Harper*). However, this requires a *reasoned* apprehension of harm with an evidentiary basis. Such evidence is lacking here. Although the government may act preemptively to avoid harm, "the existence of concerns relating to safety must be unequivocally established for the infringement of a constitutional right to be justified" (*Multani*).

Official Problem, *supra* para 3 at paras 17, 25.
Harper v Canada (Attorney General), 2004 SCC 33 at para 77, [2004] 1 SCR 827 [*Harper*].
Multani v Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6 at para 67, [2006] 1 SCR 256, Charron J [*Multani*].

[68] Second, the Program already has numerous safeguards in place to ensure that children are safe and cared for while in prison. For example, there are searches, safety reviews, and house rules that protect the children's safety and security. To achieve these safety goals, there is no need for a blanket exclusion of all women convicted of an offence involving violence.

Directive, *supra* para 1, section 10(c).

[69] Third, unlike mothers who are convicted of violent crimes, mothers who have committed an offence involving a child are allowed to participate in the Program if a psychiatric evaluation demonstrates that she does not pose a safety risk to the child. There is a *prima facie* greater concern with the safety of children when the mother has been convicted of an offence involving a child. There is no basis for treating mothers who have been convicted of an offence involving violence worse than those convicted of an offence involving a child.

Directive, *supra* para 1, section 18.

[70] Fourth, individuals who have committed offences involving violence may still look after children in prison. The only absolute prohibition on babysitters is for those who have been convicted of an offence against a child. This suggests a complete prohibition of women who have been convicted of a violent offence is not necessary to protect the safety of children.

Directive, *supra* para 1, section 40(b).

[71] Finally, there are other components of children's best interests that are undermined by the amendment. Minister Jenning's statements seem to consider only the safety and security of children. However, "the best interests of the child encompasses more than the absence of harm" and include "a myriad of considerations" (*Young*). These considerations are recognized in the Directive, which emphasizes the safety, security, physical, emotional, and spiritual well-being of children. Many of these components of a child's well-being could be better served if the child resided with his or her mother.

Young v Young, [1993] 4 SCR 3 at paras 55, 71, 108 DLR (4th) 193, L'Heureux-Dubé J, dissenting in result [*Young*].

Directive, *supra* para 1, section 3.

c) Section 18.1 is grossly disproportionate

[72] Section 18.1 is grossly disproportionate because a blunt exclusion is not a reasonable response relative to the potential threat. As the Supreme Court in *Suresh* noted, "some responses are so extreme that they are *per se* disproportionate to any legitimate government interest" (*Suresh*, emphasis in original). This is one instance where the government's response is so extreme as to be disproportionate.

> *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 47, [2002] 1 SCR 3 [*Suresh*].

[73] Section 18.1 results in significant deprivations for Claudette. She loses the ability to make many important decisions with respect to Lily and suffers serious psychological distress by being forcibly separated from her. This is further exacerbated because Claudette is imprisoned far away from her daughter and, unfortunately, has very limited visits with her. The pain of being separated from her daughter is obvious. Claudette emphasized that "[w]hen I think about my own daughter not knowing me, not knowing why I am not there to play with her, to hug her, to care for her, I cannot stop crying". Although not all women may be in the same situation as Claudette, it is enough that there is a grossly disproportionate effect on one individual (*Bedford*).

> Official Problem, *supra* para 3 at paras 20, 22.
> *Bedford*, *supra* para 60 at para 122.

Issue 4: The violations of sections 15 and 7 are not reasonable limits demonstrably justified in a free and democratic society under section 1 of the Charter

[74] The government has the onus of demonstrating that the violations of sections 15 and 7 are reasonable limits justified in free and democratic society (*Oakes*). The complete lack of social science evidence is insufficient to justify infringements on "rights and freedoms which are part of the supreme law of Canada" (*Oakes*).

> *R v Oakes*, [1986] 1 SCR 103 at paras 63, 66, 26 DLR (4th) 200, Dickson CJ

[*Oakes*].
Official Problem, *supra* para 3 at paras 17.

1. The Respondent is entitled to little deference

[75] This court should afford the Respondent little deference in determining whether it has discharged its onus under section 1. The rights at stake in this appeal are significant. Justifications for sections 15 and 7 violations are rare. A section 7 violation has never been justified under section 1 by a majority of the Supreme Court (*Constitutional Law of Canada*). It is rare that a violation of the principles of fundamental justice will be upheld as a reasonable limit (*G(J)*; *BC Motor Vehicle Act*).

Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2014) at 38-46.
G(J), *supra* para 52 at para 99.
Reference Re BC Motor Vehicle Act, [1985] 2 SCR 486 at para 85, 24 DLR (4th) 536 [*BC Motor Vehicle Act*].

[76] Furthermore, this case involves a penal context that directly threatens the liberty of the accused, which entitles the Respondent to less deference (*Hutterian Brethren*). The comments made by Minister Jennings at the Press Conference highlight the punitive element of section 18.1. He stated that "[t]he purpose of prisons is to punish offenders, and that does not mean paying for violent offenders to have the privilege of raising their children while they serve their sentences."

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 at para 37, [2009] 2 SCR 567 [*Hutterian Brethren*].
Official Problem, *supra* para 3 at para 14.

2. The limit imposed by section 18.1 is a limit prescribed by law with a pressing and substantial objective

[77] The Directive constitutes a limit prescribed by law (*Hunter*). If the government's purpose of the Directive and the amendment contained within section 18.1 is to protect the best interests

of children, this is undoubtedly a pressing and substantial objective. However, there are indications from Minister Jennings that the government's objective in amending the Directive was punitive, not about protecting children.

Hunter v Canada (Commissioner of Corrections), [1997] 3 FCR 936 at para 68, 45 CRR (2d) 189, (TD) [*Hunter*].
Official Problem, *supra* para 3 at para 14.

3. The limit imposed by section 18.1 fails the proportionality test

[78] Even assuming the government has a pressing and substantial objective in amending the Program, it fails the proportionality test. There is no rational connection, section 18.1 is not minimally impairing, and its deleterious effects outweigh any salutary effects (*Oakes*).

Oakes, *supra* para 74 at para 70.

a) There is no rational connection between the purpose and effects of the law

[79] The test under rational connection is "whether the law was a rational means for the legislature to pursue its objective" (*Bedford*). There is a strong connection between arbitrariness and rational connection (*Bedford*). Just as section 18.1 was arbitrary, it also lacks a rational connection and undermines the purpose of the Directive.

Bedford, *supra* para 60 at paras 111, 126.

b) Section 18.1 is not minimally impairing

[80] Section 18.1 is overbroad legislation, which strongly implies that it is not minimally impairing (*Heywood*). It creates a complete exclusion for women who have been convicted of a violent offence, with no possibility for an individualized assessment. A total prohibition is not justified unless "the government can show that only a full prohibition will enable it to achieve its objective" (*RJR-MacDonald*). This is not the case here.

Heywood, *supra* para 61 at para 69.
RJR-MacDonald Inc v Canada (Attorney General), [1995] 3 SCR 199 at para 163,

127 DLR (4th) 1, McLachlin J [*RJR-MacDonald*].

[81] There are more tailored means that the government can use to address its concerns. Section 18 of the Directive provides one clear alternative. A similar procedure requiring a psychiatric evaluation could be used for women convicted of a violent offence. Another alternative is requiring more regular reviews for mothers convicted of a violent offence to ensure the Program remains in the best interests of the child.

Directive, *supra* para 1, sections 18, 38.

c) The deleterious effects of section 18.1 outweigh its salutary effects

[82] The actual salutary effects of section 18.1 must be compared with the deleterious effects because there are significant concerns about whether the objective will be realized in practice (*Dagenais*). No studies suggest that mothers convicted of violent offences pose a greater risk to their children. This lack of evidence makes it impossible to conclude whether or not this amendment will have any positive effects.

Dagenais v Canadian Broadcasting Corp, [1994] 3 SCR 835 at para 93, 120 DLR (4th) 12 [*Dagenais*].
Official Problem, *supra* para 3 at para 17.

[83] In contrast to the speculative salutary effects, the deleterious effects are real and significant. First, Claudette has lost her daughter Lily during a crucial period of development and attachment. She experiences significant trauma each time her daughter must leave, which is exacerbated by her mental health issues. Furthermore, Claudette's relationship with Lily may be permanently impaired.

Official Problem, *supra* para 3 at para 22.

[84] Second, Lily and other children also suffer by virtue of section 18.1. The early childhood period when the full-time Program operates is crucial for children's proper brain functioning,

social development, and emotional security. Although Lily is fortunate to have a substitute caregiver, many children excluded by section 18.1 may not be so fortunate.

Official Problem, *supra* para 3 at para 22.

[85] Finally, these significant deleterious effects apply to the many women who have resided with their children in prison for years. Of those currently enrolled in the Program, 45% have committed an offence involving violence. Approximately 34 women and their children will be forcibly separated, destroying the loving mother-child bond. This unnecessary disruption of the mother-child bond is traumatic for both mothers and their children (*KLW*). These very real costs outweigh any speculative benefits from section 18.1.

Official Problem, *supra* para 3 at para 25.
KLW, *supra* para 48 at para 72

[86] Section 18.1 has significant deleterious effects for both mothers and their children. These effects are profound and permanent. Claudette and Lily are not the only individuals harmed by section 18.1, but their case represents a perfect illustration of the unnecessary harms caused by section 18.1.

PART V – ORDER SOUGHT

[87] The Appellants request that the appeal be allowed and the orders of Justice Lazier be restored.

All of which is respectfully submitted this 30th day of January, 2015.

Team 10

Counsel for the Appellants

PART VI – LIST OF AUTHORITIES AND STATUTES

JURISPRUDENCE	PARAGRAPHS
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567.	76
Andrews v Law Society of British Columbia, [1989] 1 SCR 143, 56 DLR (4th) 1.	27, 28, 38
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Peter W Hogg, Constitutional Law of Canada, 5th ed (Toronto: Thomson Reuters, 2014).	75
Peter W Hogg, "The Brilliant Career of Section 7 of the Charter" (2012) 58 SCLR (2d) 195.	66

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Commissioner's Directive Number 768, enacted pursuant to the *Corrections and Conditional Release Regulations*, SOR/92-620.	1, 14, 42, 46, 63, 66, 68, 69, 70, 71, 81