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 RESPONDENTS

Counsel for the Respondents

TEAM #3

TABLE OF CONTENTS

PART 1 – OVERVIEW

[1] Section 18.1 of the Commissioner's Directive regarding the Institutional Mother-Child Program prohibits mothers convicted of violent offences from making an application to participate in the program. This provision recognizes that the threat of violent conduct, inferred from a propensity for past proven violent conduct, poses an unacceptable risk to children. The restriction in eligibility seeks to address the safety concerns of infants as a historically vulnerable group.

Official Problem, the Wilson Moot 2015 at 1 [Official Problem].

[2] The issues raised on this appeal are whether section 18.1 of the Commissioner's Directive infringes the Appellant mother's section 7 and 15 rights under the *Canadian Charter of Rights and Freedoms.* In addition, the Appellant infant claims a breach of her section 15 rights under the *Charter*.

Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 7, 15 [Charter].

[3] The purpose of the impugned legislation is consistent with the principles of substantive equality as it is reflective of the need to protect children from the risk of harm. The distinction drawn in eligibility for the program is based solely on past violent conduct, therefore does not constitute a distinction on an enumerated or analogous ground for the purposes of section 15. The law does not engage the Appellant mother's right to security of the person as any breach of that right is consistent with the principles of fundamental justice.

[4] If there is an infringement of the Appellant mother's section 7 or section 15 rights, or the Appellant infant's section 15 rights, such infringement is demonstrably justified in a free and democratic society.

Charter, *supra* para 2 at s 1, 7, 15.

Official Problem, *supra* para 1 at 30.

PART 2 – STATEMENT OF FACTS

1 FACTUAL BACKGROUND

[5] Claudette Tinio ("Ms. Tinio") was convicted of assault with a weapon in 2012 and is currently serving a four year prison sentence at Maplehurst Women's Penitentiary ("Maplehurst"). Lily Tinio ("Lily") is Ms. Tinio's one year old daughter. Lily was born while Ms. Tinio was incarcerated at Maplehurst. Ms. Tinio is ineligible to apply for the Mother-Child Program pursuant to section 18.1 of the Commissioner's Directive as she was convicted of a violent offence.

Official Problem, *supra* para 1 at 1.

[6] Ms. Tinio had a difficult upbringing. She was born and grew up in Winnipeg to an immigrant mother of Filipina descent. At the age of 17, Ms. Tinio was diagnosed with bi-polar disorder, however was unable to afford medication for treatment. Around that time, she began drinking, smoking marijuana and committing petty crimes By her early 20s, her drug abuse escalated to the use of hard drugs, and she became more involved in criminal behavior.

Official Problem, *supra* para 1 at 4, 5, 6.

[7] Between 2005 and 2009 Ms. Tinio was convicted of several offences including possession, communicating for the purpose of prostitution, resisting arrest, theft under $5000, and possession for the purposes of trafficking. During her last period of incarceration, Ms. Tinio began treating her bi-polar disorder, and was able to quit using drugs as a result of her participation in counselling and education programs offered at the prison.

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

[8] Ms. Tinio was largely successful at maintaining her sobriety after she was released from prison in 2010. Although she wanted to abandon her old lifestyle, she faced difficulty

disassociating with old friends. In December of 2012 Ms. Tinio was approached by an acquaintance, Rachel, who was involved in a drug ring. She demanded that Ms. Tinio carry out a delivery of cocaine to Calgary to pay off an alleged debt. When Ms. Tinio refused, the two got in a physical altercation that resulted in Ms. Tinio striking Rachel with a telephone. Ms. Tinio was charged with assault with a weapon and convicted in 2013. She received a four year sentence.

Official Problem *supra* para 1 at 9, 10, 18.

[9] Lily was born in October of 2013. She was removed from Ms. Tinio's care within 12 hours of her birth and is currently residing with Ms. Tinio's half-sister, Emily Tinio ("Emily"), and Emily's three minor children in Calgary.

Official Problem, *supra* para 1 at 3, 19, 20.

2 LEGISLATIVE HISTORY

[10] In April of 2013, a Vancouver Tribune news story highlighted a mother who was enrolled in the Mother-Child Program while incarcerated for manslaughter resulting from her participation in assisting her husband rape and murder several young women. This drew the government's attention to possible flaws in the existing program. At the time, the program allowed any mother to apply to the program provided that the mother was incarcerated in a minimum or medium security prison, except those inmates convicted of crimes involving a child unless a psychiatric assessment approving the application was conducted.

Official Problem, *supra* para 1 at 1, 4.
Canada, Correctional Service, Commissioner's Directive No 768, *"Institutional Mother-Child Program,"* 2003 [Commissioner's Directive].

[11] As a consequence, the federal government initiated reforms to the program in April of 2013. The Minister of Public Safety and Emergency Preparedness, Mason Jennings, (the "Minister") directed that section 18.1 be added under the heading "Program Eligibility" to the Commissioner's Directive governing the Institutional Mother-Child Program. Section 18.1 reads:

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

[12] The Minister cited concerns for children's safety and development, and the need to punish offenders as the primary social and political context motivating the amendment. The government did not conduct a formal risk assessment of the Mother-Child Program prior to enacting section 18.1.

Official Problem, *supra* para 1 at 4, 5.

3 **PROCEDURAL HISTORY**

[13] The Appellants brought an application in the Federal Court of Canada seeking a declaration that section 18.1 of the Commissioner's Directive infringes Ms. Tinio's section 7 and 15 rights under the *Charter.* The Appellants also sought a *mandamus* order that the Institutional Head of Maplehurst approve her application to the Mother-Child Program.

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

[14] Justice Lazier allowed the application, holding that section 18.1 of the Commissioner's Directive infringes both Ms. Tinio's section 7 and 15 *Charter* rights, and Lily's section 15 *Charter* rights. The Court found that the eligibility criteria giving rise to Ms. Tinio's exclusion from the Mother-Child Program was not based upon violent offender status, but instead a distinction on the basis of gender, race, ethnicity, and in the case of Ms. Tinio, disability. Lazier J found this distinction to be discriminatory.

Official Problem, *supra* para 1 at 9.

[15] The Court also found that section 18.1 is contrary to section 7 as it infringes on Ms. Tinio's right to security of the person in a manner that is overbroad and grossly disproportionate. Lazier J ruled that section 18.1 was not an infringement that is demonstrably justified in a free and democratic society pursuant to section 1 of the *Charter* as the legislation is not minimally

impairing, and the deleterious effects of the legislation outweigh any gains in deterring violent crimes.

Official Problem, *supra* para 1 at 9.

[16] At the Federal Court of Appeal, the majority allowed the Attorney General's appeal. Justice Tilde and Justice Chan found that the Appellants reliance on multiple enumerated grounds served to "empty section 15 of the *Charter* of any meaningful limitation." Accordingly, the majority held that section 18.1 did not deprive Ms. Tinio of her section 15 *Charter* rights. The appeal was also allowed with respect to Lily's section 15 claim as the majority declined to recognize family status as an analogous ground, and did not find a distinction on the basis of gender, race or ethnicity.

Official Problem, *supra* para 1 at 9.

[17] The majority held that section 18.1 was not overbroad or grossly disproportionate, and therefore did not violate Ms. Tinio's section 7 *Charter* rights. In dissent, Justice George would have dismissed the appeal for largely the same reasoning as the court below.

Official Problem, *supra* para 1 at 9.

PART 3 – STATEMENT OF POINTS IN ISSUE

[18] The following issues are raised on this appeal:

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

Section 18.1 does not offend Ms. Tinio's rights pursuant to section 15(1) of the *Charter*.

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

Section 18.1 does not offend Lily Tinio's rights under section 15(1) of the *Charter*.

Issue: 3 **Does section 18.1 infringe upon Ms. Tinio's rights under section 7 of the *Charter*?**

Section 18.1 does infringe Ms. Tinio's security of the person, but is not contrary to the principles of fundamental justice.

Issue 4: **If the answers to any of questions 1, 2 or 3 is "yes," is the infringement demonstrably justified in a free and democratic society under section 1 of the *Charter*?**

If this Court finds that the impugned provision is contrary to section 7 or 15 of the *Charter*, the Respondent's submit that section 18.1 of the Commissioner's Directive is justified pursuant to section 1 of the *Charter*.

PART 4 – ARGUMENT

1 SECTION 18.1 OF THE COMMISSIONER'S DIRECTIVE DOES NOT OFFEND MS. TINIO'S RIGHTS UNDER SECTION 15 OF THE *CHARTER*.

[19] Section 18.1 does not infringe Ms. Tinio's section 15 *Charter* rights. The law does not draw a distinction on the basis on an enumerated or analogous ground, and therefore does not offend the rights afforded by section 15. In the alternative, if the distinction is based on an enumerated or analogous ground, such distinction does not amount to discrimination.

> *Charter*, [pinpoint], s 15.
> *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 31, [2001] 1 SCR 396 [*Withler*].

1.1 Section 18.1 achieves the objective of substantive equality.

[20] Section 18.1 does not in any way diminish the fundamental purpose of s 15 which is to achieve substantive equality. The essential concept of substantive equality is to consider the social, economic, political and historical context of the law in relation to the actual impact on those to whom it applies. The *Charter* enshrined right to equality under section 15 recognizes that "all human beings are equally deserving of concern, respect and consideration."

> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at para 171, 56 DLR (4th) 1 [*Andrews*].
> *Withler, supra* para 19 at para 39.
> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 25, 51 DLR (4th) 1 [*Law*].
> *Quebec (Attorney General) v A*, 2013 SCC 5 at para 138, [2013] 1 SCR *61* [*Quebec*].

1.2 Section 18.1 does not draw a distinction based on an enumerated or analogous ground.

[21] The distinction in eligibility is clearly and unambiguously based upon violent conduct, therefore the distinction does not qualify as differential treatment on an enumerated or analogous ground. Section 18.1 precludes women convicted of violent crimes from the benefit of living

with their children while in prison due to risks to the child's safety and development, whereas non-violent offenders are free to make an application to participate in the Mother-Child Program.

Official Problem, *supra* para 1 at 1.

1.2.1 The distinction is not based on an enumerated ground.

[22] As confirmed in *Quebec,* not all distinctions amount to discrimination. Those "based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."

Ermineskin Indian Bank and Nation v Canada, 2009 SCC 9 at para 188, [2009] 1 SCR 222.
Andrews, supra para 20 at para 174.
Quebec, supra para 20 at para 172.

[23] Section 18.1 applies equally to all incarcerated mothers convicted of a violent offence, regardless of race, ethnicity or disability, therefore the impugned provision does not offend section 15 on the basis of an enumerated ground. Personal characteristics of the mother have no bearing on her ability to apply for the program. The only condition which precludes eligibility is past violent conduct of an intentional nature proven on a criminal standard.

Official Problem, *supra* para 1 at 1.

[24] Although only females experience pregnancy, it is inappropriate and irrelevant to find sex as a ground of discrimination. Firstly, the beneficiaries of the Mother-Child Program are all women. There exists no similar program related to the parental obligations of fathers in prison.

[25] Secondly, this program distinguishes mothers who are violent offenders from the general population of inmate mothers. Violent offenders have been identified as a subset of incarcerated prisoners who pose a heightened risk to children and are therefore ineligible for the Mother-Child Program. While a subset of an enumerated group can be the subject of distinction for the

purposes of section 15(1), the sub-group in this case is clearly carved out on the basis that the actual characteristics of the members of the sub-group is incompatible with cohabiting with children in the prison environment.

Auton (Guardian ad litem of) v. British Columbia (Attorney General), 2004 SCC 78 at para 42, [2004] 3 SCR 657 [*Auton*].

1.2.2 The distinction is not based on an analogous ground.

[26] It would also be inappropriate to identify the distinction as analogous. For a distinction to be so classed, it must "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 risk to personal identity." Other indicia of an analogous ground include consideration of whether the characteristic is fundamentally important to the claimant's identity, personhood or belonging.

Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203 at paras 13, 60, 173 DLR (4th) 1 [*Corbiere*].

[27] The characteristic of being a "prisoner" is not immutable or constructively immutable, but rather is a direct result of a personal choice to break the law. In order words, the Appellant could have avoided the application of Section 18.1 by not committing an offence.

[28] Similarly, in this case classifying prisoner status as an analogous ground is inappropriate as this ground is drawn too broadly to capture the Appellant's characteristics. The distinction made in section 18.1 affects only those prisoners who have been convicted of violent offences, which represents only a subset of the general inmate population. Classifying the distinction on the basis of prisoner status fails to recognize that many prisoners are still able to apply to the Mother-Child Program.

Official Problem, *supra* para 1 at 1.

1.3 The Court should not consider multiple intersecting grounds

[29] Although the existence of multiple overlapping characteristics can be indicia of an analogous ground, the distinction must still relate to stereotyping or prejudice. As reasoned by the Court of Appeal, the Appellants have relied on a combination of almost every enumerated ground, which renders section 15 void of any meaningful limitation. Extension of this principle in the prison context would lead to rendering any distinction that adversely effects inmates to be contrary to section 15.

Corbiere, *supra* para 26 at para 61.
Official Problem, *supra* note 1 at 6.

[30] Female prisoners are comprised of a particularly disadvantaged group of individuals In Canadian prisons, there is a disproportionate presence of racalized women (especially aboriginal women), women suffering from mental illness, and women with substance abuse issues as compared with the general population. Women with mental health or substance abuse issues are more likely to be incarcerated for violent offences.

Official Problem, *supra* para 1 at 27.

[31] Although these women share societal disadvantage, the *Charter* guaranteed right to equality does not protect against every distinction in Canadian society. The common thread binding the section 15(1) analysis is that the distinction must be based on a ground that has historically been subject to discriminatory treatment, not the fact that the individual is a disadvantaged member of society. It is imperative that this Court scrutinize distinctions to ensure section 15(1) violations are only found where the distinction bears a real and substantial relationship to an enumerated ground. Recognizing a ground of discrimination in this case would be tantamount to establishing that any degree of social disadvantage is an enumerated ground giving rise to a finding of discrimination. Extending this principle to the prison environment

would render the government's task of regulating the safety and comfort of inmates excessively onerous.

Charter, *supra* para 2 at s 15.
Andrews, *supra* para 20 at paras 169, 171-174.

1.4 The distinction does not lead to discrimination in the form of disadvantage, prejudice or stereotyping.

[32] Even if the distinction in section 18.1 is drawn on the basis of an enumerated or analogous ground, such distinction does not amount to discrimination as it does not create a disadvantage by perpetuating prejudice or stereotyping.

[33] Discrimination is established by demonstrating that the impugned provision "has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being." A law will perpetuate prejudice if it conveys a negative impression of a person based on a personal characteristic that is enumerated in or analogous to those outlined in section 15(1). Alternatively, where differential treatment reflects assumptions of a group or personal characteristics, the differentiation will be found to stereotype and thus discriminate.

Law, *supra* para 20 at para 51.
Quebec, *supra* para 20 at para 244.

[34] The four contextual factors outlined in *Law* are still relevant in determining whether the distinction gives rise to discrimination. The court should consider:

a) Whether the claimant has suffered pre-existing disadvantage;
b) The relationship between the grounds and the claimant's characteristics or circumstances;
c) The law's ameliorative purpose or effects; and,
d) The nature of the interest affected.

Quebec, *supra* para 20 at para 171.
R v Kapp, 2008 SCC 41 at paras 19, 13, [2008] 2 SCR 483 [*Kapp*].
Law, *supra* para 20 at paras 9.

[35] The Court in *Inglis* suggests that the mothers and babies must have a means of mitigating the detrimental impacts of the eligibility requirements in order to escape a finding of prejudice. This principle should not be extrapolated to the facts of this case. It is inconsistent with the principles of rehabilitation as the law recognizes that offenders have behaved inappropriately, and are unfit to continue living in society. Classifying violent offenders as ineligible to participate in the program recognizes their risk to children. Mothers can therefore mitigate their ability to participate in the program by not committing a violent offence.

> *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 at para 603, [2013] BCJ No 2708 [*Inglis*].

1.4.1 Pre-existing Disadvantage

[36] Violent offenders are not historically subject of particular pre-existing disadvantage, vulnerability or stereotype which would be exacerbated by their exclusion from the program. Even if prisoners are in some cases subject to prejudice, violent offenders as a subset of the larger group do not experience uniquely unfair social characterization leading to differential treatment, and therefore do not experience any more severe impact. Section 18.1 therefore does not perpetuate prejudice on the basis of a pre-existing disadvantage.

> *Law*, *supra* para 20 at para para 63.
> *Quebec*, *supra* para 20 at para 418.
> *Auton*, *supra* para 25 at para 42.

1.4.2 Ameliorative Effects

[37] The third *Law* factor provides compelling footing to establish that section 18.1 does not perpetuate disadvantage or stereotype. The impugned provision represents state action to ameliorate the position of vulnerable children of violent offenders. As discussed in *Law*, legislation with an ameliorative impact will not violate the human dignity of a more advantaged

group where such exclusion corresponds to a greater need experienced by members of a more disadvantaged group which the legislation seeks to address.

Law, supra para 20 at para 72.

[38] The ameliorative aim of the legislation is clearly to protect children, a vulnerable group subject to disadvantage who are unable to shield themselves from potential risk of harm without state action. Expert testimony revealed that there were risks to children enrolled in the Mother-Child Program while living in prison. The *Convention on the Rights of the Child* recognizes that children are entitled to special protection in order to "develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in the conditions of freedom and dignity." Further, the Convention authorizes the state to enact laws to ensure protection of the child as is necessary for his or her care and well-being, taking into consideration the rights of the parent.

Official Problem, *supra* para 1 at 7.
Convention on the Rights of the Child, 20 November 1989, [1992] Can TS No 3 art 2, 3(1) (entered into force 28 May 1990) [*Convention on the Rights of the Child*].

[39] Section 18.1 is thus a rationally defensible policy choice made in order to protect the needs of a more disadvantaged group. The amendment to section 18.1 is not based on an assumption that all violent offenders are bad mothers, but rather addresses a pressing safety concern. This reasoning can be distinguished from *Inglis* as the Commissioner's Directive does not assume that mothers living with their children is incompatible with incarceration, but rather establishes a logical and reasonable inference that a history of a mother's violent conduct may pose a risk to children living in prison. Distinguishing eligibility on the basis of past violent conduct is a reasonable limitation to impose in order to protect against the potential grave dangers to children. It is not necessary for the Respondents to wait for harm to be done to a vulnerable group prior to acting.

Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37 at paras 64, 108, 143, 173 [2009] 2 SCR 567 [*Hutterian Brethren*].
Dore v Barreau du Quebec, 2012 SCC 12 at para 67, [2012] 1 SCR 395.
Inglis, supra para 35 at para 600.

1.4.3 Correspondence

[40] The Commissioner's Directive corresponds with the actual situation of the mothers. The distinction is drawn on the basis of proven violent conduct, rather than the actual characteristics of the particular inmate. The inmates may identify with certain enumerated or analogous grounds, however such characteristics have no bearing on eligibility for the program, therefore the particular needs or circumstances of the inmates is irrelevant. Further, the Mother-Child Program supports the Mother's need to attach to their child as visitation and pumping, storage and transportation of breast milk is available. The fact that Ms. Tinio is unable to enjoy the benefit of the program's accommodation due to her proximity to Emily is an unfortunate circumstance, however it does not diminish the program's support of mother-child bonding.

Official Problem, *supra* note 1 at 5, 8.

[41] The distinction drawn by section 18.1 also corresponds to the needs of the group as it is a necessary measure to enforce based on the proven violent behavior of the inmates. The eligibility criteria recognizes that persons who have committed violent offences are subject to greater restrictions in the corrections system than those convicted of less serious offences. This is reflected in longer sentencing, higher security, and the prisoner's detention in the federal system.

1.4.4 Nature of the Interest Affected

[42] As incarcerated persons, the Appellants are not in a position to fully access the benefits of motherhood. The exclusions in the Mother-Child program temporarily interfere with a violent offender's ability to nurture and care for her infant in the traditional sense. The duration of temporary interference is directly related to the degree of violence and the risk the incarcerated

mother poses to society, which is defined by the length of the sentence. Recognizing that the importance of mother child attachment is significant, the Mother-Child Program facilitates contact between mothers and their children through visitation privileges and the ability to store and transport breast milk.

Official Problem, *supra* para 1 at 21, 22, 27.

[43] In considering the *Law* factors, it is evident that the distinction in eligibility does not perpetuate prejudice experienced by the Appellants. Additionally, the Commissioner's Directive precluding eligibility for violent offenders was not based on a stereotype that all mothers are incapable of carrying out their parenting obligations, but rather solely on an assessment of risk that violent conduct is incompatible with child care.

[44] Section 18.1 does not have the effect of exacerbating a disadvantage of the Appellants. Although in *Symes* the court concluded that ill-treatment of a sub-group of persons can give rise to a finding of discrimination, the case at bar clearly relates to an evaluation of risk to children in the care of their incarcerated mothers who are violent offenders.

Symes v Canada, [1993] 4 SCR 695 at para 769, 110 DLR (4th) 470.

2 ISSUE 2: SECTION 18.1 OF THE COMMISSIONER'S DIRECTIVE DOES NOT OFFEND LILY TINIO'S RIGHTS UNDER SECTION 15 OF THE *CHARTER*.

[45] The distinction in eligibility by operation of section 18.1 is not based on an enumerated or analogous ground, and therefore does not give rise to discrimination. If this Court should find that Lily Tinio's section 15 rights are infringed by virtue of section 18.1 of the Commissioner's Directive, such infringement is demonstrably justified in a free and democratic society under section 1 of the *Charter*.

Charter, *supra* para 2 at ss 1, 15.

2.1 Section 18.1 does not draw a distinction based on an enumerated or analogous ground.

[46] The children of violent offenders do not fall into an enumerated or analogous class of persons for the purposes of section 15(1). The distinction drawn is based upon the actual circumstances of the offender. Specifically, a mother with a history of violent conduct is precluded from applying to the Mother-Child Program, and thus the child's gender, race, ethnicity or family status has no bearing on the program's eligibility criteria.

[47] Firstly, a distinction on the basis of gender cannot be imputed in this situation. The distinction is not based on the gender of the child, and does not flow from the fact that only mothers can bear children. Further, even if such a distinction can be made out, it is established law that a party cannot rely on the *Charter* rights of another in advancing a claim for their own benefit. This is not a case where the child's rights are made dependent on the gender of his or her mother. Despite the principles of applying a "purposive" interpretation of the *Charter*, such a leap would constitute a clear example of attempting to assert the rights of third-parties as the child's rights are not implicated by the legislation. Similarly, the claims that the distinction is based on race or ethnicity must fail by following the same logic.

> *R v Edwards*, [1996] 1 SCR 128 at para 51, 104 CCC (3d) 136 [*Edwards*].
> *R v Benner*, [1997] 1 SCR 358 at paras 78, 79, 143 DLR 577.
> *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at para 344, 37 Alta LR (2d) 97.

[48] The court below was correct in determining that section 18.1 does not draw a distinction on the basis of family status, nor has family status been recognized as an analogous ground under section 15. This claim must fail insofar as it is based upon Lily's assertion that her rights have been infringed as a result of a discrimination against her mother on an enumerated ground. This is akin to a third-party claim which is clearly contrary to *Edwards*.

> *Edwards*, *supra* para 47 at para 51.

[49] Lily's claim must also fail based on the "broader" reading of family status referenced in the reasons of the court below. Although family status is an enumerated ground of discrimination in the context of human rights legislation, it has not been recognized by the Supreme Court as an analogous ground of discrimination under section 15. Even if the principles found in human rights jurisprudence are applied, such analysis does not provide adequate footing to establish a distinction based upon the analogous ground of family status in the case at bar.

> *Health Sciences Association of British Columbia v Campbell River and North Island Transition Society*, 2004 BCCA 260, at paras 36-40, 240 DLR (4th) 479 [*Campbell River*].
> *Inglis*, *supra* para 35 at para 144.

[50] The Federal Court of Canada has recently set out a test for *prima facie* discrimination on the basis of family status in *Canada (Attorney General) v Johnstone*. This test established that the "prohibited grounds of discrimination generally address immutable or constructively immutable personal characteristics, and the types of childcare needs which are contemplated under family status must therefore be those which have an immutable or constructively immutable characteristics." The parent must have a legal obligation to care for the child, being an obligation that the parent cannot neglect without engaging legal liability.

> *Canada (Attorney General) v Johnstone*, 2014 FCA 110 at paras 68, 70, [2014] FCJ No 455 [*Johnstone*].

[51] A mother's legal obligations to her infant child are undoubtedly limited while incarcerated. This arises by operation of law as a consequence of committing an offence and does not constitute a form of neglect. Further, one's status as a violent offender is not an immutable or constructively immutable characteristic as a critical component to a criminal conviction is possessing requisite mental state to break the law. Family status in this broad sense therefore should not be recognized as an analogous ground.

2.2 The distinction arising from section 18.1 does not lead to discrimination.

2.2.1 Section 18.1 upholds the government's legal obligation to protect children.

[52] Canadian law strongly protects the best interests of children. The concept of "best interests of the child' is firmly entrenched in our legal system and has been recognized as a compelling consideration in legislation affecting the interests of a child. The best interests of the child is cited as a "pre-eminent consideration in all decisions relating to participation in the Mother-Child Program." This is consistent with the *Child and Family Services Act* as its main purpose is to "promote the best interests, protection and well-being of children."

Official Problem, *supra* para 1 at 1.
Child and Family Services Act, RSO c 11 s 1(1).

[53] International human rights obligations also require that the best interests of the child shall be the primary consideration in all actions of the state involving children. According to the *Declaration of the Rights of the Child*, "the child shall enjoy special protection, and shall be given opportunities and facilities, by law and other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manners and in conditions of freedom and dignity." The Supreme Court has recognized that the *Charter* should be presumed to provide protection "at least as great as found in human rights instruments ratified by Canada."

Declaration of Rights of the Child, at 20 November 1989, [1992] Can TS No 3 (entered into force 28 May 1990) Article 1.
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*].
Divito v Canada (Public Safety and Emergency Preparedness), 2013 SCC 47 at para 22, [2013] 3 SCR 157 [*Divito*].

[54] The law has clearly recognized that children are a vulnerable group worthy of state protection. Section 18.1 therefore supports, rather than hinders, the principles of substantive equality.

2.2.2 Section 18.1 does not perpetuate disadvantage or stereotype the children of violent offenders.

[55] According to *Law,* "protecting individuals or groups who are vulnerable, disadvantaged, or members of 'discrete and insular minorities' should always be a central consideration." Section 18.1 is therefore not discriminatory because the distinction is directed at every child's need to be protected from risks in prison due to their mother's status as a violent offender.

Law, supra para 20 at para 9.

[56] The impugned provision seeks to ameliorate the pre-existing disadvantage of children through addressing pressing and substantial safety concerns, rather than exacerbate it by exposing children of violent offenders to risk while living in prison. Although a formal risk assessment of the Mother-Child Program was not conducted, the Respondents submit that protecting children is so fundamental that an abundance of caution should be taken in legislation concerning their safety interests. It is reasonable to assume that the past violent conduct of a mother is a fair indication of a propensity of future violent conduct.

Official Problem, supra para 1 at 18.

[57] Further, the purpose of section 18.1 is to ameliorate the disadvantage suffered by children of violent offenders living in an unsafe prison environment. In this regard, the Minister has made a rationally defensible policy decision in determining that such a setting may include exposure to violence, contraband, mental illness and drug addiction. Expert testimony from the senior administrator at Maplehurst indicates that the prison environment did in fact pose a safety risk to children.

Official Problem, *supra* para 1 at 25.
Hutterian Brethren, *supra* para 39 at para 108.

[58] While the Respondent agrees that the nature of the child's interests is significant as it directly impedes attachment between a mother and child, this interest is clearly outweighed by the need to maintain safety and development of the child. Further, the availability of Emily to act as a stand-in caregiver to maintain familial ties cannot be ignored in the present case. The adverse impacts on Lily, therefore, are less considerable given her proximity to Ms. Tinio's half-sister and her family.

Official Problem, *supra* para 1 at 19.

3 SECTION 18.1 DOES NOT ENGAGE MS. TINIO'S RIGHTS UNDER SECTION 7 OF THE *CHARTER*.

3.1 Section 18.1 gives rise to an infringement of Ms. Tinio's security of the person.

[59] Section 7 of the *Charter* provides:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
> *Charter*, *supra* para 2, s 7.

[60] At the initial stage of analysis the question that needs to be addressed is whether section 18.1 of the Commissioner's Directive limits or negatively impacts the security of the person of Ms. Tinio, which would serve to engage section 7 of the *Charter*.

[61] Section 18.1 of the Commissioner's Directive prohibits women who have been convicted of violent offences from participating in the Mother-Child Program that is offered through the federal corrections system.

[62] In this case the physical integrity of the applicant has not been engaged, however, the right to security of the person that is guaranteed by the *Charter* also encompasses the psychological integrity of the claimant.

> *Blencoe v. British Columbia (Human Rights Commission)*, 200 SCC 44 at para 82, [2000] 2 SCR 307.

[63] In the facts as found by Lazier J. in the judgment of the Federal Court of Canada, in addition to the affidavit provided by Ms. Tinio, the psychological impact on Ms. Tinio has been demonstrated and would constitute a violation of her psychological integrity.

Official Problem, *supra* para 1 at 82.

[64] The Respondents concede that there was a violation of Ms. Tinio's section 7 right to security of the person.

3.2 The deprivation of Ms. Tinio's security of the person is in accordance with the principles of fundamental justice.

[65] While conceding that section 18.1 of the Commissioners' Directive infringes the Appellant's security of the person, the Respondent submits that the infringement is in accordance with the principles of fundamental justice, and therefore does not constitute a violation of Ms. Tinio's section 7 rights. The claimant bears the burden of demonstrating that any limitation on section 7 rights is not consistent with a principle of fundamental justice. The Federal Court of Appeal found that while the inclusion of section 18.1 did indeed carry significant consequences for Ms. Tinio, the policy was clearly related to the state's objective and was not so disproportionate as to offend basic legal norms. The section 7 analysis is a contextual one and, while parents' rights and responsibilities must be balanced together with children's right to life and health, and the state's responsibility to protect children, the underlying philosophy and policy of the legislation must be kept in mind when interpreting it and determining its constitutional validity.

Charter, *supra* para 2, s 7.
Canada (Attorney General) v. Bedford, 2013 SCC 72 at para 127, [2013] 3 SCR 1101 [*Bedford*].
Winnipeg Child and Family Services v KLW, 2000 SCC 48 at paras 11, 15, 80, [2000] 2 SCR 519 [*KLW*].

3.2.1 Subsection 18.1 of the Commissioners' Directive is not arbitrary.

[66] Demonstrating that a law is arbitrary is a demanding burden that is borne by the Appellants. In *Bedford*, McLachlin CJ, stated that "[a] law that imposes limits on [the life, liberty, or security of the person] in a way that bears *no connection* to its objective arbitrarily impinges on those interests", and as a result, would not be in accordance with the principles of fundamental justice. The conceded limit on Ms. Tinio's security of the person imposed by section 18.1 is closely connected with its object.

Bedford, *supra* para 65 at para 119.

[67] The object of the law is twofold. The first objective is that of minimizing risks to the well-being of young children of inmates in the federal corrections system. While it is not possible to provide an absolute guarantee of child safety within the Mother-Child Program, or outside of the penitentiary environment, reasonable efforts should be made to ensure that children are as safe as possible from harm. The conceded infringement of security of the person is a direct result of efforts to provide a safe environment for young children.

[68] A second objective of the law is to reflect society's condemnation of violent behaviour, and to make punishment meaningful. As stated in the *Corrections and Conditional Release Act*, "the protection of society is the paramount consideration for the Service in the corrections process." Part of the protection of society is working to maintain public faith in the justice and corrections systems and their penal function. The Minister highlighted the government's intention to address perceived weaknesses in the Mother-Child program. The condemnation of violent behaviour that is expressed in section 18.1 is reflective of Parliament's focus on punishing violent offenders and ensuring that the punishment is meaningful.

Corrections and Conditional Release Act, SC 1992 c 20 s 3.1.
Official Problem, *supra* para 1, at 14.

[69] Section 18.1 meets the rational connection requirement articulated in *Bedford*, regardless of how effectively it achieves the dual objectives of strengthening protection for children in the Mother-Child Program, and reflecting society's condemnation of violent behaviour. How effective a law is in achieving its desired objectives or the worthiness of the objectives themselves, do not form a part of the section 7 analyses, only the proportionality between the means and objective is relevant. Section 18.1 works towards reducing risk to children and strengthening public faith in the justice and corrections systems and therefore the Federal Court of Appeal was right to conclude that it was not arbitrary.

3.2.2 Subsection 18(1) is not overbroad

[70] In *R v Heywood*, the Court stated that legislation which is created in pursuit of a legitimate objective would only be regarded as overbroad if it is "broader than is necessary to accomplish that objective." The objectives of section 18.1 are to reduce the risk of harm to children in the Mother-Child Program while also serving to demonstrate societal condemnation of violent behaviour. The legislation achieves these goals within the framework of a well-regulated program and the prohibition is limited to a group of women who have been convicted of a violent offence under the *Criminal Code* and its requisite burdens of proof.

> *R v Heywood*, [1994] 3 SCR 761, at para 127, [1994] SCJ No 101 [*Heywood*].
> *Criminal Code*, RSC 1985 c C-46.

[71] The impacts of section 18.1 are rationally connected with its purpose, as children will be protected from convicted violent offenders. This reflects societal condemnation of violent behaviour.

3.2.3 Subsection 18.1 is not grossly disproportionate to the state's objective

[72] Subsection 18.1 is not grossly disproportionate, as it is not "so extreme" that it is "totally out of sync" with the government's objective. Additionally, in order to show gross disproportionality "[t]he connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society." The two-step analysis for gross disproportionality is as follows: 1) whether the law pursues a legitimate state interest; 2) whether the law is grossly disproportionate. Gross disproportionality is a high threshold to meet, as the Supreme Court has held that the constitution provides the Legislature with "broad latitude" in choosing how to address a legitimate objective.

> *Bedford*, *supra* para 65, at para 127.
> *R v. Malmo-Levine*, 2003 SCC 74 at para 175, [2003] 3 SCR 571 [*Malmo-Levine*].

[73] The Supreme Court has found laws to be grossly disproportionate only where connection between the impact of the law and its objective fall outside the realm of societal norms. In *Bedford*, the Court determined that laws that potentially exposed sex workers to greater risks of violence were disproportionate to the objective of regulating public nuisance.

> *Bedford*, *supra* para 65, at para 127.

[74] Section 18.1 is not so extreme as to fall outside societal norms. The legislation was enacted to pursue two legitimate state interests, the protection of children and the condemnation of violent behaviour.

[75] Section 18.1 is proportionate to these objectives. Any detriment to women convicted of a violent crime is outweighed by the additional protection afforded to children in the Mother-Child Program and the strengthening of societal faith in the justice and corrections systems.

3.2.4 The ‘best interests of the child’ is not a principle of fundamental justice.

[76] The Respondents submit that the Commissioners’ Directive is entirely consistent with the principle of the best interests of the child. Should the Appellants submit that this is not the case, they would need to do so in the context of establishing that best interests of the child is a principle of fundamental justice for the purposes of section 7. On that issue, the Respondents would point to *Canadian Foundations,* wherein Chief Justice McLachlin examined three criteria for determining what constitutes a principle of fundamental justice.

> First, it must be a legal principle ... Second, there must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice" ... The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice. Third, the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results.
>
> *Canadian Foundation*, *supra* para 53 at para 8.

[77] Using these criteria, the Court in *Canadian Foundation* declined to include the ‘best interests of the child’ as a principle of fundamental justice, primarily for two reasons. Firstly, there is not sufficient consensus that the principle is vital to societal understanding of justice. Although the ‘best interests of the child’ is frequently given strong consideration in many areas of law, it may be subordinated where courts deem it necessary. This reality is most clearly evident when a person is convicted of an offence and sent to prison, despite the fact that being separated from the parent may not be in the best interests of the child.

> *Canadian Foundation*, *supra* para 53 at para 10.

[78] Secondly, it is difficult to precisely identify what constitutes the ‘best interests of the child’, as it can be subject to significant variation, depending upon the context of the individual

situation. The Commissioners' Directive itself highlights a number of relevant factors that need to be considered when attempting to determine a child's best interests.

Canadian Foundation, *supra* para 53 at para 11.

[79] 'The best interests of the child' is identified as "the pre-eminent consideration in all decisions relation to participation in the Mother-Child Program" in the Commissioner's Directive, however, this must still be balanced against the protection of society, which is the "paramount consideration" for the correctional system.

Commissioner's Directive, *supra* para 10, at s 1-3.

4 ISSUE 4: IF THERE IS AN INFRINGEMENT OF MS. TINIO'S SECTION 7 OR 15 *CHARTER* RIGHTS, OR AN INFRINGEMENT OF LILY TINIO'S SECTION 15 *CHARTER* RIGHTS, SUCH INFRINGEMENT IS JUSTIFIED PURSUANT TO SECTION 1.

[80] The Respondents submit that the operation of section 18.1 has not caused Ms. Tinio's section 7 or 15 *Charter* rights to be infringed, nor are Lily's section 15 *Charter* rights violated. If the court does find a *Charter* violation under one or more grounds, the Respondent's argue that any infringement is demonstrably justified in a free and democratic society pursuant to section 1 of the *Charter*. The purpose of section 18.1 is pressing and substantial, it is rationally connected to its objectives of preventing risks to children, it is minimally impairing, and its benefits outweigh any deleterious effects.

Charter, *supra* para 2 at ss 1, 7, 15.
R v Oakes, [1986] 1 SCR 103 at paras 73-75, 26 DLR (4th) 200 [*Oakes*].

[81] In assessing whether the impugned provision is a reasonable limit that can be demonstrably justified in a free and democratic society, the courts must show deference to the legislature if the limit is one that falls within a range of reasonable alternatives. This is especially paramount where a claimant challenges a complex legislative response to a social problem. Recognizing that the elected government is in the best position to address social issues, the "bar

of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened."

Hutterian Brethren, *supra* para 39 at 37.

[82] In this case, the government is charged with the difficult task of balancing the rights of offenders with protecting children, a vulnerable group, from the risk of harm. In assessing the potential safety risks to children, the government had to consider not only the risk of violent conduct directed from mother to child, but also the unsafe environment to which the child would be exposed when co-habiting with violent offenders including the presence of drugs, contraband and mental illness. It is not necessary that the government's limits on the right be "perfectly calibrated," but rather that they be "reasonable" and "demonstrably justified." Section 18.1 meets this criteria and therefore should be afforded the full protection of section 1.

Charter, *supra* para 2 at 1.
Hutterian Brethren, *supra* para 39 at 37.

4.1 The limit is prescribed by law.

[83] Any limit is properly prescribed by law as a result of the Minister's duty to delegate control and management of all matters connected with the correctional service to the Commissioner of the Correctional Service of Canada.

Corrections and Conditional Release Act, *supra* para 68 at 6.

4.2 The purpose of the limit imposed by section 18.1 is "pressing and substantial."

[84] The purpose of section 18.1 is unequivocally to protect children against the risk of harm. This purpose is evident in the Minister's comments to the press and Parliament, and again in the Commissioner's Directive as it cites the need to uphold the best interests of the child. As children are a vulnerable group without the ability to protect themselves, the purpose of ensuring child safety in prisons is clearly a pressing and substantial objective.

Official Problem, *supra* para 1 at 14, 15.

4.3 Section 18.1 is rationally connected to its objectives of preventing risks to children.

[85] To avoid a conclusion that the legislation is arbitrary, it must be reasonable to conclude that the limit will further its objectives, not that it is certain to do so. This entails an assessment of whether there is a "causal connection between the infringement and the benefit sought on the basis of reason or logic."

Hutterian Brethren, *supra* para 39 at 48.
RJR-Macdonald Inc. v Canada, [1995] 3 SCR 199 at 153, 127 DLR (4th) 1 [*RJR-MacDonald*].

[86] In this case, the government imposed a limit to address a reasonable apprehension of harm which may arise given the safety risks inherent in living with violent offenders in a prison setting. Such a risk is prevalent given the nature of the violent offences themselves, and the heightened security risks apparent at a prison facility. Based on the evidence, this can include the presence of mentally ill or drug addicted prisoners, and the presence of contraband and drug use. It is reasonable to assume that prohibiting the ability of a child to live with his or her mother incarcerated for a crime of violence will reduce safety concerns

Official Problem, *supra* para 1 at 25.

4.4 Section 18.1 is minimally impairing.

[87] As the impugned provision is sufficiently in accordance with its objectives, section 18 is minimally impairing. The relevant question is whether the infringement on a person's *Charter* protected right goes too far, taking into account the goal the legislature seeks to achieve. In other words, the government must establish "the measures employed were the least intrusive, <u>in light of both the legislative objective and the infringed right.</u>"

Quebec, *supra* para 20 at para 442.
RJR-MacDonald, *supra* para 85 at 102.

[88] In light of the pressing and substantial objective to ensure the safety of children, and the finding that the legislation is not arbitrary, it will follow that the legislation is minimally impairing. At this stage of the analysis, the Court should be deferential to the government. This is especially important where the issues concern complex social matters where the legislature may be better equipped to assess and choose between alternative options

Hutterian Brethren, *supra* para 39 at paras 37, 53, 55, 187.

[89] The previous program requirement, nor any other program requirements, can significantly reduce the risk to children to a level that is acceptable to society. This case can be distinguished from *Inglis* as the impugned provision does not attempt to eliminate the Mother-Child Program in its entirety, but rather impose an additional safeguard in the screening process. Assuming that violent offenders pose a danger to children is a reasonable assumption to make given that all criminal offences involving violence entail some degree of intent. A mother's capacity to intend to cause violence therefore poses a significant risk to her child, or other children living in prison.

Inglis, *supra* para 35 at paras 1-2.

[90] The costs of the Mother-Child Program are also significant and worthy of consideration. If the eligibility criteria were to include violent offenders, it is likely that increases in costs would be twofold. Firstly, more security would be needed to address security risks of violent offenders participating in the program to ensure a corresponding decrease in children's safety did not result. Secondly, the program would bear the cost of individualized assessment. As violent offenders pose a risk to children, it is likely that most, if not all, mothers convicted of a violent offence would be assessed as ineligible. The costs associated with conducting individualized assessment therefore justify a distinction in eligibility.

Official Problem, *supra* para 1 at 25.

4.5 The benefits of section 18.1 outweigh its deleterious effects

[91] The alleged deleterious effects of section 18.1 are proportional to its salutary effects. This analysis "requires both that the underlying objective of a measure and the salutary effects that actually result from its implementation be proportional to the deleterious effects the measure has on fundamental rights and freedoms." The relevant inquiry is whether the benefits of the impugned provision are worth the costs of the rights infringement. Any potential adverse effects to mothers or children are outweighed considerably by the objective of preventing risk of harm to children.

Dagenais v Canadian Broadcasting Corporation, [1994] 3 SCR 835 at para 888, 120 DLR (4th) 12.

[92] The alleged deleterious effects are minimal. The program is not eliminated in its entirety, rather only those offenders who are deemed to pose a heightened risk to children are unable to participate in the Mother-Child Program. Although mothers are precluded from living with her child in prison, the option of children's visits and pumping and storage of breast milk to form mother-child attachment is still available to federally incarcerated mothers.

Official Problem, *supra* para 1 at 27.

[93] The benefits of section 18.1 are substantial. Firstly, the provision ensures that children are protected from harm. As the state has a legal obligation to consider the best interests of the child in any state action that involves a child, it follows that exposing children to unnecessary risk is contrary to the common law, the *Child and Family Services Act* and does not uphold Canada's obligations under international treaties. The court should not attempt to frustrate a law which is designed to protect the best interests of the child, which is a fundamental value in Canadian society.

Child and Family Services Act, *supra* para 52 at 1.
Declaration of the Rights of the Child, *supra* para 53 at Article 1.

Canadian Foundation, *supra* para 53 at paras 7-9, 56.

PART 5 – ORDER SOUGHT

[94] The Respondents request that the appeal be dismissed.

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

Team 3
Counsel for the Respondents

PART 6 – TABLE OF STATUTES AND AUTHORITIES

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Blencoe v. British Columbia (Human Rights Commission), 200 SCC 44, [2000] 2 SCR 307	82
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R v Big M Drug Mart Ltd. [1985] 1 SCR 295 at 344, 37 Alta LR (2d) 97	344
R v Edwards, [1996] 1 SCR 128, 104 CCC (3d) 136	51
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R v Kapp, 2008 SCC 41, [2008] 2 SCR 483	13, 19
R v. Malmo-Levine, 2003 SCC 74, [2003] 3 SCR 571	175
R v Oakes, [1986] 1 SCR 103, 26 DLR (4th) 200	73, 74, 75
RJR-Macdonald Inc. v Canada, [1995] 3 SCR 199, 127 DLR (4th) 1	102, 153
Symes v Canada, [1993] 4 SCR 695, 110 DLR (4th) 470	769,
Winnipeg Child and Family Services v KLW, 2000 SCC 48, [2000] 2 SCR 519	11, 15, 80
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OFFICIAL WILSON MOOT SOURCES	**PARAGRAPHS**
Official Problem, Wilson Moot 2014	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 14, 15, 18, 19, 20, 25, 27, 30,