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 #3

TABLE OF CONTENTS

1 OVERVIEW

[1] Howard Sapers, the Correctional Investigator of Canada, declared in a recent address that imprisonment "does not mean total deprivation or absolute forfeiture of rights." Section 18.1 of the Commissioner's Directive (the "Directive") governing the Mother-Child Program (the "Program") runs contrary to this fundamental maxim by ignoring the historical disadvantages faced by incarcerated women and their children and subordinating children's interests to the objective of "put[ting] an end to Club Fed."

> Howard Sapers, "Respecting Rights in Canadian Prisons: An Ombudsman's Perspective" (Address delivered to the British House of Lords, 17 April 2013), online: <http://www.oci-bec.gc.ca/cnt/comm/sp-all/sp-all20130417-eng.aspx> ["Respecting Rights"]. Official Moot Problem, Wilson Moot 2015 at 4 ["Official Moot Problem"].

[2] Section 18.1 violates Claudette Tinio's ("Claudette's") rights under section 7 and section 15(1) of the *Canadian Charter of Rights and Freedoms*. Her arbitrary exclusion from the Program violates her psychological integrity, engaging her "liberty" and "security of the person" interests. Further, the amendment fails to account for the historical disadvantages suffered by women with mental disorders in the prison context, thereby discriminating against Claudette on the enumerated grounds of sex and disability.

> *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 ss 1, 7, 15 [*Charter*].

[3] Section 18.1 also discriminates against Claudette's daughter, Lily Tinio ("Lily"). Lily is denied access to a program that is critical to her early development on the basis of an arbitrary classification ascribed to her mother. Her specific needs and interests are never considered.

[4] There is no empirical basis to justify the government's contention that "violent offenders" are synonymous with unfit mothers. Denying an individualized assessment on the basis of a groundless classification is the type of discriminatory conduct that is proscribed by the *Charter*.

If the legislation's true purpose is to protect "the best interests of the child," then section 18.1 must be held of no force and effect.

2 STATEMENT OF FACTS

2.1 THE MOTHER-CHILD PROGRAM

[5] The Program allows incarcerated mothers to care for their newborn children while serving their sentences in federal penitentiaries. The Commissioner of the Correctional Service of Canada (the "Commissioner") is delegated the authority to make rules for the "management of the service" under the *Corrections and Conditional Release Act.* The Program's "pre-eminent consideration" is to provide for the "best interests of the child" which include the child's "safety and security as well as the physical, emotional and spiritual well-being of the child." Mothers must meet all eligibility requirements and complete a full assessment process conducted by the Program Board before they are permitted to participate.

> *Corrections and Conditional Release Act*, SC 1992, c 20, ss 97-98.
> Canada, Correctional Service, *Commissioner's Directive No 768*, "Institutional Mother-Child Program," 2003 at ss 3, 22, 24 [Directive].

[6] Section 18 of the Directive permits mothers convicted of "a crime involving a child" to participate in the Program provided a psychiatric assessment determines that they are not a danger to their child. In 2013, the Commissioner added section 18.1 under the "Eligibility" heading, which states that "women convicted of any crime of violence, regardless of whether the crime involved a child, are not eligible to participate in the program." This section was introduced at the direction of the Minister of Public Safety and Emergency Preparedness (the "Minister") who stated that "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." Approximately 45% of incarcerated mothers are now ineligible for the Program due to section 18.1.

Directive at ss. 18, 18.1
Corrections and Conditional Release Act, supra para 5 at s 6(1).
Official Moot Problem, the Wilson Moot 2015 at 1, 4, 7 ["Official Moot Problem"].

2.2 FACTUAL BACKGROUND

[7] In July 2013, Claudette, a 30-year-old Canadian woman of Filipino descent, was convicted of assault with a weapon after an altercation with a former acquaintance, Rachel. Rachel attempted to pressure Claudette into trafficking cocaine. After Claudette refused, Rachel punched Claudette, and Claudette retaliated by hitting Rachel in the head with a telephone. She was sentenced to a four-year prison term to be served at Maplehurst Women's Penitentiary ("Maplehurst"), a minimum-security prison in Ontario.

Official Moot Problem at 1, 3.

[8] Prior to her conviction, Claudette had a history of abusive relationships, petty criminal activity, substance abuse, and mental illness. Two years prior to her present conviction, Claudette received treatment for bipolar disorder and took steps to deal with her substance abuse issues. She resolved to "leave her old life behind" and was largely successful at staying sober.

Official Moot Problem at 2-3.

[9] Claudette gave birth to Lily in October 2013. The parties agree that Claudette is precluded from participating in the Program on the understanding that assault with a weapon is a "crime of violence" within the scope of section 18.1. After she was born, Lily was placed in the care of Claudette's sister, Emily, who lives in Calgary, Alberta. The distance from Maplehurst to Calgary prevents Claudette from sending breast milk to Lily, and limits visitation opportunities.

Official Moot Problem at 1, 4.
Clarifications to the Official Moot Problem, the Wilson Moot 2015 at para 4 ["Official Clarifications"].

2.3 PROCEDURAL HISTORY

[10] Claudette brought an action in Federal Court challenging her and Lily's ineligibility for the Program. She claimed that her exclusion under section 18.1 of the Directive violated her rights under section 7 and her and Lily's rights under section 15 of the *Charter of Rights and Freedoms*, and that these violations could not be justified under section 1. She also sought an order of *mandamus* to direct the Program Board to conduct an individual assessment on herself and Lily.

Charter, *supra* para 2, ss 1, 7, 15.
Official Moot Problem at 1.

[11] At trial, expert evidence was adduced that frequent contact between mothers and their newborns is essential to develop crucial bonds and emotional attachments, which in turn promotes healthy early childhood development and contributes to the mother's rehabilitation. In contrast, separating mothers from their newborns is psychologically traumatic to the mother, and can be particularly traumatic for mothers with mental illnesses. Children who are deprived of forming "secure bonds" with their mothers are at a "higher risk of intellectual deficits, behavioural issues, and mental health problems." The parties agree that newborns benefit from ingesting breast milk and bonding with their mothers via breastfeeding.

Official Moot Problem at 6-8.

[12] Other experts testified that female prison populations are significantly less violent than male prison populations. A senior administrator at Maplehurst testified that there were only two security incidents in the last 28 months involving mothers enrolled in the Program. The Program costs about $35,000 per year above the cost of incarcerating the mother alone.

Official Moot Problem at 6-8.

[13] Lazier J determined that section 18.1 of the Directive violates Claudette's section 7 and 15(1) rights, violates Lily's section 15(1) rights, and cannot be justified under section 1. On appeal, the majority overturned Lazier J's decision, with one justice dissenting. The decision was overturned on the basis that the distinction made by section 18.1 was not on a valid enumerated or analogous ground, and it did not violate the principles of fundamental justice.

Official Moot Problem at 9-10.

3 SUMMARY OF POINTS IN ISSUE

[14] The present appeal raises four issues:

Issue #1: Does section 18.1 violate Claudette's section 15(1) *Charter* rights?

Section 18.1 draws a distinction on the enumerated grounds of sex and disability and is discriminatory against Claudette.

Issue #2: Does section 18.1 violate Lily's section 15(1) *Charter* rights?

"Children of incarcerated mothers" should be recognized as an analogous ground. Section 18.1 makes a distinction on the basis of that analogous ground, and is discriminatory against Lily.

Issue #3: Does section 18.1 violate Claudette's section 7 *Charter* rights?

Section 18.1 violates Claudette's rights to liberty and security of the person in a manner that is contrary to the principles of fundamental justice on the grounds that it is arbitrary, overbroad, and grossly disproportionate.

Issue # 4: If the answer to question 1, 2 or 3 is "yes," can the infringement be demonstrably justified in a free and democratic society under section 1 of the *Charter*?

While the Directive has a pressing and substantial objective, section 18.1 does not. The *Charter* infringements under section 18.1 cannot be demonstrably justified in a free and democratic society because it has no rational connection to the Program's objectives, it does not minimally impair the Appellants' *Charter* rights, and its deleterious effects outweigh its benefits.

4 ARGUMENT

4.1 SECTION 18.1 OF THE COMMISSIONER'S DIRECTIVE VIOLATES CLAUDETTE'S SECTION 15(1) *CHARTER* RIGHTS

[15] The Program is designed to address the systemic disadvantages experienced by incarcerated women and their children. Section 18.1 runs contrary to the Program's intended purpose and contributes to Claudette's marginalization as a mentally-ill woman by failing to consider harms she is more likely to face due to her exclusion from the Program.

A. The Mother-Child Program serves an ameliorative purpose

[16] Section 15(2) of the *Charter* states that the legislature can pass laws that "[have] as [their] object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged" on enumerated and analogous grounds. The Program seeks to ameliorate the systemic disadvantages experienced by incarcerated women and their children.

Charter, *supra* para 2, s 15(2).

[17] The *Corrections and Conditional Release Act* directs the Commissioner to ensure that "correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women, aboriginal peoples, persons requiring mental health care and other groups." Women have been recognized as a disadvantaged and historically marginalized group worthy of ameliorative treatment under section 15(2) of the *Charter* (*Inglis*, *Weatherall*). In *Kapp*, the Court confirmed that ameliorative programs fall under section 15(2) if the program seeks to address a specific disadvantage suffered by the target group. The Program was created pursuant to section 77(a) of the *Corrections and Conditional Release Act*, which states that "the Service shall provide programs designed particularly to address the needs of female offenders." The Program meets the section

15(2) test in *Kapp* as it serves to ameliorate the state of a historically disadvantaged group in the prison context.

> *Corrections and Conditional Release Act*, *supra* para 5 at ss 4(g), 77(a).
> *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 at para 577, [2013] BCJ No 2708 [*Inglis*].
> *Weatherall v Canada (Attorney General)* (1993), [1993] 2 SCR 872 at para 6, 105 DLR (4th) 210 [*Weatherall*].
> *R v Kapp*, 2008 SCC 41 at para 59, [2008] 2 SCR 483 [*Kapp*].
> Directive, *supra* para 5 at s 4.

[18] Section 15(2) does not insulate the provision from constitutional review. If the ameliorative program is under-inclusive and excludes individuals arbitrarily on the basis of enumerated or analogous grounds, then it contravenes section 15(1) (*Lovelace, Brooks, Vriend*).

> *Lovelace v Ontario*, 2000 SCC 37 at para 60, [2000] 1 SCR 950 [*Lovelace*].
> *Brooks v Canada Safeway Ltd* (1989), [1989] 1 SCR 1219 at 1240, 59 DLR (4th) 321 [*Brooks*].
> *Vriend v Alberta* (1998), 1 SCR 493 at paras 94-104, 156 DLR (4th) 385 [*Vriend*].

B. The test under section 15(1) of the *Charter*

[19] The Supreme Court has affirmed that section 15 of the *Charter* deals with substantive, and not merely formal, equality (*Andrews, Kapp, Quebec v A*). This requires courts to undertake a contextual analysis to determine whether the provision substantively deprives claimants of equal treatment under the law. The differential treatment need not be intentional for it to be discriminatory (*Law*).

> *Andrews v Law Society of British Columbia* (1989), [1989] 1 SCR 143 at 165-71, 56 DLR (4th) 1 [*Andrews*].
> *Kapp*, *supra* para 17 at paras 15-16.
> *Quebec (Attorney General) v A*, 2013 SCC 5 at para 137, [2013] 1 SCR 61 [*Quebec v A*].
> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at paras 25, 51, 170 DLR (4th) 1 [*Law*].

[20] The claimant must show that the "law creates a distinction directly by imposing limitations or disadvantages on the basis of an enumerated or analogous ground" (*Quebec v A*). Then, the claimant must demonstrate that the distinction is discriminatory by perpetuating

prejudice or stereotyping. A distinction in law can be found to contravene section 15(1) even if only a subset of that group is disadvantaged. Identifying "comparator groups" is no longer required (*Withler*).

> *Quebec v A, supra* para 19 at para 189.
> *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 64, [2011] 1 SCR 396 [*Withler*].

C. Section 18.1 draws a distinction in law on the grounds of sex and disability

i. Distinction based on sex

[21] Section 18.1 assumes that all mothers convicted of certain crimes are unfit to care for their children. With respect, this claim is unsubstantiated. The provision deprives 45% of incarcerated mothers of access to the Program despite the fact that there have only been two recent security incidents involving women enrolled in the Program. Violent crimes committed by women are often done in reaction to domestic abuse, and studies have shown that these women are less likely to re-offend than men convicted of similar crimes (*Commission of Inquiry*, "Gender Roles"). Section 18.1 does not draw a distinction based on the actual characteristics of the mothers it applies to – it merely imputes characteristics based on a categorical classification.

> Official Moot Problem at 6-8.
> Canada, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) at 201 [*Commission of Inquiry*].
> Sean Gibson & Christopher Sewrattan, "Gender Roles, Charter Holes and Societal Goals: Mentally Ill Female Prisoners in Canada" 32 Windsor Rev Legal Soc Issues 25 at 34-36 ["Gender Roles"].

[22] Depriving Claudette and similarly-situated women of access to the Program contributes to their further marginalization within the penal system. Expert testimony given at trial demonstrates that mothers who are separated from their newborn children experience higher rates of depression and mental trauma than mothers who have regular contact with their newborns. Regular contact with newborns helps incarcerated mothers rehabilitate, and makes

them less likely to re-offend upon release. These harms are unique to women, and give rise to a situation where women with newborns who are denied access to the Program will experience greater psychological harms while incarcerated (*Inglis*). Section 18.1 exacerbates unique disadvantages faced by women within the penal system; therefore, it draws a distinction in law on the enumerated ground of sex.

Official Moot Problem at 6.
Inglis, supra para 17 at para 544.

ii. Distinction based on disability

[23] Claudette suffers from bipolar disorder. The parties agree that persons with disabilities are over-represented in Canada's prisons, and that female prisoners with mental disorders suffer greater harms than other women when deprived of access to their newborns. The Supreme Court has found that "the history of disabled persons in Canada is largely one of exclusion and marginalization" (*Eldridge*). Where a beneficial program is offered, it must not be arbitrarily denied to persons with disabilities, and it must consider its negative effects on those disabled persons. Claudette suffers from a disability, and as a result is prone to greater harms by being denied access to the Program. These harms are never considered when determining her eligibility.

Official Moot Problem at 2, 6-8.
Eldridge v British Columbia (Attorney General) (1997), [1997] 3 SCR 624 at paras 56, 73, 151 DLR (4th) 577 [*Eldridge*].

D. The Court should consider multiple intersecting grounds

[24] With respect, the Federal Court of Appeal's contention that the inclusion of multiple enumerated grounds in a claim deprives the *Charter* "of any meaningful limitation" fails to properly account for the numerous ways in which women with mental disorders experience differential treatment while incarcerated. Academic commentary has noted that incarcerated

women often face discrimination on other grounds in addition to discrimination based on sex ("A Prisoner's Charter," "Gender Roles"). In *Inglis,* the Court found that "multiple and intersecting grounds" can give rise to distinctions that are protected under the *Charter.* This concept was affirmed in *Falkiner*, which found that multiple grounds of discrimination should be analyzed "to bring into focus the multiple forms of differential treatment alleged." In *Withler*, the Court recognized that "a claimant may be impacted by many interwoven grounds of discrimination" that courts must be sensitive to. The Appellants urge the Court to embrace a more flexible approach to section 15(1) that recognizes the many ways marginalized groups experience differential treatment to give effect to the *Charter*'s aim of achieving substantive equality.

Official Moot Problem at 9.
Debra Parkes, "A Prisoners' Charter?: Reflections on Prisoner Litigation Under the Canadian Charter of Rights and Freedoms" (2007) 40 UBC L Rev 629 at para 47 ["A Prisoner's Charter"].
"Gender Roles," *supra* para 21 at 31-35.
Inglis, supra para 17 at para 558.
Falkiner v Ontario (Ministry of Community and Social Services) (2002), 59 OR (3d) 481 at para 72, 212 DLR (4th) 633 (CA) [*Falkiner*].
Withler, supra para 20 at para 58.

E. The distinctions created by section 18.1 are discriminatory against Claudette

[25] Not all adverse distinctions based on enumerated or analogous grounds contravene section 15(1) (*Andrews*). The provision must be discriminatory by perpetuating prejudice or stereotyping. However, it is not necessary for the legislation to perpetuate discriminatory *attitudes*; it is sufficient to show that the legislation has a disproportionately negative *effect* on the claimant (*Quebec v A*).

Andrews, supra para 19 at 182.
Quebec v A, supra para 19 at paras 327-28.

i. Discrimination based on sex

[26] "Pre-existing disadvantages" have been recognized as "probably the most compelling factor" in determining whether a provision is discriminatory (*Law*). Women constitute a historically disadvantaged group. Section 18.1 perpetuates these historical disadvantages by depriving a subset of women from access to a program that was specifically designed to help ameliorate their disadvantaged position.

Law, supra para 19 at para 63.

[27] If a statutory scheme is designed to ameliorate the position of a more disadvantaged group, then that can justify the claimant group's differential treatment (*Law*). In *Cunningham* and *Lovelace*, the Supreme Court rejected an approach that compares the relative historical disadvantages of groups to determine which is "more worthy" of affirmative action. Instead, courts must look to the purpose of the legislation to determine whether it was intended to address specific detriments faced by the target group that are not relevant to the claimant group.

Law, supra para 19 at paras 72-73.
Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37 at paras 41-44, [2011] 2 SCR 670 [*Cunningham*].
Lovelace, supra para 18 at paras 69, 85.

[28] Mothers who have committed "violent crimes" face the same disadvantages and detriments as any other mother when deprived of access to their newborns. The Court dismissed the claims in *Lovelace*, *Weatherall* and *Cunningham* because the claimant group's needs and circumstances were different from the needs and circumstances of the group that was targeted by the program in question. Claudette's case can be distinguished from these cases, as her needs and circumstances are identical to those of the target group.

[29] In *Lovelace*, the Supreme Court affirmed that exemptions from ameliorative programs can be challenged under section 15(1) if the exemptions do not correspond to the actual needs

and capacities of the claimant group. This is analogous to the "correspondence" factor in *Law*, and expands on provincial jurisprudence regarding the application of human rights legislation to ameliorative programs (*Ontario*). It follows that an ameliorative program will not achieve the objective of substantive equality if there is no rational justification for excluding a subset group that otherwise shares the characteristics of the target group.

> *Lovelace*, *supra* para 18 at paras 99-100.
> *Law*, *supra* para 19 at para 105.
> *Ontario (Human Rights Commission) v Ontario* (1994), 19 OR (3d) 387 at 406, 117 DLR (4th) 297 (CA) [*Ontario*].

[30] There is no rational justification for excluding women convicted of "violent crimes" from a contextual assessment of their eligibility. These women face the same harms as other women who are deprived of access to newborns, and the government has failed to adduce any evidence to demonstrate that all of these women pose a threat to their newborns. The government cannot rely on a "common-sense" approach to justify singling out this specific class of women for differential treatment – it is necessary to demonstrate that there is a defensible basis for excluding this group from the targeted ameliorative program.

[31] In *Winko*, the Supreme Court found that "the individualized process is the antithesis of the logic of the stereotype." This was affirmed by the British Columbia Supreme Court in *Turner*, which suggested that determining eligibility for the Mother-Child program in that province should be based on the mother's actual conduct while incarcerated and not on the basis of "official insensitivity or systemic unfairness." Section 18.1 precludes Claudette from having her and Lily's needs assessed on an individualized basis due to a stereotypical classification that unjustifiably imputes characteristics with no proof of correspondence to Claudette's true characteristics.

Winko v British Columbia (Forensic Psychiatric Institute) (1999), [1999] 2 SCR 625 at para 87, 75 DLR (4th) 193 [*Winko*].
Turner v Burnaby Correctional Centre for Women (1994), [1994] BCJ No 1430 (SC) at paras 24-28 [*Turner*].

[32] Overall, section 18.1 is discriminatory against Claudette because it deprives her of access to an ameliorative program that was originally intended to apply to her without a reasonable justification. The provision is prejudicial towards Claudette by ignoring the very detriments and historical disadvantages that the program as a whole seeks to remedy.

ii. Discrimination based on disability

[33] The arbitrary distinction drawn by section 18.1 imposes hardships on incarcerated women with disabilities that incarcerated women without disabilities do not face. Persons with disabilities have faced significant historical disadvantages on the basis of stereotyping and prejudice. As in *Eldridge*, the benefits program in this case is being arbitrarily denied in a way that increases the harms faced by a subset of women with disabilities in federal prisons. This differentiation discriminates against Claudette by failing to consider the adverse effects she faces as a mentally disabled person by being denied access to this program.

4.2 SECTION 18.1 OF THE COMMISSIONER'S DIRECTIVE VIOLATES LILY'S SECTION 15(1) *CHARTER* RIGHTS

A. "Children of incarcerated mothers" should be recognized as an analogous ground

[34] Analogous grounds must be recognized if "they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity" (*Corbiere*). It is not necessary for a provision to contravene a ground in isolation – a "confluence" of grounds together can be considered an analogous ground. Analogous grounds should pertain to vulnerable and disadvantaged "discrete and insular minorities" (*Law*).

Corbiere v Canada (Minister of Indian and Northern Affairs) (1999), [1999] 2 SCR 203 at para 13, 173 DLR (4th) 1 [*Corbiere*].
Law, *supra* para 19 at paras 68, 93-94.

[35] "Children of incarcerated mothers" should be recognized as an analogous ground. The Supreme Court has noted that children are a marginalized group that is vulnerable, disempowered, and worthy of *Charter* protection under the enumerated ground of "age" (*Canadian Foundation*). Children of incarcerated mothers, in particular, are more susceptible to being deprived of access to their mothers than children in other contexts. The evidence shows that children who are deprived of the opportunity to form secure bonds with their mothers "are at a higher risk of intellectual deficits, behavioural risks, and mental health problems." In *Inglis*, the Court found that "children of incarcerated mothers is an immutable characteristic of historic disadvantage, analogous to the grounds listed in s 15, and as such they are worth of protection from discrimination."

Canadian Foundation for Children, Youth and the Law v Canada (Attorney General), 2004 SCC 4 at paras 7-9, 56, [2004] 1 SCR 76 [*Canadian Foundation*].
Inglis, supra para 17 at para 567.
Official Problem at 6.

[36] Section 2(2) of the *Convention on the Rights of the Child*, to which Canada is a signatory, states that "Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the […] activities […] of the child's parents." The Supreme Court has affirmed that the *Charter* is presumed to provide, at minimum, the same amount of protection as is provided by Canada's international treaty obligations (*Divito*). Children of incarcerated mothers have no control over their mothers' actions. Treating these children differentially on the basis of their mothers' actions violates their section 15(1) rights.

Convention on the Rights of the Child, 20 November 1989, [1992] Can TS No 3 art 2(2) (entered into force 28 May 1990).
Divito v Canada (Public Safety and Emergency Preparedness), 2013 SCC 47 at para 22, [2013] 3 SCR 157 [*Divito*].

[37] Children of incarcerated mothers are far more likely than others to be deprived of essential formative contact with their mothers. As a category, "children of incarcerated mothers" constitutes a "discrete and insular minority" worthy of protection under section 15(1) of the *Charter* because this group faces differential treatment on the sole basis of their mothers' classification as inmates (*Inglis*).

Inglis, *supra* para 17 at para 561.

B. Section 18.1 determines Lily's eligibility on the basis of an arbitrary classification

[38] Lily is being denied access to an individualized assessment process due to her mother's status as a violent offender. There is no evidence to suggest that it is always in the child's best interests to deprive him or her of access to his or her mother when the mother has convicted a violent offence. Legislative distinctions made on the basis of immutable personal characteristics must be rationally defensible in light of the legislation's objectives to avoid infringing section 15(1) of the *Charter*. Being the child of an incarcerated offender is an immutable characteristic that Lily cannot control, and her eligibility is determined entirely by that status. In the absence of clear evidence demonstrating that all mothers convicted of violent offences pose a danger to their children, section 18.1 creates an arbitrary distinction in law based on an immutable characteristic.

C. Section 18.1 is discriminatory against Lily

[39] The Supreme Court affirmed in *Winko* that "the essence of stereotyping […] lies in making distinctions against an individual on the basis of personal characteristics attributed to that person not on the basis of his or her true situation, but on the basis of association with a group."

Determining Lily's eligibility solely on the basis of a status ascribed to her mother discriminates against her as a child of an incarcerated mother. The courts have affirmed that the Program imposes a significant responsibility on the government to ensure that the child's best interests are being met in each case (*Whitford*). Section 18.1 prevents penal authorities from properly discharging this responsibility.

> *Winko, supra* para 31 at para 87.
> *R v Whitford,* 2008 BCSC 1378 at para 23, [2008] BCJ No 1954 [*Whitford*].

[40] In *AC*, the Supreme Court struck down an age-based cutoff because the distinction did not appropriately account for the child's actual capacities and characteristics. Similarly, in this case, there is no correspondence between the purpose of section 18.1 and Lily's "actual needs, capacities and characteristics." It presumptively denies Lily access to the Program without considering the harms she is liable to face by being denied regular contact with her mother. The provision, therefore, has little regard for Lily's best interests, and may impose a family situation on her that is harmful to her interests. The fourth contextual factor in *Law* is also engaged, as Lily's early childhood development directly implicates her health and well-being and is therefore a serious interest that warrants *Charter* protection.

> *AC v Manitoba (Director of Child and Family Services),* 2009 SCC 30 at paras 114-16, [2009] 2 SCR 181 [*AC*].
> *Law, supra* para 19 at para 88.
> Official Moot Problem at 6.

[41] The Directive seeks to ameliorate the disadvantages faced by children whose mothers are incarcerated in federal penitentiaries. Section 18.1 clearly runs contrary to this stated purpose: if the mother is subject to a certain classification, it automatically precludes any form of individualized assessment of the child's needs. In contrast, section 18 permits the participation of mothers convicted of a crime "involving a child," as long as a psychiatrist "determines that the

inmate does not represent a danger to her child." The failure to include a similar qualifying clause in section 18.1 means that the child in that case is prohibited from participating even if a psychiatrist were to determine that participation is in his or her best interests. The ameliorative intent behind section 18.1 cannot be used as a shield against Lily's section 15(1) claim because its actual effect may be detrimental to Lily's health and well-being.

Directive at ss 18, 18.1.

[42] The Minister's statements prior to the introduction of section 18.1 suggest that its true intent is to "put an end to Club Fed" and "punish offenders." This runs contrary to both the Directive's stated intent and to how the courts have dealt with cases involving the Mother-Child program previously. In *Hamilton*, the Court imposed a conditional sentence to be served by the mother at home so that she could continue to care for her children, as her children were otherwise too old to participate in the Mother-Child program. This sentence was reached despite precedent showing that incarceration was normally imposed for the crime committed (cocaine importation). Likewise, in *Whitford*, the Court noted that the accused's incarceration and participation in the Mother-Child program "may be the last and best chance" to achieve rehabilitation while remaining vigilant that the child's interests are being looked after. Section 18.1 discriminates against Lily by subordinating her best interests to punishing her mother.

Official Moot Problem at 4.
R v Hamilton, [2003] OJ No 532 at paras 220-34, 2003 CanLII 2862 (SC) [*Hamilton*].
Whitford, supra para 39 at paras 23-25.

D. Lily faces discrimination due to the violation of Claudette's section 15(1) rights

[43] In the alternative, if Lily's *Charter* rights are not violated directly, they are violated indirectly because her eligibility is premised on an arbitrary classification that violates her mother's *Charter* rights. The Supreme Court has affirmed that a person can be discriminated against if their eligibility for a government program is dependent upon a stereotypical

classification made of another person. In *Benner*, the claimant's section 15(1) rights were violated because his eligibility for citizenship was governed by the sex of his mother. Likewise, Lily's section 15(1) rights are violated because her eligibility is governed by a classification which violates her mother's section 15(1) *Charter* rights.

> *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358 at para 80, 143 DLR (4th) 577 [*Benner*].

4.3 SECTION 18.1 OF THE COMMISSIONER'S DIRECTIVE VIOLATES CLAUDETTE'S SECTION 7 *CHARTER* RIGHTS

[44] Section 18.1 of the Commissioner's Directive violates Claudette's rights under section 7 of the *Charter*. The provision deprives Claudette of her rights to liberty and security of person, and does so in a way that is not in accordance with the principles of fundamental justice. The amendment is arbitrary and its effects are overbroad and grossly disproportional.

A. The test under section 7 of the *Charter*

[45] The courts have established a two-part test to assess potential violations of section 7: first, there must be an infringement to an individual's rights to life, liberty or security of the person; and second, the infringement must be contrary to a principle of fundamental justice (*Bedford*). The Supreme Court has affirmed that the scope of rights defined by section 7 of the *Charter* must be given a broad, liberal interpretation, which the principles of fundamental justice must qualify rather than restrict (*Motor Vehicle*).

> *Charter*, *supra* para 2 at s 7.
> *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 58, [2013] 3 SCR 1101 [*Bedford*].
> *Reference re Motor Vehicle Act (British Columbia)* (1985), [1985] 2 SCR 486 at para 60, 24 DLR (4th) 536 [*Motor Vehicle*].

B. Section 18.1 infringes Claudette's right to security of the person

[46] The right to security of the person comprehends the protection of physical and psychological integrity, including mental health and well-being. Security of person interests

protected by the *Charter* are "explicit right[s] to control one's body and to make fundamental decisions about one's own life" (*Morgentaler*). An affront to psychological integrity must be "greater than ordinary stress or anxiety", but need not rise to the level of "nervous shock" or "physical illness" in order to incur a violation; it must simply "result from the actions of the state and […] be serious" (*G(J)*).

> *R v Morgentaler* (1988), [1988] 1 SCR 30 at 54, 44 DLR (4th) 385.
> *New Brunswick (Minister of Health and Community Services) v G(J)* (1999), [1999] 3 SCR 46 at para 60, 177 DLR (4th) 124 [*G(J)*].

[47] The Supreme Court has recognized that a mother's security of the person interest is engaged in her relationship with her biological child. In addition to the trauma of separation, the state's deep scrutiny into the relationship between parent and child is a "gross intrusion into a private and intimate sphere" where "the parent is often stigmatized as "unfit" when relieved of custody" (*G(J)*). The individual's identity as a parent is vital to their sense of self. The loss of this identity causes stigma and distress that is deeply psychologically damaging.

> *G(J)*, *supra* para 46 at paras 60-61.

[48] The expert evidence at trial acknowledged that female prisoners who participate in mother-child programs improve in mental and emotional wellbeing, are more likely to participate in rehabilitative programs, and are less likely to reoffend upon release. Further, these deleterious effects are exacerbated in women with mental health or addiction issues. Claudette's history of mental illness, abusive relationships and addiction collectively place her in vulnerable position. Based on her testimony, she has reunited with her child only four times in the nearly 16 months since Lily's birth, and she is "depressed for weeks" upon each instance of Lily's departure.

> Official Moot Problem at 5-6.

[49] Section 18.1 of the Directive infringes Claudette's right to security of the person by compromising her psychological integrity. The state is arbitrarily deeming a class of women to be unfit to parent their own children. The actual caregiving capacity of these individuals is never investigated or even considered. Claudette is deemed to be an unfit mother on the basis of past transgressions that may very well have little or no influence upon her ability to raise her daughter.

C. Section 18.1 infringes Claudette's right to liberty

[50] The right to liberty under section 7 of the *Charter* protects "the irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference", such as the "right to nurture a child, to care for its development, and to make decisions for it in fundamental matters" (*B(R)*). Liberty interests are grounded in the individual's right to "dignity and independence" in "fundamentally or inherently personal" matters (*Clay*).

> *B(R) v Children's Aid Society of Metropolitan Toronto* (1995), [1995] 1 SCR 315 at para 83, 122 DLR (4th) 1 [*B(R)*].
> *R v Clay*, 2003 SCC 75 at para 31, [2003] 3 SCR 735 [*Clay*].

[51] Liberty also protects the right to act without undue physical restraint; however, prisons remain a fundamental societal institution. Thus, the courts have drawn distinctions between lawful and unlawful deprivations of liberty (*Clay*). While incarceration necessarily entails a deprivation of liberty, this restriction is not unlimited (*Cunningham v Canada*). In *Martineau*, the Court stated that "depriving an individual of his liberty by committing him to a 'prison within a prison'" is unlawful, "[t]he rule of law must run within penitentiary walls." Overall, prisoners retain the right to challenge further restraints on their liberty within the prison context (*May*, *Khela*).

> *Clay*, *supra* para 50 at para 3.
> *Cunningham v Canada*, [1993] 2 SCR 143 at para 13, 20 CR (4th) 57 [*Cunningham v Canada*].

Martineau v Matsqui Institution Disciplinary Board, [1980] 1 SCR 602 at 622, 1979 CanLII 184 [*Martineau*].
May v Ferndale Institution, 2005 SCC 82 at paras 23-33, [2005] 3 SCR 809 [*May*].
Mission Institution v Khela, 2014 SCC 24 at para 29, [2014] 1 SCR 502 [*Khela*].

[52] In *Cunningham v Canada*, the Supreme Court affirmed that there "is a great difference between life inside a prison versus the greater liberty enjoyed on the outside". However, the liberty interests of prisoners must be limited "only to the extent that it is shown to be necessary for the protection of the public." McLachlin J noted that while liberty interests can be further restricted in the prison context, "prisoner status" does not automatically justify an infinite breadth of further infringement.

Cunningham v Canada, *supra* para 51 at paras 1, 4, 13.

[53] The Court in *Dumas* distinguished between three distinct forms of liberty deprivation: (1) initial deprivation, (2) a substantial change in conditions amounting to a further deprivation, and (3) a continuation of deprivation. By its nature, incarceration is an "initial deprivation"; therefore, in order to amount to a *Charter* offense, a prisoner's liberty deprivation must fall within either (2) or (3). This is apparent in the Claudette's case. Lily's birth and subsequent removal from Claudette's custody represents a substantial change in her conditions, and this deprivation is arbitrarily continued with no opportunity for appeal. Neither deprivation is in the interest of fundamental justice.

Dumas v LeClerc Institute (1986), [1986] 2 SCR 459 at para 11, 34 DLR (4th) 427 [*Dumas*].

[54] Section 18.1 deprives Claudette of her right to liberty by preventing her from taking any action on Lily's or her own behalf to develop or maintain a parental relationship beyond infrequent and often-traumatic visitations. By virtue of both geographic and economic circumstance, Emily is unable to bring Lily to visit with any frequency and Claudette is unable to transport breast milk to Lily. Aside from these visits, Claudette is afforded no means of

interacting with Lily, and is thus prevented from developing a distinct parent-child bond or influencing Lily's parenting in any meaningful way. More specifically, it is an offense to Claudette's right to any assessment of parental capacity, and goes beyond those liberty restrictions necessitated by her incarceration.

Official Moot Problem at 6.

[55] In *Winko*, the Supreme Court found that a *Criminal Code* provision that gave a Review Board the power to discharge, conditionally discharge, or forcibly hospitalize a "not criminally responsible" patient did not violate section 7. The review process was "inquisitorial, as opposed to adversarial", and did not create a presumption of dangerousness that unfairly cast the burden of proof on the accused. This is distinct from the case at hand: Claudette's designation as a "violent offender" creates a non-rebuttable presumption that she poses a danger to her child. Her ineligibility for the Program does not impede her liberty to a minimal standard; rather, it arbitrarily classifies her as an unfit parent and affords her no means to disprove the classification.

Winko, supra para 31 at para 105.

D. The infringement is contrary to principles of fundamental justice

[56] Section 18.1 of the Directive deprives Claudette of her liberty and security interests under section 7 of the *Charter*, and these violations are not in accordance with principles of fundamental justice. The distinction drawn is arbitrary and its effects are overbroad and grossly disproportional.

i. Defining "principles of fundamental justice"

[57] The Supreme Court defined the parameters of "principles of fundamental justice" in *Canadian Foundation*: (1) it must be a legal principle; (2) it must be of significant consensus that it is vital to our fundamental societal notions of justice; and, (3) it must be identified with sufficient precision to yield a manageable standard of predictable results. Established principles

"do not lie in the realm of general public policy but in the inherent domain of the judiciary as a guardian of the justice system" (*Motor Vehicle*). In each case, the legislation must be assessed in terms of both its intended purpose and its actual effects. The Supreme Court has recognized overbreadth, arbitrariness and gross disproportionality as three of these principles. In *Bedford*, the Supreme Court noted that there is "significant overlap between these three principles" and that they all "compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness."

Canadian Foundation, *supra* para 35 at para 8.
Motor Vehicle, *supra* para 45 at para 22.
Bedford, *supra* para 45 at paras 107-123.

ii. There is a discrepancy between the provision's intended purpose and its effect

[58] As mentioned previously, the Minister's assertion that the "safety and development of a child" is the fundamental basis for the amendment is unfounded. The Minister's earlier statements suggest that the Directive's "pre-eminent consideration" of "the best interests of the child" is masking an alternative purpose: to "punish offenders" and not fund a violent offender's "privilege" to raise her children while incarcerated. Increasing the severity of prisoners' punishment is an insufficient validation for an infringement of fundamental *Charter* rights. In the alternative, if the provision's purpose *is* in accordance with the Directive's pre-eminent consideration, then its effects contravene its intent.

Official Moot Problem at 4.

iii. The amendment is overbroad

[59] Legislation will be found to be "overbroad" if it is "broader than necessary to accomplish its objective" (*Heywood*). As is affirmed in *Bedford*, if legislation "captures conduct that bears no relation to its purpose, the law is overbroad under s 7".

R v Heywood (1994), [1994] 3 SCR 761 at 792, 120 DLR (4th) 348 [*Heywood*].
Bedford, *supra* para 45 at para 144.

[60] If protecting "the best interests of the child" is the intended purpose of section 18.1, then it is overbroad. The means should not adversely affect people or activities beyond what is required to achieve the state's objective without consideration of the constitutional rights of those affected (*Bedford*). Section 18.1 exceeds its ambit in four specific contexts: first, the provision arbitrarily excludes women convicted of "violent crimes" regardless of whether or not they represent a danger to their children; second, it presumptively prohibits all mothers of a certain class and denies them a right of rebuttal; third, it exacerbates the harms already suffered by disabled inmates and unfairly jeopardizes their rehabilitation; and, finally, its effect extends beyond the women it expressly describes and precludes their infants from a right to individualized assessment of their best interests. The scope of the provision far exceeds that which is necessary.

Bedford, *supra* 45 at paras 112-13.
Official Moot Problem at 6.

iv. The amendment is arbitrary

[61] A law is arbitrary where the limit imposed on the claimant's rights bears no rational or actual connection to its objectives (*Heywood, Bedford*). The provision draws an arbitrary connection between women convicted of "violent offenses" and women who represent a danger to their infants.

Heywood, supra para 59 at para 54.
Bedford, *supra* para 45 at para 105.

[62] There is no established connection between section 18.1 and its purported objective. As mentioned previously, the government has adduced no evidence to show that a mother convicted of a "crime of violence" poses any increased threat to the health and safety of her child. There is

a minimal body of academic research on prisoner mother-child programs, and the government has done nothing to investigate further. Expert evidence asserts that no other country excludes all prisoners convicted of violent offences from participation in mother-child programs. The sole result of this blanket exclusion is therefore to further marginalize these women.

Official Moot Problem at 4, 7.

v. The amendment is grossly disproportional

[63] A law is grossly disproportional when it is "so extreme" that it is "totally out of sync" with the government's objective (*Bedford*). A finding of gross disproportionality does not require that an entire group of persons be affected, nor does it encompass the law's greater effect on society as a whole. As is true with arbitrariness and overbreadth, a detriment to a single individual is sufficient to establish a disproportionate breach of section 7 of the *Charter*. Therefore, the infringement of Claudette's rights alone is adequate proof of disproportionality.

Bedford, *supra* para 45 at para 120.

[64] In *Inglis*, the Court concluded that the cancellation of the Mother-Baby Program in British Columbia infringed the security interests of mothers who would otherwise have been eligible. The resulting detriment was grossly disproportionate to the government's purported interest in child safety. While *Inglis* is distinguishable by its cancellation of an entire program, the Court's findings regarding disproportionality under section 7 also apply in this case. Specifically, the finding of disproportionality in *Inglis* was based on the following factors: there was no investigation into the program to determine a reasonable apprehension of harm to the children; there was a lack of evidence to support a reasonable apprehension of harm; the cancellation eliminated an individualized assessment process and replaced it with an arbitrary blanket exclusion; and, the constitutional rights of affected mothers and infants were not factors

considered in the decision. Similarly, in Claudette's case, she has been denied an individualized assessment to determine whether there was a reasonable apprehension of harm; there is otherwise no evidence to support the contention that Claudette is a threat to Lily; section 18.1 removed an individualized assessment process and replaced it with a blanket exclusion; and there is no evidence to show that the government considered Claudette's and Lily's constitutional rights when drafting the section. For these reasons, the harms caused by section 18.1 are grossly disproportional to the benefits realized.

Inglis, supra para 17 at paras 491, 500.

4.4 THE INFRINGEMENTS UNDER SECTIONS 15(1) AND 7 ARE NOT DEMONSTRABLY JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY UNDER SECTION 1 OF THE *CHARTER*

A. The test under section 1 of the *Charter*

[65] The burden is on the Respondent to prove that the limits imposed on the Appellants' section 7 and section 15(1) *Charter* rights are reasonable and "demonstrably justified in a free and democratic society". There must be a pressing and substantial objective that is rationally connected to the resulting limitations of rights. Further, there must be minimal impairment of the contravened rights that strikes a proper balance between the provision's benefits and its deleterious effects (*Oakes*).

Charter, *supra* para 2 at s 1.
R v Oakes (1986), [1986] 1 SCR 103 at para 63, 26 DLR (4th) 200 [*Oakes*].

B. Section 18.1 does not have a pressing and substantial objective

[66] While the provision ostensibly holds the safety of children as its paramount concern, the Minister has stated that "[t]he purpose of prisons is to punish offenders" and "not … paying for violent offenders to have the privilege of raising their children". Section 18.1 was added to further the appearance of a heavy-handed corrections system. It was not introduced in order "to provide a supportive environment that fosters and promotes stability and continuity for the

mother-child relationship." Despite the Directive's pre-eminent consideration, section 18.1 has a distinct purpose that is not in the best interests of the child.

> *Corrections and Conditional Release Act, supra* para 5 at ss 2-3.
> Directive, supra para 5 at ss 1, 3.

C. There is no rational connection between the stated purpose and effects

[67] The government must prove that a legislative limit on a *Charter* right furthers its established objectives. A procedure that is arbitrary, unfair, or irrational cannot stand as a valid restraint (*Oakes*). As established earlier, the purpose of the section 18.1 is not to protect children, but simply to further restrict the freedoms of incarcerated women. This is shown by the complete lack of evidentiary inquiry: the government "did not conduct *any* study or risk assessment of the Mother-Child program" prior to the amendment. There has been no evidence provided that mothers convicted of "crimes of violence" represent any greater danger to their children than any other applicant.

> *Oakes, supra* para 65 at para 70.
> Official Moot Problem at 4-5 [emphasis added].
> Directive, *supra* para 5 at ss 18, 18.1.

[68] This irrationality is further evidenced by the discrepancy between sections 18 and 18.1. While section 18.1 automatically excludes applicants convicted of a "crime of violence" - which the parties agree can be defined using a common-sense approach - mothers convicted of crimes involving children are not similarly prohibited by section 18. The latter retains the right to psychiatric assessment, and through it, potential entry to the Program. As an illustration of the aforementioned "common-sense" definition, a recent Statistics Canada survey expressly distinguished "violent" crimes from (among others) impaired driving, theft, arson, corrupting a child (such as through drugs or alcohol), luring a child, or abduction or removal of a child from Canada. If this definition is applied to the case at hand, then while Claudette is denied the right

of application, a mother convicted of plying a child with illicit substances is not. In *Inglis*, the Court affirmed that determining eligibility on a case-by-case basis for mother-child programs "permit[s] the state to protect the safety of infants […] while at the same time preserving the parent-child bond and the integrity of the family unit". In order to protect children, the state must extend a similar case-by-case assessment to women affected by section 18.1.

> Official clarifications at para 4.
> Canada, Canadian Centre for Justice Statistics, *Uniform Crime Reporting Survey*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2014), online: <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/legal50b-eng.htm>.
> Directive, *supra* para 5 at ss 18, 18.1.
> *Inglis, supra* para 17 at para 492.

[69] As is affirmed in *Bedford*, the Crown bears the burden of proving a rational connection based on "the social science and expert evidence required to justify the law's impact in terms of society as a whole." With respect, this has not been properly attempted, let alone established. The existing evidence is insufficient proof that forcibly separating 45% of incarcerated mothers from their children is directly and rationally connected to the protection of child safety. Further, the government has made no corroborative efforts. At minimum, a lack of individualized assessment on the mothers' behalf unfairly precludes these women from an opportunity to both raise their children and rehabilitate themselves. Further, it exacerbates the disadvantages these women already experience on the bases of sex and disability, and it marginalizes children of incarcerated mothers as an analogous ground. It is incumbent on the government to demonstrate that there is a sound basis for infringing these fundamental *Charter* rights, and that burden has not been met in this case.

> Official Moot Problem at paras 15, 25.
> *Bedford*, *supra* para 45 at para 126.

D. The limit imposed is not minimally impairing

[70] The test for minimum impairment is that there must not be "an alternative, less drastic means of achieving the objective in a real and substantial manner" (*Hutterian Brethren*). If there is a reasonable substitute that achieves the legislative goal, then the government is obliged to utilize that substitute. There are alternative means available to protect the safety of children who are potential entrants to the Mother-Child Program; for example, simply extending the individualized assessment process in section 18 to section 18.1. The law is overbroad in its effects and arbitrarily encompasses a particular group on an undefined and unproven basis. As stated in *Heywood*, overbroad legislation should be incapable of passing the minimal impairment test under a section 1 analysis.

> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 53-55, [2009] 2 SCR 567 [*Hutterian Brethren*].
> *Heywood*, *supra* para 60 at 802.

E. The deleterious effects are disproportionate to the benefits

[71] The final step in a section 1 *Charter* analysis is to balance the law's deleterious and salutary effects. As established in *Oakes*, there must be proportionality between the beneficial objective "of sufficient importance" and the resulting *Charter* limitations. If the detriments "outweigh the public benefit that may be gained from the measure", then the legislation cannot be justified under section 1 (*Hutterian Brethren*).

> *Oakes*, *supra* para 65 at para 69.
> *Hutterian Brethren*, *supra* para 70 at para 78.

[72] Respectfully, while the analysis in *Hutterian Brethren* provides for benefits that "may" be gained from a particular measure, the government must demonstrate that the intended benefits can be reasonably expected. As mentioned previously, the government has not undertaken a study or risk assessment with regards to section 18.1, and has not otherwise provided any

evidentiary basis to justify equating "violent offenders" with unfit mothers. On this basis alone, the resulting rights detriment cannot be justified.

Official Moot Problem at 5.

[73] In the alternative, if the objective of protecting the child's interests is reasonably met by section 18.1, it must still fail the test of proportionality. As concluded in *Inglis*, an assertion of an "enhancement of infant safety at the price of a reduction in maternal liberty" ignores the social, psychological, and overall health benefits to both infant and mother. The benefits claimed are unsubstantiated, and are insufficient to justify the gravity of the resulting infringement.

Inglis, *supra* para 17 at paras 647-9.
Official problem at 6.

5 ORDER SOUGHT

[74] The Appellants respectfully request that the appeal be allowed and that section 18.1 of the Directive be held of no force or effect.

6 TABLE OF AUTHORITIES

6.1 LEGISLATION

6.2 JURISPRUDENCE

6.3 SECONDARY MATERIALS

6.4 OTHER SOURCES