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 RESPONDENT

COUNSEL FOR THE RESPONDENT

TEAM 10

TABLE OF CONTENTS

PART I – OVERVIEW

[1] Section 18.1 of the Commissioner's Directive prevents children that are residing in prison from being exposed to violence. The provision responds to a serious risk of harm posed by housing violent inmates together with children in the Mother-Child Program (the "Program"). Claudette Tinio is a violent offender who challenges her ineligibility for the Program under the Commissioner's Directive on behalf of herself and her daughter Lily Tinio.

> Official Problem, The Wilson Moot 2015 at 1 [Official Problem].
> Commissioner's Directive Number 768, enacted pursuant to the *Corrections and Conditional Release Regulations*, SOR/92-620 [Commissioner's Directive].

[2] The question in this appeal is whether the Appellants' constitutional rights under ss. 15 or 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") entitle them to be eligible for the Program. The Program is a benefit that is only available to a limited number of low-risk female inmates at select prison institutions. Its strict eligibility criteria ensure that the Program promotes the best interests and healthy development of young children whose mothers are serving custodial sentences. Section 18.1 of the Commissioner's Directive accomplishes this objective by excluding mothers on the basis of their violent criminal actions, not on the basis of any protected grounds under s. 15(1) of the *Charter*. Any distinction drawn by the provision does not perpetuate prejudice, stereotyping, or exacerbate historic disadvantage. The provision does not infringe Ms. Tinio's s. 7 rights to liberty or security of the person. In the alternative, any deprivation is in accordance with the principles of fundamental justice. Any infringement of the Appellants' *Charter* rights is justified under s. 1 in light of the state's pressing policy concern.

> Official Problem, *supra* para 1 at 1.
> *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(1) [*Charter*].

PART II – STATEMENT OF FACTS

A. Factual Background

[3] Ms. Tinio seeks to have her one-year-old daughter Lily reside with her in prison at Maplehurst Women's Penitentiary. Ms. Tinio is serving a four-year sentence following a conviction of assault with a weapon. Lily currently resides with Ms. Tinio's half-sister, Emily, in Calgary.

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

[4] Ms. Tinio's legal difficulties began at an early age. As a young woman growing up in Winnipeg, Ms. Tinio began drinking, smoking marijuana, and engaging in illegal activities such as vandalism and shoplifting. Ms. Tinio's behaviour escalated by her early 20s, when she began drinking heavily and regularly using drugs such as cocaine and methamphetamine. She relied on criminal means to support herself, including theft, prostitution, and drug trafficking. Ms. Tinio's behaviour led to numerous criminal charges, including possession of marijuana and cocaine; communication for the purposes of prostitution and resisting arrest; assault and theft under $5000; and, most recently, possession of methamphetamine for the purposes of trafficking, for which she served a one-year custodial sentence.

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

[5] After Ms. Tinio's release from prison in 2010, she returned to Winnipeg. Ms. Tinio generally stayed sober, but did relapse on several occasions. She continued to socialize with her old friends, who largely remained involved in drugs and crime.

Official Problem, *supra* para 1 at para 9.

[6] In December 2012, Ms. Tinio was charged with assault with a weapon. Ms. Tinio had met with an acquaintance named Rachel who asked Ms. Tinio to transport large quantities of

cocaine to Calgary, which Ms. Tinio refused to do. During a physical altercation, Ms. Tinio struck Rachel in the head with a telephone and knocked her unconscious.

Official Problem, *supra* para 1 at paras 10-11.

[7] Ms. Tinio learned that she was pregnant in February 2013. She was convicted of assault with a weapon in July 2013 and sentenced to four years in prison. She began serving her sentence at Maplehurst in August of that year.

Official Problem, *supra* para 1 at paras 12, 18.

[8] Lily was born in Maplehurst in October 2013. She was placed in Emily's care, who is raising Lily alongside her three other children. Lily is a happy and healthy child.

Official Problem, *supra* para 1 at paras 19, 21.

B. Legislative History

[9] The federal government introduced the Program in 1999. It allows certain female inmates in federal penitentiaries to reside with their children during their prison sentence.

Official Problem, *supra* para 1 at para 16.

[10] The Program is governed by the Commissioner's Directive. Under s. 3 of the Commissioner's Directive, the paramount consideration in all decisions about participation in the Program is the best interests of the child. To promote this objective, the Commissioner's Directive excludes mothers on numerous grounds. It provides that the Program itself is subject to other inmate accommodation needs, excludes women in maximum security prisons, requires a psychiatric assessment of mothers convicted of crimes involving children, limits full-time residency to children under 4 years of age, and provides that participation is subject to periodical case reviews.

Commissioner's Directive, *supra* para 1, ss 3, 8, 17-19.

[11] In response to a risk of violence to children in the Program, the Commissioner's Directive was amended to include s. 18.1. In the 28 months prior to this litigation, there were two security incidents in the Program, one involving violence. Prison guards also expressed concerns about their ability to ensure the safety of children residing in prison. To ensure that children are not placed in a dangerous environment, s. 18.1 provides:

> 18.1 Women convicted of any crime of violence, regardless of whether the crime involved a child, are not eligible to participate in the program.

Official Problem, *supra* para 1 at 1, 7, 8.

C. Procedural History

[12] In October 2013, Ms. Tinio brought an application before the Federal Court of Canada on behalf of herself and Lily challenging her exclusion from the Program under ss. 7 and 15(1) of the *Charter*. Justice Lazier allowed the application, finding that s. 18.1 discriminated against Ms. Tinio and Lily under s. 15(1), was not in accordance with the principles of fundamental justice under s. 7, and was not justified under s. 1 of the *Charter*. Justice Lazier declined to decide whether family status is an analogous ground under s. 15.

Official Problem, *supra* para 1 at 9.

[13] A majority of the Federal Court of Appeal found no discrimination against Ms. Tinio or Lily under s. 15(1) of the *Charter*. Justice Chan held that the Commissioner's Directive creates a distinction on the basis of violent offender status, which she refused to recognize as an analogous ground. Further, she expressly declined to recognize family status as an analogous ground. In her s. 7 analysis, Justice Chan found that any deprivation caused by s. 18.1 of the Commissioner's Directive was in accordance with the principles of fundamental justice.

Official Problem, *supra* para 1 at 9, 10.

PART III – STATEMENT OF POINTS IN ISSUE

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

Issue 1: Does s. 18.1 of the Commissioner's Directive infringe Ms. Tinio's s. 15 *Charter* rights?

The Respondent's position is that s. 18.1 draws a distinction on the sole basis of Ms. Tinio's violent offender status, which is not an analogous ground and does not perpetuate discrimination under s. 15(1) of the *Charter*.

Issue 2: Does s. 18.1 of the Commissioner's Directive infringe Lily Tinio's s. 15 *Charter* rights?

The Respondent's position is that s. 18.1 does not draw a distinction on an enumerated or analogous ground and does not perpetuate discrimination against Lily Tinio.

Issue 3: Does s. 18.1 of the Commissioner's Directive infringe s. 7 of the *Charter*?

The Respondent's position is that s. 18.1 does not infringe Ms. Tinio's liberty or security of the person and does not violate the principles of fundamental justice.

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

The Respondent's position is that s. 18.1 of the Commissioner's Directive is justified pursuant to s. 1 of the *Charter*.

PART IV – ARGUMENTS

Issue 1: Section 18.1 of the Commissioner's Directive does not infringe Claudette Tinio's rights under s. 15(1) of the *Charter*

[15] Section 18.1 of the Commissioner's Directive does not violate s. 15(1) of the *Charter*. Two questions must be answered to establish a violation of the equality guarantee: "(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?" (*Kapp*). The Commissioner's Directive does not distinguish Ms. Tinio based on a prohibited ground. It does not perpetuate historic disadvantage, prejudice, or stereotypes in purpose or effect.

R v Kapp, 2008 SCC 41 at para 17, [2008] 2 SCR 483 [*Kapp*].

A. Section 18.1 does not distinguish Ms. Tinio on an enumerated or analogous ground

[16] The Commissioner's Directive creates a distinction that is "unambiguously based on Ms. Tinio's status as a violent offender." Violent offender status is a permissible ground of distinction under s. 15(1). The Commissioner's Directive does not draw a distinction on the basis of Ms. Tinio's race, ethnicity, gender, or disability.

Official Problem, *supra* para 1 at para 30.

[17] Ms. Tinio's exclusion from the Program must be viewed comparatively, not in the abstract (*Andrews*). As the Supreme Court has recognized, "[t]he role of comparison at the first step is to establish a 'distinction'. Inherent in the word 'distinction' is the idea that the claimant is treated differently than others. Comparison is thus engaged" (*Withler*).

Andrews v Law Society of British Columbia, [1989] 1 SCR 143 at 163-164, 56 DLR (4th) 1 [*Andrews*].
Withler v Canada (Attorney General), 2011 SCC 12 at para 62, [2011] 1 SCR 396 [*Withler*].

i) Offender status is not an analogous ground under s. 15(1)

[18] Violent offender status does not constitute an analogous ground under s. 15(1). It does not "serve as a basis for stereotypical decisions made … on the basis of a personal characteristic that is immutable or changeable only at an unacceptable cost to personal identity" (*Corbiere*).

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

[19] To prohibit distinctions on the basis of offender status would be contrary to established jurisprudence and the criminal justice system. In *Chiarelli*, a unanimous Supreme Court expressly endorsed the reasons of Justice Pratte below, who found no analogy between the enumerated grounds and the fact of being convicted of a criminal offence. Justice Gonthier, in *Sauvé* (writing on a point not addressed by the majority), held "to find prisoner status to be an analogous ground would be a distortion of the purpose of s. 15(1) and would come close to making a mockery of the *Criminal Code* and the values on which it is based and which it enshrines."

> *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 at para 32, 90 DLR (4th) 289.
> *Canada (Minister of Employment and Immigration) v Chiarelli*, [1990] 2 FC 299 at 311, 67 DLR (4th) 697.
> *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 201, [2002] 3 SCR 519 [*Sauvé*].

[20] Violent offender status is not an immutable characteristic. In *LCW*, the Court found that dangerous offender status is not an analogous ground, concluding "[t]he commission of a crime is a matter of personal choice for the offender. It is not an immutable personal characteristic" (*LCW*). Immigration is not an analogous ground (*Toussaint v Canada (AG)*). Like immigration status, offender status stems from the state's response to a personal choice. The fact that the individual's choice has permanent consequences does not render it immutable.

R v LCW, 2000 SKQB 302 at para 172, [2000] 10 WWR 527 [*LCW*].
Commissioner's Directive, *supra* para 1, s 1.
Toussaint v Canada (AG), 2011 FCA 213 at para 99, 343 DLR (4th) 677 [*Toussaint v Canada (AG)*].

[21] Ms. Tinio's conviction for a violent offence does not flow from a personal or individual characteristic (*Corbiere*). Lower courts have recognized that prisoner status does not constitute "a personal characteristic changeable only at an unacceptable cost to personal identity" (*LCW*). It can therefore be distinguished from established grounds like race, gender, religion, or age, which flow from an essential aspect of the individual's identity rather than his or her behaviour.

Corbiere, *supra* para 18 at para 13.
LCW, *supra* para 20 at 172.

[22] Violent offenders do not constitute a discrete and insular minority (*Corbiere*). They are not "defined by a common or shared personal characteristic"; they are disparate and heterogeneous (*Toussaint*). In this way, violent offender status resembles financial need, which the courts have accepted is a permissible ground of distinction (*Toussaint*).

Corbiere, *supra* para 18 at para 13.
Toussaint v Canada (Minister of Citizenship and Immigration), 2011 FCA 146 at para 59, 235 CRR (2d) 21 [*Toussaint*].

ii) Section 18.1 does not distinguish Ms. Tinio based on an enumerated ground

[23] As Justice Chan found in the court below, s. 18.1 does not create a distinction on the basis of Ms. Tinio's race, ethnicity, disability, or gender. Disabled women and women who belong to racial or ethnic minorities remain eligible to participate in the Program.

Official Problem, *supra* para 1 at para 30.

[24] Section 18.1 does not meet the threshold to establish an effects-based distinction. State actions create a distinction if they have a "disproportionately negative impact on a group or individual" (*Withler*). Where a law does not create a distinction on its face, a claimant must "do

more work" to establish the effect of the law draws a distinction (*Withler*). It cannot be the case that all legislation with a marginal differential impact creates a distinction under s. 15(1). The Supreme Court has expressly rejected an interpretation of s. 15(1) that would treat "all distinctions as discriminatory" in *Andrews.*

Withler, supra para 17 at para 64.
Andrews, supra para 17 at para 41.

[25] While certain groups might be overrepresented within the class of violent offenders, their disadvantage stems from criminal offences that disproportionately capture those groups. In *Symes,* the Supreme Court confirmed the importance of causation in the context of indirect discrimination. The analysis "must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision" (*Symes*). Ms. Tinio's ineligibility is caused solely by her conviction for a criminal offence and her conviction was the result of social circumstances that exist independently of s. 18.1.

Symes v Canada, [1993] 4 SCR 695 at para 134, 110 DLR (4th) 470 [*Symes*].

[26] The unfortunate fact that certain groups may be marginally overrepresented among violent offenders must not preclude the government from taking measures to ensure the safety of children. As Justice Gonthier noted in *Sauvé,* the need to address factors leading to the overrepresentation of Aboriginal offenders in Canadian prisons "does not, however, preclude the ability of Parliament to address other pressing social problems, including denouncing serious crime, enhancing the meaning of the criminal sanction and promoting civic responsibility and the rule of law."

Sauvé, *supra* para 19 at para 204.

[27] Mothers are only eligible for the Program in limited cases where it would be in the child's best interests. All female inmates in maximum-security prisons and in prisons that do not offer the Program are excluded. Given these circumstances, the Commissioner's Directive does not single out a specific group on the basis of race, ethnicity, or disability for adverse treatment.

Commissioner's Directive, *supra* para 1, s 17.

iii) The Commissioner's Directive does not draw a distinction on the basis of Ms. Tinio's gender

[28] As no male inmates are eligible for the Program, the Commissioner's Directive does not impose differential treatment on Ms. Tinio by virtue of her gender. Instead, the Commissioner's Directive combats women's historic disadvantage by recognizing the fundamental importance of the mother-child relationship (*Brooks*).

Brooks v Canada Safeway Ltd, [1989] 1 SCR 1219 at 1236, 59 DLR (4th) 321 [*Brooks*].

B. In the alternative, s. 18.1 does not perpetuate discrimination

[29] Any distinction drawn by s. 18.1 does not have a discriminatory impact on Ms. Tinio. In *Andrews*, the Court defined discrimination as a distinction with "the effect of imposing burdens, obligations, or disadvantages … or which withholds or limits access to opportunities, benefits, and advantages available to other members of society." Violent offenders are not a historically disadvantaged group. Section 18.1 does not perpetuate prejudicial attitudes that violent offenders are less capable, nor does it attribute characteristics to offenders regardless of their actual capabilities (*Kapp*). The ameliorative purpose of the Commissioner's Directive must be taken into account in assessing the constitutionality of s. 18.1 (*Law*).

Andrews, *supra* para 17 at 174.
Kapp, *supra* para 15 at para 17.
Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at para 72, 170 DLR (4th) 1 [*Law*].

i) Violent offenders are not a historically disadvantaged group

[30] Violent offenders do not experience an historic disadvantage different from the disadvantage suffered by all female inmates (*Quebec v A*). All incarcerated individuals experience some level of social stigmatization associated with the conviction for a criminal offence. The Appellants failed to adduce evidence that violent offenders experienced historic disadvantage independent of that experienced by all offenders. At trial, Justice Lazier found that Dr. Courtney Tegame's evidence was "drawn from a relatively limited body of work." This is an insufficient factual basis for a finding of disadvantage.

> *Quebec (Attorney General) v A*, 2013 SCC 5 at para 248, [2013] 1 SCR 61 [*Quebec v A*].
> Official Problem, *supra* para 1 at para 23.

ii) Section 18.1 does not perpetuate prejudice against violent offenders

[31] Section 18.1 does not perpetuate the view that Ms. Tinio is less worthy of respect or less capable as a parent on the basis of her violent offender status. In *Quebec v A*, Justice Abella described prejudice as the "holding of pejorative attitudes based on strongly held views about the appropriate capacities or limits of individuals" (*Quebec v A*). The exclusion under s. 18.1 addresses the possibility of corollary harm caused by violence between inmates in the presence of children like Lily. It does not perpetuate the view that Ms. Tinio is less capable as a mother. It does not limit Ms. Tinio's ability to make decisions regarding Lily's upbringing while serving her sentence. In this way, the Commissioner's Directive minimally inhibits Ms. Tinio's ability to parent while fostering a safe and secure environment for children.

> *Quebec v A*, *supra* para 30 at para 326.

iii) Section 18.1 does not advance stereotypes based on offender status

[32] Section 18.1 does not discriminate against Ms. Tinio by perpetuating stereotypical attitudes. Distinctions may violate the equality guarantee through the "stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance" (*Miron*). Ms. Tinio's ineligibility directly results from the fact that she engaged in criminal conduct. This is an individual circumstance and not a stereotypical presumption.

> *Miron v Trudel*, [1995] 2 SCR 418 at para 131, 124 DLR (4th) 693 [*Miron*].

[33] In the absence of arbitrary or invidious stereotyping, "the legislator is entitled to proceed on informed general assumptions without running afoul of s. 15" (*Gosselin*). Section 18.1 addresses the reasonable possibility that violent offenders engage in more violent conduct than non-violent offenders. In the past 28 months, there has been at least one incident of violence around children in the Program. Section 18.1 addresses this concern by excluding those who have chosen to engage in criminally violent activity. The Commissioner's Directive pre-emptively addresses the possibility of harm to children and prevents risk before it materializes.

> *Gosselin v Quebec (AG)*, 2002 SCC 84 at para 56, [2002] 4 SCR 429 [*Gosselin*].
> Official Problem, *supra* para 1 at para 25.

iv) The Program furthers a beneficial purpose

[34] The beneficial purpose served by the Program entitles the government to deference. The discrimination analysis under s. 15(1) analysis must be undertaken contextually (*Law*). As the Court found in *Withler*, "where the impugned law is part of a larger benefit scheme … the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will colour the discrimination analysis" (*Withler*). Moreover, a consideration of the Program's constructive purpose is not limited to s. 15(2) (*Withler*). In the context of an ameliorative program, it is unavoidable that the government "in seeking to help one group, will necessarily

exclude others" (*Cunningham*). The program legitimately distinguishes Ms. Tinio based on her past conviction for a violent offence in order to protect the safety of children.

> *Law*, *supra* para 29 at para 62.
> *Withler*, *supra* para 17 at para 38.
> *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at para 40, [2011] 2 SCR 670 [*Cunningham*].

[35] The court is entitled to consider the "[a]llocation of resources and the particular policy goals that the legislature may be seeking to achieve" (*Withler*). The Program promotes the relationship and bond between an inmate and her child, reduces the risk of trauma, minimizes potential psychological harm associated with separation from a caregiver, and facilitates breastfeeding. The Program's eligibility criteria balance these positive outcomes with the need to protect the child's best interests and ensure effective resource distribution. The Program costs the government an additional $35 000 per year above the costs of incarcerating the mother. Funding for penitentiaries is limited, and many prisons are currently overcrowded. Expanding the Program beyond what can reasonably be managed would make the Program unsustainable.

> Official Problem, *supra* para 1 at para 22, 25.
> *Withler*, *supra* para 17 at para 67.

Issue 2: Section 18.1 does not infringe Lily's rights under s. 15(1) of the *Charter*

[36] Section 18.1 does not discriminate against Lily based on an enumerated or analogous ground. It recognizes that children of violent offenders are equally worthy of respect and protection. In doing so, it alleviates the historic disadvantage suffered by all children of offenders.

> *Kapp*, *supra* para 15 at para 42.

A. Section 18.1 does not create a distinction on an enumerated or analogous ground

[37] Family status is not an analogous ground under s. 15(1). Even if it were to be recognized, it should not be interpreted so broadly as to include a parent's conduct. Further, the Commissioner's Directive extends benefits to the children of incarcerated women without distinction on the basis of family status, race, or ethnicity.

i) Section 18.1 does not distinguish Lily on the basis of family status

[38] Canadian jurisprudence does not support a finding that family status is an impermissible ground of discrimination under the *Charter*. In *Thibaudeau*, the Supreme Court declined to find that family status constitutes a basis for discrimination. Discussing this ruling in *Wynberg*, the Ontario Court of Appeal found "it difficult to conceive of family status as constituting an analogous ground." In that case, the claimant parents of children with autism alleged discrimination under s. 15(1) because of additional costs associated with raising a disabled child. The Court therefore refused to find discrimination based on a claimant's family status. There are important distinctions between *Wynberg* and the case at bar. In *Wynberg*, the claimant alleged discrimination on the basis of a family member's disability, an enumerated ground under s. 15(1). Conversely, Lily's mother made a personal choice to commit a criminally violent offence. This makes recognition of family status as an analogous ground even less plausible in the present appeal.

> *Thibaudeau v Canada*, [1995] 2 SCR 627, [1995] SCJ No 42 [*Thibaudeau*].
> *Wynberg v Ontario*, 82 OR (3d) 561 at para 206, 269 DLR (4th) 435 [*Wynberg*].
> Official problem, *supra* para 1 at para 30.

[39] Interpreting family status to include a parent's personal choices exceeds the scope of family status established by human rights tribunals and Canadian courts. Where human rights legislation recognizes and defines family status, the definition is limited to the status of being in

a parent-child relationship. The Commissioner's Directive explicitly recognizes the myriad forms of Canadian families by extending the definition of mother to include biological or adoptive mothers, legal guardians, and stepmothers. It draws distinctions based on the past conduct of parents, not on the basis of a parent's relation to their child. In the context of the *Canadian Human Rights Act*, the courts recognize it is "important not to trivialize human rights legislation by extending human rights protection to personal family choices" (*Johnstone*).

> *Human Rights Code*, RSO 1990, c H.19, s 10(1).
> Commissioner's Directive, *supra* para 1, s 6.
> *Johnstone v Canada (Border Services)*, 2014 FCA 110 at para 69, 372 DLR (4th) 730 [*Johnstone*].

[40] The government has a fundamental interest in distinguishing children based on their parent's conduct. It is on this basis that the state removes children from the care of parents who engaged in negligent or harmful conduct to their child's well-being. Prohibiting these distinctions would threaten the existence of institutions necessary for the protection of Canadian children.

ii) Section 18.1 does not create a distinction on the basis of Lily's race or ethnicity

[41] Lily does not experience discrimination on the basis of race or ethnicity under the Commissioner's Directive. There is no evidence to suggest that children excluded from the Program by virtue of section 18.1 disproportionately belong to racialized minorities or ethnic groups when compared with eligible children.

B. Section 18.1 does not perpetuate prejudice, stereotyping, or increase Lily's historic vulnerability

[42] Section 18.1 protects the safety of children of violent offenders, thereby promoting the view that these children are equally valuable and worthy of respect. It does not exacerbate historic disadvantage. Instead, it responds to Lily's actual need for emotional and physical

security. Therefore, it does not create a distinction "by perpetuating prejudice or stereotyping" (*Kapp*).

Kapp, supra para 15 at para 17.

i) Children of violent offenders are not a historically disadvantaged group

[43] The Respondent accepts that children of offenders suffer disadvantage accompanying the fact of their parent's incarceration. However, there is insufficient evidence to conclude that the children of women convicted of a violent offence suffer distinct or heightened disadvantage. Lily is not at an increased disadvantage as a result of her exclusion from the Program. As Mr. Nishant Patel's affidavit suggests, children ineligible for the Program often reside with relatives, friends, or another parent. In Lily's case, she has a home with her aunt and cousins, and is "generally a happy and healthy child."

Official Problem, *supra* para 1 at para 21.

ii) Section 18.1 does not perpetuate prejudice towards children of violent offenders

[44] Section 18.1 does not perpetuate prejudicial attitudes that consider children of violent offenders to be less worthy of respect (*Andrews*). Instead, it promotes the view that children of violent offenders are worthy of respect by taking measures to ensure their emotional and physical well-being. Excluding violent offenders from the Program minimizes the possibility that children will be exposed to violent altercations. By refusing to expose Lily to this risk, the Commissioner's Directive has affirmed that Lily is equally deserving of protection.

Andrews, supra para 17 at 168, 169.

iii) Section 18.1 does not perpetuate stereotypical attitudes towards children of violent offenders

[45] The Commissioner's Directive responds to the actual capacities and needs of children rather than creating distinctions on the basis of stereotypical assumptions (*Kapp*). International

and domestic law recognizes the importance of physical and emotional security to a child's well-being. The *Convention on the Rights of the Child* enshrines "the right of every child to a standard of living adequate for the child's physical, mental, moral and social development." As the Supreme Court recognized in *Canadian Foundation*, "Parliament and the Executive act admirably when they shield children from psychological and physical harm. In so acting, the government responds to the critical need of all children for a safe environment." Section 18.1 recognizes the importance of protecting the best interests of children, including the children of violent offenders. Moreover, it attends to the need of all children to grow up in a safe and secure environment.

Canadian Foundation for Children, Youth and the Law v Canada (AG), 2004 SCC 4 at para 58, [2004] 1 SCR 76 [*Canadian Foundation*].
Convention on the Rights of the Child, 20 November 1989, 1557 UNTS 3, Can TS 1992 No 3.
Kapp, supra para 15 at para 18.

Issue 3: Section 18.1 of the Commissioner's Directive does not infringe Ms. Tinio's s. 7 *Charter* rights

A. Section 18.1 does not deprive Ms. Tinio of liberty

[46] Ms. Tinio's right to liberty does not include a right to cohabit with Lily during a prison sentence. The Supreme Court of Canada has consistently required that "a contextual approach be taken to the meaning and scope of the s. 7 right" (*Wholesale Travel*). The right to liberty "does not mean unconstrained freedom" (*B(R)*). In an organized society, "the state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract Charter scrutiny" (*B(R)*).

B(R) v Children's Aid Society of Metropolitan Toronto, [1995] 1 SCR 315 at para 80, 122 DLR (4th) 1 [*B(R)*].
R v Wholesale Travel Group, Inc, [1991] 3 SCR 154 at para 81, 84 DLR (4th) 161 [*Wholesale Travel*].

[47] A custodial sentence necessarily removes convicted criminal offenders from society and from their families. Although inmates retain some protected residual liberties despite imprisonment, this protection extends only to "the relative or residual liberty permitted to the general inmate population of an institution" (*Miller*). Because the general inmate population does not retain the liberty to choose with whom they cohabit, Ms. Tinio's choice to reside with Lily in prison is not a residual liberty protected by s. 7. Ms. Tinio's ineligibility for the Program does not restrict her liberty any more than the prison sentence itself.

R v Miller, [1985] 2 SCR 613 at para 32, 24 DLR (4th) 9 [*Miller*].

[48] Limiting Ms. Tinio's choice of cohabitation is a lawful restriction within a state program. In *Doe*, the Ontario Court of Appeal held that state restrictions designed to protect the health and safety of participants in state programs do not infringe the participants' liberty interests. In that case, a lesbian mother participating in a state-assisted insemination program was denied the semen donor of her choice because her prospective donor was medically ineligible. The Court held that the claimant's choice was not protected because she brought herself within the state program, even though the evidence suggested she was unable to conceive without the assistance of the program. Convicted offenders have similarly brought themselves within the purview of a state apparatus that lawfully restricts their liberty. As in *Doe*, s. 18.1 restricts Program eligibility to ensure the health and safety of participants and does not infringe Ms. Tinio's liberty interest.

Doe v Canada (AG), 2007 ONCA 11 at para 33, 84 OR (3d) 81 [*Doe*].

[49] Ms. Tinio still retains the parental liberties that are available to general population prison inmates. She is still permitted to visit and communicate with Emily and Lily. While Ms. Tinio cannot cohabit with Lily during her prison sentence, "s. 7 does not afford protection of the family

unit as such" (*B(R)*). Ms. Tinio can still participate in fundamental parental decisions, such as Lily's medical treatment and early education.

B(R), *supra* para 46 at para 72.
Official Problem, *supra* para 1 at para 20.

B. Section 18.1 does not deprive Ms. Tinio of security of the person

[50] The psychological distress caused by s. 18.1 is insufficient to engage Ms. Tinio's security of the person. The Supreme Court applies a stringent standard for finding that state interference constitutes a deprivation of psychological security. The threshold is "a serious and profound effect on a person's psychological integrity" (*G(J)*). The impact "must be greater than ordinary stress or anxiety" assessed on an objective standard (*G(J)*). In the context of a custodial sentence, any additional psychological distress caused by s. 18.1 does not meet this high standard.

New Brunswick (Minister of Health & Community Services) v G(J), [1999] 3 SCR 46 at para 60, 177 DLR (4th) 124 [*G(J)*].

[51] Viewed objectively, s. 18.1 is not a sufficient cause of Ms. Tinio's psychological distress (*Bedford*). Instead, her distress is caused by her criminal conviction and custodial sentence. Other incarcerated parents without access to cohabitation programs are likely to experience similar distress at having their child 'ripped out of their arms' after a visitation, as described by Ms. Tinio. Given that no inmate is automatically entitled to participate in the Program, s. 18.1 does not deprive Ms. Tinio of a guaranteed benefit. Therefore, any psychological distress caused by s. 18.1 is not objectively severe (*G(J)*).

Canada (AG) v Bedford, 2013 SCC 72 at para 75, [2013] 3 SCR 1101 [*Bedford*].
Official Problem, *supra* para 1 at 1, 5.
G(J), *supra* para 50 at para 60.

[52] This is not the type of state interference with the mother-child relationship that will attract s. 7 protection of security of the person. In *G(J)*, Chief Justice Lamer stated that a child's

incarceration does not amount to state interference with the caregiver's security of the person, on the grounds that "the state is not directly interfering with the psychological integrity of the parent *qua* parent." Likewise, separation caused by a mother's incarceration is not state conduct that deprives the mother of her security of the person. The state has made "no pronouncement as to the parent's fitness or parental status" (*G(J)*). Violent offenders are excluded from the Program because of the risk of violent interactions between them, not because they are deemed to be unfit parents. Thus, the state has interfered with Ms. Tinio *qua* criminal, not *qua* parent.

G(J), *supra* para 50 at paras 63-64.

[53] Ms. Tinio effectively asserts a positive obligation for the state to mitigate the distressing features of a custodial sentence. To date, the Supreme Court has declined to impose positive obligations under s. 7 (*Gosselin*). Further, unlike in *Insite*, this is not a case of endangering participants' lives by cancelling a program altogether. In that case, the government withdrew permission for a safe injection facility. By contrast, s. 18.1 refines the Program to make it safer for participating children.

Gosselin, *supra* para 33 at paras 82-83.
Canada (AG) v PHS Community Services Society, 2011 SCC 44 at para 93, [2011] 3 SCR 134 [*Insite*].

C. In the alternative, any deprivation of Ms. Tinio's liberty or security of the person is in accordance with the principles of fundamental justice

[54] If the court finds that s. 18.1 deprives Ms. Tinio of liberty or security of the person, that deprivation is in accordance with the principles of fundamental justice and does not infringe s. 7. The onus of proving that a deprivation is contrary to a principle of fundamental justice rests on the claimant (*Bedford*).

Bedford, *supra* para 51 at para 127.

i) Section 18.1 is not arbitrary

[55] The principle of arbitrariness applies to laws that bear no connection to the state's objective. Section 18.1 bears a "direct connection to the purpose of the law and the impugned effect on this individual", and therefore is not arbitrary (*Bedford*).

Bedford, *supra* para 51 at paras 111, 119.

[56] The purpose of s. 18.1 is to ensure that children are living in a safe environment within the Program. As stated in s. 3 of the Commissioner's Directive, the driving consideration in all decisions made with respect to the Program is the best interests of the participating children. Section 18.1 protects the best interests of the child by removing violent inmates who, when housed together, create a dangerous living environment.

Official Problem, *supra* para 1 at 1.
Commissioner's Directive, *supra* para 1, s 3.

[57] Section 18.1 "is not arbitrary but is rationally connected to a reasonable apprehension of harm" to children participating in the Program (*Malmo-Levine*). In his affidavit, Mr. Patel identified two security incidents in the past 28 months involving mothers enrolled in the Program. One of these incidents involved a violent altercation, and the other involved contraband. These incidents exposed the children in the Program to a risk of collateral harm. At Maplehurst, all Program participants are housed in the same wing of the prison. Removing inmates who have committed violent crimes is rationally connected to the best interests of the child. It reduces their exposure to dangerous situations that may arise by housing violent offenders in close proximity.

R v Malmo-Levine, 2003 SCC 74 at para 136, [2003] 3 SCR 571 [*Malmo-Levine*].
Official Problem, *supra* para 1 at para 25.
Clarifications to the Official Problem, The Wilson Moot 2015 at 1 [Clarifications].

ii) Section 18.1 is not overbroad

[58] Section 18.1 is not "broader than is necessary" to achieve the state's objective and does not unnecessarily limit Ms. Tinio's rights (*Heywood*).

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

[59] Section 18.1 excludes no more women than necessary to achieve its purpose. Prohibiting violent offenders from participating in the Program is a tailored response to the risk of exposing children to violence in prison. Inmates who are convicted of violent crimes have demonstrated that, in some circumstances, they may resort to violence toward others. Removing violent offenders from the Program, while including non-violent offenders, logically targets those individuals who are more likely to expose children to collateral harm. Together, ss. 18 and 18.1 address two major risks of harm to children: harm from their own mother, and collateral harm from violence between mothers that are housed in the same area of the prison.

Official Problem, *supra* para 1 at 1.
Commissioner's Directive, *supra* para 1, s 18.

[60] Removing inmates from the Program only after they demonstrate actual violence in prison would undermine the purpose of the legislation. In order to ensure the safety of every child in the Program, eligibility criteria must be proactive in order to prevent their exposure to harm, rather than reactive once the risk has already materialized. Allowing even one child to suffer avoidable harm in prison is unacceptable and would not fulfill the state's purpose.

iii) Section 18.1 is not grossly disproportionate to the state's objective

[61] Section 18.1 is not grossly disproportionate to its legitimate objective because any deprivation of liberty or security of the person is not "so extreme" that "the seriousness of the deprivation is totally out of sync with the objective of the measure" (*Bedford*). Rather than mere disproportionality, "the applicable standard is one of *gross* disproportionality, the proof of which

rests on the claimant" (*Malmo-Levine*, emphasis in original). Any deprivation experienced by Ms. Tinio does not meet this high threshold.

> *Bedford*, *supra* para 51 at para 120.
> *Malmo-Levine*, *supra* para 57 at para 143.

[62] Protecting the best interests of children by minimizing their exposure to violence is a legitimate state interest. The best interests of the child is a legal principle of "paramount importance", and has a long tradition as a laudable state objective (*Canadian Foundation*). The state's interest in protecting children from harm is much more pressing than the interests advanced in *Bedford* (mitigating public nuisance) and *Insite* (achieving a uniform drug policy), where the Supreme Court found that the laws were grossly disproportionate.

> *Canadian Foundation*, *supra* para 45 at para 9.
> *Bedford*, *supra* 51 at para 4.
> *Insite*, *supra* 53 at para 133.

[63] Preventing violent offenders from cohabiting with children in prison is not an extreme deprivation. Section 18.1 does not threaten the lives and safety of ineligible inmates and so is not analogous to the grossly disproportionate laws in *Bedford* or *Insite*. Any deprivation caused by s. 18.1 is not extreme compared to the important state objective of ensuring the safety of children.

> *Bedford*, *supra* para 51 at para 159.
> *Insite*, *supra* para 53 at para 133.

iv) The 'best interests of the child' is not a principle of fundamental justice

[64] Even if the court finds that s. 18.1 does not advance the best interests of the child, this would not in itself violate a principle of fundamental justice. The Supreme Court in *Canadian Foundation* acknowledged that the best interests of the child is an important legal principle. However, it does not amount to a principle of fundamental justice because there is no consensus that it is "vital or fundamental to our societal notion of justice" (*Canadian Foundation*). Further,

the principle is imprecise because it acquires its content from the specific factual matrix of each case. The principle does not provide a justiciable standard and therefore cannot constitute a principle of fundamental justice.

Canadian Foundation, *supra* para 45 at paras 10-11.

Issue 4: Any infringements are justified under s. 1 of the *Charter*

[65] Should the court find that s. 18.1 infringes the Appellants' ss. 15(1) or 7 *Charter* rights, any infringement is nonetheless demonstrably justified in a free and democratic society. The objective of s. 18.1 is pressing and substantial and the means selected by the state to achieve its objective are proportional. The provision is rationally connected to its objective, minimally impairs the Appellants' rights, and its salutary effects outweigh its deleterious effects.

R v Oakes, [1986] 1 SCR 103 at paras 73-75, 26 DLR (4th) 200 [*Oakes*].

[66] The interests balanced in this case are "complex, and reflect a multitude of overlapping and conflicting interests and legislative concerns" (*Hutterian Brethren*). The government is therefore entitled to a degree of deference in the means it selects. Section 18.1 seeks to balance the best interests and safety of young children against the importance of the mother-child relationship, the punitive and rehabilitative goals of imprisonment, and the state's management of inmate populations.

Irwin Toy Ltd v Quebec, [1989] 1 SCR 927 at para 75, 58 DLR (4th) 577.
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 at para 35, [2009] 2 SCR 567 [*Hutterian Brethren*].

A. Section 18.1 is prescribed by law and has a pressing and substantial objective

[67] Section 18.1 is prescribed by law because the Commissioner's Directive is intended to be binding, not discretionary (*Hunter*). Protecting children from violence in prison is a pressing and substantial objective. Section 18.1 aims to reduce the risk of harm to children caused by violence

between inmates that are housed together in the children's living environment. Physical safety is an important aspect of the best interests of the child, which is recognized as a pressing and substantial objective at domestic and international law.

Hunter v Canada (Commissioner of Corrections), 3 FCR 936 at para 77, 45 CRR (2d) 189 (TD) [*Hunter*].
Canadian Foundation, *supra* para 45 at para 9.
Convention on the Rights of the Child, *supra* para 45.

B. Section 18.1 is rationally connected to the state's objective

[68] Section 18.1 bears a rational connection to the objective of minimizing children's exposure to violence in the Program. To establish a rational connection, the state only needs to show that "it is reasonable to suppose that the limit may further the goal, not that it will do so" (*Hutterian Brethren*).

Hutterian Brethren, *supra* para 66 at para 48.

[69] It is reasonable to suppose that removing violent offenders from the Program will reduce the risk to participating children. The two security incidents described by Mr. Patel demonstrate that there is a risk of exposure to violence and collateral harm to children in the Program. Given that "Parliament does not have to wait for the feared harm to occur before it can enact measures to prevent the possibility of the harm occurring", the Commissioner was entitled to proactively amend the Program upon a reasonable apprehension of harm (*Harper*).

Official Problem, *supra* para 1 at para 25.
Harper v Canada (AG), 2004 SCC 33 at para 98, [2004] 1 SCR 827 [*Harper*].

C. Section 18.1 minimally impairs the Appellants' rights

[70] Section 18.1 is minimally impairing because it is "reasonably tailored to the pressing and substantial goal" of minimizing children's exposure to harm (*Hutterian Brethren*). The appropriate standard in determining whether s. 18.1 minimally impairs the Appellants' *Charter*

interests is reasonableness. This standard reflects the margin of appreciation afforded to the means selected by the state in balancing complex interests and achieving its objective. There are no less restrictive alternatives to s. 18.1 that would achieve the state's objective as fully, and "[l]ess drastic means that do not actually achieve the government's objectives are not considered at this stage" (*Hutterian Brethren*).

> *Hutterian Brethren*, *supra* para 66 at paras 53-54.
> *Quebec v A*, *supra* para 30 at para 442.

[71] Removing violent offenders from the Program is a reasonably restrictive measure in light of the documented security incidents. Housing multiple violent offenders together creates an increased risk of violent conduct in the prison environment and exposes all of the children living in their vicinity to a risk of harm. If a violent altercation occurs between inmates in the Program, the safety of nearby children is jeopardized.

[72] Alternative measures would not fully achieve the state's objective. The previous scheme of the Commissioner's Directive was insufficient because it did not account for the possibility of violent interactions between inmates. Case-by-case screening would not achieve the government's objective. While s. 18 of the Commissioner's Directive individually screens mothers convicted of offences involving children, those offences may or may not have been violent. Meanwhile, all women excluded under s. 18.1 are violent offenders. The state also cannot remove mothers only after they exhibit violent behaviour because that is reactive and does not reduce the risk of harm to children in the Program. All violent offenders must be excluded in order to proactively confront risks of harm to children.

> Commissioner's Directive, *supra* para 1, s 18.

[73] Ineligible mothers retain all of the parental rights that are otherwise available to inmates, except for the ability to cohabit with their children. Section 18.1 does not limit the parental rights of mothers any more than necessary to achieve its objective.

Official Problem, *supra* para 1 at 1.

D. The salutary effects of s. 18.1 outweigh any deleterious effects

[74] The deleterious effects of s. 18.1 are not disproportionate to its salutary effects (*Dagenais*). Any adverse effects of s. 18.1 are outweighed by the salutary effects of preserving the safety of children and promoting their best interests.

Dagenais v Canadian Broadcasting Corp, [1994] 3 SCR 835 at para 99, 120 DLR (4th) 12 [*Dagenais*].

[75] The alleged deleterious effects of the provision are limited. The effects encompass only those deleterious effects faced by general population prison inmates. The damage to the mother-child relationship is a result of the criminal behaviour and custodial sentence of the mother, not s. 18.1. Any additional disadvantage faced by Ms. Tinio or Lily is the same disadvantage faced by other incarcerated caregivers and their children.

Official Problem, *supra* para 1 at para 20.

[76] The salutary effects of s. 18.1 are substantial. Section 18.1 preserves the safety of the children that participate in the Program. Restricting eligibility for the Program ensures that participating children do not face unacceptable and avoidable harm, either direct or collateral, from their own mothers or from other mothers in the Program. It furthers the best interests of children by ensuring that they are not housed in a dangerous environment with violent offenders. This strategy optimizes the well-being of vulnerable children without restricting their mothers' rights any more than the general prison population. The legislature has recognized that the safety

of children is of paramount importance, and s. 18.1 is a vital measure for ensuring that the state protects children residing under its supervision in prison.

Official Problem, *supra* para 1 at 1, 5.

PART V – ORDER SOUGHT

[77] The Respondent requests that the appeal be dismissed and the orders of Justice Chan be restored.

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

Team 10
Counsel for the Respondent

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.	2
Commissioner's Directive Number 768, enacted pursuant to the *Corrections and Conditional Release Regulations*, SOR/92-620.	1, 10, 20, 27, 39, 59, 72
Human Rights Code, RSO 1990 c H.19.	39

JURISPRUDENCE	PARAGRAPHS
Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37, 53, [2011] 2 SCR 670.	34
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567.	66, 68, 70
Andrews v Law Society of British Columbia, [1989] 1 SCR 143, 56 DLR (4th) 1.	17, 24, 29, 44
B(R) v Children's Aid Society of Metropolitan Toronto, [1995] 1 SCR 315, 122 DLR (4th) 1.	46, 49
Brooks v Canada Safeway Ltd, [1989] 1 SCR 1219, 59 DLR (4th) 321.	28
Canada (AG) v Bedford, 2013 SCC 72, [2013] 3 SCR 1101.	51, 54, 55, 61, 62, 63
Canada (AG) v PHS Community Services Society, 2011 SCC 44, [2011] 3 SCR 134.	53, 62, 63
Canada (Minister of Employment and Immigration) v Chiarelli, [1990] 2 FC 299, 67 DLR (4th) 697.	19
Canada (Minister of Employment and Immigration) v Chiarelli, [1992] 1 SCR 711, 90 DLR (4th) 289.	19
Canadian Foundation for Children, Youth and the Law v Canada (AG), 2004 SCC 4, [2004] 1 SCR 76.	45, 62, 64, 67

Thibaudeau v Canada, [1995] 2 SCR 627, [1995] SCJ No 42.	38
Toussaint v Canada (Attorney General), 2011 FCA 213, 343 DLR (4th) 677.	20
Toussaint v Canada (Minister of Citizenship and Immigration), 2011 FCA 146, 235 CRR (2d) 21.	22
Withler v Canada (Attorney General), 2011 SCC 12, [2011] 1 SCR 396.	17, 24, 34, 35
Wynberg v Ontario, 82 OR (3d) 561, 269 DLR (4th) 435.	38

INTERNATIONAL SOURCES	**PARAGRAPHS**
Convention on the Rights of the Child, 20 November 1989, 1557 UNTS 3, Can TS 1992 No 3.	45, 67

OFFICIAL WILSON MOOT SOURCES	**PARAGRAPHS**
Clarifications to the Official Problem, The Wilson Moot 2015.	57
Official Problem, the Wilson Moot 2014.	1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 16, 23, 30, 33, 35, 38, 43, 49, 51, 56, 57, 59, 69, 73, 75, 76