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Children's Rights and the Sentencing of Parents Facing Criminal Sanctions

Hayli Millar¹

This paper reviews the (evolving) international legal requirement for domestic criminal courts to consider the best interests of a dependent child as a primary consideration in making bail and sentencing decisions about their parent(s), especially when a primary or sole caregiver.² It examines the legal obligation involved and offers some practical guidance and resources on how the criminal courts can consider the rights and best interests of children who are affected by judicial decisions involving their parent(s) in criminal matters.

The paper also reviews the Canadian legal framework for bail (judicial interim release) and sentencing in adult criminal matters and emerging opportunities for Canadian criminal courts to take the rights and best interests of a dependent child(ren) more routinely into account when making decisions about their parent(s).

The Impact of Judicial Decisions on Children

Currently, at each point in the criminal justice process—arrest, charging, bail/remand, diversion, trial, sentencing, imprisonment, and post-release—adult parents facing criminal sanctions are considered and treated primarily as individuals, with limited attention to their role as parents or to their dependent children unless the child is a direct victim of their parent's criminal behavior. The impact of criminal justice decisions on the children of parents facing criminal sanctions is not always sufficiently considered despite compelling empirical evidence about the often-intergenerational harms associated with

¹ Associate Professor, School of Criminology and Criminal Justice, University of the Fraser Valley. This paper is adapted and updated from Hayli Millar and Yvon Dandurand, "The best interests of the child and sentencing of offenders with parental responsibilities," *Criminal Law Forum* 29 (2018): 227-77 and a 2017 briefing note that we prepared for provincial court judges in British Columbia, Canada, entitled "Mitigating the Impact of Criminal Sentences and Other Judicial Decisions on the Children of Offenders: The Application of the Principle of the Best Interests of the Child".

² In this paper, the term "parents" includes parents, legal guardians, and caregivers. While the focus is on adult parents with dependent children, especially sole or primary caregivers, who are facing criminal sanctions, we recognize that justice-involved adolescents can also be parents. Consistent with Article 1 of the Convention on the Rights of the Child ('CRC'), dependent children are defined as persons under the age of 18 years. The discussion is limited to *judicial* decisions omitting the rights and best interests of children and their parents at other critical points in the criminal process, including police and prosecutorial decisions like arrest, charging, and diversion, and corrections decisions ranging from where a parent will be imprisoned and their level of security to a parent's release and reintegration.

parental detention and imprisonment.³ The principle of the best interests of the child as a primary consideration in all decisions that directly and indirectly affect a child(ren) is rarely explicitly applied. Indeed, children who are indirectly affected by their parent’s involvement with the criminal justice system are often described as being “invisible” or as collateral victims.

Courts can play a decisive role at several important intervals. They make decisions about whether a parent is granted bail and allowed to return home, with or without conditions, or is remanded in custody pending trial, sentencing, or appeal.⁴ Subsequently, if the person is found guilty, they make sentencing decisions, including whether to imprison the parent and for how long. A decision about the length of imprisonment not only affects the amount of time a parent is potentially separated from their dependent child(ren) but *where* a parent will be imprisoned, which in turn may affect whether a parent can apply to have a young child reside with them in prison—with only a small number of available mother-child programs—and/or whether a child has access to in-person visitation. In-person visitation is especially challenging for federally sentenced women in Canada since there are only six regional prisons, including the Okimaw

Criminal Court Decisions that Affect Children

Criminal courts make many decisions that potentially affect parenting rights and the rights and best interests of a dependent child, especially when a parent is a primary or sole caregiver. These include:

- A decision to grant bail (judicial interim release) and the conditions attached to a bail order.
- Remanding a parent to custody pending trial, sentencing, or appeal.
- Sentencing a parent to a community-based disposition or a conditional sentence to be served in the community and the conditions attached to that sentence.
- Sentencing a parent to a term of imprisonment and the quantum of that sentence, which may affect where a parent is imprisoned, potential access to mother-child programs in prison, a child’s access to in-person visitation and the costs of that visitation, and additional collateral immigration consequences for non-Canadian parents who may be subject to deportation following completion of their sentence.
- Convicting and sentencing a parent for additional “administration of justice offences” for breaches of conditions attached to a community-based court order.
- The types of rehabilitative and reintegrative resources a parent can access as part of their sentence, which may be especially important for parents who are trying to regain custody of their children who are in alternative care following the completion of their sentence.

Short periods of parental detention and/or imprisonment can be as, if not more, disruptive for dependent children than a lengthy sentence.

As well, the timing of parental detention and imprisonment can be vitally important in affording a parent who is a primary or sole caregiver an opportunity to make alternative childcare arrangements.

³ See, e.g., Claire Fitzpatrick, Katie Hunter, Julie Shaw and Jo Staines, “Confronting Intergenerational Harm: Care Experience, Motherhood and Criminal Justice Involvement”. *British Journal of Criminology*, 2023, XX, 1–18 <https://doi.org/10.1093/bjc/azad028>.

⁴ Catherine Flynn, Bronwyn Naylor, and Paula Fernandez Arias, “Responding to the Needs of Children of Parents Arrested in Victoria, Australia. The Role of the Criminal Justice System”. *Australian and New Zealand Journal of Criminology*, 49(3) (2016): 351-369 at p. 360.

Ohci Healing Lodge, potentially resulting in mothers being imprisoned at great distances from their children.⁵ The length of a sentence, among other factors, affects the possibility of whether a custodial sentence can be served in the community under conditional supervision.⁶ Additionally, the criminal courts make decisions about the conditions attached to community-based bail and sentencing orders, as well as ancillary sentencing orders, that can (inadvertently) affect parenting obligations.⁷ They also make decisions about whether to convict a person for additional “administration of justice offences” in situations where a parent fails to comply with the conditions of their release on bail or as attached to a community-based sentence. As well, sentencing decisions can be figurative in facilitating parental access to rehabilitative and other resources that then enable a parent to regain custody of a dependent child who is in alternative care.⁸ And for non-Canadian parents, sentencing decisions may hold collateral immigration consequences for children if their parent is subsequently removed (deported) from the country following the completion of their sentence.⁹ In Canada, there is a lack of child-specific or family-focused guidelines to inform these judicial decisions in criminal proceedings.

Notwithstanding the enormous diversity and resiliency of affected children, there is ample empirical evidence demonstrating that sentencing and other criminal justice decisions often have a detrimental, frequently traumatic, and stigmatizing, impact upon a criminal justice-involved person's dependent children both immediately and in the long term.¹⁰ At the same time, there is a growing body of empirical evidence that preserving the family environment and maintaining family relations, when not detrimental to the

⁵ See, e.g., Standing Senate Committee on Human Rights, “The Human Rights of Federally Sentenced Prisoners”, Ottawa: Senate of Canada (2021) at pp. 92-94, also documenting the effects of COVID-19 in limiting in-person visitation.

⁶ Criminal Code of Canada R.S.C. 1985, c. C-46, section 742.1.

⁷ See, e.g., Lucy Baldwin and Rona Epstein, “Short But Not Sweet: Exploring the Impact of Short Sentences on Mothers”. Oakdale Trust, De Montfort University, and Coventry University, United Kingdom. 2017, at p. 57. Available: <https://www.nicco.org.uk/userfiles/downloads/5bc45012612b4-short-but-not-sweet.pdf>.

⁸ See, e.g., Charlotte Baigent, “Why Gladue Needs an Intersectional Lens: The Silencing of Sex in Indigenous Women's Sentencing Decisions”. *Canadian Journal of Women and the Law*, 32(1) (2020): 1-30 at p. 26. DOI: 10.3138/cjwl.32.1.01

⁹ Canadian Bar Association, “Collateral Consequences of Criminal Convictions: Considerations for Lawyers”. Ottawa: Canadian Bar Association (2017) at pp. 8-12. Among other legal outcomes, including the placement of a child(ren) in alternative care when a parent is detained or imprisoned, in Canada, as in other countries, a criminal conviction for a parent may be a factor in the termination of parental rights.

¹⁰ See, e.g., the CDC-Kaiser Permanente Adverse Childhood Experiences (ACEs) study, which defines living with an imprisoned household member as one of seven types of adverse childhood experiences. Available: <https://www.cdc.gov/violenceprevention/acestudy/about.html>. On the anticipated harms to children in the context of sentencing, see, e.g., Tamar Lerer, “Sentencing the Family: Recognizing the Needs of Dependent Children in the Administration of the Criminal Justice System”. *Northwestern Journal of Law and Social Policy*, 9(1) (2013): 23-57, at p. 27, who argues three sets of harms, including those to children, to society based on future criminogenic risk (i.e., intergenerational criminality), and the disparate impacts of prison on racialized minority children. See also Mr. Justice Albie Sachs' comments in *S v. M*, (CCT 53/06) [2007] ZACC 1, at para 35 on the duty of a sentencing court to acknowledge the interests of children to avert avoidable harm and unnecessary suffering.

safety and wellbeing of a child, can produce positive outcomes for the child (reduced state intervention, increased positive adjustment), for the parent (reduced recidivism, increased employment prospects), and for the state (increased cost savings associated with community-based alternatives instead of prison or the reduced replication of programs and services).¹¹ This compelling evidence would seem to support the greater use of alternatives to imprisonment in making bail and sentencing decisions for parents facing criminal sanctions.

The International Legal Framework

Internationally, three distinct but related legal principles suggest that domestic criminal courts, including those in Canada, are required to consider the rights and best interests of affected children and their parents when making bail and sentencing decisions in criminal proceedings. These include recognizing and applying the principle of the best interests of a child as an independent rights holder, or additionally or alternatively a child's right to family life, and substantive equality and the principle of non-discrimination in relation to mitigating the differential gendered and racialized (and other intersectional) impacts of sentencing and imprisonment on parents with dependent children.

1. The Principle of the Best Interests of the Child

An array of international norms and standards affirm that domestic criminal courts should explicitly consider the best interests of a child as a primary consideration in all judicial decisions directly or indirectly affecting the child,¹² extending to decisions about their parents or primary caregivers in adult criminal proceedings, especially

The UN CRC Principle of the Best Interests of the Child

Article 3(1) provides: "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".

Other Key CRC Provisions

Article 2 on a child's right to non-discrimination

Article 6 on a child's right to survival and development

Article 8 on a child's right to identity

Article 9 on a child's right not to be forcibly separated from their parent except in accordance with applicable law and the best interests of a child

Article 12 on a child's right to have their views considered

Article 20 on a child's right to state protection and assistance when deprived of their family environment

¹¹ Lauren Feig, "Breaking the Cycle: A Family-Focused Approach to Criminal Sentencing in Illinois", *Advocates' Forum* (2015): 13-24 at p. 17.

¹² The best interests of the child principle is a legal test. In Canada, section 16(2) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) defines the best interests of the child to include the "child's physical, emotional and psychological safety, security and well-being". See also *Family Law Act*, [SBC 2011] Chapter 25, section 37, which provides a similar definition. In the context of child protection, and in view of Indigenous rights and Canada's multicultural diversity, the list of factors to be considered in determining a child's best interests increasingly include a child's "cultural, racial, linguistic, and religious heritage", the principle of substantive equality, and for Indigenous children specifically the principle of cultural continuity. See, e.g., the *Child, Family and Community Service Act* [RSBC 1996] Chapter 46, section 4 and *Bill C-92 An Act Respecting First Nations, Inuit and Métis children, Youth and Families*, S.C. 2019, c. 24, sections 9 (including cultural continuity and substantive equality) and 10 (Best Interests of Indigenous Child).

when making bail and sentencing decisions.

In particular, the [United Nations \(UN\) Convention on the Rights of the Child](#), to which Canada is a party, and the [UN Guidelines for the Alternative Care of Children](#) provide a strong international legal foundation to argue that domestic criminal courts should routinely and independently consider the best interests of a dependent child when their parent, especially a primary or sole caregiver, is facing criminal sanctions.

The Convention on the Rights of the Child (hereinafter the CRC) does not explicitly address the rights of a child whose parents are facing criminal sanctions other than Article 9(4) which recognizes a child's right to information about the whereabouts of a detained or imprisoned parent unless contrary to the child's well-being.¹³ However, among several applicable rights provisions,¹⁴ Article 3(1), known as the "principle of the best interests of the child", specifically provides that the best interests of the child shall be a primary consideration in all state actions that affect the child, including those undertaken by courts of law.

In its General Comment interpreting and providing authoritative direction to state parties like Canada on Article 3(1), the [Committee on the Rights of the Child](#) opined that the principle applies to children affected by the situation of their parents facing criminal sanctions and has indicated that, in its view, the reference to "courts of law" extends to criminal court proceedings with a direct *or* indirect impact on children.¹⁵ The Committee also indicated that when a parent or primary caregiver commits a criminal offence, alternatives to detention should be considered on a case-by-case basis, "with full

¹³ Article 9(1) is important in recognizing that a child should not be separated from their parent except in accordance with applicable law and when in the best interests of the child. Article 9(3) of the CRC is also important in emphasizing the right of a child who is separated from their parent to regularly maintain direct contact and personal relations unless contrary to the child's wellbeing. This right has been invoked to argue for a child's right to visit and communicate with a detained or imprisoned parent.

¹⁴ These potentially include: Article 2 (non-discrimination), Article 3 (best interests), Article 5 (parental guidance), Article 6 (survival and development), Article 7 (registration, name, nationality, care), Article 8 (preservation of identity), Article 9 (separation from parents), Article 12 (respect for the views of the child), Article 16 (right to privacy), Article 18 (parental responsibilities, state assistance), Article 19 (protection from all forms of violence), Article 20 (children deprived of family environment), Article 23 (children with a disability), Article 24 (health and health services), Article 25 (review of treatment in care), Article 26 (social security), Article 27 (adequate standard of living), Articles 28 and 29 (right to education), and Article 30 (Indigenous children and minority children rights to culture, religion, and language).

¹⁵ UN Committee on the Rights of the Child (CRC), General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, para. 1), 29 May 2013, CRC/C/GC/14. Available: https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf. See also the Honourable Donna J. Martinson Q.C., "Children's Legal Rights in Canada under the United Nations Convention on the Rights of the Child", Toronto: National Judicial Institute Family Law Program, (2016), at pp. 10, 30 emphasizing that both the General Comments and Concluding Observations of the Committee on the Rights of the Child, which provide authoritative direction to state parties like Canada "can be referred to by courts when interpreting the Articles of the CRC".

consideration of the likely impacts of different sentences on the best interests of the affected child or children”.¹⁶

Additional child rights arguments include Article 2 of the CRC, which presumably protects a child against discrimination based on the (alleged) criminal status of their parent, while Article 12 relating to the child’s ‘right to be heard’ likely encompasses criminal courts considering the views of a dependent child in situations where a court is remanding or sentencing their parent to imprisonment.¹⁷ Moreover, Article 20 of the CRC pertaining to children deprived of their family environment, especially if read together with guideline 48 of the UN Guidelines for the Alternative Care of Children,¹⁸ arguably requires a criminal court to ensure that appropriate alternative care arrangements are in place when remanding or sentencing a primary or sole carer with dependent children to custody.¹⁹ Articles 5 and 18 on parenting responsibilities

Authoritative Guidance from the UN Committee on the Rights of the Child

Since 2005, the Committee on the Rights of the Child has addressed the situation of children of incarcerated and administratively detained parents as part of its concluding observations, either as a standalone item or in relation to the best interests of the child, early childhood development, children deprived of a family environment, birth registration and nationality, or as the children of migrant workers. These now more than 60 concluding observations have instructed domestic criminal courts to consider the best interests of the child principle when remanding or sentencing a parent to custody, **emphasizing the use of alternative sanctions where possible and appropriate.** In brief, the Committee has continued to develop the best interests of the child principle as an overarching principle in criminal justice contexts, including providing a range of guidance for states such as ensuring the right of a child to have their views taken into account; preventing discrimination towards affected children; and; emphasizing the use non-custodial alternatives at the pre-trial and sentencing stages of the criminal justice process. A compilation of these observations is available: <https://www.crcip.com/main.php>

In its most recent [2022 Concluding Observations](#), the Committee advised Canada to ensure that a child’s right to have their best interests is considered as a primary consideration in all judicial proceedings, to develop procedures and criteria for giving due weight to this right, and to establish impact assessments of all laws and policies relevant to the realization of this right (para 19). Among its many other recommendations, the Committee also advised Canada to strengthen “community-based alternative sentences for incarcerated mothers of infants and other children” (para 32(f)).

¹⁶ UN Committee on the Rights of the Child (CRC), General Comment No. 14 (2013) para 69 on preserving the family environment and maintaining family relations. See also UN Committee on the Rights of the Child (CRC), Report and Recommendations of the Day of General Discussion on “Children Of Incarcerated Parents”, 30 September 2011, para 30, which forms the basis of this interpretation. Available: <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRC/Discussions/2011/DGD2011ReportAndRecommendations.pdf>

¹⁷ UN Committee on the Rights of the Child (CRC), General Comment No. 14 (2013), paras 43-45, 53-54 and UN Committee on the Rights of the Child (CRC), Report and Recommendations of the Day of General Discussion on “Children Of Incarcerated Parents”, para 41.

¹⁸ Specifically, Guideline 48 provides that when a child is to be deprived of a sole or main carer because of a sentencing decision, non-custodial sentences should be used where possible and appropriate following an assessment of the best interests of the child.

¹⁹ See also UN Committee on the Rights of the Child (CRC), Report and Recommendations of the Day of General Discussion on “Children of Incarcerated Parents”, at para 42.

are also potentially relevant to ensuring that all CRC provisions are interpreted in a way that would usually allow parents to assist their children in exercising their rights and in stressing the importance of parents having primary responsibility for their child's upbringing and development focusing on the best interests of the child. As noted below, given the disparate overrepresentation of Indigenous and Black adult persons across the criminal justice process, many of whom are parents with dependent children,²⁰ as well as alarmingly high and disparate rates of Indigenous and Black children in alternative state care,²¹ a child's right to culture and identity (in particular Articles 8 and 30), to protection from harm (Article 19), and to health equity, broadly encompassing Articles 6, 24, 26, 27, 31 of the CRC, are important considerations that should be further developed as part of the legal rationale for taking a child's rights and best interests into account when making bail and sentencing decisions involving their parents and in considering alternatives to imprisonment for a parent who is a primary or sole caregiver.

In addition to the CRC and its interpretation by the Committee on the Rights of the Child, UN bodies like the General Assembly²² and the Human Rights Council²³ have adopted several resolutions addressing the situation of children affected by their parents' criminal justice system involvement, including in matters of sentencing. As well, the UN Human Rights Council²⁴ and the Council of Europe²⁵ have explicitly recognized children whose parents are facing criminal sanctions as a vulnerable group of children calling for the use of alternatives to imprisonment for parenting mothers and fathers or

Other Authoritative UN Decisions

Collectively, various **UN General Assembly and UN Human Rights Council** resolutions have stressed the importance for UN member states to:

- (1) **Prioritize non-custodial measures** when remanding or sentencing a pregnant woman or a dependent child's sole or primary caregiver to imprisonment, subject to the seriousness of the offence, the need to protect the public, and an assessment of the wellbeing of the child;
- (2) **Recognize, promote, and protect the rights of a child** affected by parental incarceration, especially to have their best interests be an important consideration in decisions affecting them and not to be discriminated against because of the (alleged) actions of one or both of their parents; and,
- (3) **Pay greater attention to the effects of parental imprisonment on children.**

²⁰ Like most countries, Canada lacks concrete data on how many children are affected by parental involvement in the criminal justice system; most available statistics are estimates.

²¹ See, e.g., Ontario Human Rights Commission, "Interrupted Childhoods: Overrepresentation of Indigenous and Black Children in Ontario Child Welfare". Toronto: Ontario Human Rights Commission (2018). Available: <https://www.ohrc.on.ca/en/interrupted-childhoods>.

²² See, e.g., UN General Assembly. Resolution 68/147 Rights of the Child adopted by the General Assembly on 18 December 2013 A/RES/68/147, 2014, paras 56-57. Available: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_68_147.pdf

²³ See, e.g., UN Human Rights Council. Resolution 19/37 Rights of the Child, A/HRC/RES/19/37, 19 April 2012, para 69. Available: <https://digitallibrary.un.org/record/725398?ln=en>.

²⁴ UN Human Rights Council. A/HRC/25/L.10, Rights of the Child, Access to Justice, 25 March 2014, para 5(a).

²⁵ Council of Europe Strategy for the Rights of the Child (2022-2027), 2022, para 33.

other primary caregivers—subject to the seriousness of the offence, the need to protect the public, and an assessment of the child's wellbeing—in recognition of a child's right to development being adversely affected (e.g., Article 6 of the CRC).

In the context of crime prevention and criminal justice, among other endorsements, the 2014 [UN Model Strategies and Practical Measures on the Elimination of Violence against Children](#) recognize children of incarcerated parents as “children in contact with the justice system” urging member states to provide support to affected parents and caregivers with the aim of reducing a child's risk of exposure to violence (paras 6(c), 23(h), 34(1), and 38 (d)).²⁶ More recently, in 2019, in the [UN Global Study on Children Deprived of their Liberty](#), the independent expert made more than 20 recommendations as part of a standalone chapter on “Children Living in Prisons with their Primary Caregivers” affirming these various UN child rights principles, commentaries, and resolutions and entreating states to recognize affected children as independent rights holders whose best interests must be an important consideration when states are contemplating detaining or imprisoning a primary caregiver at both the pre- and post-trial stages of the criminal justice process (Recommendations 5.1 and 5.2).²⁷ Importantly, the Global Study also recommends a “presumption against a custodial measure or sentence for primary caregivers” (Recommendation 5.6).²⁸

At the regional level, African law supports the judicial recognition of the best interests of the child principle in sentencing parents with dependent children. Specifically, the [African Charter on the Rights and Welfare of Children](#) (ACRWC) Article 30 on ‘Children of Imprisoned Mothers’, adopted by the Organization of African Unity in 1990, specifies that African member states “... should provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of

The African Charter and Expert Committee on the Rights and Welfare of Children Practical Guidance for Sentencers

A sentencing court should:

- (1) Find out whether a convicted person is a primary caregiver where there are indications to this effect;
- (2) Ascertain the effect of a parents' custodial sentence on affected children if such a sentence is being considered;
- (3) In instances where a custodial sentence is appropriate and required for a primary caregiver, assess whether steps should be taken to ensure adequate care for the affected child(ren)'
- (4) In instances where a non-custodial sentence is appropriate, determine the appropriate sentence taking a child's best interests into account;
- (5) In instances where there is a range of appropriate sentences, use the principle of the best interests of the child as an important consideration to guide what sentence to impose.

Source: ACERWC, General Comment No. 1, 2013, para 36.

²⁶ Available: <https://digitallibrary.un.org/record/787466?ln=en>.

²⁷ Available: <https://www.ohchr.org/en/treaty-bodies/crc/united-nations-global-study-children-deprived-liberty>.

²⁸ See, e.g., Lucy Halton and Laurel Townhead, “Children of Incarcerated Parents: International Standards and Guidelines”. Geneva: QUNO, 2020 at p. 7.

breaking the law”.²⁹ In relation to sentencing, Article 30.1 advises that African states should always first consider a non-custodial sentence when sentencing mothers with children. Additionally, interpretive commentary stresses that member states should establish and promote alternative treatment measures for convicted women and emphasize the restorative aims of punishment.³⁰

Concerning the implementation of Article 30, the [African Committee of Experts on the Rights and Welfare of the Child](#) (ACERWC) has affirmed the judicial sentencing guidelines developed by the South African Constitutional Court in *S v M* in 2007 setting forth a five-part test, calling on member states to review and amend their sentencing procedures accordingly (para 36). The ACERWC has also adopted an expansive definition of ‘mother’, which extends to children affected by the incarceration of their sole or primary caregiver so as to encompass fathers and other caregivers, including extended family members, who have custody of the child (para 13). Member states are expected to ensure there are available alternatives to incarceration for expectant prisoners and prisoners with children and that courts prioritize non-custodial measures in sentencing, subject to the seriousness of the offence and the need to protect the public and the child (para 24). Member states should also consider the views of the child, whether directly or indirectly, and give due weight to those views, extending to providing children with an opportunity to take part in sentencing procedures and if necessary to have legal representation or a guardian to ensure their participation (para 24). In articulating the rationale for Article 30, the ACERWC states: “Article 30 is informed by the fact that children of incarcerated parents/primary caregivers may find a number of their rights violated as a result of this incarceration. When a criminal court detains a child’s parent, the court reshapes the child’s family just as much as a family law court issuing an order of custody, adoption, or divorce, and as a result, children’s best interests need to have a primary role in such circumstances. As a result, there is often an acute need for special treatment, and support services, which will vary depending on the child’s particular family circumstances and the stage of the criminal proceedings” (para 7).

2. The Right to Respect for Privacy and Family Life

As a separate, yet often jointly argued, legal consideration from the best interests of the child, various international and regional treaties protect the right to privacy and family life, including Articles 17 and 23(1) of the [International Covenant on Civil and Political](#)

²⁹ Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

³⁰ ACERWC General Comment (Article 30 of the African Charter on the Rights and Welfare of the Child) on “Children of Incarcerated and Imprisoned Parents and Primary Caregivers”, 2013. Available: [General Comments | ACERWC - African Committee of Experts on the Rights and Welfare of the Child](#)

Rights,³¹ Article 10(1) of the International Covenant on Economic, Social and Cultural Rights.³² Relevant European standards include the Charter of Fundamental Rights of the European Union Article 7 “Respect for private and family life” and Article 24 rights of the child (including protection and care for their wellbeing, a child’s right to be heard, to have their best interests be a primary consideration, and to maintain a relationship and have direct contact with their parents),³³ along with the European Convention on Human Rights (ECHR) Article 8 “Right to respect for private and family life” that applies to both a parent and the child.³⁴

European Legal Standards on the Right to Family Life

Article 8 of the ECHR on the Right to respect for private and family life provides: “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

Other relevant European standards include the Charter of Fundamental Rights of the European Union article 7 “Respect for private and family life” and article 24 rights of the child including protection and care for their wellbeing, a child’s right to be heard, to have their best interests be a primary consideration, and to maintain a relationship and have direct contact with their parents.

Of note, superior and appellate criminal courts in England and Wales consider a child’s right to family life to be engaged when a parent is being criminally sentenced and have developed a range of practical judicial guidance on this issue.³⁵ Sentencing guidelines in the UK also direct the criminal courts

³¹ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Articles 17 and 23(1). Article 17 protects against arbitrary or unlawful interference with privacy and the family, while Article 23(1) recognizes the family as the fundamental social unit that is entitled to social and state protection.

³² UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations. Article 10(1) recognizes the family as the fundamental social unit that is entitled to broad protection and assistance, while Article 10(2) recognizes the right of mothers to special protections before and immediately after childbirth. Article 10(3) recognizes that special protection and assistance measures should be taken on behalf of all children and that children should not be subject to discrimination based on their parentage.

³³ Available: https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights_en.

³⁴ See, e.g., Rachel Brett, “Best Interests of the Child When Sentencing a Parent: Some Reflections on International and Regional Standards and Practice”. Families Outside: Edinburgh, UK: Families, Outside. (2018) at pp. 4-5. Available: <https://www.familiesoutside.org.uk/content/uploads/2018/05/Best-Interests-of-the-Child-when-Sentencing-a-Parent-UPDATD.pdf>. See also Shona Minson, “Briefing Paper: Safeguarding Children when Sentencing Parents Information for Primary Carers Facing Sentencing in a Criminal Court”. UK: University of Oxford, Centre for Criminology, Economic and Social Research Council, Prison Reform Trust (2020) at pp. 2-3. Available: https://www.law.ox.ac.uk/sites/files/oxlaw/maternal_sentencing_briefing_paper.pdf.

³⁵ See, especially Shona Minson, Rebecca Nadin, and Jenny Earle, “Sentencing of Mothers: Improving the Sentencing Process and Outcomes for Women with Dependent Children: A Discussion Paper”, London, Prison Reform Trust (2015) at pp. 10-11). See also Shona Minson, “Mitigating Motherhood: A study of the Impact of Motherhood on Sentencing Decisions in England and Wales”, London, The Howard League, 2014; Shona Minson, Maternal Sentencing and the Rights of the Child, Palgrave (2020); Rona Epstein, “Mothers in Prison: The Sentencing of Mothers and the Rights of the Child”, Coventry Law Journal: Special Issue Research Report (2012); Fiona Donson and Aisling Parkes, “Changing Mindsets Changing Lives: Increasing the Visibility of Children’s Rights in Cases Involving Parental Incarceration”, International Family Law, 4(6) (2012): 408-413; Fiona Donson and Aisling Parkes,

to consider whether someone is a “sole or primary carer for dependent relatives” as a factor “reducing seriousness or reflecting personal mitigation”.³⁶

The most recent iteration of the [Council of Europe Strategy for the Rights of the Child 2022-2027](#) continues to recognize children of imprisoned parents as being in a particularly vulnerable situation and the importance of addressing their situation. In 2018, the Council of Europe published its [Recommendation \(CM/Rec\(2018\)5](#) offering detailed guidance to member states concerning children with imprisoned parents focusing on preserving family and child-parent relations and respecting the rights and interests of children.³⁷ Commensurate with other international guidance, the Basic Principles emphasize that the rights and best interests of any affected child(ren) should be taken into consideration when a custodial sentence is contemplated and that alternatives to detention “be used as far as possible and appropriate, especially in the case of a parent who is a primary caregiver” (para 2). Among its 56 recommendations, courts are asked to take the rights and needs of children into account, including the potential impact of a sentence on children, *before* a judicial order or sentence is imposed on a parent. Courts are also asked to consider deferring pre-trial detention or a prison sentence and replacing them with community sanctions or measures (para 10).

In the Americas, the Organization of American States (OAS) has focused some attention on the best interests of the child and a child's separation from their parents in relation to the [American Convention on Human Rights](#) especially Articles 17(1) and 19 concerning protection of the family and special human rights protections for children and adolescents. In 2019, the Inter-American Court of Human Rights was asked to develop an Advisory Opinion on differentiated approaches to persons deprived of liberty, including the situation of children who live with their mothers in prison. In this same year, the Inter-American Children's Institute, in collaboration with the OAS and the Plataforma NNAPES, published comprehensive [Guidelines to Promote and Comprehensively Protect Children and Adolescents Whose Primary Carers are Incarcerated](#), while also conducting their first pilot training course for state officials on children with incarcerated parents in 2021.³⁸

3. The Differential Gendered and Racialized Effects of Sentencing and Imprisonment

“Weighing in the balance: Reflections on the Sentencing Process from a Children's Rights Perspective”, *Probation Journal* 63(3) (2016):331.

³⁶ Shona Minson, Rebecca Nadin, and Jenny Earle at p. 11.

³⁷ Available: <https://edoc.coe.int/en/children-s-rights/7802-recommendation-cmrec20185-of-the-committee-of-ministers-to-member-states-concerning-children-with-imprisoned-parents.html>.

³⁸ Available: <http://www.nnapes.org/news>.

In addition to the foregoing, non-binding international instruments recognize substantive equality rights and/or the principle of non-discrimination in relation to the differential, especially the gendered and racialized, impacts of sentencing and imprisonment for many parents and their dependent children. In particular, [the UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders](#), otherwise known as the Bangkok Rules, prioritize non-custodial measures when criminal courts are sentencing a pregnant woman or a dependent child's primary or sole caregiver where possible and appropriate, limiting custodial sentences to serious and violent offences or offenders who represent some danger, "after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children".³⁹

The Bangkok Rules for Women

The Bangkok Rules encourage states to develop gender-specific diversionary, pre-sentence, and sentencing alternatives (Rule 57); ensure that women are not separated from their families without due consideration to their background and family ties (Rule 58); and authorize their sentencing courts to consider a range of mitigating factors when sentencing women offenders, including a women's caretaking responsibilities (Rule 61). As well, women sentenced to prison should be afforded an opportunity to make childcare arrangements and the Rules appear to anticipate deferred or suspended sentencing options based on an assessment of the best interests of a child (Rule 2).

Relatedly, and consistent with international legal standards for substantive equality and non-discrimination, the Office of the UN High Commissioner for Human Rights and the UN Office on Drugs and Crime, among other UN agencies and special procedures, have recognized the adverse gendered, and racialized effects of parental, especially maternal, imprisonment on children, emphasizing the use of alternatives to imprisonment where appropriate.⁴⁰ The [UN's Sustainable Development Goals](#), adopted by the General Assembly in 2015, also recognize the gendered effects of maternal imprisonment vis-à-vis promoting inclusive societies and access to justice (Goal 16), ending poverty, and ensuring that the children of offenders are not drawn into a cycle of crime and poverty (Goal 1), and achieving gender equality, particularly in relation to considering gender-specific circumstances in sentencing (Goal 5).⁴¹ At the regional level, several European Parliament resolutions and recommendations have also expressly acknowledged the

³⁹ UN General Assembly, United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), Rule 64. 6 October 2010, A/C.3/65/L.5. The [United Nations Standard Minimum Rules for the Treatment of Prisoners](#) (known as the Mandela Rules), while relevant and containing some similar provisions, are exclusively focused on imprisoned parents post-sentencing, including whether it is in the best interests of a child to reside with their parent in prison.

⁴⁰ See, e.g., the United Nations Entity for Gender Equality and the Empowerment of Women, United Nations Development Programme, United Nations Office on Drugs and Crime, and Office of the United Nations High Commissioner for Human Rights, "A Practitioner's Toolkit on Women's Access to Justice Programming: Module 4: Women in Conflict with the Law", United Nations (2018). Available: https://www.ohchr.org/sites/default/files/Documents/Publications/PractitionerToolkit/WA2J_Module4.pdf

⁴¹ Rob Allen, *Global Prison Trends*, London: Penal Reform International (2016) at pp. 5-7.

gendered and adverse effects of imprisonment for women and their children advocating the use of community-based alternatives to prison.⁴²

3.1 The UN Declaration on the Rights of Indigenous Peoples

Recognizing and mitigating the adverse effects of parental imprisonment for Indigenous children is especially important for Canada in view of ongoing intergenerational trauma and other harmful legacies of a history of settler colonialism and forced state separation of children from their parents by means of residential schools and the child welfare system.⁴³ Indeed, for countries like Canada that have exceptionally high and disproportionate rates of Indigenous adults and youth who are being remanded to custody and/or sentenced to imprisonment, many of whom are parents, along with extremely high and disparate rates of Indigenous children being placed in state (alternative) care, the [UN Declaration on the Rights of Indigenous Peoples](#) (UNDRIP), to which Canada is a signatory and has implemented nationally, is directly relevant to protecting the individual and collective rights of Indigenous children who are forcibly separated from their parents due to state-imposed remand detention and/or imprisonment. In the Canadian context, as emphasized by the [National Inquiry into Missing and Murdered Indigenous Women and Girls](#), it is imperative that the principle of the best interests of the

The United Nations Declaration on the Rights of Indigenous Peoples

Preambular recognition of “the right of Indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child” (para 13)

Article 2 Indigenous rights to equality and non-discrimination

Articles 3-5 Indigenous rights to self-determination

Article 7 Indigenous rights to life, liberty and security of the person and against forcible removal of children and transfer to another group

Article 8 Indigenous rights not to be subject to forced assimilation or cultural destruction, including state-provided mechanisms for prevention and redress

Article 9 Indigenous rights to identity and non-discrimination

Articles 11-13 Indigenous rights to practice and revitalize cultural traditions, spiritual and religious traditions, and Indigenous languages

Article 18 Indigenous rights to participate in decision-making that affects rights

Article 21 Indigenous rights to socio-economic well-being including in areas of education, employment, housing, health, and social security

Article 22 emphasizing that special attention to be paid to the rights and needs of Indigenous women, children and youth, including ensuring full protection from all forms of violence and discrimination

⁴² See, for example, the European Parliament Resolution of 13 March 2008 on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life (2007/2116(INI)). Available: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0102+0+DOC+XML+V0//EN>.

⁴³ See especially the comments of Madam Justice Ross in *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, at para 15. Justice Ross recognized this principle in relation to the circumstances of Indigenous mothers in Canada who face higher rates of incarceration and given a history of familial dislocation due to state action.

Indigenous child be developed and applied to reflect “distinct Indigenous perspectives, world views, needs, and priorities, including the perspective of Indigenous children and youth”.⁴⁴

While recognizing very distinct ancestries, histories, legal statuses, cultures, and lived experiences, among many differences, similar types of arguments about child rights to culture and identity can and should be advanced to protect the rights and best interests of Black Canadian children and adolescents who are overrepresented in child welfare systems and whose parents are also highly overrepresented across the criminal justice process.⁴⁵

In brief, a wide range of international and regional norms and standards strongly suggest that domestic criminal courts are obliged to take the rights and best interests of a dependent child(ren) into account as a primary consideration when making bail and sentencing decisions about their parent, especially for primary and sole caregivers, and extending to a child's right to have their views considered. For primary and sole caregivers, along with pregnant mothers, these same standards consistently emphasize a preference to use alternatives to imprisonment whenever possible to do so subject to balancing various factors like the seriousness of the offence, the protection of the public, and an assessment of the best interests of the child. In the Canadian context, it is imperative that any assessment of the best interests of the child in relation to their parents' criminal proceedings be developed through a culturally specific lens reflecting in particular the rights of Indigenous peoples, including to substantive equality and cultural continuity.

The Canadian Legal Context

1. The Application of the CRC to Canada

While Canada incorporates the concept of the best interests of the child in some domestic legislation—such as family, immigration, and child protection laws—as a country with a dualist legal tradition, Canada is supposed to adopt implementing legislation or policy to give full effect to the CRC at the federal and provincial/territorial government levels.

⁴⁴ National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, “Calls for Justice” [Call for Justice 12.3], 2019, at p. 194. Available: <https://www.mmiwg-ffada.ca/final-report/>.

⁴⁵ See, e.g., Akwasi Owusu-Bempah, Steve Kanters, Eric Druyts, Kabirraaj Toor, Katherine A Muldoon, John W Farquhar, and Edward J Mills, “Years of Life Lost to Incarceration: Inequities Between Aboriginal and Non-Aboriginal Canadians”, *BMC Public Health* 14 (2014):585; Danardo Sanjay Jones, “Punishing Black Bodies in Canada: Making Blackness Visible in Criminal Sentencing”, LLM Thesis, Toronto: Osgoode Hall Law School of York University (2020); Robyn Maynard. *Policing Black Lives: State Violence in Canada from Slavery to the Present*, 2017, Fernwood Publishing.

However, as former BC Superior Court Justice, the Honourable Donna Martinson observes, the Government of Canada has chosen not to enact such legislation arguing that it is unnecessary to do so.⁴⁶ By ratifying the Convention, Canada evidently has accepted its obligation to fully implement the CRC and has stated that it does not need implementing legislation because it already ensures and will continue to ensure that Canadian laws, policies, and practices comply with the Convention. Certainly, Canada reports periodically to the Committee on the Rights of the Child, as required, on its implementation of the CRC. For example, among other recommendations, the Committee's 2022 concluding observations call on Canada to ensure a child's right to have their best interests is considered as a primary consideration *in all judicial proceedings* (para 19) and to strengthen "community-based alternative sentences for incarcerated mothers of infants and other children" (para 32(f)).⁴⁷

Justice Martinson's interpretation, when read together with the international legal standards surveyed above, suggests that the principle of the best interests of the child as a primary consideration in decisions that directly and indirectly affect a child *should* apply to Canadian criminal courts when making bail and sentencing decisions about accused or convicted parents even though the criminal law does not explicitly stipulate this obligation. A strong argument can also be made that even in the absence of implementing legislation, there is a presumption that the Canadian Charter of Rights and Freedoms (the Charter) protects the rights of the child under the CRC and other international human rights instruments (like

The Inglis Decision

Section 7 and 15 Charter Arguments

The best interests of the child was a significant legal consideration in a 2013 British Columbia (BC) Supreme Court decision, [Inglis versus British Columbia \(Minister of Public Safety\)](#), successfully challenging the province's unilateral cancellation of a residential mother-child program at a provincial correctional centre for women. The constitutional challenge, asserting unjustifiable infringements of section 7 (right to life, liberty and security of the person), section 12 (cruel and unusual punishment), and section 15 (equality) Charter rights, was brought by two former inmates and their children on behalf of themselves and other provincially incarcerated women.

The court found that the province's decision to cancel the program unjustifiably violated the plaintiffs' section 7 rights to security of the person (recognizing the right of mothers and infants to remain together as an aspect of security of the person) and section 15 equality rights (recognizing the mothers and their children as members of a vulnerable and disadvantaged social group, with cancellation of the program contributing to further disadvantage of the group, noting in particular the experiences of Indigenous women and their children in relation to overrepresentation in prison and a history of cultural dislocation imposed by the state). *Inter alia*, the presiding justice, Madam Justice Ross, concluded that the concept of the best interests of the child, both as a matter of applicable international law and domestic child welfare legislation, was contextually important for the case. She observed that the provincial government could not "sidestep the principle that in all state actions concerning a child, the best interests of the child shall be a primary consideration". *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 (para 371).

⁴⁶ Donna Martinson, 2016, p. 16.

⁴⁷ Committee on the Rights of the Child, "Concluding Observations on the Combined Fifth and Sixth Reports of Canada", CRC/C/CAN/CO/5-6, 9 June 2022.

the ICCPR and the ICESCR noted above) that Canada has ratified.⁴⁸ Arguably, then, the legal principles of the best interests of the child and a child's right to family life should be protected by section 7 of the Charter while the differential impacts of bail and sentencing for racialized minority children and their parents should be protected by s. 15(1) of the Charter as was successfully argued in the Inglis case, although in a slightly different legal context.⁴⁹

2. Canadian Criminal Law and the Best Interests of the Child

As prefaced, both the decision to grant or deny bail (judicial interim release) and sentencing decisions, including any conditions imposed on an adult defendant, can adversely affect the rights and best interests of their dependent child(ren). Despite these known adverse effects, Canadian criminal law does not expressly recognize the rights or best interests of a child whose parents are before the courts as a criminally accused or convicted person. This legislative oversight raises a potential legal argument about substantive *inequality* since the best interests of the child is legislatively recognized and protected in other (sometimes potentially less harmful) situations involving the voluntary (child custody in the context of separation and divorce, as well as adoption) and forced state (child protection) separation of a child(ren) from their parents.

Applicable Canadian Legal Standards

Canadian Charter of Rights and Freedoms, especially section 7 (personal security rights) and section 15 (equality rights and the principle of non-discrimination), and various legal rights (sections 7-14)

Canadian Criminal Code offences stipulating maximum and mandatory minimum sentences

Canadian Criminal Code provisions on bail and pre-trial detention, especially sections 493 and 515 in relation to decisions to release a defendant on bail or otherwise or remand them to custody, including the principle of judicial restraint and paying particular attention to Indigenous persons and the members of other vulnerable groups who are overrepresented in the criminal justice system

Canadian Criminal Code section 717 on alternative measures (diversion) for adults

Canadian Criminal Code Part XXIII on sentencing, especially section 718 (purpose and principles of sentencing), including principles emphasizing rehabilitative and reparative approaches, section 718.2(a) on aggravating and mitigating factors relating to the personal circumstances of the offender, the section 718.2(d) principle of judicial restraint and the section 718.2(e) remedial section, section 721 on pre-sentence reports, section 722 on victim and community impact statements, section 726 on other relevant information, and sections 730-745 on various sentencing options

Applicable case law on alternative measures, bail, and sentencing

Judicial picklists

Policy guidance to federal and provincial Crown prosecutors

Practice checklists for defence counsel

⁴⁸ Donna Martinson at p. 16 who describes "Canadian case law says that the Charter must be presumed to provide protection at least as great as the Convention and other international treaties".

⁴⁹ The Inglis decision, *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, affirming the sections 7 and 15 rights of incarcerated mothers and their children, is not only important as a matter of domestic law but is promoted by advocacy organizations as an international best practice in relation to the judicial recognition of the rights of children of incarcerated parents.

In Canada, section 515 of the Criminal Code, along with the applicable case law and constitutionally protected rights like the rights to be presumed innocent and to reasonable bail, is the main legal provision governing judicial interim release (bail) and pre-trial detention decisions, including enumerated grounds for pre-trial detention (section 515(10)). Importantly, section 493.1 of the Criminal Code legislatively requires judges to exercise restraint by releasing a defendant at the earliest opportunity and to impose the least onerous conditions on that release, while section 493.2 requires that a judge pay particular attention to Indigenous defendants and defendants who belong to a vulnerable population that is overrepresented in the criminal justice system. To date, despite the acknowledged overuse of pre-trial detention and its disparate impacts on Indigenous and Black people, many of whom are parents, there has been limited scholarly analysis of adult bail decisions to ascertain whether the rights and best interests of affected children hold any or much sway.⁵⁰ Certainly, the complexity of *legislatively ignoring* the best interests of a child(ren) in bail decisions involving a parent is now being recognized by the courts in criminal cases involving family violence, especially when there are intersections with family law and/or child protection law.⁵¹ As well, Crown and defence counsel guidance documents like the BC Crown policy manual on adult bail⁵² and the Law Society of British Columbia Practice Checklists on Judicial Interim Release⁵³ each recognize the adverse impact of bail/pre-trial detention decisions on the family to varying degrees.

Like bail decisions, judicial sentencing is guided by the Criminal Code, along with applicable case law and the Charter. In particular, section 718 articulates the purpose and principles of sentencing, including enumerating several aggravating factors extending to offences committed against children. section 721 of the Criminal Code authorizes probation officers to prepare pre-sentence reports, which may include information about a person's child(ren), while section 722 on victim and community impact statements and section 726 authorizing a court to consider "any relevant information placed before it,

⁵⁰ See, e.g., Jillian Anne Rogin, "The Application of Gladue to Bail: Problems, Challenges, and Potential", LLM Thesis, Toronto: Osgoode Hall Law School of York University, 2014.

⁵¹ Alexander Russell, "Court Opines on Impact of Criminal Bail Conditions on Families", Family LLB Ontario Divorce Education Centre, citing the cases of *R v. Khinda*, 2020 ONSC 7275 and *Shaw v. Shaw*, 2008 ONCJ 120, [2008] O.J. No. 1111 (Ont. C.J.), 9 February 2021. Available: <https://familyllb.com/2021/02/09/court-opines-on-impact-of-criminal-bail-conditions-on-families/>.

⁵² British Columbia Prosecution Service, "Crown Policy Manual: Policy Bail – Adults", 15 January 2021, which explicitly recognizes "[p]re-trial custody can affect the mental, social, and physical life of the accused and their family" at p. 1. Available: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/bai-1.pdf>.

⁵³ Law Society of British Columbia, "Practice Checklists Manual: Judicial Interim Release Procedure", December 2021, para 1.2.1(f). Available: <https://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/checklists/C-2.pdf>. The checklist includes seeking information from the defendant on their family such as the names, ages, and custodial status of children and especially whether any children rely on the defendant financially or emotionally, extending to any obligation to pay maintenance.

including any representations or submissions made by or on behalf of the prosecutor or the offender”, potentially enable the court to consider information about a parent’s dependent child(ren).

As is the case for bail decisions, sentencing courts are guided by the principle of restraint in the application of imprisonment. Specifically, section 718.2(d) of the Criminal Code states that “an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances”. Canadian courts are also required by section 718.2(e) to “consider all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal [Indigenous] offenders”. This section of the Criminal Code is remedial and is known as the ‘Gladue principle’ following its interpretation by the Supreme Court of Canada in the case of Jamie Gladue.⁵⁴ In this regard, judicially mandated social context submissions may be prepared for Indigenous persons (known as Gladue reports or Gladue letters) and for Black persons (known as Impact of Race and Culture Assessments or “IRCA” and other variants like Enhanced Pre-Sentence Reports or “EPSR”) that may include information about a sentenced parent’s children. The available research evidence, however, suggests that both types of social context reports should be further developed through a gendered and child-centered lens.⁵⁵

Useful Information for Sentencing Courts

According to the Children of Prisoners Europe (COPE), and affirmed by a select review of Canadian sentencing case law and policy guidance, examples of useful information for sentencing courts include:

- the names and ages of the children;
- the plan for their care if their parent is imprisoned including the suitability of prospective carers in terms of finances, age and health;
- whether siblings will be separated as a consequence of parental imprisonment;
- whether their education will be disrupted by parental imprisonment;
- any particular health or emotional needs of the children;
- and, whether the children will be able to visit their parent if they are imprisoned

Data should also be collected on the consequences of parental imprisonment on children to provide local context for sentencing decisions. Source: COPE, *Keeping Children in Mind*, 2019, pp. 22-23.

⁵⁴ R. v. Gladue [1999] 1 SCR 688.

⁵⁵ See, e.g., Charlotte Baigent. “Why Gladue Needs an Intersectional Lens: The Silencing of Sex in Indigenous Women’s Sentencing Decisions. *Canadian Journal of Women and the Law*, 32(1) 2020, 1-30. DOI: 10.3138/cjwl.32.1.01; Patricia Barkaskas, Vivienne Chin, Yvon Dandurand, and Dallas Tooshkenig,” *Production and Delivery of Gladue Pre-sentence Reports A Review of Selected Canadian Programs: Report submitted to the Law Foundation of British Columbia*”, Vancouver: ICCLR (2019); Daniela Castroparedes Herrera, “Considering the Best Interests of the Child Within the Impact of Race and Culture Assessments for African Canadian Offenders,” Unpublished Honours Thesis. Abbotsford: University of the Fraser Valley. 2021; Elspeth Kaiser-Derrick, “Implicating the System: Judicial Discourses in the Sentencing of Indigenous Women”, University of Manitoba Press, 2019.

Unlike other jurisdictions, Canadian sentencing policy does not legislatively recognize the gendered effects of sentencing as a mitigating factor (United Kingdom), the principle of “excessive hardship to dependents” (some jurisdictions in Australia), or family ties and responsibilities as a downward departure for sentencing (some American states). And in view of different treaty obligations there is a lack of appellate jurisprudence directing the lower criminal courts to take the best interests of a child (South Africa) or a child’s right to family life (United Kingdom) into account when sentencing a parent with a dependent child(ren).⁵⁶ When Canadian criminal courts have been willing to consider the impact of a sentence on an offender’s child(ren) they have done so from the perspective of the parent where the child is viewed as a “personal circumstance” of the offender consistent with section 718.2(a) of the Criminal Code⁵⁷ or as a collateral consequence of their parents’ sentence,⁵⁸ possibly weighing as a factor that results in the imposition of a shorter or community based sentence of imprisonment or an alternative sentence to imprisonment.

The courts have also been willing to consider the gendered effects of imprisonment in some circumstances, especially in cases involving racialized women who are sole care providers and/or who may be deported following completion of their sentence (collateral immigration consequences). In particular, the adverse gendered and racialized effects of maternal sentencing on dependent children have been argued in the context of the section 718.2(e) remedial sentencing provision,⁵⁹ in constitutional challenges to mandatory

⁵⁶ See Hayli Millar and Yvon Dandurand at pp. 249-262 where we review the sentencing policies of six common law countries including Australia, Canada, New Zealand, the United Kingdom, the USA, and South Africa.

⁵⁷ Canadian Friends Service Committee (Quakers), “Considering the Best Interests of the Child when Sentencing Parents in Canada Sample Case Law Review”, 2018, at p. 3. In their systematic review of 97 cases, the Committee found, firstly, sentencing courts did not refer to the CRC, the Bangkok Rules, or the principle of the “best interests of the child” and took varying approaches to whether children had any impact on sentencing; secondly, while the “general circumstances of children had little impact on sentencing” the “prospect and evidence of rehabilitation ha[d] more impact on sentencing” in relation to the rehabilitative potential of parenting, especially for less serious offenses; thirdly, for serious offences, Canadian judges rely extensively on the principles of deterrence and denunciation, a finding echoed by many other legal scholars and practitioners who have called for sentencing reforms in Canada; and, fourthly, that Indigeneity had no impact on the weight given to the children of Indigenous parents and that the existence of the federal mother-child program was not a factor in sentencing mothers.

⁵⁸ For appellate guidance on the collateral consequences of sentencing, see *R v Pham*, 2013 SCC 15. On the application of collateral consequences to parents with children, see especially *R v Stanberry* 2015 QCCQ 1097 where the sentencing court considered Stanberry’s status as a single mother and the potential fragmentation of her family where her children would be separated because of her imprisonment and where one child suffered from serious medical challenges. In this case, the sentencing court carefully distinguished between the “unfortunate” versus “exceptional” consequences of imprisonment. While taking these collateral consequences and other mitigating factors into account, the court still imposed a sentence of 45 months imprisonment.

⁵⁹ Caregiving obligations have been judicially recognized in relation to Canada’s remedial sentencing provisions, encompassing section 718.2(e) of the Criminal Code and related trial and appellate jurisprudence to address the historical and intergenerational legacies of colonialism, systemic discrimination, and socio-economic disadvantage experienced by many Indigenous (legislatively and jurisprudentially recognized) and Black (jurisprudentially recognized) people in Canada. In the renowned *Gladue* (1999) decision, the Supreme Court of Canada, in recounting

minimum sentences,⁶⁰ and in contesting legislative restrictions on conditional sentences of imprisonment.⁶¹ Nevertheless, the available jurisprudential and empirical evidence suggests that the Canadian criminal courts do not *routinely* consider the potential effects of a parent's sentence on their dependent child(ren).⁶² Most importantly, there appear to be very few cases where the sentencing courts have been willing to consider a parents' sentence from the perspective of their child whose best interests should be taken into account as a primary (in other words, as an important) and separate legal consideration. And in one of the few cases where the best interests of the affected children were judicially considered, *R. v. Hamilton*, the sentencing judge was reversed on appeal, a decision that was anticipated would "serve to chill efforts by sentencing judges to tailor their responsibilities to accord with the recognized realities of systemic and intersectional inequality in Canadian society".⁶³

the judicial history of the case, recognized trial-level mitigating factors, including that Gladue had two dependent children. At the same time, it is noteworthy that the sentencing court discounted Gladue's pregnancy with a third child at the time of her sentencing, which was treated as a neutral factor with no separate consideration for the best interests of her children.

⁶⁰ See, e.g., the legal factum prepared by West Coast LEAF as an intervener in the Supreme Court of Canada *Lloyd* versus the Queen case challenging the constitutionality of mandatory minimum sentences in relation to the hypothesized negative gendered effects for women at p. 23. Available: <http://www.westcoastleaf.org/wp-content/uploads/2016/01/Lloyd-factum-Supreme-Court-of-Canada.pdf>.

⁶¹ See, especially, *R. v. Sharma* 2020 ONCA 478 although the Supreme Court of Canada (2022 SCC 39) reversed this decision. Cheyenne Sharma, a single Ojibwa mother from the Saugeen First Nation who was trying to prevent herself and her child from being evicted and becoming homeless and who was also an intergenerational residential school survivor, pleaded guilty to importing two kilograms of cocaine into Canada, a crime that she committed out of financial desperation. At sentencing, Sharma (unsuccessfully) challenged the constitutionality of the Criminal Code restriction on the availability of a conditional sentence of imprisonment that could be served in the community as a violation of her section 15(1) rights to equal protection and benefit of the law (*R. v. Sharma* 2018 ONSC 1141 [para 243]) and was sentenced to 18 months imprisonment. On appeal to the Ontario Court of Appeal, Sharma successfully argued that sections 742.1(c) and (e)(ii) of the Criminal Code denying her the benefit of a conditional sentence violated her section 7 (deprivation of liberty) and section 15 (equality) rights constituting race-based discrimination based on her Indigeneity. In striking down the impugned provisions, the Ontario Court of Appeal substituted a conditional sentence of 24 months less a day for the previously imposed 18-month sentence. The Supreme Court of Canada (2022 SCC 39), in a split 5:4 decision, disagreed with the Ontario Court of Appeal and restored the original sentence. Still, the four dissenting Supreme Court of Canada Justices (Karakatsanis, Martin, Kasirer, and Jamal) recognized the intersectional and compounding discrimination that Indigenous women face and that "...the costs to the equality interests of Indigenous peoples [through ineligibility to conditional sentences] are still more profound, since they may include separation from one's community, work or family — *harms only exacerbated in the case of young single mothers* — while contributing to the continued overrepresentation of Indigenous offenders in prison, with all of its intergenerational fallout" [para 258; emphasis added]. Significantly, Bill C-5: An Act to amend the Criminal Code and the Controlled Drug and Substances Act, 2022, has now legislatively expanded the availability of conditional sentences. Available: <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-5/royal-assent>.

⁶² In *R. v. Hamilton*, 2003 CanLII 2862 (ONSC), the Ontario Superior Court expressly recognized the differential circumstances—including, racial and gender bias and poverty—experienced by Black women convicted as transnational drug couriers, many of whom are single parents, stating that: "As a general rule, the sentencing function should take account of the best interests of an offender's wholly dependent children" (para 197). However, the trial judge was severely criticized on appeal for leading the evidence on systemic discrimination and overstepping the bounds of a sentencing court. See *R. v. Hamilton et al.* Ontario Court of Appeal, 72 O.R. (3d) 1, [2004] O.J. No. 3252.

⁶³ Richard Devlin and Matthew Sherrard, "The Big Chill?: Contextual Judgment after *R. v. Hamilton*", *Dalhousie Law Journal* 28, 2 (2005): 409.

Challenges and Opportunities Moving Forward

As we have discussed in more detail elsewhere,⁶⁴ Canadian criminal courts are likely to encounter various challenges in recognizing and considering the best interests of a dependent child(ren) as a primary consideration when making bail and sentencing decisions for their parent. For example, there are concerns about a child and a family's right to privacy, protected by both the CRC and the Charter, given that pre-trial detention or a sentence of imprisonment may result in a child(ren) being removed and placed in alternative care. Accordingly, in situations where the child is not a direct victim of their parents alleged or proven criminal behaviour, good practice guidance suggests that it must be up to the affected parents and their children to bring their personal information to the attention of defence counsel and/or the sentencing court.

As well, there are questions about who should prepare information for the court assessing the potential impact of a bail or sentencing decision on a dependent child(ren). Notably, there are existing good practices ranging from having a court-appointed child advocate (South Africa) to probation officers and other experts preparing child or family or health equity impact assessments as part of a pre-sentence or other report (UK and the USA).

A child's right to have their best interests considered as a primary consideration in judicial decisions that affect them is also complicated because it is directly connected to a child's right to have their views considered under article 12 of the CRC. The Canadian courts will need to find ways to give effect to these participatory rights, as they are already doing in other, especially family law, legal contexts.

There are questions too about what weight the courts should place on the potential consequences of a bail or sentencing decision on a dependent child(ren). Existing guidance suggests that such assessments must be individualized (made on a case-by-case

Selected Resources and Practical Guidance for Criminal Courts

[CBA Collateral Consequences of Criminal Convictions](#)

[CBA Child Rights Toolkit](#)

[CCPHE Guidelines for the implementation of mother-child units in Canadian correctional facilities](#)

[COPE Keeping children in mind: Moving from 'child-blind' to child-friendly justice during a parent's criminal sentencing toolkit](#)

[ICCLR, EFRY, UFV Enhancing the protective environment for children of parents in conflict with the law or incarcerated: A framework for action](#)

[Families Outside UK Best interests of the child when sentencing a parent: Some reflections on international and regional standards and practice](#)

[Law Society of Ontario Guide for Lawyers Working with Indigenous Peoples](#)

[S v M \(CCT 53/06\) \[2007\] ZACC 18; 2008 \(3\) SA 232 \(CC\); 2007 \(12\) BCLR 1312 \(CC\) \(26 September 2007\)](#)

⁶⁴ Hayli Millar and Yvon Dandurand at pp. 273-276.

basis) and that while a child's best interests are an important consideration, they are only one of many factors a bail or sentencing court must balance. And there are concerns that taking the rights and best interests of a dependent child into account will further complicate and delay criminal proceedings. Most of these concerns are surmountable, and a range of practical guidance is available to assist defence counsel, crown prosecutors, and judges on these matters.

Despite these and other identified challenges, there is reason for optimism. Firstly, Canadian policymakers, practitioners, and advocates are increasingly aware of the importance of reducing adverse childhood experiences in other legal contexts, especially family law.⁶⁵ Secondly, policymakers, practitioners and advocates have been instrumental in legislatively developing the best interests of the child test in other legal contexts, especially separation, divorce, and family violence, by enumerating the many factors, including Indigenous rights to cultural continuity and substantive equality, that judges must consider in determining the best interests of a child as a primary consideration in the judicial decisions that affect them. Thirdly, policymakers and others are increasingly prioritizing the pressing need to address systemic racism and other intersecting forms of discrimination (like gender and socio-economic marginalization) across the criminal justice process and in the child welfare system, especially for Indigenous and Black peoples, with various initiatives being proposed and implemented nationally and in BC.⁶⁶ These initiatives range from recognizing Indigenous rights to self-determination and the exercise of jurisdiction over child welfare to prioritizing adult diversion via alternative measures to increasing funding and training for social context (Gladue and IRCA) reports to repealing mandatory minimum sentences and legislative restrictions on conditional sentences. The most recent data from the Office of the Correctional Investigator indicating that the proportion of federally sentenced Indigenous women, many of whom are parents with dependent children, has now reached 50%, underscores the vital importance of rapidly taking effective actions, consistent with the [TRC's Calls to Action](#) (especially on child welfare; education; language and culture; health; and justice) and the [National Inquiry into Missing and Murdered Indigenous Women and Girls Calls for Justice](#) (especially on culture; health and wellness; human security; justice; and training for legal professionals and social workers). Finally, in part because of the pandemic, there is increasing awareness and pressure for policymakers and practitioners to pay more attention to the *qualitative conditions* of detention and imprisonment by considering "the likely experience of a proposed custodial sanction in

⁶⁵ For example, the province of BC recently announced a Transform the Family Justice System (TFJS) collaborative, available: <https://www.thelawyersdaily.ca/articles/37189/b-c-family-law-collaborative-seeks-new-approach-to-deal-with-adverse-childhood-experiences>.

⁶⁶ For example, Canada is in the process of developing a Black Justice Strategy, available: <https://www.justice.gc.ca/eng/cj-jp/cbjs-scjn/index.html>.

crafting a fit sentence” and not just the quantum of imprisonment.⁶⁷ Presumably, these various pockets of increased awareness and law reform will have some spillover effect into judicial bail and sentencing decisions in criminal matters where the known adverse and often multigenerational harms of parental detention and imprisonment for dependent children are well documented and largely preventable.

⁶⁷ See, e.g., Chris Rudnicki, “Confronting the Experience of Imprisonment in Sentencing Lessons from the Covid-19 Jurisprudence”, *The Canadian Bar Review*, 99(3) (2021): 469-487. Available: <https://cbr.cba.org/index.php/cbr/article/view/4708/4511>.



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