A-201-15

FEDERAL COURT OF APPEAL

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

(Appellant)

- and -

MARIE REYES ON HER OWN BEHALF AND AS LITIGATION GUARDIAN OF SELENE REYES

(Respondent)

RESPONDENT'S FACTUM

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PART I:

INTRODUCTION

1. This case is about whether or not s.18.1 of the *Commissioner's Directive,* regarding "Eligibility" into the Mother-Child Program, is discriminatory in nature and whether it infringes upon equality rights and the right to security of the person under Section 15(1) and Section 7 of the *Canadian Charter of Rights and Freedoms*, respectively, as promised to Marie and Selene Reyes. The previous decision of Justice B. Artsmad deemed Marie's exclusion from the program, as a result of s.18.1, a violation of the aforementioned charter rights.

2. Marie Reyes, the mother of Selene Reyes, was convicted of assault using a weapon and consequently denied access to the Correctional Service of Canada's "Institutional Mother-Child Program." The respondent submits that the newly implemented directive would undermine Marie's enumerated grounds of equality as well as be detrimental to Selene's early childhood development and Marie's overall security of person.

3. The onus to prove that s.18.1 of the *Commissioner's Directive* is not a violation of the rights found under s.15 and s.7 of the *Canadian Charter of Rights and Freedoms* and that any potential infringement of the Charter can be demonstrably justified under s.1 of the Charter, lies with the appellant. However, the respondent submits:

    a) Given the personal circumstances surrounding Marie and Selene, s.18.1 of the *Commissioner's Directive* is discriminatory in nature and consequently further perpetuates their marginalization in society, violating s.15(1) of the Charter.

b) The deprivation of Marie's own autonomy regarding her ability to raise Selene, caused by s.18.1, inflicts severe psychological trauma to Marie, violating Marie's right to security of the person, under s.7 of the Charter.

c) The aforementioned infringements cannot be saved under s.1 of the Charter.

PART II:
SUMMARY OF THE FACTS

4. The Correctional Service of Canada's Institutional Mother-Child Program (the "Program") allows certain female federal prisoners to keep their young children with them in prison while they serve their sentences, under a number of conditions.

5. In April 2014, following widespread negative public attention, the Minister of Public Safety and Emergency Preparedness (the "Minister"), announced reforms to the Program. In particular, the regulations for eligibility to participate were amended. Whereas previously, women convicted of violent offenses that did not involve children were eligible, the amendment stipulates that persons convicted of any violent offense, whether or not it involved a child, would no longer be eligible for the Program.

6. Marie Reyes was convicted of assault with a weapon and is serving a four-year prison sentence at Maplehurst Women's Penitentiary, near Milton, Ontario. She has a one-year old daughter, Selene, who was born in custody shortly after Marie's incarceration.

7. Ms. Reyes, of Filipina descent, had a turbulent past in Winnipeg. In high school, she became involved with a tough crowd and started committing petty crimes. Her mother felt overwhelmed and often locked her out of the house, which forced her to sleep in a park or seek shelter with her friends. When she was 17, she was diagnosed as having bipolar disorder but was unable to afford recommended medication. By the time she was in her twenties, she was doing hard drugs. She usually quit or was dismissed from jobs due to her drug use. She resorted to illegal means to support her habits, including prostitution, theft, and drug dealing.

8. At age 26, in 2009, she was charged with possession of methamphetamine and served a year-long sentence in a provincial prison near Brandon, Manitoba. During this time, she stopped using drugs and participated in counselling and educational programs. As well, she was able to take mood stabilizing medication to treat her bipolar disorder.

9. When she was released from prison in 2010, she returned to Winnipeg, but she found it difficult to secure housing and employment due to her criminal record. Her mother had also passed away and her half-sister had moved to Calgary. She started socializing with her old friends, many of whom were still involved in drugs and crime.

10. In December 2013, one such acquaintance, Samantha, visited Ms. Reyes and pressured her to transport cocaine to Calgary. She refused, and a physical altercation ensued. Samantha punched Ms. Reyes in the face and shoved her into the wall and Ms. Reyes hit Samantha in the head with a telephone, rendering her unconscious. When police arrived, Ms. Reyes was charged with assault with a weapon.

11. While on bail pending trial, Ms. Reyes became pregnant. The father demanded she terminate the pregnancy, and their relationship ended when she refused. She decided to keep the baby despite knowing she could be facing incarceration for assault.

12. In July 2014, her self-defence claim was rejected by the trial judge. She was convicted of assault with weapon and sentenced to four years in prison. She did not pursue any appeal to conviction or sentence and began to serve her sentence at Maplehurst in August 2014.

13. In October 2014, at Maplehurst, Ms. Reyes gave birth to Selene. Selene was apprehended within 12 hours and placed in the custody of Ms. Reyes' half-sister, Christine, in Calgary. Ms. Reyes was ineligible for the Mother-Child Program and did not apply to participate as a result of the reforms described above.

14. Ms. Reyes brought an application before the Federal Court of Canada on her own and her daughter's behalf, seeking declarations that:

    a) Her exclusion from the Mother-Child Program infringes her rights under section 15(1) of the Canadian *Charter of Rights and Freedoms* (the "*Charter*");
    b) Her exclusion from the Mother-Child Program infringes Selene's rights under section 15(1) of the *Charter*;
    c) Her exclusion from the Mother-Child Program infringes her rights under section 7 of the *Charter*; and
    d) The infringements of sections 7 and 15 are not saved by section 1 of the *Charter*.

15. At the application hearing, Artsmad J. heard affidavit evidence from Ms. Reyes attesting to Ms. Reyes' psychological state during and after infrequent visits from her daughter. Christine, her half-sister, also provided evidence concerning Selene's general development and responses to these visits and concerning the burden of caring for Selene.

16. Ms. Reyes also adduced expert evidence from Dr. Sumita Dhaliwal, a psychologist specializing in female prisoners. Dr. Dhaliwal argued that a child's early emotional attachment to her caregiver is crucially important to her development. This crucial period is between the ages of one and twenty-four months. Female prisoners who participate in the mother-child programs improve in self-confidence over the course of participation and the forced separation of child from her mother is almost always a traumatic event for the mother. Trauma is exacerbated if the woman has mental health or addiction issues in particular. There are also a handful of studies suggesting that female prisoners who keep their children in prison are less likely to re-offend. Overall, however, Dr. Dhaliwal conceded that there is little academic work on these programs and that her arguments were drawn from a rather limited body of work.

17. The government relied on the evidence of Edwin Fung, an experienced senior administrator at Maplehurst. Mr. Fung's evidence described the impact on eligibility made by the reforms, the alternatives for children whose mothers would no longer be eligible, and the costs of the Program over the cost of incarcerating the mothers on their own. Most notably, however, Mr. Fung described the potential risks to young children associated with being raised in prison.

TRIAL DECISION

At trial, Marie's rights were found to be violated.

18. Justice B. Artsmad did not agree with the Attorney General that the distinction drawn by s.18.1 of the *Commissioner's Directive* was entirely based on Marie's status as a violent offender. He found that Marie's exclusion from the program discriminated against both her and Selene on the grounds of gender, race, ethnicity, and in Marie's case, disability.

Trial Decision, para. 59, 60

19. Justice B. Artsmad held that s.18.1 cannot warrant justification as it is not rationally connected with its intended purpose. He stated:

> The exclusion has nothing to do with the actual needs, abilities or circumstances of either Marie or Selene Reyes and nothing whatsoever to do with the best interests of the child.

Trial Decision, para. 61

He believed, however, that this reform to legislation was only put in place in order to further the government's plan to be harshly intolerable toward crime, rather than to be in accordance with the program's Policy Objectives.

Trial Decision, para. 61

20. Justice B. Artsmad found that the "best interests of a child" meets the three requirements for being considered a principle of fundamental justice, and is thus worthy of consideration in this specific case. First, it is a legal principle, because the law has a role in regulating it. Second, the law has an *interest* in preserving the interests of vulnerable social groups like children. Third, the best interest of the child and how that may be achieved can be precisely identified because it is present in many legal contexts. S.18.1 does not conform to the goals set out by the legal

system and is incredibly harmful to the child because of the deprivation of a mother figure and the crucial mother-child bond.

R. v. Malmo-Levine; R. v. Caine, [2003] 3 S.C.R. 571, 2003 SCC 74 para. 113

21. Due to Selene's deprivation of a crucial emotional and physical bonding with her mother and of the health benefits associated with such an intimate bond, Justice Artsmad found that s.18.1 infringed the best interests of the child. Consequently, the infringement of Marie's s.7 right to security of the person was overbroad, grossly disproportionate and inconsistent with the best interests of the child and was thus found not to be in accordance with this fundamental principle of justice.

22. Justice Artsmad found that these violations could not be justified under s.1 of the *Canadian Charter of Rights and Freedoms*; he believed that:

> The deleterious effects associated with such a severe restriction of the program clearly outweigh any minimal gains in the deterrence and denunciation of violent crimes, and are not minimally impairing.
>
> *Trial Decision,* para. 66

PART III

GROUNDS OF APPEAL

ISSUE ONE: DID ARTSMAD J. ERR IN FINDING THAT MARIE'S EXCLUSION FROM THE MOTHER-CHILD PROGRAM INFRINGES HER RIGHTS UNDER S. 15(1) OF THE *CHARTER*?

APPLICATION OF SECTION 15(1) OF THE CHARTER

23. Section 15(1) of the *Canadian Charter of Human Rights and Freedoms* states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without

> discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Canadian Charter of Rights and Freedoms Schedule B, Constitution Act, 1982, s. 15(1) [Charter]

24. In order to determine whether a law discriminates, the test outlined in the case *Law v. Canada (Minister of Employment & Immigration)*, must be applied:

> First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1) . Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage?

Law v. Canada (Minister of Employment & Immigration), 1999 CanLII para. 39

S.18.1 of the *Commissioner's Directive* fails to take into account Marie's disadvantaged position in society, both as a prisoner and as a member of historically disadvantaged groups; this results in differential treatment between herself and the other women participating in the program. This differential treatment, though not explicitly stated in s.18.1, was on the basis of four enumerated grounds: disability, gender, race and ethnicity. Lastly, s.18.1 does further endorse ills such as prejudice and the historical disadvantage faced by marginalized groups. S.18.1 succeeds

in meeting all criteria outlined within the test and is thus discriminatory in nature.

DISTINCTIONS DRAWN BY SECTION 18.1

25. S.18.1 of the *Commissioner's Directive* prevents Marie from participating in a program that would benefit both her mental and physical health. The Mother-Child program is ultimately a form of rehabilitation, particularly to women who suffer from mental illnesses or have substance abuse issues. Dr. Sumita Dhaliwal, a psychologist specializing in female prisoners, states:

> Female prisoners who are able to participate in mother-child programs generally appear to improve in confidence and self-esteem over the course of their participation, and are more likely to avail themselves of other educational and personal development programs offered by the prison.
>
> *Trial Decision,* para. 41

Furthermore, Dr. Dhaliwal's evidence also shows the trauma experienced by mothers from the forced separation from her child is aggravated in women who suffer from substance addiction or mental health issues. Likewise, Marie, in her affidavit, mentioned how being with Selene uplifted her mood, but once Selene was gone, she began feeling depressed for long periods of time. The feeling of depression is heightened more so for Marie, because of her bipolar disorder. Marie had stopped taking any medication for stabilizing her mood for a considerable amount of time; by not having medication to stabilize the chemical imbalance in Marie's brain, the grief experienced from the separation of Selene becomes increasingly harder for her to endure. Marie's ineligibility for the program deprives her of the rehabilitative benefits accompanying the program, which only worsens her mental health condition, and thus draws a clear distinction between offenders who do not suffer from

mental illnesses and offenders who do.

Trial Decision, para. 38,13

26. The mother-child bond is something very exclusive to females that males are not subject to, simply because of the childbearing experience females undergo, that precedes such a bond. S.18.1 of the *Commissioner's Directive* prevents Marie from experiencing that mother-child relationship that is so crucial and beneficial for both the mother and the child during the foundational ages of the child. This bond is what sets forth the distinction between men and women; if men were eligible to participate in a similar program and violent male offenders were to be deprived of their child, this deprivation would not impact them to the same severe extent as women would be and thus s.18.1 is discriminatory against gender.

27. Due to historical context, minority groups are overrepresented in prison. The varying sociological factors surrounding ethnic minorities are root causes that induce the higher incarceration rates. In *Trial Decision,* the Attorney General has recognized this:

> The Attorney General accepted that racialized women (particularly aboriginal women), women suffering from mental illnesses, and women who have issues with substance abuse are significantly over-represented in Canadian prisons compared with the general population. Such women are more likely to be serving time for violent offences than Caucasian women and women without mental health or substance abuse issues.

Trial Decision, para. 48

Marie is of Filipino descent; the grievances she has suffered in her past can be said to have stemmed from the lack of opportunities for amelioration. The economic and familial hardships placed on Marie, such as not being able to afford the proper medications to treat her bipolar

> disorder during its earlier stages of development and being raised by a single mother who neglected her, can be said to have been heightened due to her race and ethnicity. Likewise, society's prejudiced values against ethnic minorities have also contributed to their perpetual unjust persecution. S.18.1 of the *Commissioner's Directive,* further trivializes these oppressed ethnic minorities. As it was acknowledged by the Attorney General, racialized women have higher incarceration rates than Caucasian women and are statistically more likely to be convicted for violent offences; Marie falls under this statistic. S.18.1 draws a clear distinction between ethnic minorities and Caucasians, and creates a disadvantage to these minorities as it disallows many women of color, including Marie, to be ineligible to participate in this program, thus discriminating against both race and ethnicity.
>
> *Trial Decision,* para. 48

28. The addition of s.18.1 excludes approximately forty-five percent of women according to Mr. Fung's expert testimony in *Trial Decision,* from participating in the program. Though there is no explicit mention, it is reasonable to assume that many of these ineligible women are part of a marginalized group. S.18.1 not only infringes on Marie's rights, but also perpetuates the systemic oppression of disadvantaged groups, as it disallows already disadvantaged individuals (their disadvantage being amplified by having their rights stripped away upon being convicted of an offence) from integrating with the community in prison and into society upon completion of their sentencing.

Trial Decision, para. 45

In *Eldridge v. British Columbia (Attorney General),* the court recognized disabled individuals as a historically disadvantaged group that has been heavily marginalized:

> It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institution. This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the "equal concern, respect and consideration" that s. 15(1) of the *Charter* demands.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, para. 54

Likewise, women and ethnic minorities are also considered disadvantaged groups, as they have historically faced systemic oppression and institutionalized prejudice against them.

29. S.18.1 of the *Commissioner's Directive,* though it does not explicitly make a distinction based on race, ethnicity, gender or disability but rather on the criminal status of the individual, the respondent contends that the deprivation of the mother-child bond renders Marie and Selene unable to benefit from the newly implemented criteria to the same extent as other offenders. This is due to the adverse effects associated with the neutral criteria. As outlined by the case of *Eldridge v. British Columbia (Attorney General),* adverse effects discrimination describes how the equal application of a neutral rule to all individuals, has a discriminatory effect on the prohibited grounds of individuals, because of a characteristic

specific to an individual or group, or because of how restrictive conditions are not imposed on other individuals. The court found that:

> A legal distinction need not be motivated by a desire to disadvantage an individual or group in order to violate s. 15(1) . It is sufficient if the effect of the legislation is to deny someone the equal protection or benefit of the law.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, para. 62

As recognized by the Chief Justice, it is more common for general application of legislation to impose on individual's rights rather than have governments enact specifically discriminatory legislation. Chief Justice agreed that:

> Even in imposing generally applicable provisions, the government must take into account differences which in fact exist between individuals and so far as possible ensure that the provisions adopted will not have a greater impact on certain classes of persons due to irrelevant personal characteristics than on the public as a whole.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, para. 64

30. In the present case, the adverse effects discrimination stems from the failure to ensure that all offenders benefit equally from the Mother-Child Program. S.18.1 places restrictive conditions on Marie and forty-five percent of other women, but not on the remaining fifty-five percent of women and thus, it is inherently discriminatory.

DISADVANTAGE CREATED BY PERPETUATING PREJUDICE

31. The distinction created by s.18.1, ultimately perpetuates a social stigma against individuals who suffer from mental illnesses and substance abuse addictions. The exemption from the program is encouraging the mentality in society, that individuals with addiction and mental issues are less qualified to raise a child than individuals who are not. Individuals with

these issues are viewed as dangerous and selfish; in particular, individuals who suffer from bipolar disorder have to face on a daily basis society's ideas that bipolar disorder is a superficial illness that can be easily cured through self-control of one's emotions. The respondent contends that the residual negative stimuli will only accentuate the hardships and therefore will further harm and create a distinction between handicapped and able-bodied individuals. S.18.1 renders Marie ineligible to take part of the program which only further marginalizes Marie, as she is already part of historically disadvantaged groups. Additionally, facts stated in *Trial Decision* based on Dr. Dhaliwal's expert testimony, concluded that the psychological damage inflicted on a mother during the time she is separated from her child, is exacerbated in women with mental health issues. S.18.1 will place Marie at risk of developing other mental illnesses such as depression. S.18.1 only creates a vicious cycle of oppression, which harms the opportunities for individuals part of marginalized groups, to fully integrate into society.

Trial Decision, para. 41

ISSUE TWO: DID ARTSMAD J. ERR IN FINDING THAT MARIE'S EXCLUSION FROM THE MOTHER-CHILD PROGRAM INFRINGES SELENE'S RIGHTS UNDER S. 15(1) OF THE *CHARTER*? AND, IRRESPECTIVE OF THIS FINDING, SHOULD SELENE'S CLAIM TO AN INFRINGEMENT ON THE ANALOGOUS GROUND OF "FAMILY STATUS" BE CONSIDERED?

SECTION 15(1) OF THE CHARTER

32. Section 15 (1) of the Canadian Charter of Rights and Freedoms States:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour,religion, sex, age or mental or physical disability.

Canadian Charter of Rights and Freedoms Schedule B, Constitution Act, 1982, s.15(1) [Charter]

FAMILY STATUS AS AN ANALOGOUS GROUND

33. In order for family status to be upheld as an analogous ground, it must be comparable to an enumerated ground and be something that is not changeable or is difficult to change as outlined in the case *Corbiere V. Canada.* Based on this definition of an analogous ground, family status cannot be changed without great personal cost and difficulty.

> *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 1999 CanLII 687 (SCC)

34. While the appellant may try to argue that this is something that can be changed, and there exists mechanisms to allow that, family status remains an analogous ground as it is something that requires large personal cost to change. Marriage is one of the few options available to change family status and is very difficult and entails great personal sacrifice. As such, it meets the requirements defined in the preceding paragraphs and should be upheld as an analogous ground.

DEMONSTRATION OF DISCRIMINATION

35. Any individual that claims a violation of s.15(1) of the *Canadian Charter of Right and Freedoms* must be able to apply the test outlined in the case *Law v. Canada (Minister of Employment & Immigration)*:

> First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on

> the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1) . Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage?

Law v. Canada (Minister of Employment & Immigration), 1999 CanLII para. 39

In summary, every individual that applies for discrimination must be able to establish : (1) a personal or situational ground on which an individual is receiving differential treatment, (2) whether or not the area of differential treatment falls under an enumerated or analogous ground and (3) whether or not the differential treatment discriminates in a way that propagates harms. In this case, in particular, it is clear that due to Selene's family status (an analogous ground), she is being disproportionately discriminated against and will suffer greatly from the separation from her mother.

36. Differential treatment under the law for Selene Reyes in this case is her exclusion from the the Mother-Child program. The differential treatment exists as Selene is being excluded from a program that other children (children who are living in prison with their single parents, whom are the comparator group) in the same situation without the analogous ground of family status, would be eligible for. Furthermore, Selene is also

discriminated on the grounds of race and gender. The differential treatment exists as persons who belong to an ethnic minority are more likely to receive harsher punishments and sentencing in comparison to others. Gender provides differential treatment under the premise that because her mother is female, they undergo different types of burdens in comparison to the opposite sex. Men do not have to carry children to term and as such men who are incarcerated do not develop the same sort of psychological interdependency. In the case of Selene, she has a high dependency on her mother since she is the sole source of psychological support. This results in a direct correlation between Selene's quality of interaction with her mother and Selene's mental well being. The final factor that requires due consideration as outlined in the case *Law v. Canada* is whether or not the law discriminates by imposing a burden or withholding a benefit. Selene's exclusion from the mother child program creates a huge psychological burden on both Selene and her mother as cited by Dr. Sumita Dhaliwal in the trial decision. Moreover, Dr. Dhaliwal's testimony also establishes several key benefits that exist only when a mother-child relationship is preserved. This includes the benefits to the child's health brought by breastfeeding from the mother. By removing Selene and her mother from the program, this not only creates a burden psychologically on Selene, but also places an unnecessary burden on her later in life as without the mother child bond, it becomes much more difficult for Selena's mother to exercise her fiduciary duty and care for Selene.

Trial Decision, para. 41

Law v. Canada [1999] 1 S.C.R. 497, 1999 CanLII 675, 170 D.L.R. (4th) 1, 43 C.C.E.L. (2d) 49, 60 C.R.R. (2d) 1

DISADVANTAGE CREATED BY PERPETUATING PREJUDICE

37. Another harm that is apparent with the upholding of this legislation is the propagation of stereotypes. This dissemination of stereotypes occurs as it allows society to misconstrue the policy as something that demonstrates how minority women (who typically have a higher crime rate than that of the majority) are people who are violent in nature and are incapable of raising their own children. There are two underlying factors that cause this, the first catalyst is due to the majority of the population being uninformed on the facts behind the case and having an incomplete picture. With this fragment of an idea, it becomes much easier for people to only see the surface of the case and correlate the punitive measures with violent behavior in relation to ethnicity. The other mechanism that is employed which generates stereotypes is a direct byproduct of the completionist nature of humans. By providing what seems like an harsh and unjust punishment, people strive to fill in what could be the factors that are used to justify such punitive measures and hyperbolize the problem. This causes an extremely exaggerated negative image of minority women to be created in their mind and propagates the idea within themselves that if they deserve such a punishment they must be of a certain type (ie. violent offenders). Selene in particular is affected by this as the prejudice generated from this will not only affect her through external matters such as bullying in schools but may also create animosity between her and her mother as Selene herself may fall victim to the misconceptions outlined above.

ISSUE THREE: DID ARTSMAD J. ERR IN FINDING THAT MARIE'S EXCLUSION FROM THE MOTHER-CHILD PROGRAM INFRINGES HER RIGHTS UNDER S.7 OF THE *CHARTER*?

NOTICE

38. Section 7 of the Charter guarantees:

> ...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.

Canadian Charter of Rights and Freedoms, Schedule B, Constitution Act, 1982 s7

39. There are three criteria that an issue must fulfill before being considered a principle of fundamental justice. If a policy is implemented that contradicts a principle that is thus determined, then the policy is not a justified limitation of the rights that individuals are entitled to under the Constitution. As outlined in *R. v. Malmo-Levine; R. v. Caine*:

> The requirement of "general acceptance among reasonable people" enhances the legitimacy of judicial review of state action, and ensures that the values against which state action is measured are not just fundamental "in the eye of the beholder only": *Rodriguez*, at pp. 607 and 590 (emphasis in original). In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s.7 it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

R. v. Malmo-Levine; R. v. Caine 2003 SCC 74 para. 113

a) The first principle is the legality of the situation, and has to do with whether or not it is something that the legal system can regulate.

The courts have power over whether the mother can see her child and access the bond that forms between them.

b) The second condition is whether the principle is important to society. There needs to be a consensus that having the principle is important to preserve societal values: in the case of a mother-child relationship, which is fundamental to the development of a child, society cares about the physical and psychological care that a child receives because it has an interest in how that child develops and contributes later on in its life.

c) The third principle is whether the principle has already been applied enough in the justice system that it can be determined specifically. Parental rights are already applied in many legal contexts, such as a child's right to sexual education and the parents' rights to discipline their child; it is clear that this is a relevant issue to society.

40. If the best interests of the child are considered principles of fundamental justice, then a violation of those principles would need to be justified under three grounds. As found in *R. v. Bedford*:

a) First, the issue cannot be overbroad or arbitrary. This section will outline that the policy is imposed irresponsibly as a blanket onto everyone convicted of a violent crime, rather than considering differences between individual cases and making sure motherhood can be achieved by everyone capable of it.

b) Second, the issue cannot be grossly disproportionate to the offence committed. This section will prove that the removal of the mother-child bond, and making the mother suffer through prison with the knowledge that her child will grow distant from her, is cruel

and disproportionate to her crime.

c) Third, the state should seek to promote the best interests of the child, as earlier established to be a legal principle. This section will prove that the policy not only prevents the child from developing, it also makes it much harder for them to form a constructive bond with their mother after leaving the care of their temporary caregiver.

Trial Decision, para. 65

R. v. Bedford, 2013 SCC 72, para. 96

SECTION 7 RIGHTS VIOLATED

41. The rights to life, liberty and security are the most basic rights that humans are granted. Life means the right to live, liberty means the right to make decisions and have personal autonomy, and security means the right to feel safe and preserve dignity. The deprivation of Marie's child is a threat to her security because of the psychological harms it imposes onto her, and a serious infringement on her autonomy because she can no longer make the decision to raise her child.

42. As outlined in *Siemens v. Manitoba (Attorney General)*, liberty extends beyond just the ability to make everyday decisions, like going to work or picking clothes to wear. Liberty means that members of society have the right to make choices that reach "the core of what it means to enjoy individual dignity and independence." This policy violates Marie's autonomy because the ability to raise a child is one of the core freedoms that women have. The bond that is created between mother and child is generally not understandable by anyone except for that mother and child: that bond depends on individuals, and is emotionally distinct from person

to person. The freedom to pursue that bond, regardless of how it defines itself between the mother and the child, is fundamental to their pursuit of dignity and independence.

Siemens v. Manitoba (Attorney General), [2003] 1 SCR 6, 2003 SCC

43. The psychological harms of taking away this child are clear: when mothers form such an intimate bond with their children, the deprivation of that bond will harm them because of how much it means to them. It is a significant psychological harm because of how basic maternal instinct is. These women have formed an emotional connection and are now having that connection stripped away. As mentioned in *Blencoe v. British Columbia*, "state-imposed psychological stress" qualifies as a breach of security of person, and significantly damages a person's sense of identity and psychological integrity.

> Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" ... The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations.

Blencoe v. British Columbia (Human Rights Commission), [2000] 2 SCR 307, 2000 SCC 44 para. 55.

44. In Marie's case specifically, the right to security is violated further than it would be for a general person in society because of her mental illness. Dr. Sumita Dhaliwal, an expert on the psychological effects prison has on

females, states:

> The forced separation of a child from her mother is virtually always a traumatic event for a mother; the trauma is exacerbated in women with mental health or addiction issues. A mother who is separated from her child during incarceration is more likely than other prisoners to be depressed. She will also face considerable difficulties in re-establishing a mother-child bond upon release, even if the child is returned to her care. These difficulties are particularly acute if the child has bonded with another caregiver.

Trial Decision, para. 41

45. Marie's mental illness already prevents her from enjoying life as an individual. The focus on treating patients with mental illness should not be retributive: when the state takes away their children and tells them that they are unfit to look after them, the purpose in itself is a punishment to mothers who have committed violent offences. The state implements this policy because it thinks violent offenders should not raise children, but ignores all other factors that come with mental illness. A mother can still care for her child despite being mentally ill.

46. The appellant may argue that these limitations are in the best interest of the child; because these mothers are mentally ill, the best way to maintain the mother and child's safety is to keep them separate. This argument ignores that depriving both parties of such a crucial bond makes the situation *worse* and exacerbates issues that already exist. The mother is more likely to blame herself for not being able to see the child, and will descend into guilt. The child is more likely to develop intellectual problems later in its life because of the lack of a consistent caregiver. And because children are impressionable, as mentioned by Dr. Dhaliwal,

> it is very hard to change this bond once it has already been established between a temporary caregiver. Marie may never have the relationship with her child that she deserves, and will experience significant emotional trauma. This is counter-rehabilitative.
>
> *Trial Decision,* para. 41

INFRINGEMENT NOT IN ACCORDANCE WITH THE PRINCIPLES OF FUNDAMENTAL JUSTICE

47. The infringement is overbroad, grossly disproportionate to the crime, and does not advance the best interests of the child. Because it is in the interest of the state to create the best situation for all involved parties, this limitation cannot be justified.

OVERBREADTH AND GROSS DISPROPORTIONALITY

48. In order for a policy to be considered overbroad, it must affect groups that are not its focus. This section will prove that a better solution exists for the problem that the courts is trying to solve: instead of grouping every mother into the same group, exclusion from the program should be considered on an individual basis so that those who are able to raise children are not harmed. A policy that is grossly disproportionate inflicts penalties that are too harsh for the crime committed; this section will prove that deprivation of a child is not only harsh because of the psychological trauma it causes to vulnerable groups, but also because the crimes of the majority of offenders affected are relatively minor.

49. The policies implemented by the courts should not affect those who are not its focus. Maybe *some* violent female offenders should not be allowed to take care of children. When talking specifically about those involved in

family-related offences, domestic abuse, or harming children, they probably should not be allowed to raise children. This is because they will cause harm to them, and the courts want to promote the legal principle of the best interest of the child. Unfortunately, the policy identifies no difference between offenders in jail for rape and offenders in jail for petty assault - in Marie's case, for striking an assailant with a telephone. A blanket policy is irresponsible: the courts cannot make generalizations about individuals that prevent the majority of these prisoners from taking what is fundamentally theirs. These cases should be dealt with on a case-by-case basis, where the desire and the capacity of the mother to care for her children is assessed, not by a policy that makes distinct people into the same type of person. A case-by-case basis is more just because individuals are recognized as individuals, not a single, stigmatized group: their distinct personalities are assessed and the largest number of mothers are allowed to care for their children.

50. As mentioned in the Supreme Court case of *Canadian Foundation for Children, Youth and the Law v. Canada:*

> The state is required to value each of its citizens equally, but equal consideration of the personal characteristics and strengths of each individual may, in the circumstances of government benefit programs, dictate differential treatment.
>
> *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 SCR 76, 2004 SCC 4, para. 106

51. The way that a state accomplishes its goals should not be overly harsh or severe - it has an interest in balancing the rights of individuals with a fair, proportionate punishment that helps them reintegrate into society once it

is served. Taking children away from their mothers is a violation of the rights the mothers have to security; in this case, with Marie specifically, and in other cases of mental illness, this deprivation can cause the mother-child bond to disappear and harm the mother in a way that is completely counterproductive to rehabilitation. This is a disproportionate punishment in many cases because of how fundamental the maternal bond is - it is something that women develop after caring for their child during their pregnancy and is often the most important relationship they have in their lives. Taking this away for offenses like assault is not proportionate; even though this can be justified in some cases, like rape or murder, to be in the best interest of the child, the blanket policy that is provided for the *general* population convicted of lesser offences limits their rights disproportionately.

52. The appellant may argue that a broad policy is the best because it provides the maximum amount of deterrence: women know that they will not be able to have their children if they offend, and because the bond is so significant, are less likely to commit violent crime.

    a) The first problem is that providing deterrence does not justify making unreasonable policy - the system does not implement sentences that are harsh for the sole purpose of promoting deterrence. Deterrence should be something that is natural, and should not come from a policy that is unjust: even if the state has more deterrence, the policy harms individuals and should not pass because it is not in accordance with the principles of fundamental justice. The state does not punish theft with execution, even though that would practically erase theft - it recognizes that it has an interest in balancing the rights of individuals with its sentences.

b) The second problem is with the focus on a particular gender. As discussed in earlier sections, women specifically are being criminalized in a program that takes their children away from them because their bond with the child is unique to their gender. Taking away a child and making the maternal bond *conditional* on good behaviour is terrifying because of how controlling it is to females, and is completely unnecessary when these women can take care of their children safely.

53. Thus, because it generalizes a group that needs more individual consideration and affects prisoners who would otherwise be good mothers, this policy is overbroad and not connected to its objective. The punishment inflicted is grossly disproportionate to the crime in the majority of cases.

BEST INTERESTS OF THE CHILD

54. The best interest of the child was established to be a principle of fundamental justice earlier in the factum because of the three criteria it fulfills: it is legally enforceable by the law, society has an interesting in preserving it, and it exists in enough legal contexts to be identified specifically. Section 7 of the *Canadian Charter of Rights and Freedoms* cannot be limited unless it conforms with this principle.

55. In this case, the best interests of the child are not preserved.

a) First, the child is more likely to encounter psychological problems in the future. Children who grow up without a solid caregiver may feel like their mother does not love them; because the mother is not there, it is also very difficult for her to convince them that they

do. The relationship thus becomes distant and communication between mother and child becomes nonexistent: the child may grow up with issues socializing, as well as problems involving abandonment. It is in the state's interest to make sure this does not happen.

b) The child is impressionable in its early years, so bonds that are created are very hard to change. The deprivation of a child is not temporary, as the policy suggests. Instead, the mother of a young child will not be there to form a crucial maternal bond with them, and they will grow distant. This child is also likely to project their bond onto their temporary caregiver, making them into a surrogate parental figure: when this happens, as Dr. Dhaliwal mentions, it is very difficult to retake the bond and make sure the mother receives the love that she would originally have felt from her child.

c) The alternative to the mother-child program, in many cases, is foster care. Marie is fortunate: in her case, she has a close friend or acquaintance to take care of her child, and is guaranteed to see her again after her term is over. It is much easier for Marie to re-establish her bond because the child will have been in a safe, and trustworthy care. In a foster care system, where other members of the program will need to send their children, especially in cases where they are of low socioeconomic status, the child will receive *no* or significantly less emotional care. And in some cases, this child may be subject to violence, bullying or abuse from other members of the system. It is significantly safer for the child to be placed in minimum security prisons, where prisoners have an interest in getting out and there are tight regulations on the program, than in a system where administration

can provide less care to individual children because there are so many of them.

As mentioned in *Canadian Foundation for Children, Youth and the Law v. Canada*:

> Other courts pay lip service to the necessity of having a view to community standards, although just how that is established through evidence remains unclear (*R. v. Halcrow* (1993), 80 C.C.C. (3d) 320 ([B.C.] C.A.): the Appeal Court noted that the defendant had called no evidence suggesting the treatment of the foster children was in accordance with community standards, a burden our Court of Appeal has decided falls upon the Crown).

Trial Decision, para. 41
Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 SCR 76, 2004 SCC 4 para. 182

CONCLUSION

56. The best interest of a child have been established to be a principle of fundamental justice. This section has proven that there have been significant infringements on the rights guaranteed in section 7 of the *Charter of Rights and Freedoms*, and that these infringements are not in accordance with the principles of fundamental justice. They are overbroad. They are grossly disproportionate to the crime and stop mothers from rehabilitating in prison. They are counterproductive in preserving the rights of the child because of the harms to social development and the mother-child bond, as well as some children being forced to live in foster care. Thus, there has been an infringement on basic human liberties that cannot be justified.

ISSUE FOUR: IN THE EVENT OF FINDING ANY INFRINGEMENT ABOVE, CAN THE INFRINGEMENT BE DEMONSTRABLY JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY UNDER S. 1 OF THE *CHARTER*?

NOTICE

57. It is of utmost importance to note that the onus lies on the appellant to substantiate the violations using section 1 of the *Canadian Charter of Rights and Freedoms*. The respondent is not charged with the duty to disprove the violations of section 15 (1) and section 7 of the *Canadian Charter of Rights and Freedoms* committed by the *Commissioner's Directive*.

CONCESSIONS

58. It is worthy to note that punishing convicts accordingly is a pressing and substantial issue in line with the viewpoints of fundamental justice. By doing so, society can conform to the Rule of Law and preserve such a structure of life. However, it is equally important and substantial that said laws do not conform around biased public or political opinion that aim to discriminate or create a distinction amongst groups.

OAKES TEST

59. There are two main criteria in order to legitimize a limitation that is both reasonable and demonstrably justified in a free and democratic society as established in *R. v. Oakes*:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective...must be "of sufficient importance…There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in

> this first sense, should impair "as little as possible" the right or freedom in question... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective
>
> *R. v. Oakes*, [1986] 1 SCR 103, 1986 CanLII 46, para. 69-70

SUFFICIENT IMPORTANCE

60. The issue at hand is undoubtedly of sufficient importance because it undermines the validity of a mother-child relationship and whether or not it can be swayed by public policy. Minister Novak outrightly reaffirmed parliament's political agenda by solidifying their tough on crime agenda by stating:

> This government promised the Canadian people that we would put an end to Club Fed, and we are living up to that promise...the purpose of prisons is to punish offenders, and that does not mean paying for violent offenders to have the privilege of raising their children while they serve their sentence.
>
> *Trial Decision,* para. 33

Through this statement, Minister Novak has opened a gateway which could allow future governments to pursue amendments to laws that, while satisfying public dissatisfaction, would create an opportunity for discrimination based on enumerated grounds.

RATIONAL CONNECTION

61. The *Commissioner's Directive* cannot warrant justification under section 1 as its limitations are not rationally connected with its purpose. The Mother-Child Program's mandate states that:

> **The best interests of the child** shall be the pre-eminent consideration in **all** decisions relating to participation in the Mother-Child Program. The best interests of the child include ensuring the safety and security as well as the physical, emotional and spiritual well-being of the child.
>
> *Institutional Mother-Child Program, Commissioner's Directive,2003, Pre-Eminent Consideration*

However, s.18 .1 of the *Commissioner's Directive* has failed to do so. Rather, it procures serious psychological stress for both the mother and child as Selene will be estranged from Marie. The emotional restraints experienced by the mother will only be amplified in the case of mental health or addiction issues, as seen in Marie's situation.

Trial Decision, para. 27,41

62. The appellant may argue that s.18.1 is rationally connected with the purpose because violent offenders pose a real risk to their child. However, the government has no legitimate grounds for such a claim due to a lack of any study or risk assessment prior to amending the eligibility of the Mother-Child program. Rather, the decision was made shortly after widespread criticism from victim groups of the program resulting from an article written by the *Tribune*. The rights of individuals such as of Marie's and Selene's can not simply be overlooked by the distaste expressed by biased parties.

Trial Decision, para. 36,31

63. Not only is s.18.1 not rationally connected with the objective, it also overgeneralizes a large population of people deemed as 'violent' and implies that they lack the ability to safeguard their child's wellbeing. In the

case *R. v. Lebar,* Justice Epstein deemed that the word 'violent' should be interpreted broadly and discretion was necessary when dealing with individual cases. The assertion that a blanket policy is enough to deal with the needs of specific individuals is irresponsible; the bond a mother feels with their child is not dependent on whether the mother has committed a crime in the past, especially if that crime does not involve harming children. Dealing with this case on an individual basis, or at least implementing a policy that takes mitigating factors into account, like a desire to be with the child, is more effective at preventing harm than labelling *all* offenders as unfit to preserve the well being of another person.

R. v. Lebar, 2010 ONCA 220 (CanLII) para. 5,4

MINIMAL IMPAIRMENT

64. S.18.1 does not minimally impair the rights of Marie and Selene as there are more equally effective, if not even more effective ways, to achieve the objective of deterring crime and protecting the child. The burden lies on the government to effectively prove the absence of a less drastic and infringing medium for achieving the objectives as defined and *Carter v. Canada (Attorney General).* In addition, the government did not conduct an study or risk assessment of the program before making the decision to exclude violent offenders. The appellant may argue that S.18.1 is the best way to fulfill the mandate of the Mother-Child program; however, there can be no better alternative if no valient effort has been attempted.

Trial Decision, para.36

Carter v. Canada (Attorney General),2015 SCR 331 (SCC)para. 102

65. Although no resources have been allocated to seek a minimally impairing and less discriminatory solution, that does not mean one does not exist. In fact, the criteria outlined in "Eligibility" of the *Commissioner's Directive*

prior to the implementation of s.18.1 can both protect children and deter crime more effectively than the revised requirements. The original conditions state that:

> 17. Only women inmates classified as minimum or medium security and who are housed in institutions that offer the program are eligible to participate.
> 18. Women convicted of a crime involving a child are not eligible to participate in the program unless a psychiatric assessment, completed by a psychiatrist selected by the Institutional Head (after consultation with the child welfare authorities), determines that the inmate does not represent a danger to her child.

Institutional Mother-Child Program, Commissioner's Directive,2003, Program Eligibility

These two requirements already act as a sufficient safeguard because part section 17 denominates that those who are serious offenders and placed in a maximum security prison are not to able to participate in the program; thus, deterring individuals from committing crime by the threat of disenfranchisement with one's own child. Part b) of the original conditions protect the child as they exclude the possibility of participation into the Mother-Child program with people convicted of of child-related crime. These individuals may include sex-offenders, predators and abusive parents who pose the *greatest* threat to the physical, emotional, and spiritual well-being of the child. In addition, the original requirements did not act as a blanket policy as it allowed for the case by case eligibility determination through a psychiatric assessment.

Trial Decision, para.28

66. It has been made clear that the past method of adjudication into the program has not only been more effective at fulfilling the goals of the Mother-Child program, but also less discriminatory as it does not

overgeneralize a population as 'violent'. The government has failed to prove the absence of a better alternative as one already exists; therefore, s.18.1 has failed to minimally impair the rights of Marie and Selene.

PROPORTIONALITY

67. S.18.1 limitations are not proportional to their objective of safeguarding children and deterring crime. Whatever possible benefits that could be raised are completely negated by the physical and emotional suffrage experienced by Marie and Selene. S.18.1 undermines the benefits proven that mother-child relationships promote and marginalizes Marie based on ethnicity, gender, and disability.

68. The repercussions of Marie's exclusion from the Mother-Child program encompass a plethora of emotional issues such as an onset of depression after supervised visits between Marie and Selene. This conflicts with the rehabilitative goal of prison which is to "assist in rehabilitating offenders" as defined in the *Criminal Code of Canada*. The rehabilitative goals are further thwarted by her exclusion given her mental disability. Female prisoners who were allowed to participate in the Mother-Child program have been known to receive an increase in morale and pursue personal achievements such as education,

Criminal Code, RSC 1985, c C46, s.718

Trial Decision, para.38,41

69. The effects of s.18.1 can also detrimentally affect the wellbeing of Selene as there are countless physical and emotional setbacks associated with being raised without one's own biological mother.

> A child's early emotional attachment to his or her caregiver(s) is crucially important to his or her development to his or her

> development...children who do not develop secure bonds with a caregiver are at a higher risk of intellectual deficits, behavioural issues, and mental health problems.
>
> *Trial Decision,* para. 41

It is important to note that Christina is a nurse, and as a health care professional, is subject to long shifts. Paired with the absence of her common law partner for much of the time, means that Selene will not be able to develop an 'early emotional attachment' with a mother figure that is necessary for a healthy upbringing. By excluding Marie from the Mother-Child program, Selene will be emotionally marginalized compared to other children and a vast amount of emotional problems may compound and ensue approaching adulthood.

Trial Decision, para.41

70. Alongside a variety of behavioural issues associated with a forced separation, there are physical concerns as a result of Marie's absence in Selene's life. In the early months of childhood, breast milk is undisputedly the superior formula for feeding infants. However, because Christina's home is located far away from Maplehurst, there is no reasonable method of delivery of breast milk. Compared to other children, Selene will not reap the benefits of breastfeeding such as the development of a maternal bond as well as a multitude of beneficial health effects.

Trial Decision, para.46

71. The appellant may argue that the mandates of s.18.1 are in fact proportional to the repercussive effects. However, the respondent would like to point out that the mandates of the Mother-Child program are in fact not met simply because the objectives of the program were to deter crime and ensure the wellbeing of the child and s.18.1 failed to satisfy said objectives.

72. The government has not been able to justify the benefits of s.18.1's limitations as compared to the negative consequences resulting from its implementation into the eligibility of the Mother-Child program. However, the respondent have shown evidence that by allowing Marie to carry out her fiduciary duty, it will benefit both her and Selene.

APPLICATION TO THIS CASE

73. It is clear that due to s.18.1 of the *Commissioner's Directive,* Marie and Selene's rights have been violated as a result of the damage inflicted on their equality rights, the failure to uphold the fundamental principles of justice as it pertains to security of the person and the failure to meet the requirements set forth in the Oakes test, and thus it is requested for the amendments to s.18.1 to be read down or declared inoperative, and for the previous eligibility requirements to be read in.

PART IV
ORDER REQUESTED

74. It is respectfully requested that the appeal be dismissed and the decision of Justice B. Artsmad be upheld. The impugned law is requested to be read down from the *Commissioner's Directive,* as it has proved to be ineffective in upholding the principles of justice and the rights of

individuals, so that the eligibility criteria for the Mother-Child Program return to its initial state.

ALL OF WHICH is respectfully submitted by

_____

Benson Law, Ray Luo, Amanda Oprisan, George Yun
Of Counsel for the Respondent

DATED AT RICHMOND HILL H.S. this **6**th Day of **November**, **2015**

APPENDIX A

AUTHORITIES TO BE CITED

LEGISLATION

Canadian Charter of Rights and Freedoms Schedule B, Constitution Act, 1982, s. 15(1) [Charter]

Criminal Code, RSC 1985, c C46

Institutional Mother-Child Program, Commissioner's Directive,2003

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R. v. Malmo-Levine; R. v. Caine 2003 SCC 74

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CHARTER CHALLENGE SOURCES

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