



International Centre for Criminal Law Reform and
Criminal Justice Policy

AN OVERVIEW FOR PRACTITIONERS

Considering the Best Interests of the Child in Sentencing and Other Decisions Concerning Parents Facing Criminal Sanctions

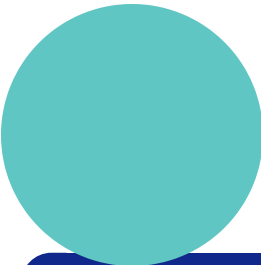
An Overview for Practitioners

Hayli Millar, Yvon Dandurand, Vivienne Chin, Shawn Bayes, Megan
Capp, Richard Fowler, Jessica Jahn, Barbara Pickering, and Allan Castle

Edited by Allan Castle

Our Partners





Corresponding author: Allan Castle (allan@castleconsulting.ca)

© 2023 International Centre for Criminal Law Reform
and Criminal Justice Policy.

All rights reserved.

We encourage sharing this publication for educational purposes.
Credit must be given to the International Centre for Criminal Law
Reform and Criminal Justice Policy.

Cover: Designed by Visme.

Photo by Chayene Rafaela on Unsplash.

Please direct inquiries to:
International Centre for Criminal Law Reform
and Criminal Justice Policy
1822 East Mall, Vancouver, BC V6T 1Z1 Canada
www.icclr.org

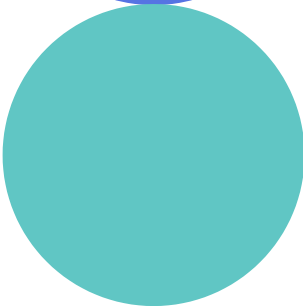


Table of Contents

Introduction	3
Who should use this Overview?.....	4
Section 1: Why attention to the best interests of the child in criminal justice process matters..	6
Why attention from the criminal justice system is long overdue	7
A focus on children’s rights and interests – not “leniency”	8
The impact of judicial decisions on children	9
What happens to a child whose parent has gone to jail?	10
Conditions of community release and the best interests of the child.....	12
The child-centered case for parental diversion	13
Section 2: The international and Canadian legal frameworks	14
The international legal framework.....	14
The principle of the best interests of the child	14
The right to respect for privacy and family life in international law	16
The differential gendered and racialized effects of sentencing and incarceration.....	17
The UN Declaration on the Rights of Indigenous Peoples.....	18
The Canadian legal framework	19
Recognition of the CRC in Canadian law	19
The <i>Inglis</i> decision (Section 7 and 15 Charter arguments)	20
Canadian criminal law and the best interests of the child	20
Evolving considerations of “collateral consequences” in Canadian sentencing.....	23
Existing patterns in Canadian courts	26
Section 3: Points of opportunity in criminal procedure where the best interests of the child may be considered.....	27
Charging decisions	27
Pre-trial	29
Sentencing.....	29
Family focused sentencing practices and the best interests of the child.....	31
Conditions of release	33
Breaches of conditions	34
Supporting parents in complying with court-ordered conditions.....	35
The role of defence counsel.....	36
Section 4: Bringing information on the best interests of the child to court.....	37
Preparing to share information on the defendant’s family situation.....	38
Details on the defendant and their caregiving responsibilities	38
Details about the child(ren)	39
The direct impact on the child	39
Sentencing options and the foreseeable impacts of incarceration	39

Alternative care arrangements if the parent is detained or incarcerated	40
Applicability of <i>Gladue</i> reports and Impact of Race and Culture Assessments (IRCAs)	42
<i>Section 5: Concurrent criminal and child protection proceedings</i>	43
Issues related to concurrent criminal and child protection proceedings affecting the best interests of the child, where family violence is present.....	44
Best and promising practices for professionals and service providers.....	46
Development of child-focused, gender-informed and culturally specific risk assessment tools.....	48
<i>Section 6: Moving forward – challenges, opportunities, and questions for consideration</i>	49
Questions of law	51
Questions of process	51
Questions of professional awareness, public awareness, and advocacy.....	52

Introduction

This Overview 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. The broader project's objective is to instigate and support a systemic and cultural change in the way that the best interests of the child are considered by defence counsel, the prosecution and the courts. The ultimate intention is to mitigate the negative impact on the child of a parent facing criminal sanctions, especially when the parent/legal guardian is a primary or sole caregiver.

The motivation for this work is the general lack of attention directed towards the best interests of dependent children whose parents are before the criminal courts, despite a wide range of international and regional norms and standards which suggest that domestic criminal courts are obliged to take the rights and best interests of dependent children into account as a primary consideration when making bail and sentencing decisions. This lack of attention persists despite all that is known about the negative influence of parental criminal sentences, and in particular incarceration, on children.

This Overview is intended specifically to encourage active consideration of child impact and family impact at time of sentencing and other court decisions, principally by prosecutors and judges but also all those with influence in criminal proceedings, to avoid the potentially negative

About this Overview and its authors

This Overview 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:

- 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.

impacts of those decisions. A broader purpose is to raise awareness about these issues more generally, and to assist the reader in identifying practices which serve to diminish consideration of the best interests of the child, where these exist.

More generally, the Overview is intended to influence policy change, to encourage greater availability of non-carceral or community-based alternatives to incarceration for people with parental responsibilities, and to support parents in mitigating the impact of their own sentencing and court order compliance on their children.

The recommendations in this Overview are intended to stir productive discussion. Our efforts will have been successful if this document encourages subject matter experts and decision makers holding positions of responsibility in the criminal process to consider how the best interests of the child may most suitably and effectively be incorporated into decisions and orders of the criminal courts.

In this document, you will find:

1. A discussion of the key issues at hand, including the absence to date of any systematic attention paid to the best interests of dependent children in Canadian criminal courts, and the corresponding impact on children with one or more parents facing criminal sanctions
2. A description of the legal context in which this discussion exists, including international treaties and norms, Canadian treaty obligations, applicable Canadian legislation, and relevant case law
3. A discussion of critical points of opportunity within the criminal justice process regarding the best interests of the child, from pre-trial decision-making to release conditions, and including the role of prosecution and defence
4. A discussion of the various current and potential mechanisms by which information on the best interests of the child may be requested by and/or submitted to the court
5. A discussion of an important subset of considerations relating to concurrent criminal and child protection proceedings
6. A discussion of challenges, opportunities and key considerations going forward.

Who should use this Overview?

The intended audience of this document is anyone whose work provides them with influence on criminal justice decision-making regarding parents who may be diverted from, remanded or sentenced to custody, their children, or both.

In addition to mitigating the impact of sentencing and other decisions of court on dependent children, actions taken upon consideration of the best interests of the child should also serve to

reinforce and support justice-involved parents in fulfilling their parental responsibilities. In both cases we assume that the principal options available to the court include:

- Diversion of mothers/parents
- Avoiding detention while awaiting trial and promoting bail release with realistic conditions attached to bail supervision orders
- Avoiding short-term sentences wherever there is discretion to do so
- Reducing the length of prison sentences wherever possible and facilitating the early release and reintegration of criminally sentenced parents and their reunification with family/children
- Promoting community-based sentences with reasonable conditions attached to them reflecting the parental responsibilities of the person under sentence or judicial interim release.

Due to the broad range of actors who have influence in the above processes, the audience for the Overview exists at multiple levels.

At the level of justice system operations, the target audience includes those directly involved in bringing information before the court and decision-making itself, including defence counsel, the judiciary, prosecutors, *Gladue* writers and support workers, IRCA writers, pre-sentence report writers, and court workers. It also includes correctional institution managers and staff, probation/parole officers, and parole board members. It includes police, during investigation and arrest phases as well as in any subsequent response to apparent breaches of conditions.

At the policy and legislative levels, the Overview is intended as a resource for those responsible for policy and institutional design within the courts and the correctional system; for Parliament, which has responsibility for Criminal Code reform and thus the power to amend s.718 of the Criminal Code by enshrining the rights of children in sentencing hearings; for advocates and researchers seeking to enhance attention to the best interests of the child within the criminal justice system; and for executives and subject-matter experts engaged in developing cross-sectoral approaches to improving child and family outcomes.

At the community level, the Overview is intended as a resource for social workers and child protection authorities, service organizations working with children, and families and/or clients with a history of justice involvement. Our target audience at this level includes anyone who is in a position to act as an advocate for the best interests of the child at any point in criminal justice process. It also includes journalists and members of the public wishing to learn more about this important issue. It is equally intended as a resource for justice-involved parents and their children and those who advocate on behalf of children/youth.

Section 1: Why attention to the best interests of the child in criminal justice process matters

This Section considers the core rationale for this Overview and the broader project of work in which it is situated: the chronic and widespread inattention during criminal court processes to the best interests of dependent children of parents facing criminal sanctions. It also sets out the consequences for children of a parent's criminal sentence.

The Canadian system of criminal justice – whether in law, policy, or operations – has historically fallen short in considering the rights of children whose parents are facing or experiencing criminal sanctions. In the most concerning circumstances, the rights of the child are either an afterthought or fail to be identified in the court's proceedings at all. Children are routinely separated from one or both parents with mitigating measures being an ad hoc or occasional feature rather than a systemic effort.

While studies of the impact of parental incarceration are rare in Canada, international research has demonstrated that the effects of parental incarceration are far reaching and largely negative across the life course of affected children. These adverse effects can also be multi or inter-generational. Children of incarcerated parents have struggles which are both internal (anxiety, depression, attachment disorders) and external (school refusal, substance use, or criminal involvement). The ongoing Adverse Childhood Events (ACE) study lists parental incarceration as a significant predictor of health risk behaviours in later life and adult-related quality of life.

The marginal status of this issue in the hierarchy of Canadian criminal justice policy is underscored by the fact that no data exist in comprehensive form in Canada on the number of parent-child separations occurring because of jail sentences. We do not know the exact number of children affected by incarceration in Canada, although the number is almost certainly in the tens of thousands and likely higher.¹

This knowledge gap is mirrored by a policy and practice gap. There is a lack of child-specific or family-focused guidelines to inform these decisions. Canadian courts are legislatively required to consider incarceration as a last resort for all persons facing criminal sanctions, but Canadian sentencing policy on mitigating factors does not expressly recognize an “excessive hardship on dependents” as in Australia or include a list of enumerated factors including family ties as in some American states. Case law suggests that criminal courts do not routinely consider the potential effects of incarceration on dependent children, and sometimes decline to take a defendant's caregiving obligations into account. As discussed in Section 2, while the application of “collateral consequences” to sentencing continues to evolve, it remains far from certain that the best interests of the child will receive significant attention in sentencing or in other

¹ In 2019-20 there were 69,604 admissions to custody (federal and provincial) in Canada (Statistics Canada, [2021 Corrections and Conditional Release Statistical Overview](#)). As the overwhelming majority of sentenced offenders are between the ages of 15 and 40, it is reasonable to assume that a large percentage of this number are parents of persons under 18. Thus, even in a single year an estimate of 10,000 or more children affected by the incarceration of a parent is plausible (and possibly conservative).

decisions like judicial interim release (bail) or prison placement or early forms of release from prison.

Why attention from the criminal justice system is long overdue

Healthy and supported child-parent relationships are important to children's wellbeing and development. In the absence of appropriate supports, separation due to parental incarceration can adversely impact children in the long-term, increasing vulnerability to feelings of abandonment, attachment difficulties, emotional maladjustment, and personality disorders.

The Canadian criminal justice system, in the exercise of its own discretion, authorizes many thousands of parent-child separations annually; as noted above, the exact number is not known, which is itself a symptom of the issue at hand. Still more parent-child relationships may be profoundly affected by court orders concerning the conditions of community release, and by subsequent decisions associated to breaches of those conditions.

The significance of this responsibility – with its profound effect on the lives and future development of many children – outweighs by some distance the quality and consistency of focus, information and process brought to bear on the best interests of the child in Canadian criminal courts. The current whose approach is best described as *ad hoc*. While the best interests of the child may be sporadically considered in court proceedings and sentencing, there is no current requirement to support the defendant in

Seven guiding principles for upholding the best interests of the child in dealing with parents in conflict with the law

EFry Society, ICCLR, and the University of the Fraser Valley (abridged from original)

The rights of the child and the principle of the best interests of the child must be respected at all times. Children's rights must be protected irrespective of the actions of a family member.

Children of parents in conflict with the law require special attention, being at risk of stigma, victimization, and developmental issues, and should enjoy opportunities comparable to other children.

Do no harm. Interventions should not stigmatize these children as "problem children"; they are children who need special protection and support.

The views and voice of the child must be heard. Children should learn about what is happening to their parents and should have input into their own care.

The centrality of the role of parents. Keeping the child's well-being in mind, it is important to support the parent's role during and after detention.

Cultural sensitivity. Culture is an important element of development, and all interventions must be culturally sensitive and appropriate.

Importance of traditional Indigenous practices. For Indigenous children, parents, extended family, Elders, and trusted community members must be involved in guiding others in traditional Indigenous law and child-rearing practices, including adoption.

disclosing their parental status; no regular means of ensuring that appropriate supports are in place for children from the point of arrest forward; and no regular process of providing reliable information regarding the best interests of the child for the purposes of the court.

The effects of sentencing on children are set out in later sections of this Overview and are not restricted to the immediate impacts on the child. Current research shows that, with the right supports, these children can overcome the increased vulnerability that comes from having a parent in conflict with the law. 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. A challenge remains that the necessary supports to prevent these outcomes are not readily accessible.

Criminal justice research and social research have identified parental incarceration as a significant criminogenic factor and, as an Adverse Childhood Experience, associated with reduced subsequent health-related quality of life and economic wellbeing. 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 when their parent coming into conflict with the law increases, it is no longer appropriate for the criminal justice system to remain underinformed and agnostic.

[A focus on children's rights and interests – not "leniency"](#)

As defined by Canada's international human rights obligations, in all matters concerning children the best interests of the child should be of primary consideration. All children, without discrimination and regardless of the legal status of their parents, have rights guaranteed by the *United Nations Convention on the Rights of the Child*, including 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.

Children with incarcerated parents have committed no crime and should not be treated as if they are in conflict with the law as a result of the actions, or alleged actions, of their parents. Children are however directly and profoundly affected by the detention or incarceration of a parent, a reality which should receive attention at all stages of criminal justice decision-making.

Accommodations made to mitigate the impact of sentencing on parent-child relationships can suffer from perceptions of leniency. These arguments suggest that equal treatment under the law has been sacrificed via (e.g.) reduction or rejection of sentences which might otherwise be imposed. This Overview makes no recommendation for leniency *per se* and does not seek to subvert any of the sentencing principles inherent in Canada's criminal justice system and embedded in the Criminal Code. It is instead based on the premise that decisions of the court create profound effects for children who have had no say in the circumstances which have led to parental incarceration but must now endure the increased vulnerability and risk factors that come from having a parent in conflict with the law.

This premise in turn reflects a growing recognition, from both within and outside the criminal justice system, that the system and the decisions it makes are not distinct from society but instead routinely create collateral social outcomes which have profound adverse consequences. The issue therefore is not one of leniency, but of the justice system and its partners explicitly acknowledging and taking responsibility for the effects of sentencing. This includes impacts felt beyond the sentenced individual, and, more precisely, on children and the family. An approach to criminal justice decision-making – including sentencing– which fails to duly consider and uphold the best interests of the child is untenable.

The impact of judicial decisions on children

Throughout the criminal justice process, adult criminal defendants are considered and treated primarily as individuals, with limited attention to their role as parents or to their dependent children. This of course is not the case when the child is a direct victim of the parent's criminal behavior. The impact of criminal justice decisions on children of parents in conflict with the criminal law is not always sufficiently considered despite compelling empirical evidence about the increased vulnerability associated with parental incarceration. The principle of the best interests of the child, as a primary consideration in decisions that directly and indirectly affect a child, is rarely explicitly applied.

Courts can play a critical role at several important intervals. They make decisions about:

- whether a parent is granted bail and allowed to return home, with or without conditions, or is remanded in custody pending trial, sentencing, or an appeal
- whether to incarcerate the parent and for how long, as the length of sentence will affect whether a custodial sentence can be served in the community under conditional supervision
- by means of the sentence length and/or a judicial recommendation, where a parent will or should be incarcerated, which has significant consequences for in-person visitation; for federally sentenced women ,only six prisons are available, resulting in mothers being incarcerated at great distances from their children
- the appropriateness and feasibility of conditions attached to community-based bail and sentencing orders which can affect parenting obligations
- whether to convict a person for additional breaches of conditions attached to a bail order or to a community-based sentence
- whether to facilitate parental access to supportive resources that allow a parent to regain custody of a dependent child.

For non-Canadian parents, sentencing decisions may hold additional collateral immigration consequences for children, if the parent is subsequently removed (deported) from the country following the completion of their sentence.

In Canada, there is a lack of child-specific or family-focused guidelines to inform these judicial decisions. This is despite ample empirical evidence showing that sentencing decisions often have a detrimental and frequently traumatic and stigmatizing impact upon a defendant's dependent children, both immediately and in the long term.² Conversely, 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 adjustment. There are also positive outcomes for the parent, in the form of reduced recidivism and increased employment prospects), and for the state, including cost savings associated with decreased reliance on prison and reduced replication of programs and services.³ These findings support the greater use of alternatives to incarceration in bail and sentencing decisions for defendants who are also parents. These alternatives ensure that they may continue to be responsible for the care and welfare of the children.

What happens to a child whose parent has gone to jail?

Even before considering the effects of parental incarceration on children, it must first be stated that setting aside incarceration, the very fact of having a parent involved in criminal activity is of significant and usually negative consequence for children. Research has established significant intergenerational criminogenic effects: children whose parents engage in criminal behavior *per se* are much more likely to display criminal behavior in future.⁴ Nor is the removal of a parent via incarceration inherently a net-negative outcome for a child, as the child may be subjected to various forms of direct and indirect abuse by that parent in the home or otherwise be exposed to negative influences, anti-social beliefs and behaviours, or physical danger. Analyses of incarcerated people show far higher levels of anti-social personality traits than exist in the general population.⁵ Thus in some cases, particularly those where a parent has exhibited pronounced anti-social and/or violent behaviour, it may be that parental incarceration has either neutral or even positive effects on the child's well-being and subsequent outcomes. There is therefore no attempt in this paper to claim that the effects of parental incarceration are unremittingly harmful to the child in all circumstances.

However, the effects of parental arrests and incarceration *per se* – independent of parental characteristics -- have been repeatedly demonstrated to have negative effects in their own right

² See, e.g., the CDC-Kaiser *Permanent Adverse Childhood Experiences (ACEs) Study*, which defines living with an incarcerated household member as one of seven types of adverse childhood experiences. Available at: <https://www.cdc.gov/violenceprevention/aces/about.html>.

³ Lauren Feig, "Breaking the Cycle: A Family-Focused Approach to Criminal Sentencing in Illinois", *Advocates' Forum* (2015): 13-24 at p. 17.

⁴ Sytske Besemer et al., [A systematic review and meta-analysis of the intergenerational transmission of criminal behavior](#), *Aggressive and Violent Behaviour*, Volume 37, November 2017, Pages 161-178

⁵ Seena Fazel and John Danesh, [Serious mental disorder in 23 000 prisoners: a systematic review of 62 surveys](#), *The Lancet*, Volume 359, Issue 9306, 16 February 2002, Pages 545-550.

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.⁶
- 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 than children who did not witness the arrest.⁷
- A parent's incarceration can affect a child in different ways depending on the age of the child. Infants and toddlers separated from mothers are more likely to develop insecure attachment, which may produce feelings of anxiety, guilt, and loneliness, or lead to aggressive anti-social behaviour in later years. Preschool children of incarcerated fathers show more aggressive behaviour and attention issues by their teen years than children whose fathers are absent for other reasons.
- Children of incarcerated mothers are at even greater risk. The absence of an incarcerated mother can create insecure attachment to other caregivers, with significant negative behavioural consequences, and this becomes more likely the younger the child is when the parent goes to jail.⁸

By school age, children will have some limited ability to understand why their parent is incarcerated. They 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 they become aware of their social 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, this awareness happens earlier.

Once knowledge of parental incarceration has spread in the community, stigma can appear in many forms and is highly damaging to children. Stigma prevents children from seeking help, connecting with peers, and reaching out to social supports. Children who know their parents are in prison are often ashamed of this fact. Some families find this situation so shameful that they do not tell children where their parents are or explain the situation to them. This can lead to feelings of fear, confusion, abandonment and low self-worth.

⁶ See McCormick, A. V, Cohen, I.M., and 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*, December 2018.

⁷ 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.

⁸ Dallaire, D. H. (2007a). Children with incarcerated mothers: Development outcomes, special challenges, and recommendations. *Journal of Applied Developmental Psychology*, 28, 15-24; (2007b). Incarcerated mothers and fathers: A comparison of risks for children and families, *Family Relations*, 56, 440-453.

Assumptions are unfortunately made about the child, based on the actions of the parent. This attitude is sometimes displayed by teachers, social workers, community members, and social service or criminal justice practitioners.⁹ These can include comments such as “the apple doesn’t fall far from the tree,” or suggestions that the child will be a negative influence on their peer group.¹⁰ This stigma can affect children in different ways dependent on their age. For example, primary school children may feel more pressure to “fit in” at this age and hide their emotions and experiences to avoid being stigmatized by peers and teachers.¹¹ Hiding these emotions due to stigma can lead to behavioural issues, sleeping problems, or challenges with school.¹²

For teenagers, the effects become more acute. Adolescents, already craving independence may be more likely to react with anger and a desire to cut off all contact with the parent.¹³ Their trauma may also manifest itself through engaging in criminal behaviour, inappropriate sexual activity, self-harm, aggression towards others, or substance use/abuse.¹⁴ With peer groups being so important to this age group, they may also hide the truth about their parent’s involvement with the law, which can prevent them from accessing support. It is likely that young adults will also suffer developmental effects of parental incarceration, although research in this area is less plentiful.¹⁵

Conditions of community release and the best interests of the child

As noted in several places in this Overview, the best interests of the child are not normally considered as a matter of course in bail and sentencing hearings within the criminal justice process. However, the application of conditions to the interim or sentenced release of a parent into the community has significant potential to advance, or to harm, the best interests of the child. In addition, the complexities of adherence to conditions and their violation can also affect the interests of the child in ways which are today rarely contemplated by the courts.

Community sentences and interim release – with some important exceptions such as alleged offences against the parent’s own child or children or offences involving intimate partner

⁹ McCormick, Millar and Paddock, 2014

¹⁰ Elizabeth Fry Society of Greater Vancouver, “Supporting children with incarcerated parents: A community guide”, 2019

¹¹ Cunningham, Alison and Linda Baker, “Waiting for Mommy: Giving voice to the hidden victims of imprisonment”, 2003

¹² Cunningham and Baker, 2003

¹³ McCormick, Millar and Paddock, 2014

¹⁴ Amanda V. McCormick, Hayli A. Millar, and Glen B. Paddock, “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, 2014; p. iii.

¹⁵ See Jean M. Kjellstrand and J. Mark Eddy, “Parental Incarceration during Childhood, Family Context, and Youth Problem Behavior across Adolescence.” *J Offender Rehabil.* 2011 Jan 1; 50(1): 18–36; Laurel Davis and Rebecca J. Shlafer, “Mental health of adolescents with currently and formerly incarcerated parents,” *J Adolesc.* 2017 Jan; 54: 120–134.; Melissa E. Noel and Evelien M. Hoebe, “‘The Glass is Half Full’: Narratives from Young Adults on Parental Incarceration and Emerging Adulthood,” *J Child Fam Stud.* 2022; 31(11): 3125–3139.

violence to which the child is witness – carry with them the important potential benefit of maintaining the family connection and parent-child bonds which would be interrupted or severed by incarceration.

Other conditions may have negative effects on the parent’s dependent children, such as overly broad no-contact orders which unnecessarily restrict positive family activity; geographic restrictions which prohibit the parent from facilitating children’s activities or family visits; and restitution orders or fines which reduce funds available to meet children’s basic needs.

The child-centered case for parental diversion

Diversion, when appropriate, is the least disruptive option for the parent-child relationship. As noted in several places in this Overview, the consequences of parental incarceration for dependent children may be acute in the short term and of lasting negative impact over a child’s lifetime. Statistically, without the appropriate supports, children of incarcerated parents exhibit significantly higher risk of school drop-out, school change, poor school performance, subsequent diagnosis with a mental disorder, subsequent involvement with the youth and/or adult criminal justice system, and subsequent incarceration.¹⁶

For purposes of comparison, it is instructive to consider recent developments with respect to Indigenous peoples and the criminal law. 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 defendants. In the Strategy, the presumption of diversion is taken to mean

that at every opportunity, the least restrictive appropriate response to criminal conduct should be pursued ... It does not mean, and never can mean, that there should not be consequences for criminal acts by individuals. It means that, prior to taking other, more conventional steps, actors and structures within the existing justice system should approach situations involving a First Nations individual by asking themselves “how may alternatives operate in this context?”, and “has every reasonable alternative been considered?”, prior to taking other, more conventional steps.

The purpose, in part is to “entrench throughout the system multiple checkpoints where the cycle of ever deeper interaction, leading to prolonged incarceration, can be broken.”¹⁷

In making this comparison, we are of course not arguing that accused parents in general should be equated with and offered the same considerations as Indigenous defendants. Instead, we

¹⁶ *Kids, Crime and Care – Health and Wellbeing of Children in Care: Youth Justice Experiences and Outcomes*. A joint report of the British Columbia Representative for Children and Youth and the Office of the Provincial Health Officer for British Columbia, 2009. <https://rcybc.ca/wp-content/uploads/2020/11/Youth-Justice-Joint-Rpt-FINAL-.pdf>

¹⁷ BC First Nations Justice Council, *BC First Nations Justice Strategy*, March 2020; pp 25-26. https://bcfnjc.com/wp-content/uploads/2022/04/BCFNJC_Justice-Strategy_February-2020.pdf

wish to highlight this key insight within the *Justice Strategy*: that incarceration does not somehow stand apart from its immediate social effect on the family and subsequent downstream and intergenerational effects. On the contrary, incarceration routinely creates lasting consequences for dependent children, and – as one consequence is higher rates of subsequent incarceration – for the children of those children in turn. The issue, “a cycle of ever deeper interaction,” is common to both analyses.

One may observe that the criminal justice system – as reflected in policy, jurisprudence, and professional discourse – has in recent decades been increasingly likely to describe itself as operating *within* social systems and feedback loops, rather than as adjacent or apart. The ruling in *R. v. Gladue* acknowledges as much implicitly. The four dissenting justices in *R. v. Sharma* [SCC 2022], again with respect to a single Ojibwa mother from the Saugeen First Nation who was trying to prevent herself and her child from becoming homeless and who was also an intergenerational residential school survivor, argued *inter alia* that “[o]verincarceration is an ongoing source of intergenerational harm to families and communities.”

In light of their point, it may be timely to consider whether a presumption of diversion may be appropriate not only for Indigenous accused persons, but in many other circumstances – again, where appropriate – where jail is demonstrated to have negative intergenerational effects on children and families.

Section 2: The international and Canadian legal frameworks

This section provides an overview of the key international treaty commitments to which Canada is a party, as well as other sources of global norms regarding attention to the best interests of the child in criminal matters. It also details key aspects of Canadian legislation which may enable such attention, whether or not those are fully utilized, as well as providing a discussion of selected relevant case law.

The international legal framework

Internationally, three distinct but related legal principles suggest that domestic criminal courts are required to consider the rights and best interests of affected children and their parents when making bail and sentencing decisions in criminal proceedings. These principles include recognizing the best interests of a child as an independent rights holder; recognizing a child’s right to family life; and upholding non-discrimination by mitigating the differential gendered and racialized impacts of sentencing and incarceration on parents with dependent children.

The principle of the best interests of the child

An array of international norms and standards affirm that domestic criminal courts should explicitly consider the best interests of a child as a primary consideration in all judicial decisions directly or indirectly affecting the child,¹⁸ extending to decisions about their parents or primary

¹⁸ The best interests of the child principle is a legal test. In Canada, section 16(2) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) defines the best interests of the child to include the “child’s physical, emotional and psychological

caregivers in adult criminal proceedings, especially when making bail and sentencing decisions. In particular, the *United Nations Convention on the Rights of the Child*, to which Canada is a party, and the *United Nations Guidelines for the Alternative Care of Children* provide a strong international legal foundation to argue that domestic criminal courts should routinely and independently consider the best interests of a dependent child when their parent, especially a primary or sole caregiver, is involved in criminal proceedings.

The *Convention on the Rights of the Child* (CRC) does not explicitly address the rights of a child whose parents are in conflict with the law other than in Article 9(4) which recognizes a child's right to information about the whereabouts of a detained or incarcerated parent unless contrary to the child's well-being. However, among several applicable rights provisions, Article 3(1), known as the "principle of the best interests of the child", specifically provides that

[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Other key CRC provisions (with the relevant Article noted) include a child's rights to non-discrimination (2), to survival and development (6), to identity (8), not to be forcibly separated from their parent except in accordance with applicable law and the best interests of a child (9), to have their views considered (12), and to state protection and assistance when deprived of their family environment (20).

Since 2005, the United Nations Committee on the Rights of the Child has addressed the situation of children of incarcerated and administratively detained parents and has instructed domestic criminal courts to consider the best interests of the child principle when remanding or sentencing a parent to custody, emphasizing the use of alternative sanctions where possible and appropriate. The Committee has continued to develop the best interests of the child principle as an overarching principle in criminal justice contexts, including providing a range of guidance for states. This guidance includes ensuring the right of a child to have their views considered; preventing discrimination towards the affected children; and emphasizing the use of non-custodial alternatives at the pre-trial and sentencing stages of the criminal justice process.

In its 2022 *Concluding Observations*, the Committee advised Canada to ensure that a child's right to have their best interests is considered as a primary consideration in all judicial proceedings, to develop procedures and criteria for giving due weight to this right, and to establish impact assessments of all laws and policies relevant to the realization of this right. The Committee also advised Canada to strengthen community-based alternative sentences for incarcerated mothers of infants and other children.

safety, security and well-being". See also *Family Law Act*, [SBC 2011] Chapter 25, section 37, which provides a similar definition.

In other authoritative UN decisions, various UN General Assembly and UN Human Rights Council resolutions have stressed the importance for UN member states to:

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

At the regional level, African law supports the judicial recognition of the best interests of the child principle in sentencing parents with dependent children. Specifically, the *African Charter on the Rights and Welfare of Children* adopted by the Organization of African Unity in 1990 specifies that African member states "should provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of breaking the law"¹⁹ and advises that African states should always first consider a non-custodial sentence when sentencing mothers with children. Additionally, member states are required to establish and promote alternative treatment measures for sentenced women and emphasize the restorative aims of punishment.²⁰

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* and the *International Covenant on Economic, Social and Cultural Rights*. The *European Convention on Human Rights* provides that:

- (1) everyone has the right to respect for his private and family life, his home, and his correspondence [*sic*]
- (2) there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

¹⁹ Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990.

²⁰ In ACERWC 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", 2013.

In 2018, the Council of Europe in its Recommendation CM/Rec(2018)5 offered detailed guidance to member states concerning children with incarcerated parents focusing on preserving family and child-parent relations and respecting the rights and interests of children.²¹ The Recommendation emphasized that the rights and best interests of the child should be taken into consideration when a custodial sentence is contemplated and that alternatives to detention “be used as far as possible and appropriate, especially in the case of a parent who is a primary caregiver” Courts are asked to take the rights and needs of children into account before a judicial order or sentence is imposed on a parent. Courts are also asked to consider deferring pre-trial detention or a prison sentence and replacing them with community sanctions or measures.

The differential gendered and racialized effects of sentencing and incarceration

Non-binding international instruments recognize substantive equality rights and/or the principle of non-discrimination in relation to the varying gendered and racialized impacts of sentencing and incarceration for many parents and their dependent children.

Women are most often the caregivers, and their incarceration is most disruptive/traumatic to the family. The *UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders*, also known as the Bangkok Rules, prioritize non-custodial measures when sentencing a pregnant woman or a dependent child’s primary or sole caregiver where possible and appropriate. The Bangkok Rules would limit custodial sentences to serious and violent offences or sentenced persons who represent some danger, “after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children”.²²

The Office of the UN High Commissioner for Human Rights and the UN Office on Drugs and Crime have recognized the adverse, gendered, and racialized effects of parental, especially maternal, incarceration on children, emphasizing the use of alternatives to incarceration where appropriate.²³ The UN’s *Sustainable Development Goals*, adopted by the General Assembly in 2015, also recognize the gendered effects of maternal incarceration with respect to promoting inclusive societies and access to justice, ending poverty, ensuring that the children of parents facing criminal sanctions are not drawn into a cycle of crime and poverty, and achieving gender equality.²⁴

²¹ Available at: <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>.

²² UN General Assembly, *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)*, Rule 64. 6 October 2010, A/C.3/65/L.5.

²³ “A Practitioner’s Guide on Women’s Access to Justice Programming”, United Nations (2018). Retrieved from https://www.ohchr.org/sites/default/files/Documents/Publications/PractitionerGuide/WA2J_Module4.pdf

²⁴ Rob Allen, *Global Prison Trends*, London: Penal Reform International (2016) at pp. 5-7.

At the regional level, several European Parliament resolutions and recommendations have also expressly acknowledged the gendered and adverse effects of incarceration for women and their children advocating the use of community-based alternatives to prison.²⁵

The UN 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 settler colonialism and forced state separation of children from their parents by means of residential schools and the child welfare system. The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which Canada is implementing nationally, is directly relevant to protecting the individual and collective rights of Indigenous children who are forcibly separated from their parents due to state-imposed remand detention and/or incarceration.

Moreover, in the Canadian context, as emphasized by the National Inquiry into Missing and Murdered Indigenous Women and Girls, it is imperative that the principle of the best interests of the Indigenous child be developed and applied to reflect “distinct Indigenous perspectives, world views, needs, and priorities, including the perspective of Indigenous children and youth”.²⁶

While recognizing very distinct ancestries, histories, legal statuses, cultures, and lived experiences, among many differences, similar types of arguments about child rights to culture and identity can and should be advanced to protect the rights and best interests of Black Canadian children and adolescents. Along with Indigenous children, Black Canadian children are also overrepresented in child welfare systems and their parents are also highly overrepresented across the criminal justice process.²⁷

In brief, a wide range of international and regional norms and standards strongly suggest that domestic criminal courts are obliged to take the rights and best interests of dependent children into account as a primary consideration when making bail and sentencing decisions about their parent. 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 assessment of the best interests of the child, in relation to their parents’ criminal proceedings, be developed

²⁵ See, for example, 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\(INI\)](https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0102+0+DOC+XML+V0//EN)). Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0102+0+DOC+XML+V0//EN>.

²⁶ National Inquiry into Missing and Murdered Indigenous Women and Girls, “Calls for Justice” [Call for Justice 12.3] at p. 194. Retrieved from: https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Calls_for_Justice.pdf.

²⁷ See, e.g., Akwasi Owusu-Bempah, Steve Kanter, Eric Druyts, Kabirraaj Toor, Katherine A Muldoon, John W Farquhar, and Edward J Mills, “Years of life lost to incarceration: inequities between Aboriginal and non-Aboriginal Canadians”, *BMC Public Health* 14 (2014):585; Danardo Sanjay Jones, “Punishing Black Bodies in Canada: Making Blackness Visible in Criminal Sentencing,” LLM Thesis, Toronto: Osgoode Hall Law School of York University (2020).

through a culturally specific lens reflecting particularly the rights of Indigenous peoples, including to substantive equality and cultural continuity.

The Canadian legal framework

Canada incorporates the concept of the best interests of the child in some domestic legislation, such as family, immigration, and child protection laws.

The *Canadian Charter of Rights and Freedoms* (the Charter) protects the rights of the child under the CRC and other international human rights instruments that Canada has ratified. The legal principles of the best interests of the child and a child's right to family life should be protected by Section 7 of the Charter while the differential impacts of bail and sentencing for Indigenous and racialized children and their parents should be protected by s. 15(1) of the Charter, as was successfully argued in the *Inglis* case, discussed below, in a slightly different legal context.

Recognition of the CRC in Canadian law

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..."²⁸

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.²⁹

UNDRIP provisions relevant to the rights and best interests of the child

- The right of Indigenous families and communities to retain shared responsibility for the upbringing, training, education, and well-being of their children
- Rights to non-discrimination
- Rights to life, liberty, and security of the person and against forcible removal of children and transfer to another group.
- Rights not to be subject to forcible assimilation and cultural destruction, including state-provided mechanisms for prevention and redress
- Rights to identity
- Rights to practice and revitalize cultural traditions, spiritual and religious traditions, and Indigenous languages
- Rights to participate in decision-making that affects rights
- Rights to socio-economic wellbeing including in areas of education, employment, housing, health, and social security.

Special attention is to be paid to the rights and needs of Indigenous women, children and youth, including ensuring full protection from all forms of violence and discrimination.

²⁸ [An Act to amend the Criminal Code \(protection of children and other vulnerable persons\) and the Canada Evidence Act](#), SC 2005, c 32.

²⁹ 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...”³⁰

It is 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.³¹ Within the criminal law the CRC is persuasive authority referenced in support of certain procedural protections for youth offenders, and for emphasizing deterrent and denunciatory sentences for people who offend against children.

The *Inglis* decision (Section 7 and 15 Charter arguments)

The best interests of the child were a significant legal consideration in a 2013 British Columbia Supreme Court decision, *Inglis v. British Columbia (Minister of Public Safety)*, in which the plaintiff successfully challenged the province’s unilateral cancellation of a residential mother-child program at a provincial correctional centre for women. The court found that the province’s decision to cancel the program unjustifiably violated the plaintiff’s Section 7 rights to security of the person, recognizing the right of mothers and infants to remain together as an aspect of security of the person.

The Court also found violations of the plaintiff’s Section 15 equality rights, recognizing the mothers and their children as members of a vulnerable and disadvantaged social group, with cancellation of the program contributing to further disadvantage of the group. The court noted in particular the experiences of Indigenous women and their children in relation to overrepresentation in prison and a history of cultural dislocation imposed by the state.

The presiding justice in *Inglis* concluded that the concept of the best interests of the child, both as a matter of applicable international law and domestic child welfare legislation, was contextually important for the case. She observed that the provincial government could not “sidestep the principle that in all state actions concerning a child, the best interests of the child shall be a primary consideration.”³²

Canadian criminal law and the best interests of the child

Bail and sentencing decisions can adversely affect the rights and best interests of dependent children. Despite these known adverse effects, Canadian criminal law does not expressly recognize the rights or best interests of a child whose parents are before the criminal courts. This raises a potential legal argument about substantive *inequality* since the best interests of the child is legislatively recognized and protected in other situations involving the voluntary (separation, divorce, and adoption) and forced state (child protection) separation of a child from their parents.

³⁰ [Youth Criminal Justice Act](#), SC 2002, c 1

³¹ See also: *Baker v. Canada (Minister of Citizenship and Immigration)*, (1999) [1999 CanLII 699 \(SCC\)](#), 2 S.C.R. 817

³² *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 (para 371).

With respect to bail and remand decisions, key elements of law include:

- Section 515 of the Criminal Code, which is the main legal provision governing bail and pre-trial detention decisions, including enumerated grounds for pre-trial detention
- Section 493.1 which requires judges to exercise restraint by releasing a defendant at the earliest opportunity and to impose the least onerous conditions on that release
- Section 493.2 requires that a judge pay particular attention to Indigenous defendants and defendants who belong to a population group that is overrepresented in the criminal justice system.

To date, despite the acknowledged overuse of pre-trial detention and its disparate impacts on Indigenous and Black persons, many of whom are parents, there has been limited scholarly analysis of adult bail decisions to ascertain whether the rights and best interests of affected children hold much (or any) sway.³³ However, the complexity of *legislatively ignoring* the best interests of the child in bail decisions involving a parent is now being recognized by the courts in criminal cases involving family violence, especially when there are intersections with family law and/or child protection law.³⁴ Similarly, Crown and defence counsel guidance documents like the BC Crown policy manual on adult bail³⁵ and the Law

Applicable Canadian Legal Standards

- Canadian Charter of Rights and Freedoms, especially Section 7 (personal security rights) and Section 15 (equality rights and the principle of non-discrimination) and various legal rights (Sections 7-14)
- Criminal Code offences stipulating maximum and mandatory minimum sentences
- Criminal Code provisions on bail and pre-trial detention, especially Sections 493 and 515
- Criminal Code Section 717 on alternative measures (diversion) for adults
- Criminal Code Part XXIII on sentencing, especially Section 718 (purpose and principles of sentencing, and especially 718.2(e) as the foundation for *Gladue*), Section 721 on pre-sentence reports, Section 722 on victim and community impact statements, Section 726 on other relevant information, and Sections 730-745 on various sentencing options, including conditional sentences served in the community

³³ See, e.g., Jillian Anne Rogin, "The Application of *Gladue* to Bail: Problems, Challenges, and Potential," LLM Thesis, Toronto: Osgoode Hall Law School of York University, 2014.

³⁴ Alexander Russell, "Court Opines on Impact of Criminal Bail Conditions on Families," Family LLB Ontario Divorce Education Centre, citing the cases of *R v. Khinda*, 2020 ONSC 7275 and *Shaw v. Shaw*, 2008 ONCJ 120, [2008] O.J. No. 1111 (Ont. C.J.), 9 February 2021.

³⁵ British Columbia Prosecution Service, "Crown Policy Manual: Policy Bail – Adults", 15 January 2021. Retrieved from: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/bai-1.pdf>

Society of British Columbia *Practice Checklists on Judicial Interim Release*³⁶ each recognize the adverse impact of bail/pre-trial detention decisions on the family to varying degrees.

Like bail decisions, judicial sentencing is guided by the Criminal Code, along with applicable case law and the Charter. In particular:

- Section 718 articulates the purpose and principles of sentencing, including enumerating several aggravating factors extending to offences committed against children
- Section 721 authorizes probation officers to prepare pre-sentence reports, which may include information about a person's child(ren)
- Section 722 on victim and community impact statements and section 726 authorizing a court to consider "any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender", potentially enable the court to consider information about a sentenced person's dependent child(ren).

As is the case for bail decisions, sentencing courts are guided by the principle of restraint in the application of incarceration. Specifically:

- Section 718.2(d) states that a sentenced person should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances
- Section 718.2(e), known as the "*Gladue* principle," requires Canadian courts to consider all available sanctions, other than incarceration, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all sentenced persons, with particular attention to the circumstances of Indigenous peoples.

In this regard, judicially mandated social context reports may be prepared for Indigenous person, known as *Gladue* reports, and for Black persons, known as Impact of Race and Culture Assessments or other variants like enhanced pre-sentence reports, that may include information about a sentenced person's children. These are discussed in Section 4 of this Overview.

Available research suggests that both these types of social context reports are typically underdeveloped in terms of gender and of the rights of the child.³⁷ Unlike other jurisdictions,

³⁶ Law Society of British Columbia, "Practice Checklists Manual: Judicial Interim Release Procedure," December 2021, para 1.2.1(f). <https://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/checklists/C-2.pdf>.

³⁷ See, e.g., Kaiser-Derrick, Elspeth. 2019. *Implicating the System: Judicial Discourses in the Sentencing of Indigenous Women*. University of Manitoba Press; Baigent, Charlotte, "Why *Gladue* Needs an Intersectional Lens:

Canadian sentencing policy does not legislatively recognize the gendered effects of sentencing as a mitigating factor. It also does not legislatively recognize the principle of "excessive hardship to dependents," or family ties and responsibilities, as considerations for sentencing. There is a lack of case law directing the lower criminal courts to take the best interests of a child, or a child's right to family life, into account when sentencing a parent with a dependent child.³⁸

Evolving considerations of "collateral consequences" in Canadian sentencing

The process of sentencing is highly flexible and individualized to the circumstances of the sentenced person and the offence. Individualization is limited by the parity principle which requires that similar sentenced persons for similar offences receive similar sentences.³⁹ Ultimately, any sentence must be proportionate to the gravity of the offence and the degree of responsibility, or moral blameworthiness, of the offender.⁴⁰

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.⁴¹

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 of what is a fit sentence. However, accounting for collateral consequences must not lead to an otherwise disproportionate sentence.⁴²

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:

- Sentencing is highly individualized
- Sentencing judges must have sufficient manoeuvrability to tailor sentences to the circumstances of the particular offence and sentenced person
- Tailoring sentences may require the judge to look at collateral consequences

The Silencing of Sex in Indigenous Women's Sentencing Decisions." Canadian Journal of Women and the Law, 32(1) 2020, 1-30. DOI: 10.3138/cjwl.32.1.01; Patricia Barkaskas, Vivienne Chin, Yvon Dandurand, and Dallas Tooshkenig, "Production and Delivery of *Gladue* Pre-sentence Reports: A Review of Selected Canadian Programs." Report submitted to the Law Foundation of British Columbia", Vancouver: ICCLR (2019)

³⁸ See Hayli Millar and Yvon Dandurand at pp. 249-262.

³⁹ *R. v. Pham*, 2013 SCC 15 at para. 9

⁴⁰ See: *R. v. Ipeelee*, 2012 SCC 13 at para.37 and 39

⁴¹ *Pham*, *supra*, at para. 11

⁴² *R. v. Stanberry*, 2015 QCCQ 1097 at paras. 16 to 24

- Examining collateral consequences enables a judge to craft a proportionate sentence by considering all relevant circumstances.⁴³

Courts have to a very limited extent considered the collateral consequences arising from a parent's separation from their children. For example, Ms. Stanberry, a single mother of two children, pleaded guilty to importing 2.35kg of cocaine. Any term of incarceration 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."⁴⁴ 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"⁴⁵ 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",⁴⁶ 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*⁴⁷ the 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 sentenced persons. Neither court considered Canada's international obligations under the CRC.

A more significant outcome arose in *McDonald*⁴⁸ wherein 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 upon the children of a custodial sentence. Similarly, in *Hadida*⁴⁹ the Ontario Court of Appeal emphasized that the defendant'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*⁵⁰ 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 incarceration.

⁴³ *R. v. Suter*, 2018 SCC 34

⁴⁴ *Stanberry, ibid*, at para. 18

⁴⁵ *Stanberry, ibid*, at para. 20

⁴⁶ *Stanberry, ibid* at para. 25

⁴⁷ *R. v. Holub*, 2002 CanLII 44911 (ON CA)

⁴⁸ *R. v. McDonald*, 2016 NUCA 4

⁴⁹ *R. v. Hadida*, 2001 CanLII 24046

⁵⁰ *R. v. Rockey*, 2016 ONCA 891

From existing case law, the courts' consideration of the collateral consequences for dependent children of parents facing criminal sanctions is very limited. It may help to convince a court to order a conditional sentence rather than incarceration, or minimally reduce the length of incarceration. Otherwise, the courts 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 parent⁵¹, 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. 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.

The law regarding collateral consequences in sentencing is, as the common law generally permits, incrementally evolving. In *Suter* the majority of the Supreme Court of Canada considered the extent to which vigilante violence inflicted upon the defendant could be considered by the sentencing judge as a collateral consequence.⁵² 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.”⁵³ In other words, collateral consequences must relate to the offence or to the circumstances of the sentenced person.

After reviewing Canadian and international jurisprudence, as well as academic writing,⁵⁴ 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 person facing criminal sanctions but also impact their dependent children. The rights of children and the best interests of the child are guiding principles within the CRC that need always be respected in judicial or administrative

⁵¹ Both *Stanberry*, *supra* and *Holub*, *supra*, reference the impact on dependent children occurring in many cases and not exceptional.

⁵² *R. v. Suter*, 2018 SCC 34

⁵³ *Suter*, *ibid*, at para 47; emphasis added.

⁵⁴ *Suter*, *ibid*, at paras 50 to 58

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.

Existing patterns in Canadian courts

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 Code⁵⁵ or as a collateral consequence of their parents’ sentence,⁵⁶ possibly weighing as a factor that results in the imposition of a shorter or community based sentence of incarceration or an alternative sentence to incarceration.

The courts have also been willing to consider the gendered effects of incarceration in some circumstances, especially in cases involving Indigenous and racialized women who are sole care providers and/or who may be deported following completion of their sentence. In particular, the adverse gendered and racialized effects of maternal sentencing on dependent children have been argued in the context of the Section 718.2(e) remedial sentencing provision,⁵⁷ and in constitutional challenges to mandatory minimum sentences⁵⁸ and legislative restrictions on conditional sentences of incarceration.⁵⁹

Nevertheless, the available jurisprudential and empirical evidence suggests that the Canadian criminal courts do not *routinely* consider the potential effects of a parent’s sentence on their dependent child(ren).⁶⁰ Most importantly, there appear to be very few cases where the sentencing courts have been willing to consider a parents’ sentence from the perspective of their child whose best interests should be taken into account as a primary and separate legal consideration. In one of the few cases where the best interests of the affected children *were* judicially considered, *R. v. Hamilton*., the sentencing judge was reversed on appeal.⁶¹

⁵⁵ Canadian Friends Service Committee (Quakers), “Considering the Best Interests of the Child when Sentencing Parents in Canada Sample Case Law Review”, 2018, at p. 3.

⁵⁶ For appellate guidance on the collateral consequences of sentencing, see *R v Pham*, 2013 SCC 15. On the application of collateral consequences to parents with children, see especially *R v. Stanberry* 2015 QCCQ 1097.

⁵⁷ Caregiving obligations have been judicially recognized in relation to Canada’s remedial sentencing provisions, encompassing section 718.2(e) of the *Criminal Code* and related trial and appellate jurisprudence, to address the historical and intergenerational legacies of systemic discrimination and socio-economic disadvantage experienced by many Indigenous (legislatively and jurisprudentially recognized) and Black (jurisprudentially recognized) Canadians.

⁵⁸ See, e.g., the legal factum prepared by West Coast LEAF as an intervener in the Supreme Court of Canada *R. v. Lloyd* case challenging the constitutionality of mandatory minimum sentences in relation to the hypothesized negative gender effects for women at p. 23. The factum is available at: <http://www.westcoastleaf.org/wp-content/uploads/2016/01/Lloyd-factum-Supreme-Court-of-Canada.pdf>

⁵⁹ *R. v. Sharma* (2018 ONSC 1141).

⁶⁰ *R. v. Hamilton*, 2003 CanLII 2862 (ONSC); *R. v. Hamilton et al.* Ontario Court of Appeal, 72 O.R. (3d) 1, [2004] O.J. No. 3252.

⁶¹ Richard Devlin and Matthew Sherrard, “The Big Chill? Contextual Judgment after *R. v Hamilton*”, *Dalhousie Law Journal* 28, 2 (2005): 409.

Section 3: Points of opportunity in criminal procedure where the best interests of the child may be considered

This section identifies points of decision-making within criminal process which represent opportunities, typically lost or overlooked, to introduce information on the best interests of the child for the consideration of the court.

Currently, at each point in the criminal justice process – arrest, remand, sentencing, incarceration, and post-release – adult defendants 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. The principle of the best interests of the child as a primary consideration in all decisions that directly and indirectly affect children 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.

Courts can play a role at several important intervals. They make decisions about whether a parent is granted bail and allowed to return home, with or without conditions, or is remanded in custody. If the person is found guilty, they then make sentencing decisions, including whether to incarcerate the parent. Courts also make decisions in situations where the parent fails to comply with the conditions of their release on bail or the conditions attached to a community-based sentence.

Charging decisions

Whether at the federal or provincial level, currently the best interests of the child are only applied to the decision to charge occasionally and for the most part indirectly.

Although not a decision of the court *per se*, the charging decision made by the Crown – whether to charge a person with one or more criminal offences further to police recommendations, or to proceed with (or stay) charges entered by police – is inherently significant for the trajectory of any criminal proceeding and thus for judicial decision-making. The decision to charge is one to which a legal standard of reasonableness applies. The Charge Assessment Standard employed in British Columbia, not dissimilar in its core elements to other provincial approaches, applies two tests:

1. whether there is a substantial likelihood of conviction; and, if so,
2. whether the public interest requires a prosecution.

This two-part test continues to apply throughout the prosecution. With respect to the best interests of the child and given the application of the Charge Assessment Standard until the point of disposition, the only way information regarding dependent children might become germane is if it is identified in the context of the public interest. In British Columbia, selected

“public interest factors” which do (or may) weigh against prosecution, and which are germane to this discussion, include:

- where the public interest has been or can be served without a prosecution by the BC Prosecution Service, including through restorative justice methods, alternative measures, Indigenous community justice practices, administrative or civil processes, or a prosecution by another prosecuting authority
- the youth, age, intelligence, physical health, mental health, or other personal circumstances of a witness or victim
- the personal circumstances of the accused.

The Charge Assessment Standard emphasizes the discretion afforded prosecutors in the charging decision and notes that “hard and fast rules cannot be imposed.” While it is not common for the parental status of an accused person to feature in the Crown’s decision-making, nor – as noted above – does consideration of “personal circumstances” exclude consideration of impacts of criminal proceedings on dependent children. On this matter the Charge Assessment Standard is silent. Similarly, in cases where the public interest is served by alternative process, it may be reasonable to consider the best interests of the child to be advanced via non-criminal process.

The Charge Assessment Standard also notes that:

The continuing consequences of colonialism for Indigenous persons in Canada provide the necessary context for any charge assessment involving an Indigenous person as a victim or potential accused. These consequences “must be remedied by accounting for the unique systemic and background factors affecting Indigenous peoples, as well as their fundamentally different cultural values and world views.”⁶²

We may understand “unique systemic and background factors affecting Indigenous peoples” to include (but not be limited to) cultural oppression and systemic bias against Indigenous peoples manifested across Canadian institutions.

Similarly, for federal prosecutions, 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.”⁶³

⁶² The quoted text is taken from the judgement in *Ewert v Canada*, 2018 SCC 30 at paras 57 and 58.

⁶³ [PPSC Deskbook 2.3: Decision to Prosecute](#). Department of Justice Canada; retrieved May 2023.

While this language is typically applied to considerations of the accused's personal history *per se*, as in *Gladue* Reports, there is a clear connection to the best interests of the child and to the responsibilities of Canadian state actors. The language employed implicates not only the specific actions of the criminal justice system, but the historical role of the justice system more generally in severing, damaging or destroying Indigenous family relationships and connections to culture, and in replicating and amplifying these effects over multiple generations – whether through Indian Residential Schools, the “Sixties Scoop” and enduring child protection overreach, or through overrepresentation of Indigenous peoples in the justice system.

In this view, the separation of an Indigenous child from their parent by a state process which is acknowledged to contain systemic bias, regardless of the internal criminal justice rationale for the decision, cannot be completely separated from these broader “systemic and background factors.” This suggests that the case for considering the best interests of the child at time of charge is even more acute in the case of Indigenous defendants. However, as things stand there is no explicit recognition of the relevance of the best interests of the child in federal or provincial charging decisions.

Pre-trial

Pre-trial detention of a parent can be very disruptive for the child. It is a stressful time of transition. At the same time, as bail and other pre-trial decisions are being made concerning a parent, one cannot rely on the parent to disclose their parenting status and the situation of their children.

Parents facing incarceration 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.

Delays in criminal proceedings (particularly when a parent is remanded in custody) can be disruptive and have a significant impact on a child. Delays can add to the anxiety and fear experienced by the children. Children need help understanding what is happening to their parent and to themselves.

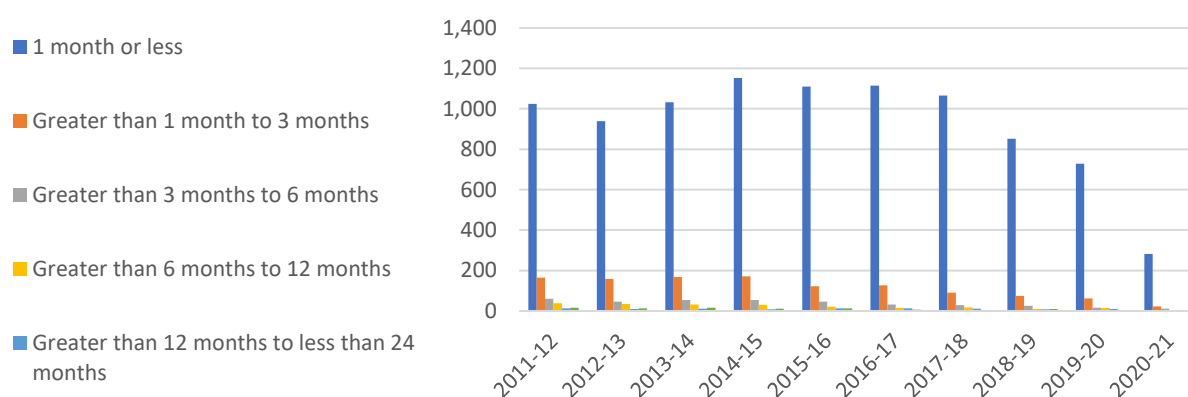
Sentencing

Custody in Canada is typically ordered in small doses. The median length of custody for all offences in Canada is thirty days, with more than 80 percent of custodial sentences being for six months or less. The effectiveness of short sentences for nonviolent persons and for those experiencing other factors such as poverty, intergenerational trauma, or mental health and substance use disorders is increasingly understood as negligible, whether in terms of denunciation, deterrence, societal short custodial sentences protection, rehabilitation, reparations, or acceptance of responsibility. In many cases incarceration via negative socialization, stigma, and disruption of positive influences may make sentencing objectives

more difficult to achieve. And as established elsewhere in this Overview, custodial sentences place parent-child bonds and the wellbeing of dependent children at serious risk. Short sentences are too brief to have any significant remedial or deterrent effect, but long enough to cause serious disruption in sentenced persons' lives and in the lives and wellbeing of their dependent children.

Although this pattern was reversed during the pandemic, in which custody counts were reduced to historic lows on public health grounds, historically courts in British Columbia have been more likely to issue custodial sentences than is true more generally in Canada.⁶⁴ Short sentences continue to be widely applied in Canada and sentences of 30 days or less are by some distance the modal custodial sentence applied in British Columbia, as shown in the case of sentenced women in Figure 2.⁶⁵ Short sentences may be as disruptive for the family/children as longer ones and offer at best marginal benefit in terms of public safety or (with respect to the opportunity to provide the incarcerated person with supportive programming) rehabilitation.

Figure 2: Known duration of custodial sentence in days, sentenced female offenders, British Columbia 2000-01 to 2020-21



Incarcerated women are more likely to have primary custody of children than their male counterparts. While there is no comprehensive data on children of sentenced persons in Canada, by gender or otherwise, an earlier study of the federal custodial correctional population revealed the prevalence of motherhood amongst incarcerated women, finding that “81.2% of these women were mothers of minor children and that 52.1% of the mothers had primary responsibility for at least one of their children at the time of their offence and incarceration.”⁶⁶

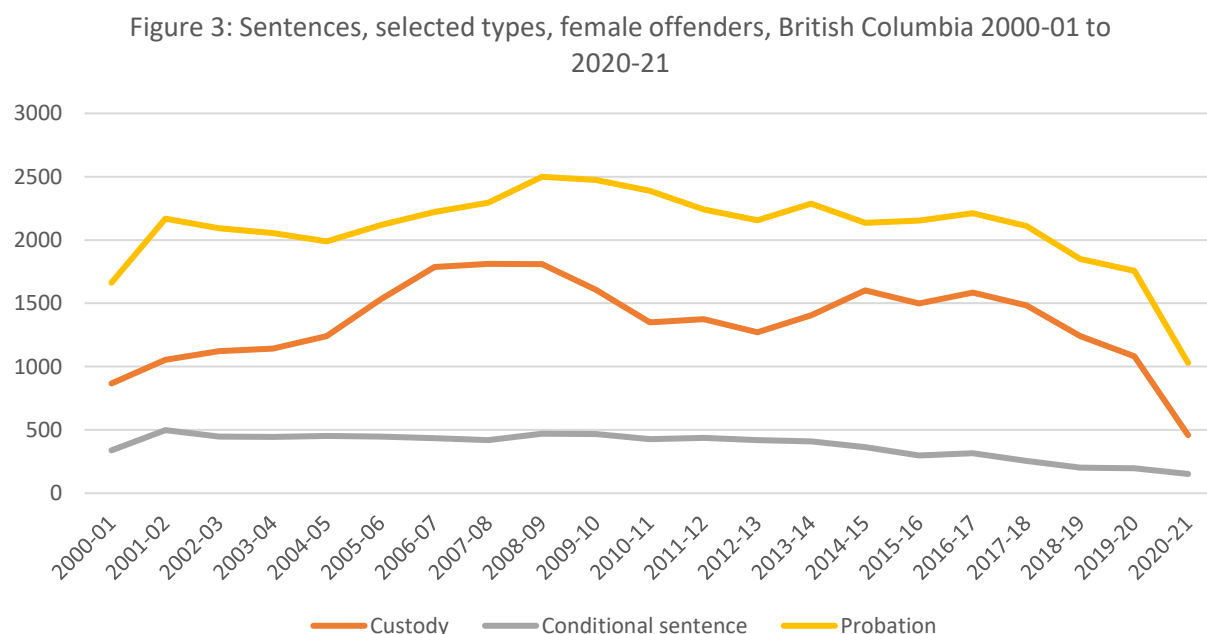
⁶⁴ Statistics Canada. [Table 35-10-0030-01: Adult criminal courts, guilty cases by type of sentence](#). Declines in the application of custody from 2019-20 forward are affected in part by extraordinary pandemic measures.

⁶⁵ Statistics Canada. [Table 35-10-0032-01: Adult criminal courts, guilty cases by length of custody](#). Declines in the duration of custody from 2019-20 forward are affected in part by extraordinary pandemic measures.

⁶⁶ Eljdupovic-Guzina, G. (1999). *Parenting roles and experiences of abuse in women offenders: Review of the Offender Intake Assessments*. Ottawa: Correctional Service of Canada.

In recent history in British Columbia – until the pandemic-driven decline in custody counts – women were issued carceral sentences at a rate of approximately 1500 annually (Figure 3).⁶⁷ Using a conservative extrapolation of the parenthood ratio noted above, the implication of these figures is that the number of mothers with primary responsibility for dependent children incarcerated in British Columbia annually may exceed 700.

This estimate is a significant understatement of the actual total number of affected dependent children, as it does not include children whose primary caregiver is a father who is incarcerated; nor does it include the substantial number of children in intact two-parent families where one parent has been incarcerated but who will still experience significant effects from incarceration of the convicted parent. While the lack of data on children of incarcerated persons *per se* renders further estimates challenging, there can be no doubt that the actual number of children affected by parental incarceration in British Columbia is substantial.



Family focused sentencing practices and the best interests of the child

Given the importance of the parent-child bond to the child's life outcomes, preservation of that bond wherever possible and appropriate is demonstrably in the best interests of the child. Sentencing alternatives which expand sentencing options in the form of community-based alternatives for non-violent offenders with minor children 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

⁶⁷ Statistics Canada. [Table 35-10-0030-01: Adult criminal courts, guilty cases by type of sentence](#). Declines in the application of custody from 2019-20 forward are affected in part by extraordinary pandemic measures.

from state care and cost reductions associated with community supervision rather than incarceration.⁶⁸

Washington State's statewide Family and Offender Sentencing Alternative 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 Community Parenting Alternative (CPA), 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. To be eligible for the CPA, defendants who are parents or legal guardians with substantial custody must be facing more than one year of incarceration as a possible sentence, cannot have a prior criminal history for felony sex or violent crime, and must formally agree to information sharing between the child welfare and corrections systems, including on matters of previous substance abuse and mental health. Program screening includes substance dependency and risk assessment, together with interviews, reference checks and home investigations. The court is expected to balance a range of factors, such as the seriousness of the offence, the appropriateness of the alternative for the offender, and the safety and needs of the victim, the child, the public and the offender. While resource intensive, preliminary evidence on the effectiveness of the program – including diversion of children from state care, lower parental recidivism rates and increased overall cost effectiveness – appears promising.

Numerous other international examples sentencing-related interventions which are design to preserve the parent-child bond exist. These include legislatively prescribed deferred or suspended sentencing options for pregnant women or primary caregivers; laws or legal principles asserting the right of a parent to serve their sentence close to family; guidance to correctional authorities to ensure that remanded or sentenced parents of dependent children are provided opportunities to arrange for childcare; and restriction of involuntary termination of parental rights for the children of incarcerated parents.

Court and non-court mandated practices that are being trialed in various countries encompassing case management or legal advocacy programs for parents or their children during criminal proceedings include assisting with re-entry from prison; parenting classes in prison; prison-based mother-child programs; child and family contact or visitation programs in prisons; prison-based early release or re-entry programs; and mentoring and advocacy programs for children affected by parental incarceration or their parents' criminal justice system involvement.

⁶⁸ This subsection draws extensively on Hayli Millar and Yvon Dandurand, "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 2017. Note that there are also costs related to the child even if not in state care; as already noted, incarceration of their parent sets the child further behind and contributes inequalities in equity related to race and social class and income, and also diminishes health and education outcomes. Associated costs arise related to subsequent interventions required for mental health care, behavioural issues and lower academic achievement.

Finally, bail, probation and conditional sentence orders can have a significant impact on 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.

Conditions of release

In Canada as in other countries, participants, stakeholders, and decision-makers in the criminal justice system have over time recognized the limitations of incarceration as a response to crime, whether in terms of its proportionality, its deterrent power, or its rehabilitative potential. There has also been a growing interest in the power of non-carceral alternatives including restorative justice. Canada has accordingly experienced an expansion of community-based alternatives to incarceration with increased judicial reliance on non-custodial sentencing options.

Although requiring careful management in terms of public safety and the experiences of victims, community sentences have many advantages. They are cheaper for government than incarceration of the same person. The offender is able to engage in productive activity, such as work and the maintenance of family relationships.

Community sentences/community release 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. A *conditional sentence* is a sentence to be served in the community as opposed to prison. Conditional sentences may only be issued for periods of up to two years and may not replace a mandatory minimum jail term. Conditions attached to a conditional sentence are normally more severe than those attached to probation, and may include a curfew, no-contact orders, mandatory substance use treatment, or other expectations. Finally, in some circumstances sentencing may be deferred in favour of probation with conditions, referred to as a *suspended sentence* or *conditional discharge*. Under this arrangement, a breach of conditions will result in a further sentencing hearing which is likely to see a harsher disposition applied, including jail time.

One additional manner in which someone is permitted to be in the community under conditions at the discretion of the court is under the terms of *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.

Depending on the nature of the alleged offence, conditions set in a bail hearing may be as or more stringent than those applied under a conditional sentence. One important restriction on bail conditions is that they may not be rehabilitative in nature, as to be prescriptive in this manner would be considered a violation of the presumption of innocence by the court.

Bail and community sentence decisions are 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. The courts are also 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. With respect to conditional sentence orders in particular, recent amendments to the *Criminal Code* in Bill C-5 (2022) which repealed some mandatory minimum sentences and removed a number of restrictions on the use of conditional sentence orders have broadened the range of possible application of these orders.

Breaches of conditions

Court-ordered conditions are a tool used 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; or by accident, lack of understanding, or lack of personal decision-making and organizational capacity. In addition, as recognized by recent criminal law amendments enacted by Parliament, conditions may have limited connection to the offence and/or may be too many in number to ensure compliance. As the correctional system in Canada contains many people who have been convicted of crimes at least in part due to a lack of life skills and resources, a history of trauma which distorts decision-making, or some combination of these and other factors including structural inequities, violation of court orders is a predictable feature of accused and convicted persons' behaviour.

Once violated, the court order becomes the subject of a separate criminal proceeding alleging an offence against the administration of justice. An administration of justice offence is an offence committed against the criminal justice system after another offence has already been committed or alleged. Common examples are failure to comply with conditions set by police or courts, failure to appear in court, or breach of probation conditions such as failing to report to a probation officer.

As the Department of Justice Canada itself acknowledges, “a disproportionate amount of resources are used to address these offences.”⁶⁹ 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. 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.

Thus, not only may court-ordered conditions sometimes act against the best interests of the child based on their inherent content, the prevalence of conditions and subsequent increases in incarceration on the basis of administration of justice offences may further harm the interests of children by damaging or severing parent-child bonds and disrupting families. These harms, in addition, are borne to a greater degree by children of families within Indigenous and other racialized and marginalized communities.

The relevance of the criminal courts’ consideration of release conditions to the best interests of the child 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?

Supporting parents in complying with court-ordered conditions

The primary means by which the criminal justice system supports accused and convicted persons living under conditions in the community is via the attention and support of probation officers.

Probation officers ensure individuals are following their court orders and work with them to connect them with supports in the community, change behaviour, and reduce reoffending. The correctional population served by probation officers is substantial. In British Columbia approximately 17,000 people are under court-ordered supervision in the community at any one time. Probation officers supervise compliance with different types of court orders, including probation orders, bail orders, conditional sentence orders, releases on own recognizance/peace bonds, and alternative measures.

There are no specific guidelines or resources in Canada to support condition compliance on the part of parents subject to orders of the criminal courts beyond those which apply to the general population of community corrections.

Suggested steps to increase parents’ compliance with court orders beyond current arrangements may include:

⁶⁹ “Reducing Delays and Modernizing the Criminal Justice System”, Department of Justice Canada, <https://www.justice.gc.ca/eng/cj-jp/redu/index.html>

- introduction of information advancing recognition of the best interests of the child through impact reports
- specific training for probation officers (and other relevant court personnel) on the best interests of the child, to inform both the discretionary aspects of the work, guidance to convicted persons, and the content of pre-sentence reports prepared by probation officers and those responsible for making *Gladue* submissions and writing *Gladue* reports and letters, and Impact of Race and Culture Assessments or enhanced pre-sentence reports
- the allocation of higher staff to client ratios by community corrections where the convicted person is known to be a parent of dependent children

The role of defence counsel

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.

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

How can defence counsel work to ensure information about the impacts upon dependent children is provided to the Court?

- Counsel may request that the court order a report to be prepared by a probation officer to assist the court in imposing sentence.⁷⁰ The contents of a report may be established by provincial regulation or specified by the court.⁷¹ Although the content of a report is generally limited to an assessment of the sentenced person's background and prospects,⁷² there is nothing to prevent a court requesting information about the impact of any sentence on dependent children.
- A sentencing judge must provide the sentenced person 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

⁷⁰ Section 721 *Criminal Code* – Report by Probation Officer.

⁷¹ Section 721(2) – regulations re content and form of a report and Section 721(3) – Content of report can be specified by the judge

⁷² See for example [R. v. Junkert](#), 2010 ONCA 549

appropriate sentence.⁷³ 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.

- The court must provide the sentenced person an opportunity to address the court before the passing of sentence, although this is not normally an opportunity to provide further evidence.⁷⁴ Given the requirement that Canada's law be interpreted consistent with its international obligations, it can and should be argued that a court has an obligation to hear from a dependent child, consistent with Article 12 of the *CRC*.
- 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 or other court-mandated report also contain information about the impacts of sentencing on dependent children. Depending on the age of the child, it could be beneficial to have them testify at the sentencing hearing.

Defence counsel may seek to provide to the court a detailed account of all the impacts on the dependent 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 the ways in which the sentenced parent contributes to the child's life.

The role of defence counsel is discussed further in Section 4 of this Overview, dealing with the introduction in court of information on the best interests of the child.

Section 4: Bringing information on the best interests of the child to court

This section outlines several current and prospective mechanisms by which information on the best interests of the child may be introduced into Canadian criminal courts and includes reflections or caveats on the limitations of these approaches.

Unlike in family court and child protection proceedings, where the best interests of the child are routinely considered, Canadian criminal courts have been inconsistent in their consideration of the rights of children separated from their primary or sole caregiver because of detention or incarceration.

Nevertheless, parental duties often form a critical part of a defendant's personal circumstances, and judges often exercise significant discretion in considering a broad range of factors that affect the sentenced person and their offence. Canadian judges are also required, under section

⁷³ Section 723 *Criminal Code*

⁷⁴ Section 726 *Criminal Code* and see for example [R. v. Gouthro](#), 2010 ABCA 188

718.2 of the *Criminal Code*⁷⁵ not to deprive the offender of liberty if less restrictive sanctions are appropriate, and to pay particular consideration to the circumstances of Indigenous peoples. Additionally, consideration of the best interests of a sentenced parent's child may align with the therapeutic goals of problem-solving courts. Finally, community-based alternatives to incarceration exist in Canada and abroad that judges and others can consider.

Preparing to share information on the defendant's family situation

As Canadian judges are not required to ask about defendants' children in remanding or sentencing their parent, the onus is often on the defendants themselves to voluntarily share information on their caregiving obligations with the defence counsel, the probation officer, or others involved in the case. In some instances, however, the accused parent may be reluctant to disclose their parental duties, owing in part to a fear of being stigmatized and the reasonable fear that the child(ren) may be apprehended and placed into formal care or that their parental rights might be involuntarily terminated. This may be particularly true in remand cases, where caregivers may have limited time to make alternative care arrangements for their children.

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

Details on the defendant and their caregiving responsibilities

Is the defendant a parent or caregiver to one or more dependent children, and in particular is the defendant a primary or sole caregiver? How are the children dependent on the defendant? Did the defendant have a parent that was involved in the criminal justice system, and if so, how did it impact the defendant and their own experience in coming in contact with the legal system?

Current pilots

In 2022-23, the [Elizabeth Fry Society of Greater Vancouver](#) implemented two pilot projects in British Columbia designed in part to facilitate the introduction of information in court relevant to the best interests of the child.

These include an **onsite support worker at Surrey Courthouse**, assisting women in bringing forward information regarding their parenting role and the substantial impacts of parental incarceration on the lives of their children, and a **Memorandum of Understanding with the BC Prosecution Service** to offer community work service and alternative measures to women involved in the criminal justice system in Victoria, BC, including a tool to assist women who wish to communicate information to the court about the potential impact a prison sentence may have on their family and children.

⁷⁵ And, where applicable, the *Youth Criminal Justice Act*.

Details about the child(ren)

What are the affected children's names and ages? What is their general maturity level? Do they have any specific needs? Would any additional children be at risk because of the defendant's sentencing?

The direct impact on the child

Will the child have to change schools, lose friends and peers, or lose community relationships like recreation, sports, or social opportunities? Does the child have a strong pre-existing relationship and attachment to the alternate caregiver? What is the anticipated impact on the child's academic and developmental progression and associated milestones, such as ability to make friends, build trust, build self-esteem, and enjoy good mental health. What is the anticipated impact on the child's physical health and well-being?

Sentencing options and the foreseeable impacts of incarceration

Where a custodial sentence is contemplated, does the detention of the defendant align with their child(ren)'s best interests? Are there alternatives to incarceration for which the defendant may be eligible? Is the prison too far from the children's home for meaningful regular in-person contact to occur? Are mother-child prison programs available to ensure the child remains with their maternal caregiver? What provisions are made for incarcerated fathers?⁷⁶ What are the carceral institution's visit protocols for children and families? Would siblings be separated because of their parent's detention? How would the parent-child relationship contribute to the sentenced parent's rehabilitation?

Useful Information for Sentencing Courts

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

- the names and ages of the children
- the plan for their care if their parent is incarcerated including the suitability of prospective carers
- whether siblings will be separated because of parental incarceration
- whether their education will be disrupted by parental incarceration
- any health or emotional needs of the children
- whether the children will be able to visit their parent if they are incarcerated.

Data should also be collected on the consequences of parental incarceration on children to provide local context for sentencing decisions.

⁷⁶ Fathers are particularly disadvantaged under current arrangements. Carceral settings for men which prohibit children from touching their parent, as in medium security, or which allow contact through video screens only, are likely to have significant impacts on younger children given their developmental level of cognition. Larger male institutions commonly have long waitlists for family visits and limited capacity to host such visits, becoming virtually meaningless for some, as in many cases the inmate is released before a visit can be successfully scheduled.

Alternative care arrangements if the parent is detained or incarcerated

Will the court (or other criminal justice agency) afford the accused or sentenced parent an opportunity to make alternative care arrangements? What alternative care arrangements could be made for the child(ren)? How and to what extent will the child's daily life be disrupted? Who would be the prospective guardian? What do the primary guardian and the child's family think about the prospective care arrangements? What would be the financial impact of the alternative care arrangement for the guardian? Would the alternative care arrangement affect the child's ability to stay in the same school, have continuity of activities and friendships, or sustain access to current medical treatment and service providers?

In aid of delivering this information, Canadian criminal courts accept supplementary information and mechanisms in which the collateral consequences of different sentencing options on the sentenced parent's children may be more fully articulated, such as in family or child impact statements, *Gladue* letters or reports, and Impact of Race and Culture Assessments. In Canada, victim and community impact statements are legislatively permitted and family or child impact statements could serve as an extension of those existing statements.

Family impact/responsibility statements are descriptions of the expected effects of sentencing options on the sentenced parent's child(ren) and family, including their extended family members like the child's grandparents who may be affected by the sentencing decision.

Child impact statements/assessments are written explanations of how the sentencing options will affect the sentenced parent's child, including consideration of the child's independent rights within their caregiver's punishment.

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 indeed include information that might otherwise have been captured in the child impact statement.

A sample of the UK Prison Reform Trust model child impact assessment is summarized in the box overleaf.⁷⁷ The assessment is part of a toolkit titled *This is Me* designed to guide practitioners in identifying and addressing children's needs when a mother is in contact with the

⁷⁷ Sarah Beresford, "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 (2022), <https://prisonreformtrust.org.uk/wp-content/uploads/2021/09/Child-Impact-Assessment-MUM-November-2022.pdf>

criminal justice system.⁷⁸ Application of the Prison Reform Trust assessment or other child impact assessment tools in Canada requires consideration of a number of factors.

First, justice system representatives may currently be poorly placed to gather the requisite information. Probation officers are not typically trained on child development, interviewing children, or on how to meaningfully assess the impact of remand or sentencing options on the defendant's children or family. In addition to this major limitation, members of Indigenous or other racialized and marginalized communities could be reluctant to engage with social workers or others in preparing family or child impact statements, fearing state intervention and apprehension of their child, or owing to a general distrust of government agencies.

Second, capturing the child's voice authentically requires careful planning. As a matter of best practice, children should be asked who they would like to prepare the impact statement or assessment and the child's voice should be reflected throughout the submission, depending on their age and their maturity level. To properly capture the child's views, relationships of trust are key. In some cases, the child may request to speak with a teacher, a family member, or a representative of a non-profit organization, who could in turn assist in preparing the statement or assessment. In some Canadian non-criminal contexts and in some non-Canadian criminal court jurisdictions, the courts have appointed independent legal representation like a guardian *ad litem* for the child(ren).

UK Prison Reform Trust model assessment of the impact of a mother's sentencing on her child

For the remand and sentencing phase, the assessment contains a short set of child-friendly questions to understand the child's needs. The child should be informed about why the questions will be asked and with whom their answers will be shared.

- How do you feel about your mum going to court?
- What questions do you have about what happens at court?
- How are you doing?
- Is there anything that you would like the people at court to know about you and your family?
- Is there anyone who could help you right now? What could they do?
- Is there anything you would like mum to know?
- If you're not living with mum, is there anything you would like the person looking after you to know?
- Is there anything else that you'd like to talk about (this does not have to be about mum)?

The child is invited to choose possible agreed next steps or actions, such as asking questions about the court process, or letting someone at school know so that parent-teacher arrangements can be made. It is important that the child has agency in expressing their needs and that they are included in decision-making about further support they may need.

⁷⁸ Sarah Beresford, "This is Me: A Child Impact Assessment Toolkit", Prison Reform Trust (2022), <https://prisonreformtrust.org.uk/child-impact-assessment-toolkit/>

Third, representatives from non-profit organizations who may assist in preparing the statement must abide by their organization's confidentiality and privacy policies, recognizing that parental criminal justice involvement is not itself a child protection matter.

Communication between the person who conducts the assessment and the relevant probation officers (or other relevant court appointed or legally recognized personnel) and lawyers is crucial to avoid competing information and ensure the successful submission of the statement.

[Applicability of *Gladue* reports and Impact of Race and Culture Assessments \(IRCAs\)](#)

Unlike family or child impact statements, *Gladue* reports and IRCAs are designed to respond to the over-representation of Indigenous, Black, and other racialized communities in Canada's correctional system.

Gladue reports are legislatively and judicially prescribed as a form of specialized PSRs 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 rights can be explained in reports.

Similar to *Gladue* reports, although not legislatively or judicially prescribed, Impact of Race and Culture Assessments (IRCAs) are a specialized form of pre-sentence reports (PSRs) that aim to 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. Among the information contained in an IRCA, limited attention has been paid to parental caregiving duties and the rights of their child(ren).

In some cases, IRCAs have contained a section devoted to addressing parent-child relationships and adverse childhood experiences, although that section addressed the sentenced person's relationship to their parents, rather than their own parental responsibilities. Nevertheless, the section could conceivably be expanded to cover the sentenced person's caregiving role and the rights of their child(ren), especially if the IRCA writers are provided training to meaningfully assess the best interests of the affected child(ren).

To date, IRCAs and *Gladue* reports have been infrequently used to convey key parenting information and advance the best interests of the child. Recent research on IRCAs, PSRs and *Gladue* reports found that only a minority contained details on the defendant's parental status and other key detail, a much smaller percentage treated the defendant's parental role as a mitigating factor and none of the cases recognized children's independent rights, including the right for the courts to consider their best interests in remanding or sentencing their parent.

In the case of *Gladue* reports, there is as yet no jurisprudence on the question of whether the best interests of the child should be considered in scope, given that the legal basis for *Gladue* reports is distinct (the historic over-incarceration of Indigenous peoples as recognized by section 718.2(e) of the *Criminal Code* and applicable case law). However, the role of Canadian justice in the forcible separation of Indigenous families and subsequent trauma may provide a compelling rationale on the basis of which this information may be welcomed by the courts.

Section 5: Concurrent criminal and child protection proceedings

This section deals with the challenges presented when criminal proceedings involving a parent are concurrent with child protection proceedings involving that parent's child(ren).

The family situation of defendants with parental responsibilities is often precarious. In many cases child protection authorities are already involved. In some instances, various forms of family violence may be present (including the involvement of the accused parent). In other situations, the children are otherwise in care or placed with family members or relatives. The parents may be in the middle of divorce proceedings, with unresolved parenting arrangements. Assessing what is the best interests of the child may not always be a simple matter.

There are two common scenarios in which children with one or more parents facing criminal charges are also the subject of child protection proceedings:

1. Concurrent or proximate criminal and child protection proceedings in which the parent is facing charges related to violence or abuse towards (or neglect of) the child or other family members, including intimate partner violence
2. Concurrent or proximate criminal and child protection proceedings in which the parent is facing criminal charges unrelated to the parent's treatment of the child or other family members

While there are many nuanced differences between these two scenarios, the primary distinction is the degree of relevance to the child protection case of facts established in the criminal case (and to some extent, *vice versa*).

In cases where the alleged criminality has no direct bearing on the child's well-being, the fact pattern and disposition of the criminal case is only likely to feature indirectly in child protection

unless the parent is incarcerated or is otherwise assigned conditions which directly impinge on the parent's ability to act as a primary caregiver.

Conversely, criminal violence, abuse and neglect directed towards the child or other family members are commonly *prima facie* reasons for child apprehension, and convictions on such charges are normally taken as voiding any need for the state to persuade a child protection court of the same pattern due to the higher standard of proof in criminal law. Similarly, accused parents' counsel often seek to delay child protection proceedings on the grounds that statements made in those proceedings may influence criminal proceedings to the detriment of the accused. In all such cases, not only are the best interests of the child inherently at issue but children may be asked to provide statements to the police ("KGB statements") or in some cases 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.

As established elsewhere in this Overview, research and data are relatively minimal regarding the first scenario. We do not know much, in general, about the dynamics of situations in which parents are simultaneously before the criminal justice and child protection systems but the concurrent cases are not linked by a common pattern of behaviour. Understandably, more extensive research and policy attention has been devoted to the alternative scenario, in which the same alleged pattern of behaviour (typically, violence towards a spouse or child) is the trigger for criminal and child protection proceedings, and sometimes separation and divorce proceedings as well. As this is the circumstance where the best interests of the child are most acutely at risk, the remainder of this module is dedicated to ways in which practice can be improved in this area by multiple professions.

Issues related to concurrent criminal and child protection proceedings affecting the best interests of the child, where family violence is present.

In recent work completed for the Department of Justice Canada, Nicholas Bala and Kate Kehoe⁷⁹ considered a range of issues related to concurrent criminal and child protection proceedings. Issues emerging in the interaction of the two systems identified by these authors are many. Selected issues identified by Bala and Kehoe are set out below, condensed for brevity.

- *Erroneous expectations of linkage between cases.* Parents may be surprised or frustrated to learn that child protection proceedings are continuing despite an acquittal.
- *Systemic obstacles to a child-focused resolution of child protection proceedings.* Poor communication and distrust between professionals in the criminal and child protection systems may emerge as a result of different system priorities.

⁷⁹ The following sections are primarily adapted from "Concurrent Legal Proceedings in Cases of Family Violence: The Child Protection Perspective", Department of Justice Canada, 2022; https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/fv-vf/child_protection.pdf

- *The (questionable) primacy of criminal proceedings.* Delay of child protection process to allow completion of the criminal process may be contrary to the interests of the child.⁸⁰
- *Charging decisions being made without child protection consultation.* In certain cases, such as an isolated incident of an assault of a child, the Crown may benefit from electing to confer with the child protection system before a decision is made.
- *Criminal jeopardy as a barrier to engaging in remedial services.* An accused's acknowledgement of criminal behaviour to participate in family counselling may be contrary to advice provided in their criminal defence.
- *Overly restrictive release conditions.* Conditions imposed in a criminal proceeding restricting contact will override any conditions allowing for contact by a child protection court. Some release conditions can be broader than necessary to protect the child.
- *Confusion over contradictions in criminal and child protection court orders.* Parents may wrongly assume that court orders made in child protection proceedings will override criminal court conditions of release.
- *Backward-looking vs. forward-looking dispositions.* Child protection cases focus on the child's best interests. The focus of criminal proceedings remains to a greater degree on retrospective punishment, meaning the best interests of the child may be marginalized.
- *Differences in the consequences of Charter breaches.* Section 7 and 8 breaches in child protection proceedings will not result in a stay or in exclusion of evidence if that would place the child at risk; in criminal law, stays, exclusions and acquittals are common.⁸¹

A number of provincial statutes have provisions that address concurrent proceeding issues in intimate partner violence cases. Within parenting arrangements law, these include consideration of the impact of intimate partner violence as it relates to the best interests of the child; and a requirement for the court to consider the existence of criminal and/or civil (including child protection) proceedings relevant to the child's safety, security, or well-being.⁸² In child protection law, these include a presumption of supervision where a parent has been charged or convicted of an act of violence; a requirement to consider the level of violence when assessing parenting ability and the child's best interests; allowing the court to make a parenting or guardianship order in favour of any person named in the child protection application, which

⁸⁰ Section 7 of the Charter applies equally to criminal proceedings and child protection, and the prioritization of criminal proceedings has been challenged in case law in *Children's Aid Society of Algoma v. B. (S)*. [OnCJ 2008] and *New Brunswick (Minister of Health) v. G.J.* [SCC 1999].

⁸¹ Bala & Kehoe, *op. cit.*, pp. 31-38.

⁸² *ibid*, pp. 13-16.

avoids the need for a parallel family law proceeding; and clarifying that the duty to report is an ongoing and personal duty, which remove the option of delegating the reporting or failing to report as new information arose.⁸³

Other provisions addressing concurrent proceedings include:

- in family law, making the breach of restraining orders a criminal offence
- in family and child protection law, requiring parents or prospective caregivers to advise the court of previous involvement in any family, child protection or criminal proceedings; and notification of and standing for child protection authorities in custody applications
- across various areas of policy and law, definitions of family violence which include emotional and financial abuse, and exposure to intimate partner violence; expeditious access to the justice system to obtain civil orders where family violence is at issue; and provision of adequate supports to allow victims to make effective use of such laws
- requiring police to share information with child protection officials that may be relevant to a child protection investigation or application.

Best and promising practices for professionals and service providers

Bala and Kehoe provide the following checklist for judges hearing child protection applications to make informed enquiries of counsel.⁸⁴

- | | |
|---|---|
| 1. Is this a case where there may be family violence? | 5. Are there any interventions taking place as a result of the criminal proceedings that may be relevant to the child protection proceedings? |
| 2. Are there criminal charges? | |
| 3. Are there any family or civil protection order proceedings, or any bail or probation conditions relating to access to the child or other parent? | 6. How will this court keep apprised of the criminal proceedings? |
| 4. If any other proceeding, orders, or conditions affect the ability of this court to order access or interventions, what steps are appropriate? | 7. Is this a case where it might be useful to hear from police or the Crown? |
| | 8. Is this a case where a joint settlement conference might be useful and possible? |

⁸³ *ibid*, pp. 59-60.

⁸⁴ *ibid*, pp. 70-71.

Within existing service frameworks, prosecutors and police may emphasize the best interests of the child and respond to the challenges of concurrent proceedings through applying some or all of the following practices.

- Early consultation by police with child protection workers on commencement of investigation into allegations of intimate partner violence in cases where there are children resident.
- Cooperation between police, Crown, and child protection agencies to identify conditions of release that permit access and interventions in the best interests of the child and the family.
- Plea bargaining and withdrawal of charges, where appropriate and in consideration of the parent's progress in addressing the protection concerns and how the proposed plea will affect the child and the options for the child protection proceedings.
- Timely disclosure to child protection authorities when responding to applications for disclosure of records from child protection authorities.
- Consultation with child protection agencies over children testifying in criminal proceedings to determine potential harm to the child, whether the child is receiving counselling or treatment, and safeguards and accommodations to assist the child.
- Where restorative justice measures are being used in the criminal process, inclusion of child protection workers or their delegates as appropriate.⁸⁵

From the perspective of child protection lawyers and staff, in situations of concurrent proceedings the following steps are recommended individually or in combination.

- Review of bail conditions prior to court to determine if criminal court conditions restrict the accused from having contact with the other parent or the child, advising the child protection court in advance, and taking steps to ensure parental compliance.
- Where criminal and child protection orders conflict, child protection staff should determine options with Crown and seek police information regarding risk to the child.
- Where a child and/or victimized parent have been interviewed by police, if relevant the child protection lawyer should request a copy from the Crown to ensure that the child protection court has the best evidence available.

⁸⁵ *ibid*, pp. 74-75.

- Where a parent's criminal court charges or conditions have been dropped or varied, the child protection worker should review the remaining conditions with both parents and parents' counsel.
- Where a charged parent has participated in counselling or other interventions which suggest a reduction in the risk of future violence, child protection workers should advise the Crown to assist in ensuring informed plea negotiations and sentencing in circumstances where this information is unlikely to be prejudicial in the criminal proceeding.
- Where the criminal charges or bail conditions are creating obstacles toward progress in the child protection case the child protection worker may advise police, the Crown and the parents' criminal and child protection lawyers to facilitate a resolution satisfactory to both agencies and in the child's and public's interest.⁸⁶

Development of 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.

⁸⁶ *ibid*, pp. 75-79.

Section 6: Moving forward – challenges, opportunities, and questions for consideration

The best interests of the child should be considered when dealing with justice-involved persons with parental responsibilities. Decision making at the time of sentencing can be improved by ensuring that the impact of the decision on the offenders' children is considered. Whenever possible and appropriate, children's separation from their parents who face criminal sanctions should be minimized by limiting the use of detention and incarceration. In aid of this objective, the courts should be provided with accurate information about an accused's family situation and the potential impact of sentencing and bail decisions on family members.

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.

- For example, there are concerns about a child and a family's right to privacy, protected by both the CRC and the Charter, given that pre-trial detention or a sentence of incarceration may result in a child being removed and placed in alternative care. Accordingly, in situations where the child is not a direct victim of their parent's alleged or proven criminal behaviour, good practice guidance suggests that it must be up to the affected parents and their children to bring their personal information to the attention of the Crown, defence counsel and/or the sentencing court.
- There are questions about who should prepare information for the court assessing the potential impact of a bail or sentencing decision on a dependent child. Various good practices exist internationally, including court-appointed child advocates, and probation officers and other experts preparing child or family or health equity impact assessments as part of a pre-sentence or other report.
- A child's right to have their best interests considered as a primary consideration in judicial decisions that affect them is also complicated because it is directly connected to a child's right to have their views considered under Article 12 of the CRC. Canadian courts will need to find ways to give effect to these participatory rights, as they are already doing in the family law context.
- There are questions too about what weight the courts should place on the potential consequences of a bail or sentencing decision on a dependent child. Existing guidance suggests that such assessments must be made on a case-by-case basis and that while a child's best interests are an important consideration, they are only one of many factors a bail or sentencing court must balance.

- 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 protecting society.
- Finally, there are concerns that taking the rights and best interests of a dependent child into account will further complicate and delay criminal proceedings.

Most of these concerns are surmountable, and a range of practical guidance is available to assist defence counsel, crown prosecutors, and judges on these matters. Despite these and other identified challenges, there are several reasons for optimism.

First, Canadian policymakers, practitioners, and advocates are increasingly aware of the importance of reducing adverse childhood experiences in other legal contexts, especially family law.⁸⁷

Second, policymakers, practitioners and advocates have been instrumental in legislatively developing the best interests of the child test in other legal contexts (especially separation, divorce, family violence and child protection) by enumerating the many factors, including Indigenous rights to cultural continuity and substantive equality, and Jordan’s Principle, that judges must consider in determining the best interests of a child as a primary consideration in the judicial decisions that affect them.

Third, policymakers and others are increasingly prioritizing the need to address systemic racism and other forms of discrimination across the criminal justice process and in the child welfare system, especially for Indigenous and Black persons, with various initiatives being proposed and implemented nationally and in BC consistent with the Truth and Reconciliation Commission’s *Calls to Action* and the National Inquiry into Missing and Murdered Indigenous Women and Girls *Calls for Justice*. Underscoring the importance of this work, recent data from the Office of the Correctional Investigator indicates that the proportion of federally sentenced Indigenous women, many of whom are parents with dependent children, reached 50% in 2022.

Finally, in part because of the pandemic, there is increasing awareness and pressure for policymakers and practitioners to pay more attention to the *qualitative conditions* of detention and incarceration by considering “the likely experience of a proposed custodial sanction in crafting a fit sentence” and not just the quantum of incarceration.⁸⁸ This Overview is designed to ensure these various pockets of increased awareness and law reform will spill over into judicial bail and sentencing decisions in criminal matters, where the known adverse and often

⁸⁷ For example, Access To Justice BC has just announced a Transform the Family Justice System (TFJS) collaborative, available: <https://www.thelawyersdaily.ca/articles/37189/b-c-family-law-collaborative-seeks-new-approach-to-deal-with-adverse-childhood-experiences>

⁸⁸ See, e.g., Chris Rudnicki, “Confronting the Experience of Imprisonment in Sentencing Lessons from The Covid-19 Jurisprudence”, *The Canadian Bar Review*, 99(3) (2021): 469-487.

multigenerational effects of parental detention and incarceration for dependent children are well documented and largely preventable.

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 state-ordered removal; the fact that consideration of a defendant'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.

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.

Questions of law

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.

Questions of process

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 supervision 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 supervision 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:
 - a. pre-sentence investigations and reports
 - b. bail reports
 - c. sentencing submissions
 - d. *Gladue* reports, letters and submissions
 - e. IRCA reports and enhanced pre-sentence reports
 - f. 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 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.
13. Who might best assume responsibility for education of legal professionals about the rights, safety, and wellbeing of children in relation to criminal justice decisions that involve their parents.
14. Who might best assume responsibility for 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.

15. Who might best assume responsibility for 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.

This Overview has been prepared in an attempt to influence policy change and sentencing reform, to provoke reflection, to encourage greater availability of community-based alternatives to incarceration for people with parental responsibilities, and to support parents in mitigating the impact of their own sentencing and court order compliance on their children. It also reflects the view that children are independent rights holders, and these rights need to be more consistently recognized and applied in criminal proceedings involving their parents. Ultimately, the success of these and related efforts rests on the good faith engagement of justice professionals with these issues, considering for themselves how the best interests of the child may most suitably and effectively be incorporated into decisions and orders of the criminal courts.

Practice is not easily changed, and in these matters many competing values and principles of law, human rights and social wellbeing are at stake. Set against this challenge, the research-based, jurisprudential, treaty-based, and moral case to consider the best interests of dependent children in criminal cases is compelling. It is our hope that this Overview in its own way has advanced consideration of this critical issue.



AN OVERVIEW FOR PRACTITIONERS



**International Centre for Criminal Law
Reform and Criminal Justice Policy**
1822 East Mall, Vancouver, BC V6T 1Z1 Canada
www.icclr.org

