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)

APPELLANT'S FACTUM

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PART I:
INTRODUCTION

1. This case is about the constitutionality of s. 18.1 of the Directive of the Commissioner of the Correctional Service of Canada (hereinafter referred to as the "Directive") regarding the Mother-Child program. Specifically, issues were raised over its alignment with ss. 7, 15 (1), and 1 of the *Canadian Charter of Rights and Freedoms* (hereinafter referred to as the "*Charter*"). The respondent claims that the program discriminates against her on the enumerated grounds of gender, race, ethnicity, and disability. Furthermore, she claims that it discriminates against her daughter Selene on the enumerated grounds of gender, race, and ethnicity, as well as the ground of family status which she considers to be analogous under s. 15 (1). She claims that it infringes her s. 7 rights and the infringements are not in accordance with the principles of fundamental justice. Finally, the respondent claims that the aforementioned infringements are not justified by s.1 of the *Charter*. On behalf of the appellant, we submit that s. 18.1 does not infringe upon the *Charter* sections in question, and would also constitute a reasonable restriction on said rights if they are found to be infringed as outlined in s.1 of the *Charter*.

> *The Canadian Charter of Rights and Freedoms, Schedule B, Constitution Act,* 1982, ss. 1, 7, 15. (the "*Charter*")

PART II:
SUMMARY OF THE FACTS

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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*.

13. 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.

14. 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.

15. 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.

16. The trial judge ruled that s. 18.1 discriminates against both Marie and Selene Reyes on the grounds of gender, race, ethnicity, and, in Marie Reye's case, disability. The trial judge also ruled that the exclusion of Marie from the Mother-Child Program is not aligned with Selene's best interests, arguing that the exclusion was based on discriminatory factors and with the intention to punish. The judge proceeded to decide that the question of family status as an analogous ground need not be considered, as s. 15 has already been violated.

17. The trial judge continued to discuss the government's "tough on crime" agenda, interpreting the reforms of the Mother-Child Program as a function of the government

to further punish the incarcerated, rather than to fulfill the program's main objectives.

18. Despite having determined that the program reforms were not conducted with regards to the child's best interests, the judge ruled that the child's best interests were nevertheless infringed. Furthermore, the child's best interests were considered a principle of fundamental justice, and therefore the infringement of s. 7 is not aligned with fundamental justice. To determine whether or not a child's best interests are a principle of fundamental justice, the judge used the three-part test from *R. v. Malmo-Levine; R. v. Caine, 2003 SCC 74* at para. 113 and found:

> First, it is a legal principle. Second, there is significant social consensus that it is fundamental to the fair operation of the legal system because, in this context, much consideration should be given to the child's best interests. Third, the best interests of the child can be identified with sufficient precision as it is already applied in many legal contexts."
>
> ***Official Problem,*** Fall 2015 OJEN Charter Challenge, at para. 64

19. The trial judge ruled that the best interests of the child were compromised as Selene was deprived of the "emotional bonding and physical health benefits" of spending time with Marie during a fundamental period of development in her life. Furthermore, her s. 7 right to security of the person was infringed in a "grossly disproportionate" way that also does not align with the child's best interests, which was determined to be a fundamental principle of justice.

20. With regards to s. 1 of the *Charter*, the judge concluded that despite the reforms of the program having pressing and substantial objectives,

> 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.
>
> ***Official Problem,*** Fall 2015 OJEN Charter Challenge, at para. 66

21. In support of his arguments, the trial judge referenced mother-child programs in other jurisdictions, commenting on their lack of restrictive reforms.

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*?

22. Section 18.1 of the Directive reads as follows:

> 18.1 Women convicted of any crime of violence, regardless of whether the crime involved a child, are not eligible to participate in the program.
>
> ***Official Problem,*** Fall 2015 OJEN Charter Challenge, at para. 3

23. Section 15 of the *Charter* states:

> 15. (1) 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.
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> *The Canadian Charter of Rights and Freedoms, Schedule B, Constitution Act,* 1982, s 15.

The appellant respectfully disagrees with the trial judge's decision that s. 18.1 of the Directive infringes the claimant's s. 15 (1) rights.

Section 15 (2) Analysis:

24. The appellant submits that the Mother-Child program (herein referred to as the "program") falls under s. 15 (2) of the *Charter* as an affirmative action program. In *R v. Kapp* the Supreme Court of Canada ("SCC") wrote:

> A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.

The appellant submits that the program satisfies these criteria, and should be exempt from a s. 15 (1) analysis.

R v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483 at para. 41

25. In *Kapp* the Supreme Court offered some considerations for determining the true purpose of a program, stating:

> [48] . . .In examining purpose, courts may therefore find it necessary to consider not only statements made by the drafters of the program but also whether the legislature chose means rationally related to that ameliorative purpose, in the sense that it appears at least plausible that the program may indeed advance the stated goal of combatting [sic] disadvantage. . .

> [49] . . .courts could be encouraged to frame the analysis as follows: Was it rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to that purpose? For the distinction to be rational, there must be a correlation between the program and the disadvantage suffered by the target group. . .

R v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483 at paras. 48-49

26. The purpose of the program, as outlined in the Directive, is to foster and support the mother-child relationship as long as it is within the child's best interests. The measures taken by this program are directly and logically connected to this purpose, as the program allows the children to be with their mothers. Therefore, following the outline created in *Kapp, supra,* the objective of this program is indeed to foster and support the mother-child relationship as long as it is within the child's best interests.

Official Problem, Fall 2015 OJEN Charter Challenge at paras. 26-27

27. In *Kapp, supra,* the Supreme Court affirmed that a law is likely ameliorative if it does not punish or restrict behaviour, or if it has a plausible or predictable effect. In this case the program is ameliorative in nature and does not impose a restriction or punishment on its target group; it allows children to be with their mothers, improving their normal condition which would include being separated from their mothers. Based on the various benefits that children receive from being with a committed caretaker, this effect can be considered plausible, thus making the law ameliorative in nature.

R v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483 at para. 54

28. In *Kapp, supra,* the Supreme Court affirmed that a disadvantage in a group is associated with vulnerability, prejudice, and negative social characterization. It is quite clear that young children whose parents are in prison for nonviolent crimes are a

vulnerable group, as affirmed by the testimony of Dr. Dhaliwal. Her evidence suggested that they are more susceptible to developing various mental and behavioural issues. Moreover, children in general have been already been established as a vulnerable group; see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* at para. 56. Therefore, as outlined in *Kapp,* they should be considered a disadvantaged group.

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4, [2004] 1 S.C.R. 76 at para. 56

R v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483 at para. 53

Official Problem, Fall 2015 OJEN Charter Challenge, at para. 41

29. From these arguments it follows that the program does fall under s. 15 (2) of the *Charter*, and by extension should not be subject to a s. 15 (1) analysis.

Section 15 (1) Analysis:

30. In the event that the program is not found to fall under s. 15 (2) of the *Charter*, the appellant submits that the program does not infringe the s. 15 (1) rights of Marie Reyes. In a s. 15 (1) analysis, as outlined in *Quebec (Attorney General) v. A.*, two questions must be answered: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

Quebec (Attorney General) v. A, 2013 SCC 5, [2013] 1 S.C.R. 61 at para. 185

31. In answering the first question, one can refer to the framework provided by LeBel J. in *Quebec (Attorney General) v. A.* Writing for the majority, he stated:

> [T]he claimant can show that the impugned law creates a distinction directly by imposing limitations or disadvantages on the basis of an enumerated or analogous ground. . .The same is true where the law restricts access to a fundamental social institution (*Law*, at para. 74) or imposes obligations that are not imposed on others (*Withler*, at para. 62). A claimant can also show that a law creates a distinction indirectly where, "although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds": *Withler*, at para. 64. At this stage, comparisons, if any, can help to demonstrate the existence of an adverse distinction.
>
> ***Quebec (Attorney General) v. A***, 2013 SCC 5, [2013] 1 S.C.R. 61 at para. 189

32. The appellant submits that the legislation did not make a distinction based on the gender of Ms. Reyes. Firstly, it is clear that the program does not explicitly differentiate based on gender. While one may argue that it differentiates by preventing women such as Marie from living with their children, the true reason why she can't see her children is that she's in prison. In other words, the source of Marie's burdens does not stem from alleged discrimination in the legislation, but rather from Marie's incarceration. For the same reason the program does not restrict her access to a fundamental social institution.

33. Furthermore, the program does not have a disproportionately negative effect on women. Negative effects experienced by mothers in prison are likely to be experienced by fathers in the same position as well. There is no evidence stating that fathers are less capable of experiencing trauma due to the loss of the child. Furthermore, assuming that fathers are somehow less capable of experience emotional trauma due to the separation from their child is pure speculation, and perpetuates the stereotype that men are not as dedicated to the upbringing of their child as women. Although some father-child programs may exist, they are far from ubiquitous. Moreover, as clarified by Bastarache J. in *Gosselin v. Quebec (Attorney General)*, a complainant may not establish that beneficial or benign purpose or effect infringes s. 15 (1). This means that a s. 15 (1) claim can not be made on the grounds that the legislation discriminates against women since it affects them positively. Based on these factors, it is clear that there was no distinction made by the legislation based on gender.

> ***Gosselin v. Quebec (Attorney General)***, 2002 SCC 84, [2002] 4 S.C.R. 429 at para. 243

34. The appellant also submits that no discriminatory distinction was made on the basis of race. For the purposes of this case, the analysis for ethnicity merges into the one for race based on the minority status of both Ms. Reyes' race and ethnicity. It is again quite clear that the program does not explicitly make a differentiation between certain races. The reason why it does not impose a restriction or obligation or restrict access

to a fundamental social institution was discussed in para. 32.

35. Moving on to the more substantive aspect of the analysis, the appellant submits that the program does not have a disproportionately negative effect on people of Filipino descent, and more generally people of racial minorities.

36. While it is true that there is an over-representation of racial minorities in Canadian prisons, it is clear that this is not due to the Mother-Child program. Additionally, no evidence was presented regarding the racial makeup of participants in the program. The burden lies on the claimant to establish that there is a disproportionate effect on a certain racial group (see *Quebec (Attorney General) v. A* at para. 243), so for the purposes of this case we can assume that the racial makeup is roughly proportionate to the distribution of racial groups in prisons.

Official Problem, Fall 2015 OJEN Charter Challenge, at para. 48

Quebec (Attorney General) v. A, 2013 SCC 5, [2013] 1 S.C.R. 61 at para. 243

37. No evidence was presented regarding negative effects experienced by specific racial groups, so one can also assert that any negative effects experienced by prisoners due to the Mother-Child program are distributed roughly proportionately between racial groups in prison.

38. Based on these pieces of information, it follows that the Mother-Child program does

not disproportionately affect racial minorities, or in this case those of Filipino descent.

39. Now considering the grounds of disability, it is once again clear that the program does not make an explicit differentiation based on disability, nor is there a restriction or obligation imposed by it, the reasons discussed in para. 32.

40. Looking at the law substantively, the appellant submits that that it does not negatively affect Marie disproportionately based on disability. Although Dr. Dhaliwal provided evidence that women with mental health problems experience more trauma than those without upon separation from their children, it should be noted that, as she affirmed, her findings were based on a relatively limited body of work.

Official Problem, Fall 2015 OJEN Charter Challenge, at para. 43

41. Furthermore, no specification was given regarding the types of mental health problems which are included in this observation. It is quite clear that not all mental health problems will cause a person to experience more trauma than usual. For instance, someone suffering from kleptomania isn't inclined to experience more trauma than the average person in this situation based on his/her condition, yet kleptomania is still classified as a mental health problem. Clearly the doctor's statement, although it may be correct in general, was not specific enough to be applied to this case. She made no comment on whether or not people with bipolar disorder would experience increased levels of trauma in this situation. The burden of proof lies on the claimant for this

section, so if there is significant uncertainty, then one must maintain that people with bipolar disorder do not experience more trauma than the average person in this scenario.

42. In the case that an adverse distinction is found to have been made based on disability, the appellant submits that the program does not create a disadvantage by perpetuating prejudice or stereotyping.

43. In *Quebec (Attorney General) v. A.*, the court provided considerations to utilize in determining whether a law perpetuates prejudice. In his ratio LeBel J. wrote:

> An adverse distinction therefore discriminates by perpetuating prejudice if it denotes an attitude or view concerning a person that is at first glance negative and that is based on one or more of the personal characteristics enumerated in s.15(1) or on characteristics analogous to them.
>
> ***Quebec (Attorney General) v. A***, 2013 SCC 5, [2013] 1 S.C.R. 61 at para. 193

44. It is difficult to argue that the program perpetuates a prejudicial view on the basis of disability. The most plausible negative view that it might propagate would be that disabled people do not make good parents. However, the program does not perpetuate this view. People with disabilities can still qualify for the program; the only restriction is based upon the crime committed. A prejudicial view will not be perpetuated when there are members of that group who are able to participate in the

program, even if there are those who can't.

45. Additionally, the program at first glance does not denote an attitude or view that is negative and based on disability. *Prima facie,* disability does not appear to be a factor in the program, seeing that it not explicitly referenced. It would require further analysis to even consider the possibility that this program is related to disability. Thus, a negative attitude or view which may be indicated by this legislation would not be based on disability. Therefore, the appellant submits that the program does not perpetuate prejudice.

46. *Quebec (Attorney General) v. A.* upheld the framework established in *Withler* for determining whether a law perpetuates stereotyping. It reads:

> The second way that substantive inequality may be established is by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group.
>
> ***Quebec (Attorney General) v. A***, 2013 SCC 5, [2013] 1 S.C.R. 61 at para. 201
>
> ***Withler v. Canada (Attorney General)***, 2011 SCC 12, [2011] 1 S.C.R. 396 at para. 36

47. It's quite clear that this law is not based on stereotypes regarding people with disabilities. Disability is not explicitly mentioned in the legislation, nor does the selection process rely on factors which are characteristic of disabled persons.

48. Because the law does not perpetuate prejudice or stereotyping, the appellant submits that it does not infringe s. 15 (1) of the *Charter* based on disability.

49. Evidently, s. 18.1 does not mention any prejudicial stereotypes, nor does it mention any personal characteristics found in s. 15 of the *Charter*. Rather, by providing inmates the opportunity to raise their children, the legislation accomplishes its goal "to provide a supportive environment that fosters and promotes stability and continuity for the mother-child relationship." There is no evidence of prejudice — intentional or unintentional — based on gender, race, ethnicity, or physical disability, nor evidence suggesting that additional burdens are being placed upon certain inmates. Therefore the legislation is in line with the tenets of s. 15 (1), and should not be changed.

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?

50. With s. 15 of the *Charter* defined at para. 23, *supra*, the appellant respectfully submits that trial judge erred in their decision that s. 18.1 of the Directive infringes Selene's s. 15 rights.

Section 15 (2) Analysis:

51. The appellant submits that the Mother-Child program falls under s. 15 (2) of the

Charter as an affirmative action program. In *R v. Kapp* the Supreme Court of Canada ("SCC") wrote:

> A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.
>
> ***R v. Kapp***, 2008 SCC 41, [2008] 2 S.C.R. 483 at para. 41

52. The appellant submits that the program provides a benefit to children with incarcerated parents, with the reasoning explained at paras. 24-29, *supra*.

Section 15 (1) Analysis:

53. The appellant submits that if the program outlined in the Directive does not qualify as an ameliorative program, it does not infringe the s. 15 (1) rights of Selene Reyes. First, the ability for Selene to claim an infringement on her rights due to legislation pertaining to her mother must be addressed.

54. In the case *R. v. Edwards*, [1996] 1 SCR 128, the SCC determined that a *Charter* infringement of a third party cannot be challenged as a *Charter* infringement of another individual, regardless of the two parties' relationship. This conclusion pertains to the application of s. 24(1) of the *Charter*, which states:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of

> competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> ***R. v. Edwards***, [1996] 1 SCR 128, at para. 55
> *The Canadian Charter of Rights and Freedoms, Schedule B, Constitution Act,* 1982, s 15.

55. Referencing the case *R v Rahey*, Corey J. stated that an application of relief under s. 24(1) of the *Charter* can only be made by a person whose own rights have been infringed, which is clear from the opening of the section. The landmark case of *Rahey* determined the scope of s. 24(1), and its conclusions may be applied to this case.

R. v. Edwards, [1996] 1 SCR 128, at para. 55

56. Therefore, an argument regarding a violation of Selene's s.15(1) rights that arises from the infringement of Marie's s. 15(1) rights cannot be accepted as a ground for discrimination. Consequently, any grounds for discrimination must involve Selene's distinct treatment by the government because of the circumstances of mother.

57. The test for determining whether a law infringes s. 15 (1) of the *Charter* was laid out in *Quebec (Attorney General) v. A.*, as outlined in para. 30. The considerations for finding a distinction based on enumerated or analogous grounds were also cited from *Quebec (Attorney General) v. A.* at para. 31.

58. It is quite clear that there exists no differentiation based on gender against Selene. No

evidence has been provided stating that female children react differently to separation from a mother than male children, or experience different effects in the short and long-term. Furthermore, the legislation does not consider qualities of the children in the program, so a claim regarding explicit differentiation against them cannot be made. Thus, the legislation does not violate s. 15 (1) of the *Charter* based on gender.

59. Claims for discrimination against Selene based on race or ethnicity are unfounded. The claims for racial and ethnical discrimination merge upon closer observation due to the minority status of Selene's race and ethnicity. As mentioned above, the legislation does not explicitly reference the children in the Mother-Child program, so no explicit differentiation against them exists. Furthermore, there was no evidence given regarding the racial or ethnic makeup of children in the program, meaning a disproportionately negative effect cannot be determined. Thus, the program does not discriminate against Selene based on race or ethnicity.

60. Regarding the claim of family status being an analogous ground for s. 15, the appellant submits that while family status can be considered a ground for discrimination, it is not applicable as an analogous ground for this case.

61. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, the Supreme Court formulated a test for determining whether a ground should be considered analogous to

the enumerated grounds provided in s. 15 (1) of the *Charter*. In her judgement L'Heureux-Dubé wrote:

> An analogous ground may be shown by the fundamental nature of the characteristic: whether from the perspective of a reasonable person in the position of the claimant, it is important to their identity, personhood, or belonging. The fact that a characteristic is immutable, difficult to change, or changeable only at unacceptable personal cost may also lead to its recognition as an analogous ground. . . It is also central to the analysis if those defined by the characteristic are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked. . .Another indicator is whether the ground is included in federal and provincial human rights codes. . .Other criteria. . .may also be considered in subsequent cases, and none of the above indicators are necessary for the recognition of an analogous ground or combination of grounds (emphasis removed)
>
> ***Corbiere v. Canada (Minister of Indian and Northern Affairs)***, [1999] 2 S.C.R. 203

62. Family status likely qualifies as an analogous ground due to its immutable nature. People are also vulnerable to becoming disadvantaged based on this factor; see *Canada (Attorney General) v. Johnstone* for an example. Furthermore, it is listed in various human rights codes, such as the *Ontario Human Rights Code*, *British Columbia Human Rights Code*, and *Canadian Human Rights Act*. The combination of these factors indicate that family status should be accepted as an analogous ground.

Canada (Attorney General) v. Johnstone, 2013 FC 113, [2013] FCJ 92

Ontario Human Rights Code, 2015, RSO 2015, c 19, s 1.

British Columbia Human Rights Code, 2015, RSBC 2015, c 210, s 7 (1).

Canadian Human Rights Act, 2014, RSC 2014, c 6, s 3 (1).

63. The appellant submits that if family status is an analogous ground under s. 15 (1) of the *Charter*, Marie's exclusion from the Mother-Child program does not infringe on Selene's rights to equality.

64. The program does not make a distinction based on family status, nor does it create a disadvantage for Selene due to the fact that being separated from her imprisoned mother is in her best interests; see the section titled **Best Interests of the Child**. If her mother was eligible for the program, Selene would be disadvantaged as her best interests would not be followed, unlike the children who would normally qualify for the program. For this reason it does not create a disproportionately negative impact on her either.

65. As aforementioned, the law does not impose a limitation or obligation on its intended recipients, as it is solely beneficial. For this reason, the program does not restrict access to a fundamental social institution, as the restriction is caused by the laws relating to imprisonment.

66. If the law is found to create an adverse distinction based on family status, the appellant submits that it does not perpetuate prejudice or stereotyping. The law does not perpetuate prejudice based on family status, as the law does not denote an attitude or view concerning Selene that is at first glance negative. The law only refers

to the mother, not the child, so any negative view would have to be implicit. However, there is no negative view present; if anything, the view would be positive because the best interests of Selene are the main determining factor in the outlines of the program.

67. The appellant also submits that the law is not based on a stereotype that does not correspond to the actual circumstances or characteristics of children whose parents are violent offenders in jail. The law is based on utilitarianism and the best interests of the child, not assumptions about the children of violent offenders.

68. Due to the fact that the law does not create a distinction nor discriminate based on any of the grounds of s. 15 (1), the appellant submits that Artsmad J. did indeed err in finding that Marie's exclusion from the Mother-Child program infringes Selene's rights under s. 15 (1) of the *Charter*.

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*?

69. Section 7 of the *Charter* states:

> 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.
>
> *The Canadian Charter of Rights and Freedoms, Schedule B, Constitution Act,* 1982, s 7.

The appellant respectfully disagrees with the trial judge's decision that s. 18.1 of the

Directive infringes the claimant's s. 7 rights.

70. For a s. 7 infringement to have occurred, the law must be shown to directly result in the deprivation of the Marie's right to "life, liberty and security of the person" and demonstrated to be unjustifiable by the principles of fundamental justice.

71. In general, the appellant submits that Marie's exclusion from the program does not constitute as a deprivation of her rights under s. 7, as these rights, if deprived, were caused by her status as a prisoner, not due to her exclusion from the program.

72. The program only offers benefits to the prisoner — namely the ability to raise her child, which could lead to other positive effects such as improved "confidence and self-esteem" as claimed in Dr. Dhaliwal's testimony. Furthermore, the prisoner does not have to participate in this program. Thus, there is no deprivation of her s. 7 rights. The following considerations follow a more methodical approach to the s. 7 analysis, but this general observation underlies the majority of the arguments presented.

Official Problem, Fall 2015 OJEN Charter Challenge, at para. 41

Deprivation of Right to Life, Liberty and Security of the Person:

73. The most recent interpretation on the right to life was established by the SCC in the unanimous judgement of *Carter v. Canada (Attorney General)*:

> [T]he right to life is engaged where the law or state action imposes

> death or an increased risk of death on a person. . .
>
> ***Carter v. Canada (Attorney General)***, 2015 SCC 5, [2015] 1 S.C.R. 331 at para. 62

74. From this definition, it is clear that Marie's right to life is not infringed as s. 18.1 of the Directive does not increase her risk of death in any means whatsoever.

75. The right to liberty was defined in the majority decision written by Bastarache J. in *Blencoe v. British Columbia (Human Rights Commission)* where he stated:

> "[L]iberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices. . .
>
> ***Blencoe v. British Columbia (Human Rights Commission)***, 2000 SCC 44, [2000] 2 S.C.R. 307 at para. 49

76. He cited La Forest J. in *Godbout v. Longueuil (City)* for emphasis:

> [T]he autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.
>
> ***Godbout v. Longueuil (City)***, 1997 CanLII 335 (SCC), [1997] 3 S.C.R. 844, at para. 66

77. The appellant submits that the raising of one's children cannot be characterized as a choice that is fundamentally personal, since in this case, there exists a minimum of two individuals that are directly impacted by such a choice: the mother and the child. Considerations for the child detract from the overall argument that the choice is solely

based upon and only has effect on the parent's individual dignity and independence. Such considerations for the best interests of the child is examined in more detail under the section titled **Best Interests of the Child**.

78. The appellant also submits that existing legislation such as s. 21 (1) of Manitoba's *The Child and Family Services Act*, as stated below, already impose numerous restrictions on parental choice and influence over their children.

> 21(1) The director, a representative of an agency or a peace officer who on reasonable and probable grounds believes that a child is in need of protection, may apprehend the child without a warrant and take the child to a place of safety where the child may be detained for examination and temporary care and be dealt with in accordance with the provisions of this Part.

The Child and Family Services Act, CCSM RSM 2015, c 3, s 21(1).

79. Similar pieces of legislation can be also found in other provinces, suggesting a general prevalence of statutory limitations on the decision to raise one's children. The appellant therefore submits that society does not view this decision as fundamental to such a degree required for a s. 7 claim.

Child and Family Services Act, RSO 1990, c. C.11
The Child and Family Services Act, CCSM RSM 2015, c 3, s 21(1).

80. Furthermore, prior to the amendments to the Directive, the Mother-Child program already contained several restrictions on eligibility:

> a) the woman inmate must be classified as minimum or medium security, she must be housed in an institution offering the program; and
> b) she must not have been convicted of a crime involving a child.
>
> If an inmate was convicted of a crime involving a child, they could be eligible to participate if a psychiatric assessment determined that she did not represent a danger to her child.
>
> [29] The upper age limit of the child for full-time residency in the Mother-Child Program is four years (at the fourth birthday).

Official Problem, Fall 2015 OJEN Charter Challenge, at paras. 28, 29

81. Mr. Edwin Fung's affidavit also described an incident in which a mother was disqualified from the program after violating prison regulations:

> d. He was aware of approximately two security incidents over the last 28 months preceding his affidavit involving disturbances in Canadian federal prisons (across the country) involving women enrolled in the Mother-Child Program. One. . .case involving contraband possession resulted in the mother's removal from the Mother-Child Program.

Official Problem, Fall 2015 OJEN Charter Challenge, at para. 45

82. These pre-existing restrictions and incidents prior to the s. 18.1 amendment lend support to the fact that the Mother-Child program provides a benefit, not an established right, for incarcerated mothers to keep their children with them in prison. It can be reasonably inferred from these limitations that the prohibition of keeping one's children while serving a sentence, which the program is aimed to ameliorate, stems directly from the nature of incarceration itself. The Mother-Child program provides

women in prison the choice to raise their children, and cannot be considered the direct source of deprivation of said choice: a choice which is already limited by Marie's status as a prisoner, regardless of s. 18.1.

83. In *Blencoe v. British Columbia (Human Rights Commission)* Bastarache J. also defined the protection afforded to security of the person in the *Charter* as follows:

> [S]tate interference with bodily integrity and serious state-imposed psychological stress constitute a breach of an individual's security of the person. In this context, security of the person has been held to protect both the physical and psychological integrity of the individual…
>
> ***Blencoe v. British Columbia (Human Rights Commission)***, 2000 SCC 44, [2000] 2 S.C.R. 307 at para. 55

84. For this case, the psychological stress imposed upon Marie rather than her physical integrity is in question, as supported by Dr. Dhaliwal's affidavit:

> d. 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.
>
> ***Official Problem,*** Fall 2015 OJEN Charter Challenge, at para. 41

85. At first glance this testimony appears to hold merit and the trauma described, should there be any, does indeed constitute some degree of psychological stress. However, the threshold for a s. 7 claim on security of the person was established by Bastarache J. in *Blencoe v. British Columbia (Human Rights Commission)* as such:

> In order for security of the person to be triggered in this case, the impugned state action must have had a serious and profound effect on the respondent's psychological integrity…
>
> ***Blencoe v. British Columbia (Human Rights Commission)***, 2000 SCC 44, [2000] 2 S.C.R. 307 at para. 81

86. The only specific evidence to substantiate the seriousness of the trauma stems from Marie's own affidavit since the nature of Dr. Dhaliwal's statement involves a generalization of women. The appellant respectfully submits that more objective evidence on Marie's psychological state from a neutral third party is required to properly determine whether the threshold has been met. This is not to bring into question the integrity of Marie's affidavit, but simply acknowledging that a more rigorous scrutiny for bias must be applied to the sole piece of evidence that is specific to Marie's circumstances in order to avoid bringing the administration of justice into disrepute.

Official Problem, Fall 2015 OJEN Charter Challenge, at para. 38

87. The appellant also submits that, similar to the analysis on s. 7 liberty, the Mother-Child program exists as a benefit and is not responsible for the pre-existing limitations placed upon child custody while in prison, as they stem from the nature of incarceration itself. Therefore, even if the psychological stress experienced by Marie meets the established threshold of seriousness, the stress is caused by her imprisonment rather than s.18.1 of the Directive.

Determining Best Interests of the Child as a Principle of Fundamental Justice

88. The appellant respectfully disagrees with the analysis of the trial judge, and submits that the best interests of the child should not be considered a principle of fundamental justice.

89. The three criteria which all principles of fundamental justice must adhere to was summarized by McLachlin C.J. in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* as follows:

> 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": Rodriguez v. British Columbia (Attorney General), 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, at p. 590….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 for Children, Youth and the Law v. Canada (Attorney General)***, 2004 SCC 4, [2004] 1 S.C.R. 76 at para. 8

90. McLachlin C.J. then proceeded to examine the best interests of the child as a principle of fundamental justice. She determined that it met the first criteria as "[t]he "best interests of the child" is an established legal principle in international and domestic law."

> ***Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)***, 2004 SCC 4, [2004] 1 S.C.R. 76 at para. 9

91. McLachlin C.J. failed the best interest of the child on the second criteria:

> The "best interests of the child" is widely supported in legislation and social policy, and is an important factor for consideration in many contexts. It is not, however, a foundational requirement for the dispensation of justice.
>
> ***Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)***, 2004 SCC 4, [2004] 1 S.C.R. 76 at para. 10

She cited Article 3(1) of the United Nations *Convention on the Rights of the Child*:

> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> *Convention on the Rights of the Child*, November 20, 1989, [1992] Can. T.S. No. 3, Art. 3(1)

and emphasized the distinction between "a primary consideration" and "the primary consideration" (emphasis added).

> ***Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)***, 2004 SCC 4, [2004] 1 S.C.R. 76 at para. 10

McLachlin also cited L'Heureux-Dubé J. in *Baker v. Canada (Minister of Immigration and Citizenship)*:

> [T]he decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations… (emphasis added)
>
> ***Baker v. Canada (Minister of Immigration and Citizenship)***, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at para. 75

92. At this point in the analysis it has already been established that the best interests of the child does not constitute a principle of fundamental justice in general.

93. It is realized that such a test does not take into consideration the particulars of this specific case, however the following example given by McLachlin C.J. illustrates a pertinent point:

> It follows that the legal principle of the "best interests of the child" may be subordinated to other concerns in appropriate contexts. For example, a person convicted of a crime may be sentenced to prison even where it may not be in his or her child's best interests.
>
> ***Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)***, 2004 SCC 4, [2004] 1 S.C.R. 76 at para. 10

94. In this context, the Mother-Child program can once again be viewed as ameliorative, as it reconciles the best interests of the child with the restrictions of incarceration to such a reasonable extent. However, this also illustrates the duality of the issue at hand, since the program is essentially the reversal of imprisonment in regards to its effect on the best interest of the child. If the best interests were to be considered as a principle of fundamental justice, its initial subordination during the act of imprisonment would be brought into question.

95. It should also be noted that in the process of reconciling the child and mother, the child's location is altered, namely from home to a prison, which may give rise to other

concerns addressed in the section titled **Best Interests of the Child.**

96. The analysis by McLachlin C.J. regarding the third and final criteria: "capable of being identified with some precision", presents an argument that is relatively independent of the individual circumstances surrounding each case:

> Here, too, the "best interests of the child" falls short. It functions as a factor considered along with others. Its application is inevitably highly contextual and subject to dispute; reasonable people may well disagree about the result that its application will yield, particularly in areas of the law where it is one consideration among many, such as the criminal justice system. (emphasis added)
>
> ***Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)***, 2004 SCC 4, [2004] 1 S.C.R. 76 at para. 11

97. This provides a rather definitive answer regarding the reliability of determining the best interests of the child and its appropriate application. The lack of precision will only be compounded in cases such as this, given society's mixed yet forceful response to the initial *Tribune* story which instigated the amendment.

Official Problem, Fall 2015 OJEN Charter Challenge, at para. 30

98. Based upon this analysis, the appellant submits that the best interests of the child cannot be considered as a principle of fundamental justice for cases such as this which involve strongly divided societal opinion and demand an examination of multifaceted issues pertaining to the criminal justice system.

Best Interests of the Child

99. In the event that the best interests of the child are found to be a principle of fundamental justice, the appellant submits that Marie's exclusion from the Mother-Child program adheres to it. Although various factors have to be taken into consideration, given that children in general are considered a disadvantaged group, actions taken to further the best interest of the child will likely be aimed at ameliorating this disadvantage such that they are one step closer to becoming fully functioning members of society.

100. The appellant first submits that a prison environment is unsuitable for the raising and nurturing of children in general. Mr. Fung, a senior administrator who has been involved with the Mother-Child program for 15 years, identified concerns about the environment in prisons, including "the presence of mentally ill and drug-addicted prisoners, and the presence of contraband." Furthermore, he was aware of two incidents in the 28 months preceding his affidavit involving mothers in the program. One case involved violence between prisoners and the other involved the possession of contraband.

Official Problem, Fall 2015 OJEN Charter Challenge, at para. 45

101. The incidents are compounded by concerns of prison guards regarding "their ability to ensure the safety of children residing in prison". Temporarily disregarding the merits of such claims, the fact that guards are questioning their ability to uphold what essentially

constitutes an additional task poses a threat to the overall order of the institution. This overextension of resources further escalates the risk of having children in prison, especially those that house violent offenders.

Official Problem, Fall 2015 OJEN Charter Challenge, at para. 45

102. These factors clearly show that there is reason to be wary about letting children live with their mothers in prison. However, it is true that the preferred situation in general is to allow children to live with their mother, especially when the child will be placed into foster care otherwise. In this case the government must balance the importance of a secure relationship in child development with the importance of a nurturing environment.

103. The key limiting factor in this case is the quality of the environment in which the child is being raised. It is very likely that prisoners who have committed similar crimes are grouped in the same area of the prison. Additionally, it is obvious that violent criminals have a higher chance of being involved in altercations in jail. Thus, a child living with a violent criminal is more likely to be exposed to violence. This is far from ideal for the psychological well-being of the child. Even if the child is not directly harmed, they may still experience trauma from exposure to such behaviour. The heightened risk justifies governmental intervention at this threshold: the increased potential for physical and psychological harm to the child becomes too great to ignore when the mother is a

violent offender. At the end of the day, the safety and psychological security of the child must be placed before the mother's own wishes.

104. An important point of consideration is the early development of the child. In particular, the importance of breastfeeding in early development was acknowledged by both parties.

Official Problem, Fall 2015 OJEN Charter Challenge, at para. 46

105. Christina, Selene's current guardian, is likely able to breastfeed her. As stated in the Official Problem, Christina has 4 children under the age of 10. The fact that the ability to breastfeed does not decrease with age is a well established medical fact, so if Christine was able to breastfeed her children she should be able to feed Selene as well. Based on Christina's commitment to the care of Selene while Marie is in prison, concerns regarding breastfeeding are resolved because in all likelihood Selene will be breastfed by Christina for as long as possible. Additionally, even if Christine isn't willing to breastfeed Selene, it is still possible to buy breast milk from facilities that are present in major cities such as Calgary.

Official Problem, Fall 2015 OJEN Charter Challenge, at paras. 8 and 39

106. Based on this evidence Marie's exclusion from the program does not prevent Selene from being breastfed, and the concerns raised by the respondent in paras. 46 and 47

of the *Official Problem* do not exist.

107. Dr. Dhaliwal brought up concerns regarding the development of children at a young age. In her evidence she stated:

> A child's early emotional attachment to his or her caregiver(s) is crucially important to his or her development. Secure attachment promotes healthy brain functioning, social development, and emotional security. Children who do not develop secure bonds with a caregiver are at a higher risk of intellectual deficits, behavioural issues, and mental health problems. The crucial period for the formation of such bonds is between the ages of one and twenty-four months.

Official Problem, Fall 2015 OJEN Charter Challenge, at para. 41

108. As stated in the facts of the case, Christina is "prepared to continue to care for Selene as long as Marie is incarcerated." Based on this statement it is clear that Selene will have the opportunity to develop secure bonds to a caregiver. It must be emphasized that the bond does not need to be between a parent and child, just a caregiver and child. Therefore, there is no problem with Selene developing a bond to Christina as opposed to Marie during the first four years of her life.

Official Problem, Fall 2015 OJEN Charter Challenge, at para. 39

109. In addition, the situation which unfolds after Marie is released from prison must also be considered, when Selene is 47 months old. Dr. Dhaliwal's evidence, *supra*, states that it is crucial for children to form secure bonds between the ages of 12 - 24 months.

However, it does not specify the importance of these bonds after 24 months. In Selene's case, it is unclear as to how she will be affected by a change in caregiver after 47 months of life.

110. It should be noted that this change would not be overly dramatic; Selene would have met her mother before, and would have been able to form some bonds with her, although they'll likely be weaker than the ones she has with Christina. In addition, given the positive relationship between the two siblings, there is little doubt that Selene would still be able to see Christina after Marie is released from prison.

Official Problem, Fall 2015 OJEN Charter Challenge, at para. 7

111. The appellant therefore submits that due to the inconclusive nature of Dr. Dhaliwal's statement regarding the importance of a secure bond in a child's development after 24 months, it cannot be ascertained that the change in caregivers will negatively affect Selene's development.

112. Based on all these factors, the appellant submits that the law is in the best interests of the child, as the law benefits children more than it harms them.

Arbitrariness

113. In *Canada (*Attorney *General) v. Bedford* the Supreme Court clarified its view on

arbitrariness, writing:

> Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person (Stewart, at p. 136). A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges on those interests.
>
> ***Canada (Attorney General) v. Bedford***, 2013 SCC 72, [2013] 3 S.C.R.1101 at para. 111

114. In this case, the s. 7 deprivation experienced by those who fall under the the Directive's s. 18.1 clause has a rational connection with the purpose of the law. As mentioned previously, the purpose of the Directive " is to foster and support the mother-child relationship as long as it is within the child's best interests," and 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."

Official Problem, Fall 2015 OJEN Charter Challenge at paras. 26 and 27

115. With respect to the best interests of the child, the appellant submits that whether or not a prisoner has been convicted of a violent offense has a direct correlation with whether or not the purpose of the Directive is met. The distinctions in the nurturing environment for children with mothers who are violent offenders was discussed in paras. 100-101.

116. Specifically, the disposition of mothers who have been convicted of violent crimes in

their detention facility subsequently affects the disposition of the child, their safety, physical, and emotional well being. The s.7 infringement does not intend to perpetuate the generalization of how violent offenders raise their children, but rather to ensure a suitable environment for the child to be raised in.

Overbreadth

117. In *Bedford*, the SCC also explained what constitutes as overbreadth. In her ratio McLachlin C.J. wrote:

> Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. . .(emphasis in original)
>
> ***Canada (Attorney General) v. Bedford***, 2013 SCC 72, [2013] 3 S.C.R.1101 at para. 111

118. Section 18.1 of the Directive clearly specifies which group it is intended to affect. Because the restriction specifically identifies violent offenders as the sole party it applies to, it could not possibly unintentionally infringe upon the rights of another group. Given that it is in the best interests of the child to be separated from these violent offenders (see **Best Interests of the Child** section for further analysis), this portion of the law and the law in general is rationally connected to the purpose of furthering the best interests of the child. Therefore, the section in question is in

accordance with the principle of justice.

Gross Disproportionality

119. The principle of gross disproportionality was also established by the Supreme Court in *Bedford* as:

> The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure...The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society. (emphasis added)
>
> ***Canada (Attorney General) v. Bedford***, 2013 SCC 72, [2013] 3 S.C.R. 1101 at para. 120

120. It is submitted that the numerous victim's rights organizations, which initially requested for the program to be amended, represent societal interest in the deterrence of crime, the reasoning behind this is further explored in the section titled **Balancing Societal Interests**. They also proposed that the program be cancelled altogether if amendments could not be made. This inclination to eliminate the program, which by extension excludes all female prisoners from raising their children, sufficiently demonstrates an existing degree of acceptance in society towards the notion of such an exclusion. As the violation of gross disproportionality "only applies in extreme cases", it is not required to determine precisely what degree of this acceptance exists, since its very existence suggests that such a notion cannot be properly characterized

as "extreme". As such, the s. 18.1 amendment to the Directive which only restricts violent offenders cannot be held as "entirely outside the norms accepted in our free and democratic society" nor is it "totally out of sync with the objective", which is to reflect public interest in deterring criminals and that would otherwise be compromised if prisoners received what society deems to be disproportionately lenient treatment to their crime through such benefits.

Official Problem, Fall 2015 OJEN Charter Challenge, at para. 31

Canada (Attorney General) v. Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101 at para. 120

Balancing Societal Interests

121. The appellant also submits that there exist conflicting societal interests in this case, mainly between society's vested interest in the deterrence of crime and the child's best interest, should it be determined in favour of the respondent's claims.

122. The approach to determining principles of fundamental justice in such circumstances is outlined by the SCC in its unanimous decision of *Suresh v. Canada (Minister of Citizenship and Immigration)*:

> Determining whether deportation to torture violates the principles of fundamental justice requires us to balance Canada's interest in combatting terrorism and the Convention refugee's interest in not being deported to torture. Canada has a legitimate and compelling interest in combatting terrorism. But it is also committed to

> fundamental justice. The notion of proportionality is fundamental to our constitutional system.
>
> ***Suresh v. Canada (Minister of Citizenship and Immigration)***, 2002 SCC 1, [2002] 1 S.C.R. 3 at para. 47

The SCC held that the conflicting interests must be balanced, and the same approach can be applied to this case as society also has a "legitimate and compelling interest" in combating crime and punishing criminals.

123. Society's interest against allowing violent offenders to enjoy the benefits of the Mother-Child program was first demonstrated in the events leading up to the introduction of s.18.1, namely when several victims' rights organizations began pressing the government for reforms after the *Tribune* story was publicized.

Official Problem, Fall 2015 OJEN Charter Challenge, at para. 31

124. The test for determining *locus standi* for public-interest groups was established by Cory J. in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)* as follows:

> Three aspects of the claim must be considered when public interest standing is sought. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or, if not, does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the Court?
>
> ***Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*** 1992 SCC, [1992] 1 S.C.R. 236

125. The Mother-Child program falls under the broader issue involving the treatment of convicted criminals during their sentence. It is clear that society holds a substantial interest in punishing those that break the law as well as deterring others from committing the same crime, hence the establishment of prisons and the criminal justice system. In this case, the victim rights organizations were protesting the original legislation on the basis of perceived leniency; leniency that detracted from the utilitarian purpose of incarceration which is to deter both sentenced criminals and future criminals from unlawful acts. This interest cannot be characterized in any way other than serious and substantial.

126. The purpose of victims' rights organizations involves lobbying for legal, social, or political change on behalf of the victims of certain crimes. The crimes themselves are often serious in nature, encompassing violent charges such as murder, sexual assault, and assault with a weapon. Many members of these organizations are relatives or friends of the victims. Therefore, these organizations generally have a genuine interest in the treatment of prisoners convicted of said crimes, as they do not wish for such tragic incidents to be repeated with others.

127. The victims themselves often are effectively precluded from representing their own interests in court, whether due to psychological trauma or the loss of life as seen in the

rape and murder victims of Tessa Coulten mentioned in the *Tribune* story. The nature of such claims also make it difficult to mount a substantial case without gathering a reasonably large group of individuals that have a shared genuine interest in the proceedings.

Official Problem, Fall 2015 OJEN Charter Challenge, at para. 31

128. Therefore, the appellant respectfully submits that the numerous victims' rights organizations involved with the government's decision to amend the Directive represent substantial societal interest in the deterrence of crime and would have had *locus standi* as a public-interest group if they had chosen to instigate legal proceedings.

129. It should also be noted that society has a vested interest in the perceived effectiveness in the governmental allocation of public resources, which includes monetary funding decisions. Although this interest is arguably less significant than the public interest in deterring crime, nevertheless it still holds merit as shown in Mr. Edwin Fung's affidavit:

> e. The participation of a mother-child pair in the Mother-Child Program costs the federal government approximately $35,000 per year over and above the costs of incarcerating the mother alone.

Official Problem, Fall 2015 OJEN Charter Challenge, at para. 45

130. The appellant respectfully submits that the aforementioned aspects of societal interest

must be considered in conjunction with the best interests of the child when determining the principles of fundamental justice for this case, and a balance be struck between the conflicting interests that does not disproportionately favour the respondent's claims regarding the best interests of the child.

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*?

131. s. 1 of the *Charter* states:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> *The Canadian Charter of Rights and Freedoms, Schedule B, Constitution Act,* 1982, s. 1.

132. The appellant respectfully submits that any potential infringement of the Charter can be demonstrably justified in a free and democratic society.

133. An outline for s. 1 analysis was provided in *R v. Oakes*, which states:

> 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 to warrant overriding a constitutionally protected right or freedom". . .It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. . .First, the measures

> adopted must be. . .rationally connected to the objective. Second, the means. . .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 which has been identified as of "sufficient importance". [emphasis in original]
>
> ***R. v. Oakes***, [1986] 1 S.C.R. 103 at paras. 69-70

Prescribed by Law

134. The exclusion of violent offenders from the Mother-Child program is clearly set out in s. 18.1 of the Directive, thus it is prescribed by law.

Pressing and Substantial

135. In this case it is clear that the issue addressed by the legislation, the development of children whose mothers are in prison, is pressing and substantial. Children are the future of our nation, and issues that have an substantial impact on their development should always be considered pressing.

Rational Connection

136. The appellant submits that restrictive measures outlined in s. 18.1 are rationally connected to its purpose. The purpose of the program is to allow children to live with their mothers in a healthy environment as determined by both the child and society's best interests; the means taken by the government help to achieve this goal. By only

allowing mothers who have not been convicted of a violent crime to participate in the program, the physical and psychological well-being of the child is preserved. When a female prisoner is convicted of a violent crime, various aspects of her incarceration are different from that of a non-violent offender, with respect to the violent offender's fellow inmates, their environment, and psychological factors.

Minimal Impairment

137. The degree of proof required for determining minimal impairment was outlined by the SCC in *Irwin Toy Ltd. v. Quebec (Attorney General)*:

> The party seeking to uphold the limit must demonstrate on a balance of probabilities that the means chosen impair the freedom or right in question as little as possible. (emphasis added)
>
> ***Irwin Toy Ltd. v. Canada (Attorney General)*** 1989 SCC, [1989] 1 S.C.R. 927

138. The appellant submits that the program is minimally impairing to all rights on a that may have been infringed, as any attempt to further limit the degree of impairment would result in substantial deviation from the program's original purpose.

139. In the case of the s. 7 claim, an increase of psychological stress and thus an impediment on security of the person experienced by Marie cannot be accredited to Marie's exclusion of the program; it is due to her incarceration that such psychological

burdens are experienced. Furthermore, for Marie to qualify, the Mother-Child program would violate its intended purpose of fostering and supporting the mother-child relationship as long as it is in accordance with the child's best interests. If the respondent's claims are upheld, the precedent set will allow all mothers, regardless of their behavioural history, to raise their children in prison. This substantial change to the program will no longer be in the children's best interests, nor would it be necessary to support a healthy mother-child relationship. The government would then have little choice but to cancel the Mother-Child program entirely.

140. Regarding the respondent's s. 15 claims, there remains no other option for the program to have a smaller distinction between different groups, regardless of whether the restriction is characterized as discriminatory or non-discriminatory. Currently, the only distinctions drawn by the legislation are based upon the type of crime committed and the facility in which the prisoner is held. The analogous grounds of race, ethnicity, disability, and family status are not mentioned whatsoever. Therefore, the only way that the program could accommodate these groups in line with substantive, not formal, equality, would be to grant a preference to those who have disabilities or are part of a racial minority to participate in the program. However, this would result in a substantial deviation from the program's original purpose; in essence, it would shift the focus of the program to providing equitable access to all incarcerated mothers, with a complete disregard to the best interests of the child and society as a whole.

141. With respect to the respondent's gender claim, the only way to limit the inequality between genders would be to make the Mother-Child program available for all female prisoners; however, this has no correlation with the program's intended purpose whatsoever.

142. The same line of reasoning can be used for family status. The only way to reduce the inequality caused by the program on such grounds would be to expand it to include all prisoners, but doing so would compromise the purpose of the legislation, detracting from its original goal.

143. The Supreme Court in *Irwin Toy Ltd. v. Canada (Attorney General)* also established the need for granting the government greater deference in application of the minimal impairment test in certain circumstances:

> [A]s courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.
>
> ***Irwin Toy Ltd. v. Canada (Attorney General)*** 1989 SCC, [1989] 1 S.C.R. 927

Children of non-violent offenders and children in general, have been established to be both a vulnerable and disadvantaged group under the reasoning outlined in para. 28. Therefore, the more lenient standard of minimal impairment applies to this case:

> The question is whether the government had a reasonable basis ... for concluding that [the law in question] impaired [the right infringed]

> as little as possible given the government's pressing and substantial objective. (emphasis added)
>
> ***Irwin Toy Ltd. v. Canada (Attorney General)*** 1989 SCC, [1989] 1 S.C.R. 927

144. The appellant submits that the program passes such scrutiny and the government indeed had a "reasonable basis" to conclude that the restrictions placed on eligibility were of minimal impairment as outlined *supra*, if not in fact being absolutely minimal given the priority of preserving the program's integrity.

Proportionality

145. The appellant submits that the positive effects derived from the law in question outweigh any deleterious effects caused by an infringement of *Charter* rights.

146. One of the primary positives of the Mother-Child program is that it ensures that children are raised in the best possible environment. This helps ensure that the child will develop properly in his or her early life and live up to their full potential.

147. Additionally, the law helps to ensure public confidence in the judicial system. Society in general has an interest in seeing criminals punished for their actions as a method of deterrence. This view is reflected in the words of Minister Novak, who stated:

> . . .I think most Canadians were shocked to learn that women convicted of serious crimes of violence are allowed to keep their children and raise them in prison. The purpose of prisons is to

> punish offenders, and that does not mean paying for violent offenders to have the privilege of raising their children while they serve their sentences.

Official Problem, Fall 2015 OJEN Charter Challenge, at para. 33

148. This view is further substantiated by the victim's rights groups discussed in the section titled **Balancing Societal Interests**. Furthermore, in the U.S.A., which generally shares similar societal beliefs to Canada, no such programs exist on a widespread scale, presumably in part due to a lack of public support.

Official Problem, Fall 2015 OJEN Charter Challenge, at para. 44

149. Criminals who have committed violent offences are not offered the benefits of the program; improving public confidence in the judicial system, which is vital in a well-functioning society.

150. Lastly, imposing a sort of restriction on the program is financially beneficial to the government. The costs of the program are discussed at para. 129. Based on the information provided by Mr. Edwin Fung, the government has saved approximately $1 181 250.00 per year (not adjusted for inflation) due to the new restrictions. The government receives limited funding from taxes, and there are more pressing societal issues to which this money can go towards.

Official Problem, Fall 2015 OJEN Charter Challenge, at para. 45

151. The negative effects of the infringement solely apply to those convicted of violent crimes. Based on the evidence given the only negative effects would be "trauma", a higher disposition for depression, and more difficulties in establishing the mother-child relationship after she is released from prison. Although these issues are somewhat substantial, they are not more important than the development of the child along with the other positives effects of the legislation. While the effects on the mother are likely temporary in the majority of scenarios, the negative impact of removing s. 18.1 could have a much more deleterious effect on the child.

152. Based on these arguments presented above, the appellant submits that even if the law is found to infringe upon a *Charter* right, the right is reasonably limited under s. 1 of the *Charter*.

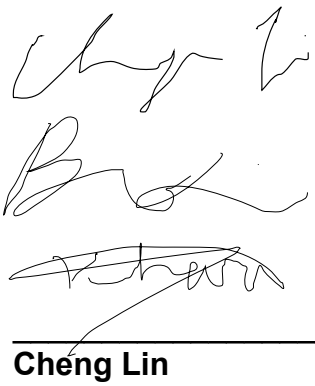
APPLICATION TO THIS CASE

153. The arguments presented in this case prove that s. 18.1 of the Commissioner's Directive does not violate the s. 15 rights of either Marie or Selene, nor Marie's s. 7 rights, on the grounds that it is an ameliorative program striving to uphold the best interests of the child. Furthermore, in the case that there is an infringement, the legislation as prescribed by s. 18.1 is justifiable under s. 1 of the the *Charter*.

PART IV
ORDER REQUESTED

154. It is respectfully requested that the appeal be granted, s. 18.1 of the Directive of the Commissioner of the Correctional Service of Canada regarding the Mother-Child Program be held not in infringement with ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*, and the decision of the trial judge be overturned.

ALL OF WHICH is respectfully submitted by



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Chiung-Ting Lin
Khari Thomas
Of Counsel for the Appellant

DATED AT MARC GARNEAU COLLEGIATE INSTITUTE

this 13th Day of **November, 2015**

APPENDIX A - Issue #1

AUTHORITIES TO BE CITED

LEGISLATION:

The Canadian Charter of Rights and Freedoms, Schedule B, Constitution Act, 1982, s. 15.

Official Problem, Fall 2015 OJEN Charter Challenge

JURISPRUDENCE:

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4, [2004] 1 S.C.R. 76

Gosselin v. Quebec (Attorney General), 2002 SCC 84, [2002] 4 S.C.R. 429

Quebec (Attorney General) v. A, 2013 SCC 5, [2013] 1 S.C.R. 61

R v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483

Withler v. Canada (Attorney General), 2011 SCC 12, [2011] 1 S.C.R. 396

APPENDIX B - Issue #2

AUTHORITIES TO BE CITED

LEGISLATION:

*British Columbia Human R*ights Code, 2015, RSBC 2015, c 210.

Canadian Human Rights Act, 2014, RSC 2014, c 6.

Official Problem, Fall 2015 OJEN Charter Challenge

Ontario Human Rights Code, 2015, RSO 2015, c 19.

JURISPRUDENCE:

Canada (Attorney General) v. Johnstone, 2013 FC 113, [2013] FCJ 92

Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203

R v. Edwards, , [1996] 1 S.C.R. 128.

R v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483

R. v. Rahey, [1987] 1 SCR 588, 1987 CanLII 52 (SCC)

APPENDIX C - Issue #3

AUTHORITIES TO BE CITED

LEGISLATION:

Child and Family Services Act, RSO 1990, c. C.11.

Convention on the Rights of the Child, November 20, 1989, [1992] Can. T.S. No. 3.

Official Problem, Fall 2015 OJEN Charter Challenge

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

The Child and Family Services Act, CCSM RSM 2015, c 3.

JURISPRUDENCE:

Baker v. Canada (Minister of Immigration and Citizenship), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817

Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44, [2000] 2 S.C.R. 307

Canada (Attorney General) v. Bedford, 2013 SCC 72, [2013] 3 S.C.R.1101

Canadian Council of Churches v. Canada (Minister of Employment and Immigration) 1992 SCC, [1992] 1 S.C.R. 236

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4, [2004] 1 S.C.R. 76

Carter v. Canada (Attorney General), 2015 SCC 5, [2015] 1 S.C.R. 331

Godbout v. Longueuil (City), 1997 CanLII 335 (SCC), [1997] 3 S.C.R. 844

Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1, [2002] 1 S.C.R. 3

APPENDIX D - Issue #4

AUTHORITIES TO BE CITED

LEGISLATION:

The Canadian Charter of Rights and Freedoms, Schedule B, Constitution Act, 1982, s. 1.

Official Problem, Fall 2015 OJEN Charter Challenge

JURISPRUDENCE:

Irwin Toy Ltd. v. Canada (Attorney General) 1989 SCC, [1989] 1 S.C.R. 927

R. v. Oakes, [1986] 1 S.C.R. 103