THE HIGH COURT OF THE DOMINION OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

CLAUDETTE TINIO and LILY TINIO (BY HER LITIGATION GUARDIAN CLAUDETTE TINIO)

Appellants

– AND –

ATTORNEY GENERAL OF CANADA

Respondents

FACTUM OF THE APPELLANTS

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PART I – OVERVIEW

[1] At issue in this appeal is whether the state-enforced separation of an incarcerated mother from her newborn child violates both the mother's and child's rights to equality and the mother's right to security of the person under s. 15(1) and s. 7 of the *Canadian Charter of Rights and Freedoms*.

> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[2] Under its legislative mandate to ensure that Canada's correctional system addresses the particular needs of incarcerated women, the Commissioner of the Correctional Service of Canada, through Commissioner's Directive 768 ("the Directive") established the Institutional Mother-Child Program. The Mother-Child Program enables incarcerated mothers to remain united with their newborn and young children. In 2013, without any prior study, Directive 768 was amended by adding s. 18.1 which categorically and without individual risk assessment excludes all women incarcerated for "violent offences" from participating in the Mother-Child Program.

> Exhibit "A" to the Official Problem - Commissioner's Directive 768, s 4 [Directive].
> Official Problem, Wilson Moot 2015 at paras 14, 16 [Official Problem].

[3] Ms. Claudette Tinio gave birth to Lily Tinio in prison. Under s. 18.1, Ms. Tinio and Lily were separated a mere 12 hours after Lily's birth because Ms. Tinio's offence, a minor assault with a phone, has been classified as a "violent crime" for the purpose of the Mother-Child Program. There is no evidence that Ms. Tinio poses a risk of harm to Lily nor is there any evidence that residing with her mother in prison is not in Lily's best interests.

> Official Problem, *supra* para 2 at paras 10, 19.

[4] The *Charter* restricts the state when it wishes to act in a manner that directly interferes with a person's fundamental rights, and that has an adverse impact on equality-seeking groups.

Section 18.1 violates Ms. Tinio's and Lily's right to equality because it adversely impacts both mother and child on enumerated and analogous grounds. The separation enforced by s. 18.1 violates Ms. Tinio's right to security of the person by causing psychological harm contrary to the principles of fundamental justice.

[5] Neither infringement is saved under s. 1 because s. 18.1 lacks a rational connection to its objective, impairs *Charter* rights unnecessarily and perpetrates harms that outweigh its benefits. The appeal should be allowed.

PART II – STATEMENT OF FACTS

Factual background

[6] Claudette Tinio is a Filipina-Canadian single mother of an infant daughter, Lily, who is now one year old. Ms. Tinio was born in Winnipeg to a single mother who immigrated to Canada though the Live-In Caregiver Program. Ms. Tinio had a difficult childhood. She suffered corporal punishment as a child, and was forced to seek shelter with friends and in public parks. As a teenager, Ms. Tinio was diagnosed with bipolar disorder but remained untreated because she was unable to afford the recommended medications. Ms. Tinio also experienced problems with drug use, which led her to a number of interactions with the justice system.

Official Problem, *supra* para 2 at paras 1, 4-7.

[7] Ms. Tinio has shown tenacity in trying to turn her life around. While serving a prior prison sentence, Ms. Tinio took advantage of the drug recovery and education programs offered by the institution to help her prepare to successfully reintegrate into society. She was also given access to mood stabilizing medication to treat her bipolar disorder.

Official Problem, *supra* para 2 at para 8.

[8] For two years after her release in 2010, Ms. Tinio worked hard to maintain this progress. She attended Alcoholics Anonymous meetings and has been largely successful in remaining sober. However, she found that it was difficult to escape from her past. In December 2012, an old acquaintance demanded that Ms. Tinio traffic a large quantity of cocaine. When Ms. Tinio resisted this demand, the acquaintance punched and shoved Ms. Tinio. In response, Ms. Tinio struck the acquaintance with a phone. She was charged and convicted of assault with a weapon, and sentenced to Maplehurst Women's Penitentiary, a federal minimum-security prison near Milton, Ontario.

Official Problem, *supra* para 2 at paras 10-11, 18.

[9] Ms. Tinio was pregnant while awaiting trial. At that time, she learned of the Mother-Child Program which enables new mothers to remain united with their newborn and young children while incarcerated.

Official Problem, *supra* para 2 at para 12.

[10] Shortly before Ms. Tinio began serving her sentence at Maplehurst, the Mother-Child Program was amended by the addition of s. 18.1 which excludes all women convicted of "any crime of violence" from participating in the Program.

Official Problem, *supra* para 2 at paras 14, 19.

[11] Ms. Tinio gave birth to Lily while she was in prison, only two months into her four-year sentence. Ms. Tinio and Lily were separated a mere twelve hours after Lily's birth. Lily has been placed in the care of Ms. Tinio's half-sister Emily who lives more than 3,000 km away in Calgary. Due to the distance and prohibitive cost, Emily has only been able to bring Lily to visit Ms. Tinio four times since her birth. After each brief visit with Lily, Ms. Tinio feels as though her daughter is being ripped from her arms once again, and experiences depression for

significant periods of time. Ms. Tinio fears that Lily will not remember her once she is released and is concerned about how she will repair the damage of the separation.

Official Problem, *supra* para 2 at para 19-20.

Legislative context

[12] The *Corrections and Conditional Release Act* (*CCRA*) is the enabling statute for the Directive. Pursuant to s. 76 of the *CCRA*, the Mother-Child Program falls squarely within the ambit of Correctional Service Canada's (CSC) statutory obligation to operate programs that contribute to the successful reintegration of offenders into the community.

Corrections and Conditional Release Act, SC 1992, c 20, s 76 [*CCRA*].

[13] No notice of, or opportunity to make submissions regarding, the contemplated policy change was given to affected inmates. Moreover, the amendment was adopted without prior expert consultations or risk assessments. This process contravenes CSC's mandate under s. 77 of the *CCRA* to consult with expert groups when designing programs that address the particular needs of female offenders. The decision to exclude all violent offenders from the program was the result of lobbying by several victims' rights organizations in response to the participation of a particular inmate convicted of a highly violent crime in the Mother-Child Program.

CCRA, *supra* para 12, s 77.
Official Problem, *supra* para 2 at paras 13, 17.

Procedural history

[14] Ms. Tinio brought an application before the Federal Court of Canada in October 2013. She sought a declaration on behalf of herself and her daughter that their exclusion from the Mother-Child Program infringed their rights under s. 15 and Ms. Tinio's s. 7 rights under the *Charter*. Ms. Tinio also sought an order in the nature of *mandamus* that the Institutional Head of Maplehurst approve her enrollment in the Mother-Child Program.

Official Problem, *supra* para 2 at para 30.

[15] Justice Lazier of the Federal Court held that Ms. Tinio's exclusion from the Mother-Child program discriminates against her and her daughter on the grounds of gender, race and ethnicity. Justice Lazier found that the amendment also discriminated against Ms. Tinio on the grounds of disability, and infringed Ms. Tinio's right to security of the person in a manner that was both overbroad and grossly disproportionate. Justice Lazier concluded that the infringements were not demonstrably justifiable under s. 1 of the *Charter* because the deleterious effects outweighed any minimal gains, and were not minimally impairing.

Official Problem, *supra* para 2 at para 30.

[16] In a divided ruling, the Federal Court of Appeal allowed the Attorney General's appeal in September 2014. The majority of the Court ruled that there was no violation of s. 15(1) or s. 7. Justice George, in dissent, adopted the reasoning of Justice Lazier and would have dismissed the appeal.

Official Problem, *supra* para 2 at para 30.

PART III – STATEMENT OF POINTS IN ISSUE

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

Issue 1: Does the amendment to the Mother-Child Program infringe Claudette Tinio or Lily Tinio's rights under s. 15(1) of the *Charter?*

Issue 2: Does the amendment to the Mother-Child Program infringe Claudette Tinio's rights under s. 7 of the *Charter?*

Issue 3: If the answer to either of these questions is yes, is the infringement demonstrably justified in a free and democratic society under s. 1 of the *Charter?*

PART IV – ARGUMENT

Issue 1: Section 18.1 of the Directive discriminates against incarcerated women and their children under s. 15(1) of the *Charter*

[18] Section 18.1 infringes s. 15(1) of the *Charter* by imposing differential treatment that has the effect of denying a benefit to a disproportionate number of persons belonging to enumerated and analogous groups. Section 18.1 adversely impacts mothers like Ms. Tinio based on their sex, race and mental disability. It adversely impacts children excluded from the program, such as Lily Tinio, on the basis of their age and family status. These distinctions are discriminatory.

[19] Section 18.1 infringes s. 15(1) when measured against the two-step test established by the Supreme Court of Canada in *R v Kapp*. The test is as follows:

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?

However, the Supreme Court in *Withler v Canada* emphasizes, "[a]t the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?" Ms. Tinio and Lily's exclusion denies them substantive equality.

> *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 17 [*Kapp*].
> *Withler v Canada (AG)*, 2001 SCC 13, [2011] 1 SCR 396 at para 2 [*Withler*].

[20] The analysis under the first step below will begin by outlining the accepted approach to adverse effects discrimination, particularly where multiple grounds of discrimination intersect. It will then turn to discussing the grounds on which differential treatment is being imposed. The second step will demonstrate how the distinction is discriminatory.

1. Section 18.1 imposes differential treatment on enumerated and analogous grounds

A. Substantive equality requires recognition of adverse effects discrimination on intersecting grounds

[21] Although s. 18.1 is not discriminatory on its face, it has an adverse effect on both Ms. Tinio and Lily. *Quebec (Attorney General) v A* reaffirmed that "laws that are apparently neutral because they do not draw obvious distinctions may [...] treat individuals like second-class citizens whose aspirations are not equally deserving of consideration." In *British Columbia v BCGSEU (Meiorin)*, the Supreme Court recognized that ignoring the adverse effect of a neutral policy on certain groups supported formal equality and perpetuated systemic discrimination.

> *Quebec (AG) v A*, 2013 SCC 5 at para 198, [2013] 1 SCR 61 [*Quebec v A*].
> *British Columbia (Public Service Employees Relations Commission) v British Columbia Government and Service Employees Union (BCGSEU)* [1999] 3 SCR 3, 176 DLR (4th) 1 at para 42.

[22] Beginning with its ruling in *Andrews v Law Society of British Columbia*, the Supreme Court of Canada has consistently stated that the equality rights in s. 15(1) embrace a right to be free from adverse effects discrimination. The Court's opinion in *Eldridge v British Columbia (Attorney General)* is a strong statement of the importance of the role of s. 15(1) in eliminating systemic barriers to equal access to public benefits. The Court recognized that substantive equality required that deaf patients be treated differently – that they be provided with sign language interpretation in hospitals. Sections 76 and 77 of the *CCRA* and the Directive clearly point to the fact that substantive equality requires that women be treated differently in relation to their biological and social roles as mothers. Section 18.1 violates substantive equality by adversely impacting incarcerated mothers.

> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at paras 173-174.
> *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*].
> *CCRA*, supra para 12, s 76-77.

[23] Ms. Tinio and Lily experience complex discrimination on the basis of multiple grounds. Rather than making a series of isolated comparisons, the Court should take the approach established in *Withler* and confirmed in the statutory human rights context. In *Withler*, the

Supreme Court of Canada recognized, "[i]t is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination". The search for a mirror comparator group may shortcut substantive equality analysis and fail to account for intersecting forms of discrimination.

Withler, supra para 19 at paras 56-59, 63.

B. Heterogeneity among groups is not a barrier to discrimination

[24] It is clear that not all women are excluded from the Mother-Child Program. Similarly, only some racialized women and some women with mental disabilities are excluded. However, the jurisprudence is clear that the discriminatory treatment need not be "perfectly inclusive" of an entire group to establish a nexus between the ground and the distinction.

Janzen v Platy Enterprises Ltd, [1989] 1 SCR 1252 at paras 1288-89.
Quebec v A, supra para 21 at para 354.

[25] *Nova Scotia (Workers' Compensation Board) v Martin* further exemplifies that heterogeneity is not a barrier to discrimination. In that case, the claimants suffered from chronic pain syndrome but were denied disability benefits. They succeeded in their claim of discrimination on the basis of physical disability even though the beneficiaries of the program were also those with physical disabilities.

Nova Scotia (Workers' Compensation Board) v Martin, 2003 SCC 54.

C. Ms. Tinio faces a distinction on the grounds of sex, mental disability and race

[26] Ms. Tinio's exclusion from the Mother-Child Program is superficially based on her classification as a person convicted of a crime of violence. However, just as an employment rule made for sound business reasons, equally applicable to all, was found to be discriminatory in *Ontario Human Rights Commission v Simpsons-Sears*, a blanket exclusion that treats all violent

offenders the same discriminates. It discriminates due to the disparate effect it has on members of enumerated groups. It adversely impacts Ms. Tinio as a woman, a person with a mental disability and a racialized person. For greater clarity, each ground will be discussed in turn, but it is crucial to recognize that Ms. Tinio experiences discrimination on all grounds concurrently.

Ontario Human Rights Commission v Simpsons-Sears, [1985] 2 SCR 536 at para 18.

Gender

[27] Only women are eligible to participate in the Mother-Child Program. By creating and maintaining the Mother-Child Program, the Respondent demonstrates that it recognizes the important gender differences that make this program indispensable for female prisoners while declining to operate a parallel program for male prisoners. That substantive equality may require differential treatment of male and female prisoners has also been acknowledged by the Supreme Court of Canada in *Weatherall v Canada (AG).*

Weatherall v Canada (AG), [1993] 2 SCR 872, [1993] SCJ No 81 (QL*).*

[28] There are three relevant differences between incarcerated fathers and mothers that form the basis for a differential impact based on sex. Based on these differences, this adverse impact was found to be discriminatory in *Inglis v British Columbia (Minister of Public Safety)* where the cancellation of a Mother-Child Program was at issue.

Inglis v British Columbia (Minister of Public Safety), 2013 BCSC 2309, BCJ No 2708 (QL) at paras 548-550 [*Inglis*].

[29] First, women are more likely than men to be the primary caregiver. Because Ms. Tinio is now unable to care for Lily, Lily has been placed in the care of a non-parent. Incarcerated fathers are more likely to be able to rely on the non-incarcerated mother of their child for care.

[30] Second, female prisoners are more likely to have suffered abuse by family members or romantic partners than male prisoners. This history may make them more vulnerable to the

negative psychological consequences of separation from their children. It follows that supports like the Mother-Child Program are essential to help them break the cycle of family dysfunction.

Official Problem, *supra* para 2 at para 29.
Inglis, *supra* para 28 at para 549.

[31] Finally, there are fewer female prisons than male prisons. Due in part to overcrowding, women are less likely to be incarcerated near their families and are less likely to have contact with them without the benefit of a Mother-Child Program. Indeed, Ms. Tinio has only seen Lily four times over the course of her incarceration due to the geographic distance between them.

Official Problem, *supra* para 2 at para 18.
Inglis, *supra* para 28 at para 550.

Disability

[32] As a person with bipolar disorder and a history of drug use, Ms. Tinio is a person with a mental disability, an enumerated ground under s. 15(1). Mothers with disabilities face disproportionate effects in relation to the Mother-Child Program. They are more likely to have committed a violent offence than women without mental health or substance abuse issues. By extension, excluding women who have committed violent offences from the Mother-Child Program disproportionately excludes mentally ill women. In Ms. Tinio's case, her inability to access treatment for bipolar disorder as a teenager and her drug and alcohol addictions were inextricably connected to her involvement with the justice system. Not only are mentally ill women over-represented among violent offenders, the trauma of forced separation is exacerbated for women with mental health or addiction issues.

Official Problem, *supra* para 2 at paras 5-7, 22(d), 28.

Race

[33] As a Filipina-Canadian, Ms. Tinio is a member of a racial minority. Racialized persons are adversely affected by s. 18.1 of the Directive in much the same way as mentally ill women.

They are over-represented among women serving a sentence for a violent offence and therefore more likely to be excluded from the Mother-Child Program.

Official Problem, *supra* para 2 at para 28.

D. Lily Tinio faces a distinction on the grounds of family status and age

[34] Lily has committed no offence. If a distinction is being made on the basis of violent offender status (a notion the Appellants reject) this distinction is inapplicable to Lily. A distinction is being made on the basis of Lily's family status as a child of an incarcerated woman and based on her age as an infant under 24 months.

Family status is an analogous ground

[35] Family status should be recognized as an analogous ground on which discrimination is prohibited under s. 15(1) of the *Charter*. At a minimum, family status encompasses the fact of being in a parent-child relationship. Family status shares the qualities that make discrimination impermissible on the existing enumerated grounds. International law also supports the recognition of family status as an analogous ground in this context. Article 2(2) of the *Convention on the Rights of the Child* recognizes the rights of a child not to be discriminated against based on the status or activities of her parents.

Convention on the Rights of the Child, Can TS 1992 No 3, Art 2(2) [*Convention on the Rights of the Child*].

[36] Three main considerations guide the analysis in establishing a new analogous ground, most recently affirmed in *Corbiere v Canada (Minister of Indian and Northern Affairs)*. First, courts should consider the actual or constructive immutability of the ground. Children have no ability to change their status as the child of an incarcerated woman. Although this status will eventually change when the mother has completed her sentence, a status that can only be changed after a significant period of time is nonetheless considered immutable.

Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203, 173 DLR (4th) at para 13.
Falkiner v Ontario (Minister of Community and Social Services), 59 OR (3d) 481, 212 DLR (4th) 633 at para 89 [*Falkiner*].

[37] The second consideration is whether the group has experienced historical disadvantage. Children of incarcerated women face a number of social, emotional and educational disadvantages, as recognized by Ross J. in *Inglis*.

Inglis, supra para 28 at para 567.

[38] A third consideration is whether the ground is recognized in federal and provincial human rights codes. Family status is an enumerated ground in most provinces' human rights codes as well as in the *Canadian Human Rights Act*.

Falkiner, supra para 36 at para 90.
See *e.g. Human Rights Code*, RSO 1990, c H.19, s 1.
Canadian Human Rights Act, RSC, 1985, c H-6, s 3(1).

[39] Exclusion from the Mother-Child Program interferes with a parent's legal obligations to care for her child in a substantial way, negatively impacting the well-being of the child. This interference engages the ground of family status as it was defined under the *Canadian Human Rights Act* in *Canada (AG) v Johnstone.* In that case, the Supreme Court held that *prima facie* discrimination on the basis of family status would be found where an employment rule interfered with an employee's ability to engage in those childcare activities that were central to a parent's legal obligation towards the child.

Canada (AG) v Johnstone, 2014 FCA 110 at para 93.

[40] Jurisprudential precedent exists to establish family status as an analogous ground. Justice McLachlin, as she then was, held in her dissent in *Thibaudeau v Canada* that the family status of divorced or separated custodial parents should be considered an analogous ground under s. 15(1). Moreover, in *Inglis,* the Court found that babies born to incarcerated mothers faced

discrimination on the basis of family status. Family responsibilities have also been recognized as an important factor to consider in the context of sentencing. In *R v CM*, the Court of Appeal upheld a conditional sentence that considered the offender's care responsibilities for his disabled wife and son, despite the availability of assistance from other family members.

> *Thibaudeau v Canada*, [1995] 2 SCR 627 at para 722.
> *Inglis, supra* para 28 at para 566.
> *R v CM*, [1998] NJ No. 209, 165 Nfld & PEIR 124 (CA).

[41] Section 18.1 precludes Lily's best interests from being considered solely on the basis of her family status. For a child outside of prison in the child protection context, that child's best interests will be considered in determining separation from her parent. Due to the impugned amendment, there was no evaluation of Lily's best interests.

Age

[42] Lily experiences an adverse distinction on the basis of her young age as an infant under twenty-four months. Adverse effects discrimination on the basis of age was recently found in *Taypotat v Taypotat*, where a First Nations elections code required that all candidates had a grade 12 education. Elders who were unlikely to have completed formal education were disproportionately excluded by this rule. Although young children are not disproportionately excluded by s. 18.1, it has a disparate impact on them. The lower court accepted that children between the ages of zero and twenty-four months, like Lily, are in a critical period for physical, emotional and psychological development. Only young children suffer the harms of being unable to form an initial secure attachment to their mothers and being unable to breastfeed. There is no dispute among the parties that breastfeeding is superior to bottle-feeding.

> *Taypotat v Taypotat*, 2013 FCA 192.
> *Official Problem, supra* para 2 at paras 22(b), 26.

[43] Individual assessment of children's age-dependent needs and abilities can be determinative of constitutionality. In *AC v Manitoba Child and Family Services*, the statutory scheme regarding consent to make medical decisions was upheld because it properly balanced each child's wishes and capabilities with its attempt to protect vulnerable children from harm. This was accomplished through a process of individual assessment – a process conspicuously absent from s. 18.1.

AC v Manitoba (Director of Child and Family Services), 2009 SCC 30, 2 SCR 181.

2. The distinctions drawn by s. 18.1 create a disadvantage by perpetuating prejudice or stereotyping

[44] Within the second step of the s. 15(1) test, two concepts guide the analysis: (1) the perpetuation of prejudice or disadvantage to members of a group identified in the enumerated and analogous grounds; and (2) stereotyping on the basis of these grounds that does not correspond to a claimant's or group's actual circumstances and characteristics. Prejudice and stereotyping are not discrete elements of the test. Abella J., writing for the majority on s. 15(1) in *Quebec (Attorney General) v A*, clarified that "[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."

Kapp, *supra* para 19 at para 18.
Quebec v A, supra para 21 at paras 327, 332.

A. Perpetuation of prejudice or disadvantage

[45] Chief Justice McLachlin and Justice Abella confirmed in *Withler* that perpetuation of historical disadvantage is often central to discrimination. For the Appellants, s. 18.1 will "contribute to the perpetuation or promotion of their unfair social characterization and will have a more severe impact upon them, since they are already vulnerable".

Withler, supra para 19 at para 35
Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497, 170 DLR (4th) 1 at para 63.

[46] The enumerated groups to which Ms. Tinio belongs experience pre-existing disadvantages that are exacerbated by s. 18.1. The Supreme Court of Canada has acknowledged that women have been historically disadvantaged. This disadvantage is more severe for incarcerated women. The majority of female offenders were assessed upon entering custody as having difficulties with substance abuse, social, emotional or family problems, and were likely to be victims of abuse. Dealing with a similar population, the Court in *Inglis* found that the claimants belonged to an especially vulnerable group.

Weatherall, supra para 27 at para 6.
Official Problem, *supra* para 2 at para 30.
Inglis, supra para 28 at para 597.

[47] The Respondent's actions perpetuate the pre-existing disadvantage experienced by women with mental illness. As LaForest J. stated in *Eldridge*, "[i]t is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization." The trauma of forced separation is exacerbated in women with mental health or addiction issues.

Eldridge, supra para 22 at para 56.
Official Problem, *supra* para 2 at para 22(d).

[48] Furthermore, as a person of Filipina descent, Ms. Tinio belongs to a group that experiences a distinct form of disadvantage due to a high prevalence of separation as a result of global care chains, exemplified by her mother's participation in the Live-In Caregiver Program. Separating Ms. Tinio from her child exacerbates the disadvantage her community already faces.

Official Problem, *supra* para 2 at para 1.

[49] There is no doubt that exclusion from the Mother-Child Program creates a disadvantage. It denies women much needed benefits associated with the program, including improved self-

esteem and confidence, and a higher likelihood of participation in educational and personal development programs. This is in addition to being denied the obvious benefit of forming and maintaining a strong mother-child bond.

Official Problem, *supra* para 2 at para 22(c).

[50] Lily's exclusion from the Mother-Child Program on the basis of family status perpetuates historical disadvantage. *Inglis* recognized that infants of incarcerated mothers are a historically disadvantaged group as "invisible victims" of the corrections system.

Inglis, *supra* para 28 at para 567.

B. Stereotyping that does not correspond to actual circumstances or characteristics

[51] The general category "crime of violence" is imprecise and fails to account for differences among those classified as violent offenders. For many offenders, the nature of their offence may bear no relation to their fitness as a mother. This sweeping categorization is discriminatory because it disproportionately captures racialized and mentally ill women. It tars them as incapable of fostering a mother-child relationship. Through the Minister's comments, the Respondent is perpetuating stereotypes of members of these enumerated groups as unfit parents, deepening the stigma they face.

Official Problem, *supra* para 2 at para 15.

[52] Individualized assessment is often a necessary accommodation to avoid discrimination where the actual needs and abilities of excluded persons differ. It is impossible to know whether women who have committed violent offences are a danger to their children without an individualized assessment. Similarly, it is impossible to know whether forcible separation from her mother corresponds to a child's true circumstances or best interests without an individual inquiry. Section 18.1 precludes such an assessment.

British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights), [1999] 3 SCR 868, 181 DLR (4th) 385 [*Grismer*].

Issue 2: Section 18.1 of the Directive deprives Ms. Tinio of her right to security of the person under s. 7 of the *Charter* in a manner that infringes principles of fundamental justice

[53] Section 18.1 of the Directive infringes Ms. Tinio's s. 7 right to security of the person in a manner that is inconsistent with the principles of fundamental justice. A two-step test is used to determine whether state action violates s. 7 of the *Charter*. Following this test, s. 7 is engaged by virtue of state interference with Ms. Tinio's security of the person. In turn, this interference is not in accordance with principles of fundamental justice.

Winnipeg Child and Family Services v KLW, 2000 SCC 48 at para 71, 2 SCR 519 [*KLW*].
Canada (AG) v PHS Community Services Society, 2011 SCC 44 at para 84, 1 SCR 134 [*Insite*].

[54] While incarcerated, Ms. Tinio retains all constitutional and statutory rights other than those expressly or impliedly taken from her by law. Ms. Tinio is subject to the Commissioner's Directive but continues to retain residual rights to the security of the person.

Bacon v Surrey Pretrial Services Centre, 2010 BCSC 805 at para 272.

1. Section 18.1 of the Directive deprives Ms. Tinio of security of the person by barring her from caring for her child

[55] Section 18.1 infringes Ms. Tinio's security of the person by causing her significant distress following her forced separation from Lily. Security of the person under the *Charter* protects both the physical and psychological integrity of individuals, and threats to security need not rise to the level of nervous shock or psychiatric illness. Rather, s. 7 is engaged when legislation or government policy results in psychological impact that is "greater than ordinary stress or anxiety".

R v Morgentaler, [1988] 1 SCR 30, 44 DLR (4th) 385 at 4.

Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44, [2000] 2 SCR 307 at para 56.
Chaoulli v Quebec (AG), 2005 SCC 35, [2005] 1 SCR 791 at para 204.

[56] The Supreme Court of Canada held in *New Brunswick (Minister of Health and Community Services) v G(J)* that the removal of a child from her parent's custody constitutes government interference that engages a parent's security of the person. In the instant case, barring Ms. Tinio from participating in the Mother-Child Program removes infant Lily from her mother's custody and has broken the bonds of motherhood. This has caused Ms. Tinio subsequent distress.

New Brunswick (Minister of Health and Community Services v G(J), [1999] 3 SCR 46, 177 DLR (4th) 124 at paras 61, 64 [*G(J)*].
Official Problem, *supra* para 2 at para 3.

[57] Ms. Tinio's separation from Lily is not a necessary incident to her prison sentence. Section 18.1 of the Directive is the only policy that prohibits Ms. Tinio from raising her infant daughter while at Maplehurst. There are no other criminal laws, policies or government objectives that mandate this separation between mother and young child.

[58] Section 18.1 of the Directive is thus the primary cause of separation of Ms. Tinio and infant Lily. The lack of a causal connection between parental separation and incarceration was found by Ross J. in *Inglis* – a decision that has not been appealed by the government of British Columbia.

Inglis, *supra* para 28 at para 408.

[59] Similarly, in a unanimous decision in *Insite*, the Supreme Court of Canada rejected the government's submission that negative effects experienced by users of a safe injection service resulted from the user's own illegal drug use, rather than from state action. Instead, the Court found that government action was responsible for the harms the claimants faced.

Insite, supra para 53.

[60] In *Canada (AG) v Bedford*, another unanimous decision of the Supreme Court of Canada, security of the person was engaged where criminal provisions heightened the risks sex workers faced. In that case, a sufficient causal connection showed that government action violated the security of the person where marginalized claimants demonstrated "minimal power of choice" in engaging in risky activities.

Canada (AG) v Bedford, 2013 SCC 71 at para 86 [*Bedford*].

[61] Likewise, Ms. Tinio's separation from her daughter is not the result of incarceration or prior criminal behaviour. The Mother-Child Program exists at Maplehurst to alleviate the exact distress currently being experienced by Ms. Tinio. This separation of mother and child is due to government action in enacting s. 18.1, rather than a necessary incident of incarceration in a federal minimum-security prison.

[62] Section 18.1 unjustifiably interferes with Ms. Tinio's ability to foster a mother-child relationship. Enrollment in the Mother-Child Program provides the opportunity to forge a mother-child bond, to alleviate the psychological harms caused by the impugned amendment, and to better facilitate Ms. Tinio's rehabilitation into the community upon release.

Official Problem, supra para 2 at 20.

2. The violation of Ms. Tinio's s. 7 rights are not in accordance with principles of fundamental justice

[63] Section 18.1 is arbitrary, overbroad, grossly disproportionate and does not accord with procedural fairness. The deprivation of a person's s. 7 rights in a manner that is contrary to these principals of fundamental justice is sufficient to establish a violation of the *Charter. Bedford* established that the deprivation of *anyone's* s. 7 right violates the *Charter*, regardless of whether the deprivation of those rights present a benefit to society at large.

Bedford, *supra* para 60 at para 123.

A. Section 18.1 of the Directive is arbitrary

[64] Section 18.1 is arbitrary. Arbitrariness describes a situation where there is no connection between a law's detrimental effect on an individual's s. 7 rights and the law's objective. The detrimental effect of s. 18.1 is a further punitive sentence for already incarcerated mothers through government-sanctioned separation from their children. This effect has no connection with the Directive's stated objective, and contravenes the purpose of the *CCRA*.

Bedford, *supra* para 60 at para 99.
Directive, *supra* para 2 at s .1
CCRA, supra para 12, s 3.

[65] Prior to instructing the Commissioner to amend the eligibility requirements of the Directive, Minister Jennings stated, "the 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". He added, in response to a question from the press, "prisons are just not appropriate places for children".

Official Problem, *supra* para 2 at para 14-15.

[66] The objective that underpins s. 18.1 bears no rational connection to the *CCRA*'s objective and the Directive's overarching purpose. The policy objective of the Mother-Child Program is "to provide a supportive environment that fosters and promotes stability and continuity for the mother-child relationship". This is harmonious with the purpose of its enabling statute, the *CCRA*. Section 3 of the *CCRA* enumerates its purpose as to "provide inmates with adequate living standards and opportunities for rehabilitation to support return to society". The Minister's purpose in instating s. 18.1 contradicts the purposes of the Mother-Child Program and its enabling statute.

Directive, *supra* para 2 at s 1.
CCRA, supra para 12, s 3.

[67] The implication that mothers charged with violent crimes cannot continue to be attentive parents as part of the Mother-Child Program is unfounded. Allowing incarcerated women charged with non-violent crimes access to the Mother-Child Program, while barring others who may display no aggression or violence towards their own children is an arbitrary standard.

B. Section 18.1 of the Directive is overbroad

[68] Section 18.1 is overbroad in that it is a blanket prohibition on all incarcerated mothers deemed "violent" offenders. The violent offender category is one that is vague and bears no relation to the law's purpose.

[69] Overbreadth can be measured as "means which are broader than necessary to accomplish [the law's] objective", and where no rational connection exists between purposes of the law and some, but not all, of its impacts. By instructing the Commissioner to restrict eligibility requirements to exclude women convicted of "violent" offences, Minister Jennings chose means that were broader than necessary. A narrow, tailored approach such as individual assessments available to incarcerated mothers convicted of crimes against children under s. 18 of the Directive would have accomplished the Minister's objective.

R v Heywood, [1994] 3 SCR 761, 120 DLR (4th) 348 at para 49.
Bedford, *supra* para 60 at para 112.
Official Problem, *supra* para 2 at 15.
Directive, *supra* para 2 at s 18.

C. Section 18.1 of the Directive is grossly disproportionate to its purpose

[70] The deprivation caused by s. 18.1 on Ms. Tinio's security of the person is grossly disproportionate to the amendment's objectives in a way that cannot be rationally supported. A

law is grossly disproportionate where "the seriousness of the deprivation is totally out of sync with" its objectives.

Bedford, *supra* para 60 at para 120.

[71] Exclusion from the Mother-Child Program under s. 18.1 for otherwise eligible mothers is a denial of child custody. The categorical exclusion of mothers serving sentences for violent crimes is entirely out of sync with the objectives of the Directive and its enabling statute. The deprivation caused by the amendment breaks family bonds and imposes a cycle of instability for mothers and their young children. In contrast, the reasons given by Minister Jennings to support the amendment are not "reasonable in relation to the threat" posed. Providing very young children the opportunity to live in the care of their mothers does not pose a threat to public safety or support the goals of victims' rights groups.

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

[72] Early emotional attachment between mother and baby is crucial to the development of a healthy parent-child relationship. Providing custody of Lily to Ms. Tinio while she serves her sentence would recognize a mother's right to security of the person. Section 18.1 of the Directive imposes unacceptably detrimental effects on Ms. Tinio's s. 7 rights relative to its purpose.

D. Section 18.1 of the Directive breaches the fundamental principle of procedural fairness

[73] It is well-established that the principles of fundamental justice in the s. 7 analysis include common law principles of procedural fairness. The essence of the procedural content of the principles of fundamental justice is the right to be informed of the case against you, and the right to make submissions before a decision is made.

Re BC Motor Vehicles Act, [1985] 2 SCR 486 [*Re BC Motor Vehicles Act*].
Charkaoui v Canada (Citizen and Immigration), 2007 SCC 9, [2007] 1 SCR 350 at paras 19-20, 29.

[74] In *Smith v Canada (AG)*, at issue was the legality of the Canadian government's decision to withdraw diplomatic support it had previously provided to Mr. Smith – and all Canadian citizens facing the death penalty for crimes committed in other countries – in his efforts to seek clemency. Because the withdrawal of diplomatic support had a potentially significant impact on Mr. Smith's interests as a death row inmate in the U.S., Barnes J. found that the government had a duty to inform Mr. Smith of the contemplated policy change and a duty to give him and his legal advisors an opportunity to be heard. The government's decision was unlawful and had to be set aside because the government had failed to conform to these requirements of the common law rules of procedural fairness before withdrawing diplomatic support.

Smith v Canada (AG), 2009 FC 228, [2010] 1 FCR 3 at paras 42, 58-59.

[75] Similarly, since exclusion from the Mother-Child Program for mothers convicted of violent crimes has significant impacts on their security of the person, the government was under an obligation to inform women enrolled, or eligible to enroll, in the program of the contemplated policy change and to give them an opportunity to respond. Section 18.1 was adopted by the Commissioner on the instructions of the Minister without compliance with these basic elements of procedural fairness and therefore was adopted in a manner that did not conform to the principles of fundamental justice.

Issue 3: The violation of s. 15(1) and s. 7 are not reasonable limits demonstrably justified in a free and democratic society under s. 1 of the Charter

[76] Section 18.1 of the Directive cannot be justified under s. 1 of the *Charter*. The amendment does not impose "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The onus is on the government to demonstrate that the rights infringement is justified.

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567 at para 27 [*Hutterian Brethren*].

1. Contextual considerations in s. 1 include the best interests of the child

[77] By adding s. 18.1 at the request of the Minister, the Commissioner has ignored the perspective in which the Directive is intended to operate. In *Roncarelli v Duplessis*, the Supreme Court held that departing from that intended perspective constitutes an unacceptable use of discretion. Section 3 of the Directive states that the "**[t]he best interests of the child** shall be the pre-eminent consideration in **all** decisions relating to participation in the Mother-Child Program". In *Baker v Canada (Minister for Citizenship and Immigration)* an immigration officer did not properly consider the best interests of the children affected by his decision to deny an application for an exemption on humanitarian and compassionate grounds. The decision was quashed because the reasons for his decision were "inconsistent with the values underlying the grant of discretion".

Roncarelli v Duplessis, [1959] SCR 121 at 140.
Directive, *supra* para 2, s 3 [emphasis in original].
Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 at para 65 [*Baker*].

[78] Moreover, Canada's international law commitments, including the *Convention on the Rights of the Child*, require that a child not be separated from her parent unless separation is determined to be in her best interest. The *Bangkok Rules on the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* specifically provide that this requirement applies to incarcerated mothers and their children. It is well-established that the rights under the *Charter* must be interpreted in light of Canada's international human rights commitments. *Charter* rights must be interpreted to ensure protection that is at least as great as that afforded by international instruments.

Convention on the Rights of the Child, *supra* para 35, Arts 6, 9.
UN General Assembly, United Nations Rules for the Treatment of Women Prisoners and *Non-Custodial Measures for Women Offenders (the Bangkok Rules):* note / by the Secretariat, 6 October 2010, A/C.3/65/L.5, rule 49.
Baker, supra para 77 at para 70.
Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia, [2007] 2 SCR 391, 2007 SCC 27 at para 69-70.

2. The infringment of Ms. Tinio's s. 7 rights is not saved by s. 1 of the Charter

[79] A violation of s. 7 will rarely be justified under s. 1. In *Re BC Motor Vehicles Act*, Lamer J. held that "Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s.7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like." There are no exceptional circumstances here. Based on the above conclusion that s. 18.1 infringes security of the person in a manner that is arbitrary, overbroad, grossly disproportionate and lacking procedural fairness, s. 1 justification of the s. 7 violation is certain to fail.

Re BC Motor Vehicles Act, supra para 73 at para 85.

3. The deprivation of Ms. Tinio and Lily Tinio's s. 15 rights are not saved by s. 1 of the Charter

The Appellants concede that s. 18.1 of the Directive is a limit prescribed by law. The Directive has the force of law because Parliament has empowered the Commissioner, through ss. 97 and 98 of the CCRA, to enact directives.

CCRA, supra para 12, ss. 97-98.

A. The Respondent fails to provide a pressing and substantial objective

[80] The Respondent claims that a concern for child safety and development is behind s. 18.1. The Respondent is attempting to emphasize a new objective for the impugned amendment whereas evidence indicates that the *intention* behind s.18.1 was deterrence and denunciation of

violent crime. The object of s. 18.1 can be gleaned from the Minister's comments to the press, discussed in s. 7 above. He emphasized that "the purpose of prisons is to punish offenders".

Official Problem, supra para 2 at para 14.

[81] It is clear that such a shifting purpose is impermissible. *R v Zundel* affirms that the court must look at the original intentions of the decision-maker: "it cannot assign objectives, nor invent new ones according to the perceived current utility of the impugned provision."

R v Zundel, [1992] 2 SCR 731, [1992] SCJ No 70 at p 761.

[82] In the alternative, the Appellants submit that neither objective can be identified with certainty as pressing and substantial, because the record does not disclose the necessity of additional punishment for the class of excluded offenders or the goal the Respondent sought by excluding them. In *Sauvé v Canada*, the absence of specific reasons to limit prisoner voting rights made it difficult to assess whether the objective was important enough to justify an infringement.

Sauvé v Canada (Chief Electoral Officer), 2002 SCC 68, [2002] 3 SCR 519 at para 25 [*Sauvé*].

[83] Similarly, the government has "failed to identify particular problems" that require the removal of all violent offender mothers and their children, who have so far participated in the program without incident. This makes it difficult to assess whether the objective is pressing and substantial.

Sauvé, supra para 82 at para 26.

B. The means are not rationally connected to the objective

[84] There is no demonstrated "causal connection between infringement and the benefit sought on the basis of reason or logic". Assuming that the Respondent's purpose is to protect the safety of children of incarcerated mothers, it has failed to produce any evidence that all, or even

most, violent offenders create a risk of harm to their children. CSC did not conduct any study or risk assessment before amending the Mother-Child Program, relying at the application hearing on anecdotal evidence of guards. Across the country over a 28-month period, there were just two security incidents in the Mother-Child Program, neither of which resulted in injury to a child.

Hutterian Brethren, *supra* para 76 at para 48.
Official Problem, *supra* para 2 at paras 17, 25(c)-(d).

[85] Moreover, the Respondent's chosen means belie its stated purpose. If the Respondent truly believed that living in prison around violent offenders put children's safety at risk, they would have cancelled the entire Mother-Child Program. Despite s. 18.1, children of non-violent offenders will continue to live in the same wing as violent offenders.

Clarifications to the Official Problem, 6.

[86] If the Respondent's purpose is in fact to punish offenders to reduce future crime, restricting access to a program that decreases rates of reoffending is ineffective in achieving that purpose. Where the restriction actually runs counter to the stated objective, it is not rationally connected to the limit.

Official Problem, *supra* para 2 at para 22(f).
Sauvé, *supra* para 82 at para 41.

[87] Not only does s. 18.1 run counter to its purpose, it contradicts the overarching objectives of the Directive itself. The Directive intends to promote "stability and continuity for the mother-child relationship" while s. 18.1 does the opposite.

Directive, *supra* para 2, s 1.

C. A blanket exclusion does not minimally impair the Appellant's rights

[88] To be demonstrably justified in a free and democratic society, the limit must impair the claimant's rights "as little as is reasonably possible". Although deference is granted to the

government in choosing among minimally impairing measures that meet their objective, "that deference is not blind or absolute". Though governments need not examine all available evidence to discover the least-rights impairing option, "[t]here must nevertheless be a sound evidentiary basis for the government's conclusions". The Respondent's actions go further than necessary in impairing rights and there is no evidence on the record that the Respondent considered and rejected alternatives that were non-discriminatory.

> *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at para 91.
> *Hutterian Brethren, supra* para 76 at para 55.
> *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927 at para 88.

[89] Individual assessment to determine mothers' eligibility for the program ensures the safety of children and avoids discrimination against women convicted of violent crimes. This exact regime is provided for in s. 18 of the Directive, which demands psychiatric assessment for mothers convicted of a crime involving a child. These mothers arguably pose a greater risk to their children, but they are not excluded outright. They are evaluated in a non-discriminatory manner. This approach accords with the individual assessment of Not Criminally Responsible offenders that gained the Supreme Court's approval in *Winko v British Columbia (Forensic Psychiatric Institute)*. Similarly, individual assessment of visually impaired individuals was necessary to avoid discrimination when granting driver's licenses in *Grismer.*

> *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625.
> *Grismer, supra* para 52.

[90] Individual assessment is also necessary for the appropriate denunciation of crime. Denunciation "must be individually tailored in order to fulfill the legitimate penal purpose of condemning a <u>particular</u> offender's conduct".

> *Sauvé, supra* para 82, at para 50 [emphasis in original].

D. The deleterious effects of s. 18.1 outweigh its benefits

[91] At this stage, the Respondent must show that the "benefits of the impugned law are worth the costs of the rights limitation". There is no contest here between the projected salutary effects of the amendment – unsupported by evidence – and the documented harms of exclusion on the Appellants and on others. Justice Lazier accepted Ms. Tinio's testimony on the emotional distress she experiences following her rare visits with her daughter. Although Lily is unable to testify to her experience, at the age of four, she will experience the trauma of being separated from her aunt and placed with a mother she has never had the chance to fully know. Section 18.1 is the cause of this avoidable trauma.

Official Problem, supra para 2 at para 20.

[92] On a broader scale, excluded women are deprived of the documented benefits of the Mother-Child Program. Exclusion has negative effects on rehabilitation as well as deleterious emotional and psychological effects on mothers. Furthermore, it perpetuates the cycle of disadvantage and trauma experienced by many incarcerated women by needlessly depriving children of a bond with their mothers. These harms are not balanced by any documented benefits to public safety.

Official Problem, supra para 2 at para 22(c)-(f).

PART V – ORDER SOUGHT

[93] The Appellants respectfully 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.

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Team 7
Counsel for the Appellant

PART VI – LIST OF AUTHORITIES AND STATUTES

LEGISLATION	PARAGRAPHS
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.	1, 7, 15
Canadian Human Rights Act, RSC, 1985, c H-6.	3
Convention on the Rights of the Child, Can TS 1992 No 3.	2, 6, 9
Corrections and Conditional Release Act, SC 1992, c 20, s 76	3, 76, 77, 97, 98
Human Rights Code, RSO 1990, c H.19.	1
Non-Custodial Measures for Women Offenders (the Bangkok Rules): note / by the Secretariat, 6 October 2010, A/C.3/65/L.5.	49

JURISPRUDENCE	PARAGRAPHS
AC v Manitoba (Director of Child and Family Services), 2009 SCC 30, 2 SCR 181.	
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567.	27, 48, 55
Andrews v Law Society of British Columbia, [1989] 1 SCR 143.	173, 174
Bacon v Surrey Pretrial Services Centre, 2010 BCSC 805.	272
Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817.	65, 70
Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44, [2000] 2 SCR 307.	56
British Columbia (Public Service Employees Relations Commission) v British Columbia Government and Service Employees Union (BCGSEU), [1999] 3 SCR 3, 176 DLR (4th).	42
British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights), [1999] 3 SCR 868, 181 DLR (4th) 385.	52
Canada (AG) v Bedford, 2013 SCC 71.	86, 99, 112, 120, 123
Canada (AG) v Johnstone, 2014 FCA 110.	93
Canada (AG) v PHS Community Services Society, 2011 SCC 44, 1 SCR 134.	84
Chaoulli v Quebec (AG), 2005 SCC 35, [2005] 1 SCR 791.	204