International Centre for Criminal Law Reform
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The Role for Defence Counsel to Ensure Judges Consider the Best Interests of the Child When Sentencing a Parent

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International Centre for
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August 2023

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The Role for Defence Counsel to Ensure Judges Consider the Best Interests of the Child When Sentencing a Parent

Richard Fowler, K.C.

Overview

Children can be the direct victims of crimes committed by one or both of their parents. They may suffer physical assault, in the most extreme cases leading to death; sexual offences including assaults, invitations to sexual touching and child pornography; or neglect or abandonment that are serious enough to amount to a criminal offence. Children can also be victims when witnessing crimes committed by one of their parents, for example the physical abuse of an intimate partner, often the other parent, or stepparent of the child. Such direct victimization of children significantly increases the seriousness with which a judge will view the offence. In fact, sections 718.2(a)(ii), (ii.1) and (iii) of the Criminal Code deem the abuse of a person under 18 or a family member, and/or the abuse of a position of trust or authority in relation to the victim, aggravating factors for sentencing.

In addition, children are frequently indirect victims when one or both of their parents, or care givers, commit crimes and are sentenced. This paper will consider the extent to which courts are able to consider the effects on dependent children when sentencing offenders. The focus here is where a child is the indirect victim of a parent's criminal conduct, for example where a mother is being sentenced for fraud, or a father for a drug offence, both of which are likely to lead to a period of incarceration, not those cases where a child is the direct victim of a parent's criminal conduct.

It is argued that statutory and common law sentencing principles, analyzed in conformity with Canada's international legal obligations, require courts to meaningfully consider the best interests of children when sentencing a parent. Consequently, it is incumbent on defence counsel to ensure that a judge is fully informed about the effects of any sentence on a dependent child.

Introduction

When a parent becomes involved with the criminal justice system, dependent children are effected immediately: a child may witness their parent being arrested and learn very little about why, or when they might be returning home; a child is likely very ill equipped to deal with the stigma of media accounts of why their parent was arrested; a parent who is denied bail will likely be incarcerated many miles from their children (this is especially true when mothers are incarcerated because there are fewer institutions for women offenders); bail conditions not infrequently significantly restrict a parent's freedoms – for

example they might be under house arrest, electronic monitoring, a curfew, prohibited from driving or travelling either out of or within a province - all of which will also have some effects on a dependent child; a trial will be stressful, disruptive and potentially a financial burden; and finally, if convicted, all types of sentences will have some effect on any dependent child, with incarceration of a parent obviously likely having the greatest impact.

Criminal justice policy experts are increasingly concerned about these impacts on dependent children whose parents are involved with the criminal justice system. Impacts can include both "immediate and long-term emotional, psychological, financial, material, physical and social impacts"[1]. A child's life can be significantly disrupted, moving homes and schools, losing connections with friends and other family members, and in many cases being taken into the care of child protection services. Moreover, such impacts affect Indigenous and minority children disproportionately. Maternal incarceration, women being the fastest growing inmate population in Canada and other countries, may correlate with specific development problems like attachment insecurity, as well as unstable caregiving arrangements.[2] Despite the difficulty proving a causal connection between a parents incarceration and a dependent child's future antisocial behaviour or poor mental health, there is little dispute that the incarceration of a parent is very likely to seriously exacerbate any other attendant disadvantages, leading to considerably poorer prospects for the offender's children.

So, what can we try to do?

Legal Framework

International Law - Best interests of the Child

It is well established that Canadian domestic law is presumed to conform with Canada's international obligations. Therefore, international law can help define the scope of Canada's domestic law.[3]

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[1] H Millar and Y Dandurand, '*The Best Interests of the Child and the Sentencing of Offenders with Parental Responsibilities'* 2018 Criminal Law Forum, vol. 29(2) pages 227-277 at page 229

[2] For extensive discussion of the academic literature and research see Millar and Dandurand, *ibid,* at pages 229-238.

[3] *R. v. Hape* 2007 SCC 26:

> (4) Conformity With International Law as an Interpretive Principle of Domestic Law
>
> 53 One final general principle bears on the resolution of the legal issues in this appeal. It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result. R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 422, explains that the presumption has two aspects. First, the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those

Canada ratified the UN *Convention on the Rights of the Child* [*CRC*]in 1991. The preamble recognizes the fundamental importance of the family as the environment in which to raise children, urging states to provide necessary protection and assistance so it can assume its responsibilities. More specifically, in all legal, administrative, social welfare and legislative actions concerning children, the best interests of the child must be he primary consideration.[4] Furthermore, a child must be provided an opportunity to be heard in any judicial or administrative proceedings affecting them.[5]

While no provincial legislation in British Columbia explicitly refers to the *CRC*, the principle of the best interests of the child has been widely adopted in legislation specifically dealing with children.[6]

The *CRC* has received explicit recognition in Canadian domestic law. For example, the preamble to legislation amending sections of the *Criminal Code* dealing with sexual offences against children references the *CRC*: "Whereas Canada, by ratifying the United Nations Convention of the Rights of the Child, has undertaken to protect children from all forms of sexual exploitation and sexual abuse."[7]

Within the sentencing context generally, for all offences that involve the abuse of a child, justification for primary consideration being given to deterrence and denunciation is again grounded in part in Canada's obligations as a signatory to the *CRC*, as well as optional protocols concerning child pornography. [8]

> obligations. The second aspect is that the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them. The presumption is rebuttable, however. Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation. See also P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at pp. 367-68.

[4] United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, in force 2 September 1990, ratified by Canada 1991.

https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf

Article 3

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.

[5] Article 12

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

[6] See for example: Family Law Act, SBC 2011, c 25; Child, Family and Community Service Act, RSBC 1996, c 46

[7] An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act, SC 2005, c 32

[8] See: *R. v. W.(D.R.)* 2012 BCCA 454; and *R. v. B.C.M.* 2008 BCCA 365

The *CRC* is referenced in the preamble to the *Youth Criminal Justice Act*: "WHEREAS Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms..."[9]

Unsurprisingly, the *CRC* has also been referenced as a source of authority in establishing principles concerning the prosecution of youth. For example, the conclusion that the presumption of diminished moral culpability is a principle of fundamental justice is supported by Canada's commitments to the *CRC*.[10] The placing of a youth in solitary confinement for over two years required the court to stay the proceedings in part because such conduct "contravened Canada's international obligations under the United Nations Convention on [the] Rights of the Child".[11] Courts have found support for enhanced procedural protections throughout the criminal justice process, including a guarantee of the right to state funded counsel, and privacy, based in large part on the *CRC*.[12] And the right of a child to be heard in any administrative or judicial proceeding, as set out in Article 12 of the *CRC*, was one source of authority supporting the conclusion that a decision of the Deputy Attorney General of Ontario, made without any input from the accused, requiring a jury trial contrary to the wishes of the accused, was an abuse of process.[13]

It is therefore clear that Canada's legislatures, and the Courts, have attempted to ensure that statutes and the common law conform with international obligations under the *CRC*.[14]

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[9] Youth Criminal Justice Act, SC 2002, c 1

[10] See: R. v. **D.B.**, 2008 SCC 25

> [59] This legislative history confirms that the recognition of a presumption of diminished moral culpability for young persons is a long-standing legal principle.
>
> [60] It is also a legal principle that finds expression in Canada's international commitments. The United Nations *Convention on the Rights of the Child*, explicitly mentioned in the preamble to the *YCJA*, was ratified by Canada in 1992 (Can. T.S. 1992 No. 3). Paragraph 1 of art. 40 of the Convention states:
>
> > 1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

[11] R v **CCN**, 2018 ABPC 148 at para. 96

[12] See: R. v. **T.J.M.**, 2021 SCC 6 re. jurisdiction of youth courts and **R. v. M. (B.)**, **1998 CanLII** 27763 (ON CJ) re. state funded counsel for youth. Enhanced protections of the privacy of young persons in conflict with the law have been widely recognized. See: **R. v. Z.W.**, 2016 ONCJ 490 at para 46:

> The status of privacy as a value in the *Youth Criminal Justice Act* cannot be under-estimated. The Preamble to the *Act* notes that Canada is a party to the *United Nations Convention on the Rights of the Child*. Article 40 of the *Convention* provides that
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> > Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
> >
> > (vii) To have his or her privacy fully respected at all stages of the proceedings.

[13] R. v. G.C., 2010 ONSC 178 (CanLII)

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

Within the criminal law the *CRC* is persuasive authority referenced in support of enhanced procedural protections for youth offenders, and for emphasizing deterrent and denunciatory sentences for people who offend against children.

Sentencing – Collateral Consequences

The process of sentencing is highly flexible and individualized to the circumstances of the offender and the offence. Individualization is limited by the parity principle which requires that similar offenders for similar offences receive similar sentences.[15] Ultimately, any sentence must be proportionate to the gravity of the offence and the degree of responsibility, or moral blameworthiness, of the offender.[16]

It is now generally accepted in Canadian sentencing jurisprudence that a judge can consider, in fashioning a fit and appropriate sentence, so called collateral or indirect consequences. Such consequences are neither aggravating nor mitigating factors, but rather they are the personal circumstances of the offender which are relevant to the individualization of the sentence. In addition, some collateral consequences may be relevant to the statutory objective of assisting in rehabilitating offenders.[17]

There is no list of what collateral consequences may be considered. There is no formula for computing the extent to which collateral consequences will impact the determination

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> Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification [page861] by Canada of the *Convention on the Rights of the Child*, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute: ***Francis v. The Queen***, 1956 CanLII 79 (SCC), [1956] S.C.R. 618, at p. 621; ***Capital Cities Communications Inc. v. Canadian Radio-Television Commission***, 1977 CanLII 12 (SCC), [1978] 2 S.C.R. 141, at pp. 172-73. I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.
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> ¶ 70 Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:
>
> [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]
>
> The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, ***Tavita v. Minister of Immigration***, [1994] 2 N.Z.L.R. 257 (C.A.), at p. 266; ***Vishaka v. Rajasthan***, [1997] 3 L.R.C. 361 (S.C. India), at p. 367. It is also a critical influence on the interpretation of the scope of the rights included in the Charter: ***Slaight Communications***, supra; ***R. v. Keegstra***, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697.

[15] **R. v. Pham**, 2013 SCC 15 at para. 9

[16] See: **R. v. Ipeelee**, 2012 SCC 13 at para.37 and 39

[17] *Pham, supra,* at para. 11

of what is a fit sentence. However, accounting for collateral consequences must not lead to an otherwise disproportionate sentence.[18]

In summary, four observations can be made about the sentencing process that are particularly relevant to considering how effects upon a dependent child can be considered during the sentencing process:

1. Sentencing is highly individualized;
2. Sentencing judges must have sufficient manoeuverability to tailor sentences to the circumstances if the particular offence and offender;
3. Tailoring sentences may require the judge to look at collateral consequences; and
4. Examining collateral consequences enables a judge to craft a proportionate sentence by considering all relevant circumstances.[19]

Courts have to a very limited extent considered the collateral consequences arising from a parent's separation from their children. Ms. Stanberry, a single mother of two children, pleaded guilty to importing 2.35kg of cocaine. Any term of imprisonment would necessarily mean she would be separated from her two daughters aged seven and three at the time of sentencing. The trial judge described this as "unfortunate but not exceptional" and not "justifying a significant adjustment of an otherwise appropriate sentence."[20] However, the trial judge held that two additional collateral consequences, the two children would be separated from each other, and Ms. Stanberry would be separated from her younger daughter who suffered from serious medical difficulties, would cause "incalculable adverse effects both for the offender and her children"[21] and must be taken into account.

How exactly these collateral consequences were considered is unclear as the sentence of 45 months, significantly below what the crown was seeking, was justified mainly by the accused's mitigating circumstances rather than any collateral consequences. The court still felt compelled to impose an "exemplary sentence that gives due expression to the objectives of denunciation and deterrence",[22] rather than a conditional sentence because the circumstances of the case were not exceptional. It is a sad commentary on our criminal justice system that a mother's separation from a three year old daughter with serious medical difficulties is not considered an exceptional circumstance. In fact, in *Holub*[23] the

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[18] R. c. Stanberry, **2015 QCCQ 1097** at paras. 16 to 24

[19] R. v. **Suter**, 2018 SCC 34

[20] *Stanberry, ibid,* at para. 18

[21] *Stanberry*, *ibid*, at para. 20

[22] *Stanberry, ibid* at para. 25

[23] R. v. **Holub**, 2002 CanLII 44911 (ON CA) This case involved a mother and father jointly convicted of fraud. The mother was pregnant at the time of sentencing – which caused the Court of Appeal "concern". However, the mother's

Ontario Court of Appeal went as far as describing the separation of a father from his 13 months old daughter while incarcerated as "unfortunate" but a consequence of incarceration for many offenders. Neither court considered Canada's international obligations under the *CRC*.

The outcome in *Kaneza*[24] was similar; the accused, a single mother of three children (who were in foster care in Belgium because of violence by the then estranged father) would be physically and geographically separated from her children entailing incalculable adverse effects for both the mother and the children. The crown sought a sentence of 12 to 15 years for the importation of 2.92 kg of heroin. The court considered that the mitigating factors and collateral consequences justified a sentence at the lower end of the range and imposed 11 years. Again, the incalculable impacts on the children, clearly had a very modest effect on the sentence.

A more significant outcome arose in *McDonald*[25] wherein the court allowed an appeal from an order remitting the offender back to custody for breach of a conditional sentence order, in part because of the adverse effects upon the children of a custodial sentence. Similarly, in *Hadida*[26] the Ontario Court of Appeal emphasized that the offender's wife and children were completely dependent upon him; a custodial sentence would be a very great hardship inconsistent with the interests of justice. Furthermore, in *Rockey*[27] the Ontario Court of Appeal again emphasized "the extensive evidence on the hardship that would accrue to the appellant's large family should he be incarcerated" in substituting a conditional sentence for an 18-month term of imprisonment.

Based on existing case-law, the best that can be said is that the collateral consequence for the offender of dependent children is that it might help to convince a court to order a conditional sentence rather than incarceration, or minimally reduce the length of incarceration, but otherwise Court's pay very little substantive attention to the impacts on dependent children when sentencing a parent. Despite the flexibility and individualized approach to sentencing, and the apparent frequency with which children are impacted by the incarceration of a parent[28], it is surprising that no cases refer to the *CRC* when considering this specific collateral consequence. Those cases that do consider the impacts of separating a parent from a child largely consider it from the perspective of the parent – in other words it is the parent that will be impacted by being separated from their child.

"current situation" did not warrant varying the custodial sentence to a conditional sentence. It was "fortunate that there are maternal grandparents who are willing and able to look after the child."

[24] R v **Kaneza**, 2015 ABQB 658, affirmed, R v. **Kaneza**, 2016 ABCA 411 – the court disagreeing that the trial judge had minimized the collateral consequences regarding the children.

[25] R. v. McDonald, **2016 NUCA 4**

[26] R. v. **Hadida**, 2001 CanLII 24046

[27] R. v. **Rockey**, 2016 ONCA 891

[28] Both *Stanberry, supra* and *Holub, supra*, reference the impact on dependent children occurring in many cases and not exceptional.

There is little to no meaningful analysis of the distinctly meaningful impacts on the child themselves, most likely because there is rarely, if ever, detailed information of these impacts placed before the court.

Collateral Consequences – The Law Evolving

The law in respect of collateral consequences in sentencing is, as the common law generally permits, incrementally evolving. In *Suter*[29] the majority of the Supreme Court of Canada considered the extent to which vigilante violence inflicted upon the offender could be considered by the sentencing judge as a collateral consequence. Traditionally collateral consequences flow from the conviction or the length of sentence, rather than from peripheral events.

However, in *Suter* the Supreme Court endorsed the views of Professor Alan Manson that collateral consequences can also emerge from the very act of committing the offence, such that collateral consequences can now include "**any** consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence that impacts the offender."[30] In other words, collateral consequences must relate to the offence or to the circumstances of the offender.

After reviewing Canadian and international jurisprudence, as well as academic writing,[31] the Supreme Court endorsed an evolution in the sentencing jurisprudence to recognize that the impacts of vigilante violence experienced by the accused "should .. be considered to a limited extent" when determining an appropriate sentence as it is inextricably linked to the circumstances of the offence.

One way the sentencing common law should evolve, to ensure that it is consistent with Canada's international obligations, is by extending collateral consequences to include consequences that not only impact the offender but also impact an offender's dependant children. The rights of children and the best interests of the child are guiding principles within the *CRC* that need to be always respected in judicial or administrative proceedings which affect the child; and it is obvious that the sentencing of a parent is a judicial proceeding which will impact a child in immeasurable ways.

What can defence counsel do?

Of course, defence counsel's responsibility is to act in the best interests of their client. Counsel cannot have divided interests – they cannot attempt to act in the best interests of a dependent child to the detriment of their client. However, in some cases, providing

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[29] R. v. **Suter**, 2018 SCC 34

[30] *Suter, ibid,* at para 47

[31] *Suter, ibid*, at paras 50 to 58

evidence to the court of the impact of a sentence on the dependant child will also be beneficial to the client.

How can information about the impacts upon dependant children be provided to the Court?

1. A court may order a report to be prepared by a probation officer to assist the court in imposing sentence.[32] The contents of a report may be established by provincial regulation or specified by the court.[33] Although the content of a report is generally the limited to an assessment of the offender's background and prospects[34], there is nothing to prevent a court requesting information about the impact of any sentence on dependent children. The probation officer could be directed by the judge to talk to the children, for example.

2. A sentencing judge must provide the offender an opportunity to make submissions about any facts that are relevant to the sentence to be imposed. A court of its own motion may require production of evidence, including compelling the appearance of any compellable witness, that would assist it in determining the appropriate sentence.[35] In appropriate circumstances, a court may be encouraged to direct that the other parent attend to provide evidence about the likely impacts of any sentence on a dependent child.

3. The court must provide the offender an opportunity to address the court before the passing of sentence, although this is not normally an opportunity to provide further evidence.[36] Arguably, given the requirement that Canada's law be interpreted consistent with its international obligations, this section could be expanded to require that a court hear from a dependant child, consistent with Article 12 of the *CRC*.[37]

4. A sentencing judge is required to consider any relevant information presented on behalf of the offender.[38] Hearsay evidence is also admissible provided it is credible and trustworthy.[39]

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[32] Section 721 *Criminal Code* – Report by Probation Officer.

[33] Section 721(2) – regulations re content and form of a report and Section 721(3) – Content of report can be specified by the judge

[34] See for example R. v. **Junkert**, 2010 ONCA 549

[35] Section 723 *Criminal Code*

[36] Section 726 *Criminal Code* and see for example R. v. **Gouthro**, 2010 ABCA 188

[37] Article 12

2 For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

[38] Section 726.1 *Criminal Code*

[39] Section 723(5) *Criminal Code* and see R. v. **Pahl**, 2016 BCCA 234

A judge has a broad jurisdiction to receive information at a sentencing hearing: it must be relevant, credible and trustworthy. The primary source of information will be counsel's submissions. However, there is nothing preventing a judge from specifying that a pre-sentence report also contain information about impacts of sentencing on dependent children. It could be beneficial, depending on the age of the child, to have them testify at the sentencing hearing.

It will be best to provide to the court a detailed account of all the impacts on the dependant child from the child's perspective. Not only the practical inconveniences or changes but also the intangible losses of guidance and affection. For example, counsel could provide details of a normal day or weekend, setting out all the ways the offender contributes to the child's life.

Conclusion

Canada has been a signatory to the *CRC* for many years. Canada's domestic law, both statutory and caselaw, is presumed to conform with Canada's international obligations. In fact, some legislation specifically references the *CRC* its preamble; some caselaw specifically references the *CRC* in support of a specific interpretation of the law.

The law of sentencing in Canada is governed principally by provisions within the *Criminal Code*. These principles, as interpreted by the courts, establish that the process of sentencing is highly individualized. Each offender, each offence, is different. Consequently, courts have grown accustomed to considering collateral consequences of an offence or a sentence, on an offender, when determining an appropriate sentence. This law is evolving. It should evolve in a manner consistent with Canada's international obligations under the *CRC* such that the interests of dependent children are considered by the courts when sentencing their parent. A child should be heard by the courts, either directly, through the submissions of defence counsel, or in the report of a probation officer.

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