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OUT OF THE SHADOWS

CONSIDERING THE IMPACT ON DEPENDENT CHILDREN OF ADULT CRIMINAL JUSTICE PROCESSES

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Out of the Shadows

Considering the Impact on Dependent Children of Adult Criminal Justice Processes[1] [2] [3]

Introduction

What happens to children whose parents are incarcerated, remanded, or otherwise subject to the criminal justice system? Too often, the answer is: pain and distress due to separation from a parent, stigmatization, poor performance in school, social withdrawal, impoverishment, diminished life chances, health problems, and increased likelihood of the child themselves being incarcerated in adulthood. That these harms to children are unintended 'collateral' effects of justice decisions is immaterial. The effects are similar to those of many other more direct, adverse experiences a child may encounter.

The adult criminal justice system in Canada is of course not alone in creating harmful outcomes for children, today or historically. For more than 150 years, the residential school system [h] caused devastating intergenerational harm to generations of Indigenous families. Provincial child welfare systems continue to be a focus of reform and devolution due to the harmful effects of past and current practices. In identifying the harms caused by institutions and systems, we must point out that harm to children is not only systemic in origin. Parental abuse or neglect driven by substance use, trauma or mental illness is common, even though many of those individual behaviours may in turn have systemic origins.

Whether the harms experienced by children have systemic or individual causes, we now understand that many different actors and sectors must collaborate to protect children, as systemic and individual harms routinely overlap and multiply the damage done. For example, the trauma and loss of belonging associated with being removed from parental care due to parental incarceration may be expressed by self-harm or behavioral acting out at school. The disruption of parental incarceration can impede the delivery of routine health care, such as vaccinations. Child homelessness brings greater exposure to

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[1] This document is a revised, updated and condensed version of ideas first introduced in the International Centre's 2023 publication, Considering the Best Interests of the Child in Sentencing and Other Decisions Concerning Parents Facing Criminal Sanctions – An Overview for Practitioners. It forms part of a broader project on the *Best Interests of the Child in Sentencing and Other Decisions Concerning Parents Facing Criminal Sanctions*, made possible through the support of a generous project grant from the Vancouver Foundation.

[2] For ease of reading, footnoted references from the parent document are not included in this summary document, unless they are in support of information newly introduced. Please consult the parent document linked in footnote 1 for full bibliographic references.

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exploitation. Considering these overlaps, it is insufficient to act in isolation. Child advocates, Indigenous Nations and communities, non-profit services, child welfare and health authorities, educators and other systems – including the adult criminal justice system – all have a role to play in collaborating to protect children, prevent their stigmatization, and support their healthy development.

The subject of this paper – the substantial impact of adult criminal justice system decisions on the dependent children of those coming before the system – has to date received little consideration by the system itself, whether in terms of research, case law, legislation, or legal principles. Moreover, there is no consensus within the system itself as to the degree of responsibility the system itself should bear in mitigating these harms. One recent superior court decision suggested that while lamentable, such child impact should be understood as an unavoidable consequence of serious criminality.

Our analysis is based on a contrary position: that independent of the nature of any particular offence, the criminal justice system has a legal and moral responsibility to develop far greater awareness of the impact of its decisions on children, both in general and of course at the level of individual cases. Our conclusion is not that the criminal justice system is solely responsible for mitigating the harms to children flowing from its decisions, nor that it has all the tools to do so. Instead, we suggest that in increasing its awareness of child impact and thus the prospects for any appropriate mitigation, the courts and the criminal justice system will benefit from becoming less isolated from the issue (whether philosophically or practically) and engaging more fully with other sectors and actors working collaboratively to better protect children. We promote the emergence of a norm which recognizes dependent children as uniquely impacted and vulnerable parties because of their parents' treatment by the criminal justice system and places an onus on that system to ensure those impacts are properly considered and weighed in their own right.

Child impact mitigation: a major gap in policy and practice

While consideration of impacts on dependent children may seem completely reasonable and desirable at face value, our reality is far different. For a range of reasons – traditional, legal and systemic factors – it has been unusual in the Canadian criminal justice system for judges, prosecutors, police, corrections officials or other justice actors to seek input on the effects of any justice process or disposition on the dependent children of those arrested, accused and/or convicted. Thus, the first of several problems we can identify is that **the culture and practice of Canadian criminal justice has been to treat dependent children as an afterthought**, if their situation is even considered in the first place.

As in all matters implicating children, Canada's international commitments under the United Nations Convention on the Rights of the Child place an obligation on the criminal justice system to ensure dependent children have their best interests protected, have their right to development protected, have their views respected, and are able to maintain

regular relationships and direct contact with their parents.[4] It is uncontroversial to suggest that these obligations are often unmet. We cannot be more definitive, because of a second shortcoming of current practice: **no one in the Canadian criminal justice system tracks how many children are affected by the system's actions**. The number of children in Canada dealing with loss of contact with and care by a parent following arrest, remand, incarceration and/or court-ordered conditions in any given year is a matter of educated guesswork. Where police, prosecutors, defence, courts or corrections do record such information, it is only in an ad hoc and unsystematic matter.

Moreover, parents who are defendants will not reliably provide this information voluntarily, due to fear of losing custody under separate proceedings. We consider this especially true for Indigenous parents, who on the basis of colonial history may be especially fearful of the state's interest in their family's situation. This highlights a third issue with current practice: **there is no mechanism to communicate the expected impact on a dependent child of parental incarceration and other sentencing decisions which is not potentially prejudicial to the parent's interests in other matters**.

Taking these issues together, our current circumstance regarding children with parents before the criminal courts is unacceptable. Children are uniquely vulnerable and uniquely impacted by parental criminal justice involvement. Yet, we have no established expectation of criminal justice consideration of child impacts. We have only partial knowledge of which, and how many, children are affected. And we have no established mechanism to bring forward relevant information on child impact to inform the courts and other decision-makers.

Impacts on children

Impact of judicial decisions and parental criminal involvement

What happens to a child whose parent is arrested, charged and becomes a defendant in a criminal justice proceeding?

Developmental impacts

The effects of parental arrest and incarceration – independent of any other strengths and weakness of parental behaviour – have been repeatedly demonstrated to have negative

[4] In earlier work in this project, the stated focus was on having the criminal courts and others consider the best interests of the child (BIOTC). While BIOTC is an established international and Canadian legal principle, we have instead elected to promote consideration of child impact. To invoke BIOTC as the standard is to invite external expertise and place the onus of recommending a course of action on such experts. We have come to conclude it will not prove practical or timely to import BIOTC decision-making frameworks from civil law into criminal law. Instead, our focus is on promoting introduction of basic factual information regarding the immediate consequences for children to the attention of the courts, by methods which can be applied by informed lay parties, leaving the onus of decision-making with the traditional actors in the criminal justice system.

effects in their own right on the child. In particular, psychological and sociological research has made important contributions to our understanding of what a child experiences when a parent is incarcerated and/or implicated in the criminal justice system.

- Human development research has found that children who witness the arrest of a parent may suffer maladjustment.

- Children who witness a parent's arrest are more likely to have difficulty regulating emotions, perform worse on vocabulary tests, and exhibit more anxious and depressed behaviours.

- Incarceration can be significantly damaging to mother-child relationships. As Mitchell (2024) notes, "relationships within the family are often irreparably harmed by imprisonment and what can be termed 'relational trauma'".

- We know, due to the well-known body of research on Adverse Childhood Experiences (ACEs), that children of incarcerated parents have struggles which are both internal and external and that parental incarceration is a significant predictor of health risk behaviours and reduced quality of life.

- Infants and toddlers separated from mothers are more likely to develop insecure attachment, with significant downstream emotional effects. These outcomes become more likely the younger the child is when the parent goes to jail.

- Preschool children of incarcerated fathers show more aggressive behaviour and attention issues by their teens than children with fathers absent for other reasons.

From a more positive standpoint, there is a growing body of evidence showing that preserving the integrity of the family, where safe and appropriate, can produce positive outcomes for the child, including reduced state intervention, and increased positive development. There are also positive outcomes for the parent, in the form of reduced recidivism and increased employment, and for the state, including cost savings associated with decreased reliance on prison and reduced replication of programs and services. These findings support greater use of alternatives to incarceration as a pre-trial or sentencing measure for defendants with primary care responsibility for children.

In pointing out the harms to children which may come from parental arrest, charge, conviction and incarceration, we must acknowledge that there are many circumstances in which the pre-arrest behaviour of the parent is so damaging that separation i can be either a beneficial outcome regarding child development or at worst neutral. Having a parent involved in criminal activity, whether or not that parent is charged and convicted, commonly carries negative consequences for children. Thus, we do not seek to claim that the effects of parental incarceration are harmful to the child in all circumstances.

Stigma and shame leading to marginalization

By school age, children will have much more awareness of the stigma surrounding parental incarceration and can withdraw into isolation to protect their secret. Elementary school-age children are easily stigmatized as others learn of their position, and by age ten most children are conscious of cultural stereotypes and group differences. If the child belongs to an already racialized, marginalized and stigmatized group, the need to cope with stigma and exclusion happens earlier. Stigma prevents children from seeking help, connecting with peers, and reaching out to social supports, but can affect children in different ways dependent on their age. Primary school children may feel more pressure to "fit in" at this age and hide their emotions, resulting in behavioural issues, sleeping problems, or challenges with school. For teenagers, the effects become more acute. Adolescents may be more likely to react with anger and a desire to cut off all contact with the parent and reject support. Their trauma may also manifest itself through engaging in criminal behaviour, inappropriate sexual activity, self-harm, aggression towards others, or substance use/abuse.

The scale of impact: how many children?

Parental separation is inherently consequential for children and is unsurprisingly considered an Adverse Childhood Experience in itself. We know the Canadian system of criminal justice sees children routinely separated from one or both parents, with mitigating measures being an *ad hoc* or occasional feature rather than a systemic effort. We know, as noted above, that the effects of parental incarceration are typically negative, far reaching and inter-generational.

Despite these known harms, we have little information about how many children are impacted. No comprehensive data are collected in Canada on the number of parent-child separations occurring through criminal justice decisions. We do not know the exact number of children affected by incarceration in Canada, although with approximately 70,000 admissions into provincial and federal adult custody annually in Canada, the number is almost certainly in the tens of thousands and likely higher. Extrapolating from related research on the prison system in England and Wales and adjusting for Canada's prison population and average family size, at any one point in the past five years there may have at that moment in time been between 40,000 and 50,000 instances of Canadian children with a parent currently in custody, whether remanded or sentenced.

The practical and legal cases for a change of approach

The Canadian criminal justice system effectively authorizes many thousands of parent-child separations annually through remand and/or sentenced jail time; exactly how many, we do not know. Still more parent-child relationships are affected by conditions of community release, or as a consequence of breaches of those conditions; by the sudden fact of arrest of a parent; or by the stigma associated to parental criminal involvement.

Although child-parent relationships are crucial for children's wellbeing and development, criminal justice decisions applicable to parents are too often taken in the absence of meaningful information about impacts on the child. This is not because of a lack of will but rather lack of process and opportunity. All too often, a judge will be unaware of a defendant's parental status entirely. While child impact may be considered *ad hoc* in court proceedings and sentencing – indeed, often, in First Nations Court – there is no current requirement to support the accused t in disclosing their parental status. There is no regular means of ensuring that appropriate supports are in place for children from the point of arrest forward. And there is no regular process of providing even basic information regarding impacts on the child for the purposes of the court.

This matters greatly for the life chances and social integration of these children, because as negative as the impact of parental criminal conviction and/or incarceration can be, many of their effects may be mitigated. Current research shows that, with the right supports, children can overcome the increased vulnerability that comes from having a parent in conflict with the law. Conversely, in the absence of these supports, children can exhibit behavioural, emotional and developmental difficulty going forward into adolescence; increased risk of social withdrawal and/or violent externalization; and significantly greater risk of criminal involvement and incarceration in later years.

Moreover, we cannot pretend as though the multi-generational cyclical impact of incarceration is felt evenly across the population of Canada. Systemic racism, the overrepresentation of Indigenous people and Black Canadians in the correctional system, and other forms of discrimination across the criminal justice process and in the child welfare system, are well established phenomena. Impacts on dependent children inevitably mirror these same patterns of overrepresentation.

We are no longer in an era in which social institutions – such as schools, health authorities, government agencies, or the justice system – can operate as though independent of other sectors in terms of cause and effect. All of our institutional systems have increasingly well-understood consequences which cross arbitrary lines between mandates, and all have a role to play in ensuring a protective environment around the child. Criminal justice research and social research have identified parental incarceration as a significant criminogenic factor associated with reduced subsequent health-related quality of life and socio-economic prospects. The children of parents in conflict with the law are at risk of facing increased barriers to their future health and wellbeing. As our understanding of the increased vulnerabilities these children face solidifies, it is no longer appropriate to be agnostic on the subject of collateral consequences of criminal justice actions, or for criminal justice processes to remain uninformed regarding child impact. As the Canadian Bar Association noted in its 2017 paper on Collateral Consequences of Criminal Convictions,

> *But if not the job of counsel at the sentencing hearing, who will advise the offender of potential additional implications of a finding of guilt, beyond incarceration? Who will be*

responsible for ensuring that all likely collateral consequences of a conviction are before the court in arriving at a just sentence, viewed comprehensively?

The CBA's focus is necessarily on the actions of counsel for the defence and prosecution. We would extend the challenge to all those who are in a position to inform the courts, and to inform other criminal justice decision-makers, regarding child impact.

Why a focus on child impact does not equate to 'leniency'

Equal treatment under the law is a foundational aspect of Canadian criminal law, as set out in Section 15 of the Charter. One question raised with respect to considerations of e.g. sentencing, bail, court conditions, or other factors relevant to child impact is the issue of whether it is defensible under the Charter to order a mitigated disposition in the case of an accused with dependent children – a disposition which might in itself be considered lenient relative to existing case law and sentencing guidelines. In other words, should/would a focus on child impact imply allowing accused parents to avoid more stringent consequences purely because they are parents, creating a separate and protected class of persons under the law?

In a word, no, although it is understandable why such an assumption is sometimes reached. It is important to appreciate that a focus on child impact is *a focus on the child in their own right as an inherently interested and involved party, a rights-bearer, rather than on the accused parent*. . It could be argued that the impact on the child has no logical connection to the circumstances surrounding the adult parent's criminal behaviour. Seeking consideration of child impact does not mean accepting a premise that parents before the courts should be treated with leniency, not least because the interests of the child are not necessarily congruent with the interests of the accused parent.. A focus on child impact is instead based on two other premises: (a) that decisions of the court and other criminal justice decision-makers can create profound and sometimes lifelong effects on children, who must now endure the increased vulnerability and risk factors that come from having a parent in conflict with the law, and (b) that it is appropriate for the criminal justice system to accept some responsibility for these outcomes and seek to mitigate collateral damage to children as innocent third parties. An approach to criminal justice decision-making – including but not limited to sentencing – which fails to duly consider impact on the child is not acceptable.

The child-centered case for parental diversion

Diversion, when appropriate, is the least disruptive option for the parent-child relationship. Diversion is also a central component of Indigenous justice strategy and reform discussions. The British Columbia First Nations Justice Council, in its *Justice Strategy* agreed with the provincial government in March 2020, identified the "presumption of diversion" as an important principle to be applied in the criminal justice system's approach to Indigenous accused. We highlight this not to equate accused parents in general with Indigenous accused, but to underscore a key insight within the *Justice Strategy*: that incarceration as a choice cannot be artificially separated from its collateral effects on the

family and subsequent downstream and intergenerational effects. Incarceration routinely creates lasting consequences for dependent children, and for the children of those children in turn, “a cycle of ever deeper interaction.”

Child rights and adult criminal justice: Canada’s international commitments

An array of international norms and standards affirm that domestic criminal courts should explicitly consider the best interests of a child in all judicial decisions directly or indirectly affecting the child, especially when making bail and sentencing decisions. Importantly, despite current practice none of these international instruments absolve the Canadian state from its responsibility to protect the rights of the child as an individual (and innocent third party) regarding their development, family life, and/or parental contact simply due to their parent’s criminal justice involvement.

For primary and sole caregivers, along with pregnant mothers, these same standards consistently emphasize a preference to use alternatives to detention and incarceration whenever possible to do so. In the Canadian context, it is imperative that any statement of child impact, in relation to their parents’ criminal proceedings, be developed through a culturally specific lens reflecting particularly the rights of Indigenous peoples, including to substantive equality and cultural continuity.

The United Nations Convention on the Rights of the Child

From a children’s rights perspective, the UN Human Rights Council and the Council of Europe have explicitly recognized children whose parents are in conflict with the law as a vulnerable group of children calling for the use of alternatives to imprisonment for parenting mothers and fathers or 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 per article 6 of the *United Nations Convention on the Rights of the Child* (CRC). Under the CRC, in all matters concerning children the best interests of the child should be of primary consideration. Other articles of the CRC provide that all children, without discrimination and regardless of the legal status of their parents, have the right to have their best interests protected, the right to development, the right to have their views respected, and the right to maintain personal relations and direct contact with their parents on a regular basis.

In 2022, the UN Committee charged with monitoring the implementation of the CRC in Canada 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. The Committee also advised Canada to strengthen community-based alternative sentences for incarcerated mothers of infants and other children.

The Bangkok Rules

The *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (the Bangkok Rules) stipulate that "women offenders shall not be separated from their families and communities without due consideration being given to their backgrounds and family ties. Alternative ways of managing women who commit offences, such as diversionary measures and pretrial and sentencing alternatives, shall be implemented wherever appropriate and possible." (Rule 58)

The United Nations Declaration on the Rights of Indigenous Peoples

Recognizing and mitigating the adverse effects of parental incarceration for Indigenous children is especially important for Canada in view of ongoing intergenerational trauma and other harmful legacies of a history of colonialism and forced state separation of children from their parents by means of residential schools, the child welfare system, and via mass incarceration of Indigenous peoples, the criminal justice system. In 2022/23 30% of the 163,387 admissions to provincial/territorial jails in Canada were Indigenous. The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in its preamble recognizes "the right of [I]ndigenous 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" and in Article 7(2), recognizes that "Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group."

The right to respect for privacy and family life in international law

Various international and regional treaties protect the right to privacy and family life, including the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), to both of which Canada is a party. ICCPR Article 23(1) states that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State." ICESCR Article 10(1) states that "[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."

Canadian criminal justice and child impact

Charter and legislative provisions

Canada protects the rights of the child and/or incorporates the principle of the 'best interests of the child' in some domestic legislation, such as family, immigration, and child protection laws.

The legal principles of the best interests of the child and a child's right to family life should in principle be protected by Section 7 of the *Charter of Rights and Freedoms* (the Charter), while the differential impacts of bail and sentencing for Indigenous and racialized children and their parents should be protected by s. 15(1) of the Charter. It is also clear that Canada's legislatures, and the Courts, have attempted to ensure that certain statutes and the common law conform with international obligations under the CRC, which is often cited in a foundational sense – such as in legislation amending sections of the *Criminal Code* dealing with sexual offences against children, and in the preamble to the *Youth Criminal Justice Act*.

In contrast, Canadian legislation addressing judicial interim release (bail) does not expressly recognize the rights or best interests of a child whose parents are before the criminal courts and may be remanded, despite the potentially traumatic and life-long consequences for the child.

With respect to judicial sentencing, of particular relevance are Section 721, authorizing pre-sentence reports, which may include information about a person's child(ren); Section 722 providing for victim and community impact statements; and Section 726, authorizing a court to consider relevant information on child impact. As is the case for bail decisions, sentencing courts are guided by the principle of restraint in the application of incarceration, and under the *Gladue* principle in Section 718.2 (e), required to apply such restraint "with particular attention to the circumstances of Indigenous peoples." In this regard, judicially mandated social context reports may be prepared for Indigenous persons, known as Gladue reports. Similarly, Impact of Race and Culture Assessments or other reporting variants like enhanced pre-sentence reports, may include information about a sentenced person's children.

While of direct relevance as a model for child impact statements, in such reports information about family is only brought forward as it relates to the person being sentenced, i.e. the adult parent. As such, restraint in sentencing is fundamentally different in principle and in focus from consideration of child impact *per* se, and should not be seen as a more general vehicle for the latter.

Consideration of child impact in Canadian case law

In this section, we provide an overview of relevant Canadian case law as regards the impact on children, and the courts' willingness to consider such impact as collateral impact in principle – and as a reason to mitigate a parent's sentence, in practice. Key considerations for the courts in such matters have included questions of equality before/equal protection under the law, per Charter Section 15, as well as the "personal circumstances" of the accused. The courts have until very recently have been reluctant to consider impacts on children, whether as personal circumstances or collateral consequences, as grounds for significant mitigation of sentences to (e.g.) lessen parent-child separation. However, recent case law, as set out below, suggests new thinking in this

area, under which sentence mitigation for parents in some circumstances may be permissible under Section 15.

The mother-child bond protected under Charter Section 7, in Inglis v. British Columbia

The principle of the best interests of the child is a significant legal consideration in *Inglis v. British Columbia* (BCSC 2013), in which the plaintiff successfully challenged the province's cancellation of a residential mother-child program at a women's jail. The court found that cancellation of the program unjustifiably violated the plaintiff's Section 7 rights, recognizing the right of mothers and infants to remain together as an aspect of security of the person, and Section 15 protections re disadvantaged groups (in this case, Indigenous women). The court concluded that the best interests of the child as a matter of applicable international law and domestic child welfare legislation was contextually important for the case, stating 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."

Child impact as a "collateral consequence" in Canadian sentencing

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 sentenced person 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 sentenced persons. This said, there is no list of collateral consequences which may be considered, nor any formula for determining the impact of collateral consequences on the determination of a fit sentence. Furthermore, accounting for collateral consequences must not lead to an otherwise disproportionate sentence.

Canadian courts have to a very limited extent considered the collateral consequences arising from a parent's separation from their children, typically without substantial consequence for the eventual disposition. Some of the more notable cases include:

- *R v Stanberry* (2015 QCCQ), in which the court identified collateral consequences which deserved consideration – separation of the accused's two children, and the mother's separation from her younger daughter who suffered from serious medical difficulties – although the eventual sentence was only reduced due to the accused's own mitigating circumstances, rather than impact on children.

- *R. v. Holub* (2002 ONCA), in which the court characterised the separation of a father from his 13-month-old daughter while incarcerated as "unfortunate" but a consequence of incarceration for many sentenced persons.

- *R. v. McDonald* (2016 NUCA), in which the court allowed an appeal from an order remitting the defendant back to custody for breach of a conditional sentence order, in part because of the adverse effects of a custodial sentence upon the children.

- *R. v. Hadida* (2001 ONCA), in which the court emphasized that the defendant's wife and children were completely dependent upon him and that a custodial sentence would be a very great hardship inconsistent with the interests of justice.

- *R. v. Rockey* (2016 ONCA), in which the court 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 jail term.

From existing case law, the courts' consideration of the collateral consequences for dependent children of parents facing criminal sanctions is very limited, and it is perhaps noteworthy that no cases refer to the CRC when considering this specific collateral consequence.

Consideration of child impact as a "personal circumstance"

While reluctant to consider impact on the child per se as a mitigating factor, Canadian criminal courts have on occasion been willing to consider the impact of a sentence on a child from the perspective of the sentenced parent, where the child is viewed as a "personal circumstance" of the parent consistent with Section 718.2(a) of the Criminal Code. In R v Suter (SCC 2014), the Supreme Court of Canada identified the effect of collateral consequences being that of making a sentence more severe than it would be for other offenders, and thus providing a potential justification for a less stringent sentence:

> *"The question is not whether collateral consequences diminish the offender's moral blameworthiness or render the offence itself less serious, but whether the effect of those consequences means that a particular sentence would have a more significant impact on the offender because of his or her circumstances. Like offenders should be treated alike, and collateral consequences may mean that an offender is no longer "like" the others, rendering a given sentence unfit."*

Until quite recently, however, the available jurisprudential evidence suggests that the Canadian criminal courts have not routinely considered the potential effects of a parent's sentence on the dependent child. In one of the few cases where the best interests of the affected children were judicially considered, *R. v. Hamilton* (2005 SCC), the sentencing judge was reversed on appeal. And in *R. v. Upright* (2020 ABCA), the Court of Appeal of Alberta noted that "the sad fact is that many offenders leave behind children, dependent partners or ill and aged parents … an inevitable consequence of serious criminal behaviour for which a penitentiary sentence is warranted", and that "a sentencing judge is not compelled to adjust the sentence to avoid the impact of this collateral consequence."

Recent case law suggests fuller consideration of family consequences of sentencing

Against this current, in *R. v. GG* (2023 QCCA), in which the Crown had appealed against an intermittent sentence it considered too lenient, the Quebec Court of Appeal noted with respect to the reasoning in *Upright* that "it is also well established that, in exceptional and specific circumstances, the consequences of a lengthy term of imprisonment on the offender's family may bear on the judge's analysis of a fit sentence" provided that the

resulting sentence is not "disproportionate to the gravity of the offense or the moral blameworthiness of the offender." The court noted further that circumstances in which the offender and victim were members of the same family, as in this case, were potentially mitigating given the significant consequences such as loss of income or dwelling should the accused to be sentenced to a lengthy prison term, further penalizing the victim. The court also quoted a leading legal textbook (Parent & Desrosiers, 2020): "[F]amily consequences may, in certain specific circumstances, constitute a factor mitigating the sentence." The Crown's appeal of the sentence was dismissed.

In *R. v. Habib* (ONCA 2024), the Ontario Court of Appeal held that the sentencing judge wrongly overlooked family consequences of the offender's pending incarceration, noting that "depending on the facts, family separation consequences may justify a sentence adjustment – even a significant one – or a departure from the range … While defendants and not the courts are to be blamed for the adverse consequences that those family members may suffer, those family members are still innocent. They do not deserve to suffer for the defendant's crimes." Moreover, the Court of Appeal pointed out that "the pain of being unable to care and provide for family members while incarcerated is a collateral consequence that increases the severity of incarceration and can jeopardize rehabilitation."

In *R. v. Crawford* (OSCJ 2025), the Ontario Superior Court of Justice echoed the Court of Appeal in Habib in making explicit reference to the impact of family consequences on sentencing. "I have considered the family impact, including Mr. Crawford's separation from his vulnerable children. I recognize proportionality demands the importance of factoring and preserving the family to the extent possible." A variety of other factors were also considered. The sentence was reduced by one year.

It is encouraging that Canadian courts' consideration of family impact appears to be moving in the direction of greater consideration of family impact as something which may in itself render the same sentence harsher for (e.g.) a parent than a non-parent. However, again we must underline that the impact being considered is that on the accused or sentenced person: the adult. To the extent that the child is considered, within Canadian jurisprudence they are a feature of the collateral consequences for their parent.

How and when might child impact be considered?

Key thresholds within the criminal justice system

Currently, at each point in the criminal justice process – arrest, remand, sentencing, incarceration, and post-release – adult accused 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 parents' criminal behaviour. Impact on children, beyond immediate care and custody, is not always explicitly considered. Children who are indirectly affected by their parents' criminal justice system involvement are often

described as “invisible” or as collateral victims, and as falling between government departments with limited policy or statutory interest in their rights and wellbeing.

Arrest, bail and pre-trial detention

Unlike the more predictable features of criminal justice proceedings such as trial and sentencing, arrest and (in many cases) pre-trial detention commonly arrive without warning. The parent is suddenly absent from daily life, perhaps being apprehended in the presence of the child themselves. Parents facing arrest and remand have difficulties in arranging care for their children. They have limited time and resources to do so and may not want to disclose that they have children because of concern that child welfare authorities will become involved. In some instances, chaotic family circumstances may make it difficult for the parents to make suitable care arrangements for their children, particularly in what may be a crisis situation for the family or where sick children or children with special needs are involved. Furthermore, delays in criminal proceedings (particularly when a parent is remanded in custody) can be disruptive and have a significant impact on a child. The indeterminate nature of a parent being remanded in custody, together with other delays, can add to the anxiety and fear experienced by the children.

The arresting officer, the Crown and the presiding judge all have considerable discretion with respect to arrest and consideration of pre-trial detention. However, while information regarding child impact may be most timely if introduced here, at an early stage in the process, the short time frames associated to all decisions leading up to the decision to release awaiting trial/remand in custody mean that these are amongst the most challenging circumstances for the provision of well-sourced, reliable information.

Charging decisions

British Columbia’s standard for charge assessment, taken as an example and not dissimilar in its core principles to other provincial approaches, empowers prosecutors to consider the “personal circumstances” of the individual who may be charged, and to consider “unique systemic and background factors affecting Indigenous peoples” including cultural oppression and systemic bias against Indigenous peoples manifested across Canadian institutions. Federally, the Public Prosecution Service of Canada identifies several factors within the personal circumstances of the accused which may affect the decision to charge, the most relevant of which are those requiring Crown counsel to consider “the ongoing impacts of colonialism, residential schools, over-representation, and systemic discrimination in the criminal justice system” or whether “the consequences of a prosecution or conviction will be disproportionately harsh or oppressive for the accused.”

There are few decisions in criminal justice with greater latitude for the exercise of discretion than the decision to charge. Given the increased attention of the courts to family impact (above), there is therefore some potential scope for provincial and federal prosecutors to consider parent-child separation as a “personal circumstance” of the accused, which may serve to render a given sentence harsher for a parent by virtue of that

separation. This may also be understood typically to be more acute for Indigenous persons. However, it is unknown how frequently the parental status of an accused person features in decision-making regarding charges – and, again, there is no explicit recognition of child impact *per se*, beyond the circumstances of the parent, being relevant to charging decisions. Recognizing that alterations to the charging standard are for good reason developed and considered over time before being introduced, given the weight and the frequency of child impact of prosecutorial decisions we would encourage prosecution services to consider making references to child impact and parental responsibilities more explicit in the charging standard, providing guidance in that regard such that charging decisions might limit harm and promote assumption of parental responsibility wherever appropriate.

Bail

Upon charge, the accused may be is permitted to remain at home/in the community under conditions at the discretion of the court. This is known as *judicial interim release* of an accused, also known as bail. In this circumstance, an accused person brought before the courts may be released by a judge to await trial (or to await sentencing or pending an appeal) in the community. Bail, like community sentence decisions, is informed by several factors. These include the positive and regenerative aspects of life in the community as a rehabilitative influence on the accused/offender, and the opportunity for offenders to demonstrate acceptance of responsibility. They also include acknowledgement of the damaging secondary effects of incarceration on individuals, families, and communities, particularly for non-violent offenders.

Community sentences

The courts are expected under Section 718.2 of the Criminal Code to exercise restraint in the use of custody and, bearing in mind the adverse effects of colonialism and systemic discrimination and other factors connected to the overrepresentation of Indigenous peoples in Canadian jails, to consider the particular circumstances of Indigenous peoples as a further mitigating factor. The key point here is that community sentences and judicial interim release are significant and powerful tools in avoiding rupture of parent-child relationships and in supporting the parent's ability to fulfill their parenting obligations. It is of great importance that the sentencing court consider carefully the impact that the conditions attached to a supervision or probation order may have on the offender's child or the offender's ability to discharge his or her parental responsibilities – and that the court be provided with information sufficient to make such a consideration.

Community sentences/community release in Canada can take a number of forms. A judge can issue a probation order as a standalone disposition, or as a community sentence that may follow time spent in custody, or as part of another community sentence such as a fine. Probation orders are the most commonly ordered sentences in Canada. A conditional *sentence* is a sentence to be served in the community as opposed to prison.

Breaches of conditions

Court-ordered conditions are a tool use by the courts to manage the conduct of accused and sentenced persons in the community. In some cases, conditions are used expansively to assert the court's response to and control of a person's behaviour. However, conditions are frequently violated by those who are the subjects of those orders. They may be violated as a matter of conscious choice; by accident or lack of personal capacity; or for a legitimate but unforeseen reason. Conditions may have limited connection to the offence and/or may be too many in number to ensure compliance. In addition, Indigenous people and other racialized and marginalized populations are disproportionately impacted by onerous and unnecessary bail conditions and are more likely to be charged with breaching minor conditions.

Breaches of conditions are common, and once violated, the court order becomes the subject of a separate criminal proceeding alleging an offence against the administration of justice. Many criminal cases include at least one administration of justice offence, resulting in a guilty verdict and a period of incarceration where the original offence was one for which jail was deemed unnecessary. A substantial proportion of people serving a short prison sentence in provincial institutions are there as a result of such an administrative offence.

Thus, not only may court-ordered conditions sometimes negatively impact the child, the prevalence of such conditions and related jailing of parents following breaches may further harm the interests of children, by damaging or severing parent-child bonds and disrupting families. The relevance of release conditions to child impact is therefore plain, and the chronic lack of consideration of this principle that much more concerning. How can the courts be convinced to consider the children of accused and convicted persons in bail and sentencing hearings? And what can be done to assist parents in complying with court-ordered conditions to avoid unnecessary periods of incarceration?

Custodial sentences

Custodial sentences place parent-child bonds and the wellbeing of dependent children at serious risk. More than 80 percent of custodial sentences being for six months or less. Short sentences are too brief to have any significant remedial or deterrent effect, but long enough to cause serious disruption in the lives and wellbeing of the sentenced person's dependent children.

Court challenges in considering child impact

Beyond interpreting statute and case law, Canadian criminal courts are likely to encounter various challenges in recognizing and considering the best interests of a dependent child as a primary consideration when making bail and sentencing decisions for their parent.

Privacy of the child and family. Given that pre-trial detention or a sentence of incarceration may result in a child being removed and placed in alternative care, in cases where the child

is not a direct victim of their parent's alleged criminal behaviour, good practice suggests that it must be up to the affected parents and their children to bring their personal information to the attention of the Crown, defence counsel and/or the sentencing court.

Qualifications to develop assessments and statements. Various good practices exist internationally, including court-appointed child advocates, and probation officers and other experts preparing child or family impact assessments as part of a pre-sentence or other report.

Views vs best interests. A child has a right to have their best interests considered as a primary consideration in judicial decisions that affect them, and/but also to have their views considered under Article 12 of the CRC. Canadian courts will need to find ways to give effect to these participatory rights, as they are already doing in the family law context.

Are alternative sentence options effective and funded? The court must consider whether community-based alternatives to detention and incarceration exist and can be used in ways which are appropriate and effective for not only the parent and the child but in ensuring justice for victims and public safety.

Delay. Finally, taking the impact on a dependent child into account may further complicate and delay criminal proceedings.

What can I / you / we do?

Consider adopting family-focused sentencing practices

Sentencing alternatives which expand sentencing options in the case of parents are of potentially great importance. Preservation of family ties and parent-child involvement are likely to increase the resilience of both the parent and the child, while also achieving savings for the state by diverting children from state care and cost reductions associated with community supervision rather than incarceration.

In Scandinavia, both Norway and Denmark have relied far more extensively than Canada on the use of electronic monitoring. Norway uses electronic monitoring as an alternative to prison custody. The focus is on normal, healthy activity and there is an obligation when on electronic monitoring to be active during the daytime (*e.g.* out in the day, at work, or going to school, with breaches for those at home when required to be outside). These methods are associated with very low recidivism rates. The rise in use of electronic monitoring in turn has been linked to a rise in the proportion of sentences which are served in the community, which is not simply a by-product of technology but a conscious choice. Norway has also introduced deferred commencement of jail sentences, which may serve to make a parent's incarceration more predictable and manageable for the child.

In Denmark, the prison service has the latitude to change the location of a custodial sentence from prison to the home. Housing, education and employment status must be appropriate for electronic monitoring. The offender must be monitored by their employer or teacher and consent to unannounced control visits.

Washington State's criminal justice system allows a judge to waive a potential prison sentence and impose one year of intensive community supervision and support for parents of dependent children. State law also includes a prison-based, early release option consisting of electronic home monitoring and intensive community supervision and support for a one-year period to strengthen family bonds and assist with offender reintegration. Numerous other international examples of sentencing-related interventions which are designed to preserve the parent-child bond exist.

Finally, bail, probation and conditional sentence orders can bolster (or harm) an offender's capacity to sustain their role as a parent in the community. The attachment of conditions to bail, probation, and other community supervision orders may affect an individual's ability to parent and may affect the children themselves. Being "set up to fail" through onerous or overly restrictive conditions may have profound and disruptive impacts on children. Breaches of conditions are one of the main reasons why adult women find themselves in detention.

Mitigate child impact at the corrections level

Acknowledging that funding is determinative, corrections authorities typically have considerable latitude in the delivery of programming, supervision and forms of release for sentenced persons.

Non-court mandated practices being trialed by corrections officials in various countries include parenting classes, mother-child programs and child and family contact or visitation programs in prisons; early release or re-entry programs; and mentoring and advocacy programs for children affected by parental incarceration or their parents' criminal justice system involvement. In addition, corrections personnel often provide key information to the courts regarding sentencing and compliance with orders. Corrections officials are also, typically, the justice officials most likely to be aware of parental status as this information is gathered on intake.

Suggested steps to increase corrections support of parental compliance with court orders beyond current arrangements may include introduction of child impact information in pre-sentence reports, specific training for probation officers (and other relevant court personnel) on child impacts of adult criminal justice, and the allocation of richer staff to client ratios by community corrections where the convicted person is known to be a parent of dependent children.

Take opportunities to inform the court re child impact: defence counsel

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 interests of a dependent child should those in any way be contrary to the interests of their client. Clients may also be opposed to bringing up the matter of their children in court for fear of triggering or further fuelling child protection proceedings. And it must also be said that the child's interests and those of the parent will not always align. However, in some cases, providing evidence to the court of the impact of a sentence on the dependent child will also be beneficial to the client.

- Counsel may seek to provide to the court an account of all the impacts on the child from the child's perspective, both practical and emotional.
- Counsel may request that the court order a pre-sentence report to be prepared, with the court requesting information about the child impact of any sentence.
- Counsel may include child impact information when invited to make submissions about any facts that are relevant to the sentence to be imposed
- Counsel may encourage their client to include child impact information when invited to address the court before the passing of sentence.
- Given Canada's international obligations, it can and should be argued that a court has an obligation to hear from a dependent child, consistent with CRC Article 12.

Consider courts requesting basic detail on child impact as routine practice

The following categories of information may enable judges to properly consider the foreseeable hardships to which the child might be subjected:

- What are the custody circumstances of the defendant's children, and in what practical and emotional ways do they rely on the parent before the court?
- Is there a generational pattern of criminal involvement and incarceration in the defendant's family?
- What are the basic facts regarding the defendant's children, such as ages, names, schools, residence, activities, needs and vulnerabilities?
- What material changes to the child's life in terms of attachment, schooling, recreation, residence etc. will occur due to the contemplated sentence?
- Is the prison too far from the children's home for meaningful regular in-person contact to occur?
- Are there any corrections programs which the defendant is likely to be offered to mitigate mother-child separation? Or parent-child disruption in general?
- Will the court afford the parent the opportunity to make alternative care plans? What arrangements are possible, and with what impact on the child?

Develop child impact statements, or use existing court submission formats

Canadian judges are able to exercise significant discretion in considering a broad range of factors that affect the sentenced person and their offence, abiding by the principles of

sentencing set out in Section 718 of the *Criminal Code* to arrive at a proportionate sentence. To assist judges in assessing the circumstances of the person to be sentenced, Canadian courts routinely request informational submissions by way of a number of established reporting formats, such as pre-sentence reports, *Gladue* reports or letters, and Impact of Race and Culture Assessments (discussed below). In Canada, victim and community impact statements are legislatively permitted.

Family or child impact statements would represent an important addition to these sources of information, as well as potentially serving as an extension of one or more of those existing forms. Family impact statements (sometimes, 'family responsibility statements') are descriptions of the expected effects of sentencing options on the sentenced parent's children and family, including their extended family members who may be affected by the sentencing decision. Child impact statements are written explanations of how the sentencing options will affect the sentenced parent's child, including consideration of how the child's independent rights may be affected by the caregiver's disposition.

We distinguish here between an impact statement and an impact assessment. It is true that the terms statement and assessment are sometimes used interchangeably. Here we wish to make a very clear distinction in usage.

- *A child (or family) impact statement* is a statement limited to factual observations regarding the expected impact of sentencing on a child or children/a family, observations which may be made by an informed lay observer, are typically not open to interpretation, and are descriptive rather than predictive or probabilistic. A child impact statement may be completed by any of a number of relevant professionals with appropriate training and guidance.

- *A child (or family) impact assessment* may contain any or all of the elements within an impact statement but may also include expert opinion and inference on longer-term or more individualized impacts from a qualified professional trained in working with children and familiar with contemporary research on child experience of sentencing impacts. A childhood impact assessment should normally be completed by an appropriate specialist such as a child psychologist or a duly qualified social worker.

The main difference between family impact statements and child impact statements is the person(s) who are affected: child impact statements mainly cover the needs, perceptions, and rights of the sentenced parent's child, whereas family impact statements more broadly address the implications of sentencing options for the immediate and extended relatives, such as those who might temporarily care for the affected child(ren). Where a child impact statement is not prepared, family impact statements could include information that might otherwise have been captured in the child impact statement.

Use accepted Gladue and Impact of Race and Culture Assessment formats

Gladue reports are used in Canada to help judges consider the individual circumstances and social context of Indigenous persons and assist in shaping culturally appropriate healing and sentencing options. Judges have a duty to review information coming from a Gladue Report, Letter or submission that outlines the unique systemic or background factors which may have played a part in bringing the particular individual before the court. Gladue reports are prepared for sentencing, bail, appeals, long term offender hearings, dangerous offender hearings, or parole hearings that provide the court with comprehensive information on the Indigenous person, their community, and their family and a healing and restorative justice plan as an alternative to prison time. The children of Indigenous accused are not specifically referenced in the Gladue factors, but information on a person's family situation and their children's independent circumstances can be explained in reports.

Similar to Gladue reports, although not legislatively or judicially prescribed, Impact of Race and Culture Assessments (IRCAs) help judges in sentencing defendants of African or Caribbean descent by describing their lived experiences, including the effects of systemic anti-Black racism and social exclusion on the defendant and the circumstances that brought the person before the court. IRCAs also offer recommendations for culturally appropriate accountability measures. In existing practice regarding IRCA submissions, limited attention is typically paid to parental caregiving duties and impact on children. Nevertheless, as with Gladue Reports, there is no prohibition or other reason to exclude information on child impact.

Communicate child impact in the context of concurrent proceedings

There are two common scenarios in which children with one or more parents facing criminal charges are also the subject of child protection proceedings: when the parent is facing charges related to violence, abuse or neglect of the child or other family members, including intimate partner violence, and conversely when the parent is facing criminal charges unrelated to the family. The primary distinction is the degree of relevance to the

Introduction of Child Impact Statement prototype

In January 2025, project members were invited by a member of the defence bar to provide a draft child impact statement template. Counsel was representing a parent with sole custody of two children adt a forthcoming sentencing hearing in the Supreme Court of British Columbia, for an offence for which a custodial sentence was probable. On review of the template, the Court indicated that a completed template addressing impact the defendant's children would be welcome. A completed template was submitted, and project members were advised that in the court's oral decision the court commented on the usefulness of the information it contained. The disposition arrived at in sentencing was a community sentence. No written decision has been filed in the case and the original conviction has been appealed.

The child impact statement template used in this case is appended at the conclusion of this document.

child protection (CP) case of facts established in the criminal case. Criminal violence, abuse and neglect directed towards the child or other family members are commonly *prima facie* reasons for child protection intervention. In all such cases, not only are the best interests of the child inherently at issue but children may be asked to provide statements or to testify in court, providing an additional layer of stressful and potentially traumatizing experience. Further complicating this situation is the likelihood of Family Law Act proceedings as well as concurrent criminal and child protection matters, at or near the same time, and possibly more frequently in cases of violence, abuse, or neglect.

Information issues, obviously impacting the creation of reliable child impact statements, are rife in cases of concurrent proceedings; and the concurrent proceedings themselves may have harmful impacts on children. Per recent research conducted by the Department of Justice Canada, such issues include:

- Distrust between professionals in the criminal and CP systems regarding priorities
- Delay of CP cases in favour of criminal trials, possibly with harmful child impact
- Criminal charging decisions being made without CP consultation
- Criminal jeopardy as a barrier to remedial service uptake (e.g., family counselling)
- Overly restrictive release conditions restricting beneficial parent child contact
- Errors in assuming primacy of CP orders over criminal orders (e.g., assuming that an order to attend counselling supersedes a criminal order regarding no-contact).

Some provincial laws address concurrent proceeding issues in intimate partner violence cases. Within parenting arrangements law, these include but are not limited to consideration of the impact of intimate partner violence on the child, and a requirement for family court to consider concurrent proceedings as they may be relevant to the child's safety, security, or well-being. In child protection law, they include a presumption of supervision for parents charged or convicted of violence, and consideration of level of violence when assessing parenting ability and the child's best interests.

There are numerous other provisions in both family law and civil (child protection) law which serve to minimize information issues and countervailing court effects harmful to children's interests. One key takeaway is that preserving and protecting the interests of the child in civil and family proceedings when they are concurrent with a criminal case is extremely challenging, despite the child's interests being central. In criminal law, though the child may be impacted more negatively in absolute terms than in (e.g.) a family law or child protection proceeding, child impact normally arises only in consideration of collateral sentence effects on, or personal circumstances of, the parent.

Develop child-focused, gender-informed and culturally specific risk assessment tools

Risk assessment tools focused on intimate partner violence typically measure risk of violence or lethality to the female partner of a male abuser and are inappropriate guides to

assess the risks to the children of abusers' partners. Moreover, the question of the child's risk of experiencing physical or other forms of violence and neglect is not the sole consideration in the family law or child protection contexts. In issuing parenting, guardianship, protection, and contact orders, a court must also consider psychological factors such as continuing trauma to the child and the level of conflict between the parents. In the absence of formal risk assessment tools to measure risk to children, many provinces have parenting assessors who apply clinical judgment in determining the needs of the child and the best parenting plan (including whether to have time with both parents). Family violence research indicates that children from homes where there is family violence require assessments from experts who are not only expert in traditional disciplines such as child development, but also in the dynamics and impacts of family violence. Knowledge of the impact of violence on child development does not in itself confer understanding of how domestic violence affects parenting.

Lead and reinforce the creation of a child impact norm in criminal justice

There are many potential obstacles to the courts' embrace of the principle of the rights of the child in bail and sentencing decisions and in ordering conditions. These include parents' reluctance to disclose the existence of children to avoid child protection intervention ; the fact that consideration of a accused's personal circumstances already occurs; the lack of theoretical legal rationale in relation to the traditional aims of punishment and the main goals of sentencing; the fear of encouraging more crime by parents or encouraging people to have children to avoid criminal responsibility; the further slowing of criminal process; and concerns over inequitable sentencing occasioned by preferential treatment to those with parenting responsibilities. It is equally important that the "best interests of the child" principle be interpreted and applied in gender-informed and culturally specific and appropriate ways.

1. Discussion questions

In weighing the ways in which criminal procedure might consider the best interests of the child more regularly and more explicitly, judges, prosecutors, and defence counsel – and indeed, all professionals and advocates whose work with the justice system has direct impact on children – may wish to consider the following questions.

Legal principles

1. Whether the courts can deal with the rights of children who are directly and indirectly affected by the criminal proceedings of their parent, especially in bail and sentencing decisions involving the potential detention or incarceration of a parent.
2. The extent to which the impact on a dependent child or children should be a factor in remand or sentencing decisions about a parent.

Process questions

3. Whether arrest and detainment procedures consider the responsibility of parents to arrange care for their children in addition to addressing their legal circumstances.
4. Whether bail and pre-trial detention decisions consider, as much as is possible, the likely impact of the decision on the family and the children of the accused.
5. Whether reporting requirements and conditions attached to a bail, probation or community sentence order take account of, and do not negatively affect, a defendant's child caring responsibilities.
6. Whether families are appropriately informed about the conditions imposed by a bail, probation or community sentence order on a parent.
7. Whether unnecessary delays are occurring in proceedings concerning a parent in pre-trial detention.
8. Whether parents facing pre-trial detention are aided in communicating with their family and arranging temporary care for their children.
9. How the court can practically consider an individual's parental responsibilities and the best interests of the child in remand or sentencing.
10. What the roles of the court, the defence bar, the Crown, and other agencies are in bringing information on the child or family to the attention of the court.
11. Whether existing forms of court report such as pre-sentence investigations and reports, bail reports, sentencing submissions, *Gladue* reports, IRCA reports or community impact statements may be repurposed (or their scope expanded) to incorporate assessment of the best interests of the child; or whether unique means of introducing such information (e.g., family/child impact statements) are required.

Questions of professional awareness, public awareness, and advocacy

12. Who might best assume responsibility for:
    a. determining expected child impact of charging decisions.
    b. informing accused parents about their responsibility to bring the matter to the attention of the court when relevant, and about how to do so.
    c. increasing public awareness about the situation of children who are adversely affected by their parents' criminal conduct and involvement in criminal proceedings and the potential social, cultural and economic benefits of child and family focused sentencing reforms.
    d. education of legal professionals about the rights, safety, and wellbeing of children in relation to criminal justice decisions that involve their parents.
    e. development of guidance or information sharing protocols for legal professionals dealing with parents or caregivers with dependent children who are involved in multiple and concurrent legal proceedings.
    f. the promotion of more effective and less expensive non-carceral or community-based alternatives for youth and adult parent defendants and sentenced persons with dependent children.

Bibliographic note

This document synthesizes insights from separate works, most of which were prepared under the auspices of the **Supporting Children of Incarcerated Parents** project. Each is available online as a separate module at www.icclr.org. Contributing authors include Hayli Millar, Yvon Dandurand, Vivienne Chin, Shawn Bayes, Megan Capp, Richard Fowler, and Barbara Pickering. The document was edited by Allan Castle, who also authored further original material.

In particular, readers are referred to the following original works (available at www.icclr.org unless otherwise linked):

- H. Millar, Children's Rights and the Sentencing of Parents Facing Criminal Sanctions
- J. Jahn, Bringing Information to Prosecutors and Courts on the Impact of Sentencing Decisions on Offenders' Families and Children
- S. Bayes, Y. Dandurand and V. Chin, *Enhancing the Protective Environment for Children of Parents in Conflict with the Law or Incarcerated: A Framework for Action*
- B. Pickering, *Psychological Consequences for Children of Incarcerated Parents*
- R. Fowler, The Role for Defence Counsel to Ensure Judges Consider the Best Interests of the Child when Sentencing a Parent
- M. Capp, The Parenting Experiences of Mothers in Conflict with the Law
- H. Millar and Y. Dandurand, The best interests of the child and sentencing of offenders with parental responsibilities, *Criminal Law Forum* 29 (2018): 227-77.

References

ACERWC. (2013). *General Comment No. 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) On "Children of Incarcerated and Imprisoned Parents and Primary Caregivers"*.

An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act, S.C. 2005, c. 32.

Access To Justice BC. (2022). *Transform the Family Justice System (TFJS) collaborative*. The Lawyer's Daily. Retrieved from https://www.thelawyersdaily.ca/articles/37189/b-c-family-law-collaborative-seeks-new-approach-to-deal-with-adverse-childhood-experiences

Allen, R. (2016). *Global prison trends*. Penal Reform International.

Baigent, C. (2020). 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), 1–30. DOI: 10.3138/cjwl.32.1.01

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

Bala, N., & Kehoe, C. (2022), Department of Justice Canada. *Concurrent legal proceedings in cases of family violence: The child protection perspective*. https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/fv-vf/child_protection.pdf

Barkaskas, P., Chin, V., Dandurand, Y., & Tooshkenig, D. (2019). *Production and delivery of Gladue pre-sentence reports: A review of selected Canadian programs*. Report submitted to the Law Foundation of British Columbia. ICCLR.

BC First Nations Justice Council. (2020, March). *BC First Nations justice strategy*. https://bcfnjc.com/wp-content/uploads/2022/04/BCFNJC_Justice-Strategy_February-2020.pdf

Beresford, S. (2022). *Child impact assessment: Support for children with a mum who's been arrested, has a court appearance, is serving a community sentence, is in prison, or is being released from prison*. Prison Reform Trust. https://prisonreformtrust.org.uk/wp-content/uploads/2021/09/Child-Impact-Assessment-MUM-November-2022.pdf

Beresford, S. (2022). *This is me: A child impact assessment toolkit*. Prison Reform Trust. https://prisonreformtrust.org.uk/child-impact-assessment-toolkit/

Besemer, S., van der Geest, V. R., Murray, J., Bijleveld, C. C. J. H., & Farrington, D. P. (2017). A systematic review and meta-analysis of the intergenerational transmission of criminal behavior. *Aggression and Violent Behavior*, *37*, 161–178.

British Columbia Prosecution Service. (2021, January 15). *Crown policy manual: Policy bail – Adults*. https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/bai-1.pdf

Canadian Friends Service Committee (Quakers). (2018). *Considering the best interests of the child when sentencing parents in Canada: Sample case law review*.

Centers for Disease Control and Prevention. (n.d.). *About the CDC-Kaiser ACE study*. Violence Prevention. Retrieved from https://www.cdc.gov/violenceprevention/aces/about.html

Committee of Ministers. (2018). *Recommendation CM/Rec(2018)5 of the Committee of Ministers to member states concerning children with imprisoned parents*. Council of Europe. 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

Cunningham, A., & Baker, L. (2003). *Waiting for mommy: Giving voice to the hidden victims of imprisonment*.

Dallaire, D. H. (2007a). Children with incarcerated mothers: Development outcomes, special challenges, and recommendations. *Journal of Applied Developmental Psychology*, *28*(1), 15–24.

Dallaire, D. H. (2007b). Incarcerated mothers and fathers: A comparison of risks for children and families. *Family Relations*, *56*(5), 440–453.

Dallaire, D. H., & Wilson, L. C. (2010). The relation of exposure to parental criminal activity, arrest, and sentencing to children's maladjustment. *Journal of Child and Family Studies*, *19*, 404–418.

Davis, L., & Shlafer, R. J. (2017). Mental health of adolescents with currently and formerly incarcerated parents. *Journal of Adolescence*, *54*, 120–134.

Department of Justice Canada. (2017). *The impact of sentencing and other judicial decisions on the children of parents in conflict with the law: Implications for sentencing reform*.

Department of Justice Canada. (2023). *PPSC deskbook 2.3: Decision to prosecute*.

Department of Justice Canada. (2019). *Reducing delays and modernizing the criminal justice system*. Retrieved from https://www.justice.gc.ca/eng/cj-jp/redu/index.html

Devlin, R., & Sherrard, M. (2005). The big chill? Contextual judgment after R. v Hamilton. *Dalhousie Law Journal*, *28*(2), 409.

Eljdupovic-Guzina, G. (1999). *Parenting roles and experiences of abuse in women offenders: Review of the offender intake assessments*. Correctional Service of Canada.

Elizabeth Fry Society of Greater Vancouver. (2019). *Supporting children with incarcerated parents: A community guide*.

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

Ewert v. Canada, 2018 SCC 30.

Family Law Act, S.B.C. 2011, c. 25.

Fazel, S., & Danesh, J. (2002). Serious mental disorder in 23,000 prisoners: a systematic review of 62 surveys. *The Lancet*, *359*(9306), 545–550.

Feig, L. (2015). Breaking the cycle: A family-focused approach to criminal sentencing in Illinois. *Advocates' Forum*, 13–24.

Inglis v. British Columbia (Minister of Public Safety), 2013 BCSC 2309.

Jones, D. S. (2020). *Punishing Black bodies in Canada: Making Blackness visible in criminal sentencing* [LLM Thesis, Osgoode Hall Law School of York University].

Kaiser-Derrick, E. (2019). *Implicating the system: Judicial discourses in the sentencing of Indigenous women*. University of Manitoba Press.

Kjellstrand, J. M., & Eddy, J. M. (2011). Parental incarceration during childhood, family context, and youth problem behavior across adolescence. *Journal of Offender Rehabilitation*, *50*(1), 18–36.

Law Society of British Columbia. (2021, December). *Practice checklists manual: Judicial interim release procedure*. https://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/checklists/C-2.pdf

McCormick, A. V., Cohen, I. M., & Ashton, A. (2018). Modifying the 'how' of an arrest: Reducing the interacting effects of childhood exposure to intimate partner violence and parental arrest. *Police Practice and Research*, 1–17.

McCormick, A. V., Millar, H. A., & Paddock, G. B. (2014). *In the best interests of the child: Strategies for recognizing and supporting Canada's at-risk population of children with incarcerated parents*. Centre for Safer Schools and Communities, University of the Fraser Valley.

Millar, H., & Dandurand, Y. (2017). The impact of sentencing and other judicial decisions on the children of parents in conflict with the law: Implications for sentencing reform. In *[Title of book/collection needed]* (pp. 249–262). Department of Justice Canada.

National Inquiry into Missing and Murdered Indigenous Women and Girls. (2019). *Calls for justice*. https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Calls_for_Justice.pdf

Noel, M. E., & Hoeben, E. M. (2022). 'The glass is half full': Narratives from young adults on parental incarceration and emerging adulthood. *Journal of Child and Family Studies*, *31*(11), 3125–3139.

Organization of African Unity (OAU). (1990, July 11). *African Charter on the Rights and Welfare of the Child*.

Owusu-Bempah, A., Kanters, S., Druyts, E., Toor, K., Muldoon, K. A., Farquhar, J. W., & Mills, E. J. (2014). Years of life lost to incarceration: Inequities between Aboriginal and non-Aboriginal Canadians. *BMC Public Health*, *14*(585).

R. v. B.C.M., 2008 BCCA 365.

R. v. Crawford, 2025 OSCJ.

R. v. GG, 2023 QCCA.

R. v. Habib, 2024 ONCA.

R. v. Hadida, 2001 CanLII 24046.

R. v. Hamilton, 2003 ONSC CanLII 2862; O.J. No. 3252, 72 O.R. (3d) 1 (ONCA).

R. v. Holub, 2002 ONCA CanLII 44911.

R. v. Ipeelee, 2012 SCC 13.

R. v. Junkert, 2010 ONCA 549.

R. v. McDonald, 2016 NUCA 4.

R. v. Pham, 2013 SCC 15.

R. v. Rockey, 2016 ONCA 891.

R. v. Sharma, 2018 ONSC 1141.

R. v. Stanberry, 2015 QCCQ 1097.

R. v. Suter, 2018 SCC 34.

R. v. Upright, 2020 ABCA.

R. v. W.(D.R.), 2012 BCCA 454.

Representative for Children and Youth & Office of the Provincial Health Officer for British Columbia. (2009). *Kids, crime and care – Health and wellbeing of children in care: Youth justice experiences and outcomes*. https://rcybc.ca/wp-content/uploads/2020/11/Youth-Justice-Joint-Rpt-FINAL-.pdf

Rogin, J. A. (2014). *The application of Gladue to bail: Problems, challenges, and potential* [LLM Thesis, Osgoode Hall Law School of York University].

Rudnicki, C. (2021). Confronting the experience of imprisonment in sentencing: Lessons from the Covid-19 jurisprudence. *The Canadian Bar Review*, *99*(3), 469–487.

Russell, A. (2021, February 9). *Court opines on impact of criminal bail conditions on families*. Family LLB Ontario Divorce Education Centre.

Statistics Canada. (2022). *Table 35-10-0030-01: Adult criminal courts, guilty cases by type of sentence*.

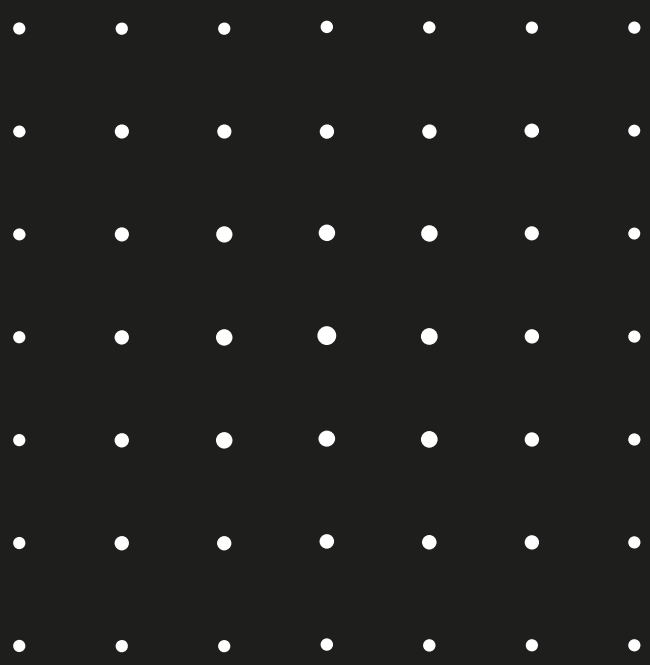
Statistics Canada. (2022). *Table 35-10-0032-01: Adult criminal courts, guilty cases by length of custody*.

United Nations General Assembly. (2010, October 6). *United Nations rules for the treatment of women prisoners and non-custodial measures for women offenders (the Bangkok Rules)* (A/C.3/65/L.5).

United Nations. (2018). *A practitioner's guide on women's access to justice programming*. https://www.ohchr.org/sites/default/files/Documents/Publications/PractitionerGuide/WA2J_Module4.pdf

West Coast LEAF. (2016). *Factum of the intervener, West Coast Women's Legal Education and Action Fund*. R. v. Lloyd. http://www.westcoastleaf.org/wp-content/uploads/2016/01/Lloyd-factum-Supreme-Court-of-Canada.pdf

Youth Criminal Justice Act, S.C. 2002, c. 1.



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