



Canadian Friends
Service Committee
(QUAKERS)

**Considering the Best Interests of the Child
when Sentencing Parents in Canada**

Sample Case Law Review

December 2018



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About CFSC

Canadian Friends Service Committee (CFSC) is the peace and social justice agency of the Religious Society of Friends (Quakers) in Canada. CFSC's criminal justice work discerns, develops, and encourages responses that actively prevent harm, repair harm, and move beyond harm in relation to the justice system. It does this in ways that are healing for all concerned and for society as a whole.

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Considering the Best Interests of the Child when Sentencing Parents in Canada: Sample Case Law Review

1 Executive Summary

Children of incarcerated parents, including parents detained in relation to immigration, are a vulnerable population that experience complex long-term psychological, social and economic disadvantages. Several Canadian studies have found that many of these children end up in the child welfare system and are also more likely than the general population of children to be in conflict with the law. *The Convention on the Rights of the Child* (*'The Convention'*), to which Canada is a signatory, states that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."¹ When dealing with children of incarcerated parents at all stages in the criminal justice system, from the time of arrest to incarceration and release, considering the "best interests of a child" would contribute to reducing or eliminating some of the lifelong harmful impacts and outcomes they currently experience.

In Canada, judicial approaches to sentencing and other court decisions (bail/remand) can and do vary. When making sentencing decisions, Canadian judges should take into account all relevant circumstances of the offender,² which can include whether an individual has children, whether the child/ren were living with the accused parent at the time of and/or prior to the arrest and consequently, the best interests of the child or any rights under the *Convention*. In other words, judges can exercise discretion and may consider the dependency of an individual's children (socially, economically, emotionally and physically) among the various mitigating or aggravating factors relating to the individual and the offence. Under Canadian law, judges are not required to consider the best interests of children when sentencing their parents.

Canadian Friends Service Committee commissioned a review of sample case law in 2016 to determine if the "best interests of the child" were considered in the sentencing of parents in Canada. Using a combination of Quicklaw and CANLII, searches were made of 521 sentencing decisions from all court levels in British Columbia, Alberta, Manitoba, Saskatchewan, and Ontario, and the most relevant sample cases were refined to a total of 97. The sample data for this time period were found to follow some trends, including an absence of any cases that incorporated the "best interests of the child," the *Convention* or the *UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (*Bangkok Rules*) into sentencing decisions.

¹ Article 3, The Convention on the Rights of the Child

² [Purpose and Principles of Sentencing](#), section 718.2(a)

These findings, along with research on best practices in other jurisdictions, indicate that Canada is lagging behind other common law countries and emerging international standards that prioritize the “best interests of the child” when dealing with individuals with parental responsibilities.³

Based on this study and a review of the literature in Canada, we consider that significant further research and consideration of the impact of parental incarceration must be undertaken in Canada. Questions that remain following this study include: How might sentencing practices in Canada be strengthened to encourage and enable judges to take the best interests of the child as a primary consideration when sentencing parents? How can the criminal justice system incorporate education and training on the impact of incarceration on children and how to assess the best interests of the child for offices that make decisions about parental incarceration? What further information do we need to inform legislative and policy changes? And finally, how can we raise public awareness of this issue?

Below are our final reflections and suggestions for areas of pursuit.

- 1) Canada needs a rights based framework for sentencing, enhanced pre-sentence reports and alternatives to prison.**
- 2) Canada needs more accurate and detailed data about children with incarcerated parents.**
- 3) There needs to be more education and public awareness about children of incarcerated parents.**
- 4) Children need a strong and independent advocate for their rights when decisions are made that impact them: A National Child Rights Advocate or Commissioner?**
- 5) Further research is necessary to consider the multiple and overlapping vulnerabilities of children impacted by the justice system and its relationship with child welfare and other institutions.**
- 6) Further research is necessary to consider situations in which the child/ren has/have been a victim or witness to an offence committed by their parent/s.**

³ See [section 2.3](#).

2 Background

Terminology

In this report ‘parent’ and ‘individual with parental responsibilities’ refer to parents, legal guardians and other primary caregivers who have the sole or primary care for a child/ren. ‘Child/ren’ refer to the UN definition of persons below the age of 18 years old⁴ and includes both babies and small children living in detention facilities with their parent and those left outside. Offender is the term used for a person who has been charged and convicted of a crime.

2.1 The Effects of Parental Incarceration on Children

To determine the best interests of children when sentencing parents, it is imperative to understand the pervasive damage of custodial sentences on children. There is extensive research highlighting the significant impact that sentencing decisions have on the children of offenders, potentially with traumatic effect. Children of incarcerated parents, including those detained in relation to immigration, are a vulnerable population that can experience complex long-term psychological, social and economic disadvantages.⁵ Separation of children from their parents can cause distress, which leads to disruption, destabilization, and deprivation.⁶ Separation and parental incarceration also has developmental effects on children and can cause difficulties maintaining relationships, leading to further distress and continuous cycles of trauma.⁷ Incarceration of parents can also lead to the loss of income and financial stability, as well as social stability and support when children have to relocate, shift schools or are taken into institutional care.⁸

Research conducted in other countries has demonstrated that there are far-reaching repercussions on children of all ages in all aspects of their lives when their parents are incarcerated.⁹ This research has found that children with incarcerated parents continue to be exposed to increased levels of risk for both internalizing (e.g. depression, anxiety) and externalizing (criminal justice system contact) behaviours.¹⁰ These externalizing and internalizing behaviours include: “physiological problems, such as sleep problems, eating problems, or developmental regressions; and behavioural problems, such as delinquency, substance use, aggression, and substituting older delinquent peers and/or street gangs as pseudo-families”.¹¹ Research also indicates that “children with one or both incarcerated parents face increased risks of antisocial or other delinquent

⁴ Article 1, UN Convention on the Rights of the Child

⁵ Robertson, 2007; Townhead, 2007; Hannem and Leonardi 2014.

⁶ Millar and Dandurand 2018.

⁷ Millar and Dandurand 2014.

⁸ Millar and Dandurand 2018.

⁹ See for example, Beresford 2017.

¹⁰ See Dallaire and Wilson 2010; Huebner and Gustafson 2007; Murray and Farrington 2005, 2007; Phillips et al. 2006; Wilbur et al. 2007

¹¹ McCormick, Millar and Paddock 2014, citing Blanchard 2004; Block and Potthast, 1998; Cunningham and Baker 2003; Johnston 1995; Jose-Kampfner 1995; Murray and Farrington 2005, 2007; Poehlmann 2005b; Wilbur et al. 2007.

behaviours”, and are at higher risk of future involvement with the criminal justice system.¹² In Canada, one study estimated that children of federally sentenced fathers were between two and four times more likely than the general population of children to be “in conflict with the law.”¹³ A smaller study of provincially incarcerated women reported that half of their adolescent children had already been in youth custody.¹⁴ Children with incarcerated parents who go on to be imprisoned themselves tend to exhibit significantly more attachment problems compared to inmates who had never experienced parental incarceration.¹⁵

A study of Canadian women in provincial detention found that 83% of women had no time to make alternative care arrangements for their children before entering custody, and the provinces’ Children’s Aid Society was involved in approximately half of the child placement decisions.¹⁶ This may be contributing to the high level of Indigenous children who end up in the child welfare and foster care system.¹⁷ At the point of arrest, mothers are given very limited time to arrange caregiving for their children. This practice may result in the child(ren) being left informally with a neighbour, friend, or relative,¹⁸ even when the new caregiver might not have adequate resources (financial or otherwise) to properly care for the child. In addition to the unanticipated economic burden of caring for a child, these caregivers may “face additional risk factors affecting their quality of parenting, such as being unemployed, on social assistance, having poor health, having a low education, and being a single parent.”¹⁹

Quality caregiving is particularly important because many children struggle emotionally and psychologically following the incarceration of a parent.²⁰ Foster parents and child welfare workers are not required to take children to visit their incarcerated parent,²¹ and for Indigenous children, this continuing practice reproduces and extends the legacy of family separation experienced through residential schools. Child services, placement homes, foster parents and sometimes the primary guardian on the outside can be hesitant to take a child to the prison because they have concerns about the negative effects of the prison atmosphere on the child/ren.²² While visitation can be very valuable to and desired by children, they need social and professional support and

¹² McCormick, Millar and Paddock 2014 citing Aaron and Dallaire 2010; Farrington 2004; Huebner and Gustafson 2007; Murray and Farrington 2005; Murray, Janson, and Farrington 2007; Thornberry, Freeman-Gallant, Lizotte, Krohn and Smith 2003; Trice and Brewster, 2004; Withers and Folsom, 2007.

¹³ This study involved 534 federally incarcerated men in Ontario, 53% of whom were fathers of minor children, Withers and Folsom 2007.

¹⁴ This study involved 40 provincially incarcerated women, Cunningham and Baker 2003.

¹⁵ Novero et al. 2011.

¹⁶ Cunningham and Baker 2003.

¹⁷ Aboriginal Children in Care Working Groups 2015; Vandna Sinha et al. 2011

¹⁸ Cunningham and Baker 2003; International Association of Chiefs of Police 2014.

¹⁹ Poehlmann 2005a.

²⁰ McCormick et al. 2014 citing Adalist- Estrin 2006; Huebner and Gustafson 2007; Murray and Farrington 2005; Poehlmann, 2005a.

²¹ McCormick, Millar and Paddock 2014.

²² Scharff-Smith & Gampell, 2011

assistance to have a parental contact visit. These challenges are compounded by the financial instability and insecurity of these children's living situations, whether they remain with their other parent or another caregiver, and even when their parent returns home. Because of the disruption to family income, the remaining parent may need to work to support the family, which may result in reduced supervision of the children and decreased quality of care giving.

2.2 Parents in Prison

Accurate research and information in the Canadian context is lacking on the situation of incarcerated parents and on the number of children who are impacted by incarceration, federally and provincially. The Correctional Service of Canada collects some intake information²³ and the Correctional Investigator of Canada has some information on the percentage of incarcerated people with children, but there are no complete reports on the number of affected children. Of the limited data available, only parents in a strict sense are recorded, which does not capture the complex kinship networks children rely on for their safety and well-being.

In 2007, it was estimated that 357,604 Canadian children (or 4.6% of the Canadian population aged 19 and younger), were affected by 'parental' incarceration.²⁴ As of 2003, at least 25,000 Canadian children a year were estimated to experience separation from their mothers resulting from incarceration.²⁵ More than half of federally incarcerated adults report being 'parents' of minor children, and the proportion increases for women generally, and for Indigenous women in particular.²⁶ According to the most recently available data, 70% of federally incarcerated women report being parents of minor children, and incarcerated women are twice as likely as men to be supporting dependents on the outside.²⁷ Emerging data also indicates higher percentages of mothers in provincial prisons, however there is little to no data on how many fathers are in provincial prisons.

While women are more likely to be their children's primary caregivers before incarceration, incarcerated men are more likely to be their primary financial support. One Canadian study suggests that more than half of fathers were living with their children at the time of their incarceration.²⁸ The available statistics about the number of incarcerated parents are also

²³ "Incoming inmates undergo an assessment using the Dynamic Factor Indicator and Analysis Revised interview in which some questions focus on parenting skills (Brown and Motiuk 2005). Specifically, an indicator regarding parental responsibility notes whether the offender has dependent children, how often they see those children, and who is currently looking after them." McCormick, Millar and Paddock 2014.

²⁴ Withers and Folsom 2007

²⁵ (Blanchard 2009)

²⁶ McCormick, Millar and Paddock 2014 citing Barrett et al., 2010; Eljdupovic-Guzina 1999; Vis-Dunbar 2008; Withers and Folsom, 2007

²⁷ Office of the Correctional Investigator 2015

²⁸ Withers and Folsom 2007.

themselves incomplete insofar as they only account for incarcerated adults, while older incarcerated juveniles might also be the parents of young children.

2.3 International Norms and the Best Interests of the Child

In 1991 Canada ratified *The Convention on the Rights of the Child* ('*The Convention*'). The *Convention* is relevant in many respects and in particular states in Article 3(1):

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

and Article 9:

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

The UN Committee on the Rights of the Child (the expert body which oversees the *Convention*) also devoted the 2011 Day of General Discussion to "Children of Incarcerated Parents." Aware of the wide-ranging and overwhelmingly negative impacts a parent's incarceration has for children, as well as the extent to which this issue has been historically neglected, the Committee made a number of recommendations in their report.²⁹ Notably, the Committee report states:

The Committee emphasises that in sentencing parent(s) and primary caregivers, non-custodial sentences should, wherever possible, be issued in lieu of custodial sentences, including in the pre-trial and trial phase. Alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of affected child(ren).³⁰

The Committee recommends that States parties ensure that the rights of children with a parent in prison are taken into account from the moment of the arrest of their parent(s) and by all actors involved in the process and at all its stages, including law enforcement, prison service professionals, and the judiciary.³¹

And,

The Committee reiterates State parties obligation under the Convention to respect the right of the child who is separated from one or both parents to maintain personal relations and

²⁹ Committee on the Rights of the Child 30 September 2011: Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents" ('Committee Report'). See also QUNO Geneva's detailed analytical report on the Day of General Discussion at: http://www.quno.org/sites/default/files/resources/ENGLISH_Collateral%20Convicts_Recommendations%20and%20god%20practice.pdf

³⁰ Para. 30, 'Committee Report'

³¹ Para. 31, 'Committee Report'

*direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.*³²

The *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders* (also known as the *Bangkok rules*) contain provisions that directly affect the children of incarcerated mothers, and data collection about children. The Bangkok rule 64 states:

Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and 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.

and Rule 2.2:

Prior to or on admission, women with caretaking responsibilities for children shall be permitted to make arrangements for those children, including the possibility of a reasonable suspension of detention, taking into account the best interests of the children.

The *United Nations Guidelines for the Alternative Care of Children* recommends that best interests of the child be given due consideration when their sole or main carer is subject to “preventive detention or sentencing decisions, non-custodial remand measures and sentences” and when deciding whether to remove a child born or living with a parent in prison.³³

In Canada, Indigenous Peoples, particularly Indigenous women, are significantly overrepresented in the Canadian prison system.³⁴ This is reflected in the *United Nations Declaration on the Rights of Indigenous Peoples* which:

*Recogniz[es] in particular the right of Indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, and as such, forms part of the basis for Canada's legal obligation to protect the rights of Indigenous children whose parents are incarcerated.*³⁵

Additional international rules, UN resolutions, and standards that are relevant to children are further extracted in [Appendix 1](#).

2.4 Decision-making involving the “best interests of the child” in other countries

Judicial decision-making involving the principle of the “best interests of the child” in other countries can be instructive. In 2007, the Constitutional Court in South Africa ruled that the best interests of the child must be taken into account when sentencing the primary carer of minor

³² Para. 35, ‘Committee Report’

³³ Adopted by the UN General Assembly, 18 December 2009, para.48:

³⁴ Office of the Correctional Investigator 2017

³⁵ See <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement>

children.³⁶ The Court specified that in addition to usual sentencing considerations, a sentencing court should find out if the offender is a primary caregiver, the effect on the children of a custodial sentence, and if a custodial sentence is appropriate, take steps to ensure the children are adequately cared for during their caregiver's incarceration.³⁷

The Council of Europe Committee of Ministers adopted a Recommendation on children of imprisoned parents in April 2018, which states as a basic principle:

Where a custodial sentence is being contemplated, the rights and best interests of any affected children should be taken into consideration and alternatives to detention be used as far as possible and appropriate, especially in the case of a parent who is a primary caregiver.

Currently, sentencing judges in the United Kingdom are required to give thought to the impact upon family life of his or her children if a parent is to be imprisoned. Recently the Supreme Court of the United Kingdom held that extraditing judges, including those executing European Arrest Warrants, are required to treat the welfare of any child involved as a primary consideration.³⁸

2.5 Sentencing context in Canada

Across Canada, judicial decision-makers from pre-trial to sentencing vary in their approach to considering a person's parental or caregiving responsibilities and the rights of their children. Children are not direct parties to the proceedings, may not be in attendance at court and are not considered part of traditional sentencing principles of proportionality, which balances the protection of society, seriousness of offence, circumstances of the offending, in addition to accounting for aggravating and mitigating factors of the offence and the offender.³⁹ An overview of sentencing law is provided in *R. v. Pham* [2013]⁴⁰ excerpted in [Appendix 2](#).

Sentencing judges have discretion to account for the needs of child dependents (or even potential dependents) of individuals among a larger set of considerations, and under the Canadian Criminal Code, judges must not give custodial sentences "if less restrictive sanctions may be appropriate in the circumstance"⁴¹. Most commonly, children are considered a mitigating personal circumstance of the offender. In particular, information about the individual with care responsibilities that relates to emotional and/or financial care/support or involvement with their children may be a circumstance considered by the judge in the sentencing decision, as part of the overall 'package' of circumstances of the person and of the offence that are considered in sentencing. Because of the discretion judges have in sentencing and the imperative to balance all factors carefully, the weight

³⁶ *S v M* (CCT53/06) see Appendix 1.

³⁷ Brett 2018.

³⁸ Jones and Wainaina-Wozna 2012

³⁹ Section 718.1 and 718.2 of the Criminal Code RSC 1985, c C-46.

⁴⁰ SCC 15, [2013] 1 S.C.R. 739

⁴¹ Section 718.2(a) of the Criminal Code

given to this factor varies to some extent across decisions (see [Appendix 2](#) for Canadian jurisprudence).

In addition to this variability, hardship on dependents or children are not an explicit mitigating factor in Canada, nor do mitigating circumstances fulfil Canada's international obligations to consider the impact of custodial sentences in light of the best interests of the child as a separate sentencing consideration. There is also no obligation or duty on the part of Canadian sentencing judges to enquire into whether or not a person is a primary or sole caregiver.

In relation to Indigenous offenders, the *Gladue*⁴² decision in 1999 added a range of factors applicable when sentencing Indigenous parents, to take into account the legacy of state-imposed child separation and inter-generational trauma experienced by Indigenous Peoples in Canada. However, the *Gladue* factors do not appear to specify parental responsibilities of the individual as opposed to more systemic risk factors for Indigenous offenders.⁴³

2.6 Legal Precedent in Canada

In addition to the legal precedents set by the international agreements, there exist several cases that evoke the Canadian government's obligation to consider the best interests of children when sentencing their parents.⁴⁴ In *Inglis v. British Columbia* (2013)⁴⁵, Inglis was a woman incarcerated at the Alouette Correctional Centre for Women who challenged the decision to suspend a residential mother-baby program that allowed inmates to keep their newborn and infant children with them during their incarceration. The court found that the cancellation of the program violated the plaintiff's section 7 (rights to security of person) and section 15 (equality) rights. The judge also made a number of statements pertaining to the government's responsibility to children of incarcerated parents, among them:

- Individualized decision-making with respect to the best interests of the child is important;
- The family is the fundamental social unit and as such is entitled to protection by the state;
- The best interests of the child shall be a primary consideration in all actions taken by the state concerning children;
- A child shall not be separated from his or her parents against their will except with due

⁴² *R. v. Gladue* [1999] 1 S.C.R. 688.

⁴³ Millar and Dandurand 2018.

⁴⁴ See *R. v. Hamilton* 2003 CanLII 2862 (ON SC) at para 197 noting the cases: *Regina v. Scott*, [1996] O.J. No. 3419 (C.A.), *Regina v. Wellington*, supra at 476-7; *Regina v. Hadida*, [2001] O.J. No. 843 (C.A.) at para 2; the *Queen v. Bunn* (2000), 140 C.C.C. (3d) 505 (S.C.C.) at 517; *Regina v. Aranguren and Others* (1994), 99 Cr. App. R.347 (C.A.) at 353; *Regina v. Holub and Kufrin* (2002), 163 C.C.C. (3d) 166 (Ont. C.A.). See also *Lloyd v. the Queen*, at para 23, which identifies three cases in which caregiving obligations have been considered: *R. v. Hamilton*, 2003 CanLII 2862 (ON SC); *R. v. Wellington*, [1999] OJ No569 (CA); and *R. v Bunn*, 2000 SCC 9.

⁴⁵ *Inglis v British Columbia (Minister of Public Safety)* 2013 BCSC 2309.

process and where it is necessary in the best interests of the child;

- In all state actions concerning a child, the best interests of the child shall be a primary consideration.

As of the date of this report, these provisions have yet to be systematically incorporated into policy or sentencing decisions.

3 Methodology

In the winter of 2016, the researcher conducted a series of searches of Canadian criminal law decisions primarily on Quicklaw and CANLII to gather a snapshot of criminal law cases from 2015. These databases were selected as they are the primary repository for published Canadian legal decisions. Searches were conducted to identify and select case law which related to sentencing of criminal offenders who were parents.

Advanced searches were completed so as to narrow the case law as much as possible to sentencing decisions involving male or female offenders with dependent or minor children. There was no search that allowed this specific request to be made – therefore many cases were perused. The most successful searches included variations and combinations of the words ‘sentence’, ‘accused’, ‘dependant/dependent’, ‘child’, and ‘mitigate’.

A large number of criminal cases involved children as victims, which were specifically excluded from this study. This was achieved by excluding search terms involving any cases of pornography and then manually eliminating all other cases involving child victims. A few cases where offences were committed in front of children or impacted children were kept in the study, such as where children of victims or of offenders were present. Manual exclusions were also used for decisions involving offenders having committed *past* offences against children. Cases where the child/ren were dependents of the offender were preferred, with a small margin of variability. For searches related to the *Convention* and *Bangkok Rules*, the formal legal titles and then alternative titles were inputted in combination with some or all of the above search terms.

Searches were made of some 521 decisions online. 170 decisions from all court levels of British Columbia, Alberta, Manitoba, Saskatchewan, and Ontario were reviewed in detail. These provinces were selected because of their higher incarceration rates. Occasionally a case from another province or from the Supreme Court of Canada was identified within a decision that was also pursued. Those cases were reviewed, with the total case sample being refined to 97 in total (see [Appendix 3](#)). This is not a statistical study, but a limited overview of some of the more common and noticeable trends in sentencing of parent offenders in the listed jurisdictions.

These cases were reviewed by an Ontario lawyer, commissioned to conduct sociolegal research into the sentencing practices in Canadian courts where the offender is a parent or caregiver. Specific focus was made to analyze whether sentencing judges were considering the best interests of the child, international obligations, and whether non-custodial sentences were considered in light of parental obligations.

4 Key findings

The review of selected case law highlighted some trends in judicial reasoning and decision making when children were raised in sentencing submissions. In the discussion of trends below, it was assumed that where evidence relating to children was raised, including factors related to caretaking or raising of children, the judge would have accounted for it as part of the offender's circumstances. Unfortunately, this could not be confirmed using this research method.

4.1 General Trends

In general, the following trends were observed for circumstances relating to children in sentencing decisions:

- **Judges made no reference to International Conventions or Rules:**

The case law review did not in this time period turn up any relevant cases mentioning either the *Convention on the Rights of the Child* or the *Convention* or the *Bangkok Rules*.

- **Judges did not refer to the “best interests of the child” framework:**

Sentence decisions that included reference to child dependants did not raise children or parental responsibilities in a “best interests of the child” framework. Rather, these factors were framed in terms of the effect the sentence would have on the ability of the individual to care for or provide for children or the family unit. This falls within general principle that the judge should take into account “objective and subjective factors related to the offender's personal circumstances”⁴⁶.

Since the “best interests of the child” is not the framework for sentencing judges, the holistic well-being of the child/ren including the emotional, spiritual, and mental health implications of incarceration are not cited. Rather, financial support was focused on when sentencing, over other considerations which may equally impact a child's best interests.

- **Whilst children were often cited in sentencing, there were varying approaches to the impact of children on sentencing:**

Because there is no specific mitigating circumstance or sentencing principle that outlines how judges should weigh parental responsibilities and the impact on children of sentencing, there are varying approaches by judges as how to list these factors in the reviewed case law. Some judges do not separate circumstances out this way and simply highlight circumstances as a whole; and there may be a shift underway in terms of whether factors related to having children should be considered mitigating or just part of the offender's circumstances. Finally, some judges list the mitigating and aggravating factors proposed by the Crown and defence, without then indicating which were paramount in their decision. In

⁴⁶ R. v. Pham, 2013 SCC 15, [2013] 1 S.C.R. 739 at para 8.

general, the approach taken is to assess the overall weight of the factors given without specific reference to the weight given to children or parental responsibilities or whether they are considered mitigating. This differs from other jurisdictions such as Australia, which includes parental responsibilities within the category of “excessive hardship” as a mitigating factor or in some jurisdictions in the United States that consider “family ties”.⁴⁷

- **General circumstances relating to children may have little impact on sentencing:**

The actual existence of children, their ages, the status of other parent(s) and availability of other parents or relatives to care-take children and financially support them did not particularly impact sentencing decisions. In some cases, there was no evidence of the individual having an existing or intended relationship with a child or children, nor having made any effort to care for and raise the child or children; this may explain in part the lack of weight given in a number of cases to, for example, the existence of a biological child, other than to state it briefly in the circumstances of the offender.

- **The prospect and evidence of rehabilitation has more impact on sentencing⁴⁸:**

When the parent was seen as able to be rehabilitated because of his/her role as a parent, this appeared to have a greater impact on sentencing. The factors that were considered relevant to rehabilitation included: was the individual able to be a responsible, contributing member of society, a model to his/her children? Is he/she interested in family and has he/she demonstrated interest in the children so far? Finally, although more carefully weighed, the court also considered if there was an intention to improve oneself (based on evidence provided by the defence around any such intention).

The sentencing principle of rehabilitation was given more priority particularly in less serious crimes (not always an objective assessment) and where there were few or no aggravating factors. Whether an individual with parental responsibilities had family support and whether they can and will support or continue to support his/her family, were factored in for rehabilitation purposes, though each of these was allocated varying weight depending on the case. Factors involving children were usually raised in discussion of rehabilitation, if the judge prioritized this sentencing principle in the particular case.

- **Judges rely more heavily on the principles of denunciation and deterrence for more serious crimes in general:**

Factors around children may be considered but will often in these cases be eclipsed by considerations of public safety, safety for family members etc.

⁴⁷ Millar and Dandurand 2018, p. 254.

⁴⁸ Given more consideration within the text of the decisions than a cursory mention.

- **Being Indigenous did not appear to impact the weight given to children when sentencing Indigenous parents:**

While the sentencing regime makes particular note of the circumstances of Indigenous offenders (Criminal Code s. 718.2e)⁴⁹, there do not appear to be major differences in the treatment of children when their parents were Indigenous. However, this limited case law study suggests that there seems to be more involvement of other relatives in Indigenous families (parents' siblings, their parents, others who have helped care for the children in the past and may continue to do so while the individual with parental responsibilities is in detention/prison), which may have impacted on decision making.

- **The existence of the Correctional Service Canada's Mother-Child Program was not a factor in the sentencing mothers**

While the existence of the program did not appear to impact any of the reviewed cases, in *R v Grant* (Ont Ct Just) the judge noted that "If [the individual] were to give birth while incarcerated within the federal correctional system she could potentially take advantage of the "Institutional Mother-Child Program" offered by [Correctional Service Canada]." However, the judge cited the fact that the program was currently in a state of transition and so might not be available to the female individual for an extended period. The mother was still sentenced to a prison term in relation to importing cocaine.

Although the mother-child program exists, there have been severe limits on prisoner-mother candidacy, eg. it is often not utilized for long termers.⁵⁰

4.2 Specific References to Children in sentencing decisions

The case law review demonstrated there were reoccurring factors which judges took into account within the overall balance of sentencing considerations. As noted above, it is unclear the priority or weight given to each of these factors, or whether they were considered specifically mitigating for the purposes of sentencing. Below are some generalized factors taken into account, with more specific detail in [Appendix 4](#):

- Financial support provided by the offender and potential hardship if the parent was incarcerated without the ability to work. This was relevant regardless of custody status or the existence of another parent.
- Support and evidence of family ties and community from third parties.

⁴⁹ Criminal Code s. 718.2e: Judges must use "all available sanctions, other than imprisonment, that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."

⁵⁰ See Office of the Correctional Investigator (2014)

- Evidence of demonstrated care and relationship with child, including desire and commitment to begin or maintain a relationship.
- Child's wishes and request to remain with parent.
- Pregnancy and recent birth.
- Ability to rehabilitate because of relationship with children.
- Age of the child/ren.

In some cases reviewed, circumstances of children and the parental relationship were raised which were not considered mitigating or positive for the offender, albeit not specifically aggravating either. For example, evidence that an offender was not committed to their children and not involved in their care, or made choices that prevented them being good parents did not positively impact sentencing.

Notably, whilst it was not clear if children were the paramount factor in sentencing, some judges ordered sentences that appeared to directly consider the impact of sentencing on children, predominantly for financial reasons. For instance:

- Imposing intermittent sentences, which allowed continued employment, often linked to continuing financial support for spouse/children.
- In two cases, conditional sentences were imposed rather than custody to allow the offender to obtain or maintain work to financially support their children:
 - *R v Fiedorowicz*, 2016 ONCJ 26 (QL): Offender "has been unable to earn a living since [being taken into custody]. Since his release from custody, owing to the terms of his bail, he has not been permitted to return to work, notwithstanding a desire and ability to do so. I am satisfied that in his circumstances, being the father of three young dependent children, that this has worked a hardship not simply upon him, but also his wife and children."
 - *R v Fox*, 2015 ABPC 64 (QL): "In this case the collateral consequences of imposition of a sentence would be to directly affect [offender's] employment both in the present and future in health related matters and to impact the ability of her to be responsible financially and otherwise for her four children."
- In other cases, conditional sentences were imposed to provide for care of children, financial support and often included exceptions to house arrest such as child medical emergencies, getting children to school and appointments etc.

5 Reflections, Questions and Further Research

The above research and findings indicate that Canada is lagging behind other common law countries and international standards around the “best interest of the child” when sentencing parents in criminal matters. Whilst Canada has international obligations to consider and protect the best interests of the child, local legislation and practice does not reflect these obligations within criminal sentencing. Although this was a limited study, the research in this paper indicates that Canada does not currently apply consistent or clear approaches to sentencing of parents and how children and various parental responsibilities should be weighted and considered in the balancing act of sentencing. The ad hoc application of sentencing principles in relation to children is far from best practice.

Overall these preliminary findings, along with research on best practices in other jurisdictions, indicate that Canada must enhance its sentencing framework to protect and ensure the rights of children when their parents are being sentenced, particularly when judges are considering custodial sentences. This study raises significant questions and invites areas of further investigation to protect the rights of the child, address the impact of parental incarceration on children in Canada. Questions that remain following this study include: How might sentencing practices in Canada be strengthened to encourage and enable judges to take the best interests of the child as a primary consideration when sentencing parents? How can the criminal justice system incorporate education and training on the impact of incarceration on children and how to assess the best interests of the child for offices that make decisions about parental incarceration? What further information do we need to inform legislative and policy changes? And finally, how can we raise public awareness of this issue?

Below are some suggestions of areas for further research, investigation and discussion:

1) Canada needs a rights based framework for sentencing, enhanced pre-sentence reports and alternatives to prison:

Article 3, paragraph 1, of the Convention on the Rights of the Child gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her. The inconsistency and often omission of judges to consider the best interests of the child who is impacted by sentencing decisions of their parents demonstrates the need for a stronger rights based framework for judicial decision making. How might sentencing practices be strengthened to allow the best interests of the child to be taken as a primary consideration?

A rights based framework for sentencing

Sentencing remain a balancing act, however a legislative framework that requires judges to assess the best interests of the child when sentencing parents would provide consistency and priority

consideration of the impact of incarceration on the child. This framework must be accompanied by the availability of alternatives to custody and other sentencing options.

A framework for sentencing parents or persons with parental responsibilities should refer to international norms, standards, and guidelines as key reference points. Implementing a framework could go some way to reducing or eliminating the harmful impacts and outcomes currently experienced by children whose parents are incarcerated. How this framework might look like and how it might work needs further research and exploration.

One model for a framework could be taken from the South African Constitutional Court judgment which sets out how a sentencing court should proceed to take into account the best interests of the child. The court specified that the best interests of the child/children must be a separate consideration in addition to other sentencing considerations, stating:

- *The sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so:
The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.*
- *If the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.
If the appropriate sentence is clearly non-custodial the court must determine the appropriate sentence bearing in mind the interests of the children.*
- *Finally, if there is a range of appropriate sentences, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.⁵¹*

There are various ways of how to incorporate a rights based framework for sentencing parents in Canada, primarily through amendments to the sentencing principles of the *Criminal Code*, but other options may also be available through training, case law development or perhaps a bill of rights for children.

Pre-sentence Reports

Additionally, how judges receive information about children of offenders must be discussed. Judges must have credible and reliable information to make the assessment of the best interests of the child, which may not be readily available. For a variety of reasons, such as stigma, or fear of child welfare intervention, some parents and their advocates may be reluctant to disclose information about children in sentencing hearings. In order to assist sentencing judges to assess the effect of a

⁵¹ Brett 2018

custodial sentence on children, child impact or family impact assessments would be useful to provide at pre-trial and sentencing.⁵²

In 2007, the Canadian Senate recommended child rights impact assessments as a tool to implementing the *Convention on the Rights of the Child*.⁵³ Child impact assessments can be used during sentencing procedures as well as after a sentence has been completed for data collection purposes and consideration in future cases.⁵⁴ Child rights impact assessments would include a personalized account of the child's interests concerning the impact of their parent/caregivers sentence on the child's physical, emotional, mental needs, the child's relationship with the parent, the impact of parental situation on child's development based on considerations such as age and special needs, who the child's primary caregiver will be, and the child's financial situation. Impact assessments should also evaluate the impact of various sentences on the child,⁵⁵ including non-custodial or probation sentencing options whenever that decision can be made without posing undue threat to public safety or the administration of justice. This thorough assessment would provide judges credible and reliable information that would assist them assess the best interests of the child in relation to sentencing decisions of their parents. This information relates not only as a factor in sentencing, but also to the broader consideration of public safety.

Some of the above may be captured already by section 721 of the *Criminal Code* in relation to pre-sentence reports. That section could be amended to include a need for reports to include information about parenting and the Best Interests of the Child. Additionally, this required information could also be included in regulations set by the provinces, however a more uniform and consistent approach would be achieved at the federal level. We also note the Gladue reports are important to provide the parental and intergenerational impact of separation of Indigenous children from parents.

Alternatives to Prison

As mentioned earlier, judges must also have robust community options and alternatives to prison when sentencing, otherwise any progress within sentencing will be impeded by practical constraints. We cannot address the complex needs and the limited resources and constraints on current community based sentences in this report, but signal that further movement on the issue of children of incarcerated parents is closely linked with broader advocacy and resourcing of alternative sentencing options to incarceration.

We also note that when parents receive community sentences, or pre-sentence bail, children may still be significantly impacted. For instance, bail conditions or probation restrictions may be set without consideration of how these might affect children and breaches of bail conditions or

⁵² Ministry of Health and Social Affairs, Sweden, 2001; Canadian Coalition on the Rights of the Child 2012, 2013

⁵³ See <http://www.parl.gc.ca/Content/SEN/Committee/391/huma/rep/rep10apr07-e.pdf>.

⁵⁴ Children of Prisoners Europe (COPE) 2015

⁵⁵ McCormick et al. 2014

probation are likely to have a huge impact on children. The best interests of the child and the impact of parental incarceration must be taken into account not only for the baseline sentence, but all the consequences of criminal justice processes and decision making.

2) Canada needs more accurate and detailed data about children with incarcerated parents:

Enhanced data and statistics are necessary to monitor the ongoing issue of children of incarcerated parents and the impact on these children. Canada is lacking in data on children impacted by incarceration, including inadequate data on the number of parents separated from their children in custody, the number of children placed in foster care because of incarcerated parents, the number of children residing in custody with their mothers, and the number of Indigenous and racialized children separated from their parents. Further, what current statistics we have are limited to biological or legal parents. Data must be sufficiently detailed and expansive to capture alternative and unconventional family and kinship networks that children live within and the extensive impact of incarceration.

Data collection is necessary to:

- a) Determine the scope of the issue, that is, how many children are affected by the incarceration of individuals with parenting responsibilities;
- b) Identify the scale of programs and supports needed; and
- c) Track the successes or failures of particular policies, programs and supports meant to alleviate the detrimental effects on children impacted by incarcerated parents.

We reflect upon the need for a coordinated Federal and Provincial government approach to data collection and the need for data to relate to specific areas. Initially, we would recommend that all Federal and Provincial correctional institutions collect information upon arrival about whether persons are parents.

3) There needs to be more education and public awareness about children of incarcerated parents:

When decision makers such as judges and police officers are making decisions about arresting, bailing or incarcerating parents, children are often invisible or not prioritized in their decision making. Further education on the impact of incarceration on children, rights of the child and how to take into account the best interests of the child in decision making would greatly enhance the capacity of the judiciary and other criminal justice officers to consider children of incarcerated parents. Further education and training would also bring to light the impact of parental incarceration on children within the criminal justice system and potentially, in the public arena.

Education could be incorporated into professional development and continuing legal education through the Canadian Judicial Council, the National Judicial Institute or the Canadian Association of Provincial Court Judges. Areas of training should include International Agreements such as the

Bangkok Rules, the *Convention*, and *United Nations Guidelines for the Alternative Care of Children*. Training in these areas would empower judges to ask for the information they need to make assessments for sentencing, both in pre-sentencing reports and from the parent and their advocate.

4) Children need a strong and independent advocate for their rights when decisions are made that impact them: Would Canada benefit from a National Child Rights Advocate or Commissioner?

Within the justice system specifically, but in Canada more generally, children are often not given an independent voice when decisions are made about them. Their views, opinions and rights are overshadowed by other rights and principles within sentencing and other justice decisions.

The UN Committee on the Rights of the Child, the Standing Senate Committee on Human Rights, the Canadian Coalition, and the many Canadian representatives of civil society, have previously called on the federal government to take legislative action to establish a National Child Rights Advocate or Commissioner (or Parliamentary Officer for Canada's children and youth).⁵⁶ This Officer would act as an oversight body responsible for the protection and promotion of children's fundamental human rights under the *Convention*, independent from the government. This role could provide guidance and accountability to a rights based framework approach for policies and practices that impact children with incarcerated parents discussed earlier, including sentencing practices. This office could provide a key research and reporting mechanism to address how Canadian practices compare and conflict with international standards. A National Child Rights Advocate or Commissioner would also act as a voice for children whose opinions are often neglected in the creation of social policy and legislation that affects them.

Currently, majority of provinces and territories in Canada have a child/youth advocate or representative.⁵⁷ Unfortunately, these positions are not immune to defunding or closure, illustrated by the recent decision to close the Ontario Child and Youth Advocate Office.⁵⁸ These offices are also only accountable to provincial institutions and services, leaving federal institutions, and legislation and policy without accountability to the rights of the child and international obligations. A national office and advocate for children would offer, consistency, guidance and accountability for Canada and its obligations to international standards and norms within domestic affairs.

5) Further research is necessary to consider the multiple and overlapping vulnerabilities of children impacted by the justice system and its relationship with child welfare and other institutions:

⁵⁶ See <http://rightsofchildren.ca/wp-content/uploads/2017/02/Joint-Call-to-Action-Outcome-Statement.pdf>

⁵⁷ <http://www.cccya.ca/content/members/Index.asp?langid=1>

⁵⁸ <https://www.provincialadvocate.on.ca/office-news/~36-Statement>

The issue of children of incarcerated parents highlights that children are vulnerable not just because of their age, but because they and their parents are Indigenous, racialized, and are financially and socially marginalized. Children with incarcerated parents reflect the criminal justice system as a whole, where Indigenous and racialized, particularly Black individuals are significantly over-represented, also replicated in the over-representation of Indigenous and Black children in the child welfare system.⁵⁹

There is a critical link between social marginalization, racialization, parental incarceration and child welfare that has not been sufficiently explored in Canada. Further research is needed to consider the intersections between the children of incarcerated parents and Indigenous and racialized overrepresentation in both the criminal justice system, including the role of incarceration on foster care and separation of Indigenous and racialized children from their families.

The separation of children from parents within the criminal justice system also echoes the separation of children from parents in immigration contexts. Within immigration detention and removal of parents, there is a clearer legislative basis to consider the “best interests of the child” principle and the impact on children when making decisions about their parents. Further comparative research into the parallel and diverging areas of sentencing and immigration decision making that impacts children, could highlight further areas of improvement and progress within the criminal justice system. This may be particularly salient when noncitizen parents are subject to a removal order following a federal sentence.

6) Further research is necessary to consider situations in which the child/ren has/have been a victim or witness to an offence committed by their parent/s:

Finally, the research in this paper specifically excluded case law where children were directly or indirectly victimized by their parents. Children may also have been witness to offences committed by their parents. This complexity has not been sufficiently addressed in Canadian or international literature and must be further researched, to expand our understanding the best interests of the child principle in varying criminal circumstances, including aggravating factors.

We hope that this study and review contribute to the research and discussion on children of incarcerated parents. Our findings and reflections highlight the significant work needed in Canada to progress this issue. We are now considering the various ways the Canadian Friends Service Committee can advocate for children impacted by parental incarceration. One action we are taking is to hold a dialogue on children of incarcerated parents with various partners to discuss how to move this issue forward and support the work that is needed in Canada.

⁵⁹ <http://www.ohrc.on.ca/en/interrupted-childhoods>

Appendix 1: International Norms and Standards

UN Convention on the Rights of the Child

Provisions applicable to the justice system

- **Principle of the Best Interests of the Child (Article 3)**
- **The Right to Family Integrity (Article 5)**
- **The Right to Survival and Development (Article 6)**
- **The Right to Protection from Arbitrary Separation from Parents (Article 9)**
- **The Right to Child Participation (Article 12)**
- **The Right to Protection for Children Deprived of Family Environment (Article 20)**
- **The Right to Protection from Arbitrary Detention (Article 37)**
- **The Right to be Treated with Dignity (Article 40)**

Read the full provisions here: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

United Nations Guidelines for the Alternative Care of Children

- **Preventing the need for alternative care (Section IV)**

Read the full section here: https://www.unicef.org/protection/alternative_care_Guidelines-English.pdf

UN Resolutions

The following UN resolutions and discussions also address the rights of the Child whose parents have been incarcerated:

- Day of General Discussion “Children of Incarcerated Parents” 30 September 2011
<https://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2011.aspx>
- Human Rights in the Administration of Justice (A/RES/65/213), 21 December 2010
http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/65/213
- Rights of the Child (A/RES/64/146), 18 December 2009
http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_64_146.pdf
- Rights of the child (A/RES/63/241), 24 December 2008

Other Commonwealth Countries

The United Kingdom

In a 2007 review on women “in contact with the criminal justice system,” a key recommendation was that primary caregivers for young children, should only be held in custody after a “probation report detailing the likely effect of incarceration upon the children is considered by judges.”⁶⁰ The report also “recommended that non-custodial sanctions should be the norm for nonviolent female offenders and that such community sentences must consider childcare commitments.” Parliament is monitoring implementation of the recommendations.

Currently, sentencing judges are required to give thought to the impact upon family life of his or her children if a parent is to be imprisoned. Recently the Supreme Court of the UK held that extraditing judges, including those executing European Arrest Warrants, are required to treat the welfare of any child involved as a primary consideration.⁶¹

South Africa

In 2007 the Constitutional Court in South Africa addressed the question of the application of the best interests of the child by a court when sentencing the primary carer of minor children in the case of *S v M* (CCT53/06). The Court ruled that in these types of cases:

- The ruling must be applied and set out guidelines to ‘promote uniformity of principle, consistency of treatment and individualization of outcome’, namely:
- The sentencing court should find out whether a convicted person is a primary carer whenever there are indications that this might be the case.
- The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.
- If the appropriate sentence is clearly custodial and the convicted person is a primary carer, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the carer is incarcerated.

⁶⁰ Corston, 2007

⁶¹ Jones and Wainaina-Wozna, 2012

- If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.
- Finally, if there is a range of appropriate sentences, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.

These determinations have been taken up in 17 cases in the South African courts since the initial ruling in *S v M* (CCT53/06).

India

In October 2011, the Gujarat High Court ordered that the state support the family of a prisoner because the imprisonment had caused them “untold misery and deprivation without any fault on their part.”

Australia

In Australia, children of incarcerated parents have been the “focus of federal and state research, policy, and practices that focus on minimizing harm to children when a parent is incarcerated, such as through the development of arrest protocols for caregiving parents and the use of alternative sentences for convicted persons with dependent children”⁶² In 2004, a state Standing Committee on Community Services and Social Equity recommended that a “Children’s Officer in the Australian Capital Territory Corrective Services be appointed who could represent the interests of children and young people when their parent is incarcerated.”⁶³

⁶² Hannon 2006, 2007

⁶³ Standing Committee on Community Services and Social Equity, 2004

Appendix 2: Sentencing Principles

These are excerpts of selected case law in Canada about sentencing principles and relevant to the impact of sentencing on parents and their children.

R. v. Pham, 2013 SCC 15, [2013] 1 S.C.R. 739

[6] Proportionality is a fundamental principle of sentencing. Section 718.1 of the *Criminal Code*, R.S.C. 1985, c. C46, provides that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[7] LeBel J. explained proportionality as follows in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 37:

[8] In addition to proportionality, the principle of parity and the correctional imperative of sentence individualization also inform the sentencing process. This Court has repeatedly emphasized the value of individualization in sentencing: *Ipeelee*, at para. 39; *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455, at para. 21; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 92. Consequently, in determining what a fit sentence is, the sentencing judge should take into account any relevant aggravating or mitigating circumstances (s. 718.2(a) of the *Criminal Code*), as well as objective and subjective factors related to the offender's personal circumstances.

[9] As a corollary to sentence individualization, the parity principle requires that a sentence be similar to those imposed on similar offenders for similar offences committed in similar circumstances (s. 718.2(b) of the *Criminal Code*). In other words, "if the personal circumstances of the offender are different, different sentences will be justified" (C. C. Ruby, G. J. Chan and N. R. Hasan, *Sentencing* (8th ed. 2012), at §2.41).

[10] Ultimately, the sentence that is imposed must be consistent with the fundamental purpose of sentencing, which is to contribute to respect for the law and the maintenance of a just, peaceful and safe society. The sentence must have one or more of the objectives of denunciation, general and specific deterrence, separation of offenders from society if need be, rehabilitation, reparations to victims for harm done to them, promotion of a sense of responsibility in offenders and acknowledgment of the harm done to victims and to the community (s. 718 of the *Criminal Code*).

[11] In light of these principles, the collateral consequences of a sentence are any consequences for the impact of the sentence on the particular offender. They may be taken into account in sentencing as personal circumstances of the offender. However, they are not, strictly speaking, aggravating or mitigating factors, since such factors are by definition related only to the gravity of the offence or to the degree of responsibility of the offender (s. 718.2(a) of the *Criminal Code*). Their relevance flows from the application

of the principles of individualization and parity. The relevance of collateral consequences may also flow from the sentencing objective of assisting in rehabilitating offenders (s. 718(d) of the *Criminal Code*). Thus, when two possible sentences are both appropriate as regards the gravity of the offence and the responsibility of the offenders, the most suitable one may be the one that better contributes to the offender's rehabilitation.

[12] However, the weight to be given to collateral consequences varies from case to case and should be determined having regard to the type and seriousness of the offence. Professor Manson explains this as follows:

As a result of the commission of an offence, the offender may suffer physical, emotional, social, or financial consequences. While not punishment in the true sense of pains or burdens imposed by the state after a finding of guilt, they are often considered in mitigation. . .

The mitigating effect of indirect consequences must be considered in relation both to future re-integration and to the nature of the offence. Burdens and hardships flowing from a conviction are relevant if they make the rehabilitative path harder to travel. Here, one can include loss of financial or social support. People lose jobs; families are disrupted; sources of assistance disappear. Notwithstanding a need for denunciation, indirect consequences which arise from stigmatization cannot be isolated from the sentencing matrix if they will have bearing on the offender's ability to live productively in the community. The mitigation will depend on weighing these obstacles against the degree of denunciation appropriate to the offender. [emphasis added by the SCC].

[...]

[14] The general rule continues to be that a sentence must be fit having regard to the particular crime and the particular offender. In other words, a sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender.

R. v. M. (C.A.), [1996] 1 S.C.R. 500

[92] Appellate courts [...] serve an important function in reviewing and minimizing the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed throughout Canada. [...] But in exercising this role, courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges. It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. [...] Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be

a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. For these reasons [...] a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes.

R. v. Hamilton, 2004 CanLII 5549 (ON CA)

[111] Fixing the range of sentences for a particular offence, of course, does not determine the sentence to be imposed on a particular offender. The range is in large measure a reflection of the "objective seriousness" of the crime: *R. v. H. (C.N.)*, supra, at pp. 574-75 O.R., p. 266 C.C.C. Once the range is identified, the sentencing judge must consider specific aggravating and mitigating factors. The mitigating factors may be so significant as to take the case below the otherwise appropriate range. For example, in *R. v. H. (C.N.)*, the offender's cooperation with the authorities and his belief that he was importing marijuana and not cocaine, along with other more common mitigating factors, justified a sentence that was well below the range of sentence established for the importation of very substantial amounts of cocaine.

R v Spencer, 2004 CanLII 5550 (ON CA) discussing proportionality principle, in a case involving a female offender convicted of importing cocaine:

[46] It is a grim reality that the young children of parents who choose to commit serious crimes necessitating imprisonment suffer for the crimes committed by their parents. It is an equally grim reality that the children of parents who choose to bring cocaine into Canada are not the only children who are the casualties of that criminal conduct. Children, both through their use of cocaine and through the use of cocaine by their parents, are heavily represented among the victims of the cocaine importer's crime. Any concern about the best interests of children must have regard to all children affected by this criminal conduct.

[47] The fact that Ms. Spencer has three children and plays a very positive and essential role in their lives cannot diminish the seriousness of her crime or detract from the need to impose a sentence that adequately denounces her conduct and hopefully deters others from committing the same crime. Nor does it reduce her personal culpability. It must, however, be acknowledged that in the long-term, the safety and security of the community is best served by preserving the family unit to the furthest extent possible. In my view, in these circumstances, those concerns demonstrate the wisdom of the

restraint principle in determining the length of a prison term and the need to tailor that term to preserve the family as much as possible. Unfortunately, given the gravity of the crime committed by Ms. Spencer, the needs of her children cannot justify a sentence below the accepted range, much less a conditional sentence.

Appendix 3: Case Study Sample List 2015

R v A.S.H. (Ont Sup Ct)	R v Doxtator (Ont Sup Ct) (Offender Elijah)	R v Li (Ont Ct Just)
R v Abraham (Alta CA)	R v Dufour (ON C.A.)	R v MacDonald (BC Sup Ct)
R v Alli (Ont Sup Ct)	R v Duncan (Ont Ct Just)	R v Masakayash (Ont Ct Just)
R v Balbar (BC Sup Ct)	R v Dunlop (Alta QB)	R v McCook (BC Prov Ct)
R v Bayers (BC Sup Ct)	R v Eby (Ont Sup Ct)	R v McCrea (Ont Sup Ct)
R v Bell (BC Prov Ct)	R v Elie (Ont Sup Ct)	R v McKenzie (Ont Sup Ct)
R v Bonilla (BC Sup Ct)	R v Elshebiny (Alta Prov Ct)	R v McMath (BC Sup Ct)
R v Boussoulas (Ont Sup Ct)	R v Esseghaier (Ont Sup Ct)	R v Murley (Ont Ct Just)
R v Brown (Ont Sup Ct)	R v Fiedorowicz (Ont Ct Just)	R v Nayneecassum (Sask Prov Ct)
R v Bull (Alta Prov Ct)	R v Fox (Alta Prov Ct)	R v Nelsen (BC Sup Ct)
R v Bunn (SCC 2000)	R v Frieson (Alta QB)	R v Noname (Sask QB)
R v Burger (Alta Prov Ct)	R v Gentles (BC Sup Ct)	R v Oliveira (Ont Sup Ct)
R v Cabral (Ont Ct Just)	R v Grant (Ont Ct Just)	R v O'Neill (BC Sup Ct)
R v Cavanagh (Ont Ct Just)	R v Heath (Ont Sup Ct)	R v Onyaditswe (Ont Ct Just)
R v Ceballos (Ont Sup Ct)	R v Hildebrandt (BC Prov Ct)	R v Oud (BC Sup Ct)
R v Chan (BC Sup Ct)	R v Jassem (Ont Ct Just)	R v Owen (Ont CA)
R v Chartrand (Man CA)	R v Jean (Ont Sup Ct)	R v Pepper (BC CA)
R v Chen (Ont Sup. Ct.)	R v Johnson (Ont Sup Ct)	R v Pham (2013 SCC)
R v Chukwu (Alta Prov Ct)	R v Johnston (Sask Prov Ct)	R v Porter (Ont Sup Ct)
R v Clarke (Ont Ct Just)	R v Kaiswatum (Sask QB)	R v Prior (Ont Ct Just)
R v Clifford (BC Sup Ct)	R v Kramer (Alta QB)	R v Rahey (Alta QB)
R v Cowan (Ont Sup Ct)	R v Kubashek (Sask QB)	R v Ramsay (Ont Sup Ct)
R v Dacosta (Ont Sup Ct)	R v Kueviakoe (Ont Ct Just)	R v Rangī (Ont Ct Just)
R v Daniels (BC Prov Ct)	R v Lazore (Ont Sup Ct)	R v Ren (Ont Sup Ct)
R v Denis (Ont Sup Ct)	R v Lee (Ont Sup Ct)	R v SF (BC Prov Ct)
R v Doxtator (Ont Sup Ct) (Offender Doxtator)		

R v SPH (BC Sup Ct)

R v Salamat Ravandi (BC
Sup Ct)

R v Schur (BC Sup Ct)

R v Shearer (Ont Sup Ct)

R v Smith (BC Sup Ct)

R v Soares (BC Sup Ct)

R v Spencer (Ont CA 2004)

R v Stankovic (Ont Sup Ct)

R v Summerton (Alta QB)

R v TEC (BC C.A.)

R v Trinh (Ont Ct Just)

R v Vaugeois (BC Prov Ct)

R v Vu (Ont Sup Ct Just)

R v Vuletic (Ont Ct Just)

R v White (Alta QB)

R v Williams (Ont Sup Ct)

R v Woodward (BC Sup Ct)

R v Yesno (Ont Sup Ct)

R v York (Ont Ct Just)

R v Zenari (Alta Prov Ct)

R v Zenari (Alta CA)

Inglis v B.C. (Minister of
Public Safety) (2013)

M.M. v Canada (Minister
of Justice)

Pakulski v Canada (A.G.)
(Ont CA (2015))

Appendix 4: Examples Cited in Case Study

Specific child-related circumstances elaborated in sample sentencing decisions in case study

- Evidence of financial (regular or irregular) support provided to children (or the family as a whole) by an offender, and/or offender not able to work if in detention/incarcerated; resulting potential financial hardship on the children (especially if offender was sole provider); this is relevant whether offender had full or joint custody, didn't have custody, was involved with the other parent or was separated/divorced (e.g., paid child support);
- Financial hardship (and general hardship in raising especially a larger or younger family alone) may also extend to the impact on other parent if other parent was not working in order to care for children; also, if other parent unable to work for any reason
- Evidence of the importance of the survival of the offender's family unit (e.g., as words of family pastor in a letter cited in decision)
- Children or spouse is disabled
- Evidence of offender's desire to regain custody of children (one case)
- Female offender pregnant and/or gave birth while in custody
- Evidence that female offender demonstrated interest in own child by making efforts to ensure its future care (e.g. when pregnant and right after committing offence) as a first priority
- Child's own strong interest in continuing to be in the care of her father (through letter pleading with judge)
- Evidence of continuing positive relationship with child even after relationship with child's mother ended
- Evidence that offender is capable of affection and empathy in relation to another person, by virtue of affection for son
- Evidence of efforts to continue caring for child even without help of child/ren's other parent
- Age of children (young = more urgent care needed)
- Evidence supporting judge's statements, "He is a family man" / "he is devoted to family" (character letters etc) (Note that none of the female offenders in this sample are described this way, and it would be interesting to examine the question whether there are more expectations on women than on men to be good parents (mothers), in judicial decisions

- Evidence of presence or absence of spouse in the life of the offender – hard to say whether judges more lenient or less; whether married or common law did not seem important. If no longer in relationship with mother of child/ren, evidence of being in a long-term relationship is seen as positive.
- Evidence of the quality of the relationship with significant other/s and children; intentions are not given as much weight as demonstrated care/support. For example, evidence of the offender’s relationship with the child, if any has been provided, including efforts made to remain in the child/ren’s lives (whether or not the other parent is), notwithstanding the offender’s continued or discontinued romantic involvement with the other parent; and demonstrations of moral support, care, interest, nurturance through evidence of the offender’s actions, character letters etc.
- In a number of cases, the offender has done nothing to date but expresses a desire for the first time to develop a relationship with minor children. Have marginally reduced the number of such cases in this pool to be able to get more cases where children are actual dependents of the offender.

Not mitigating/not helpful to offender (though not specifically noted as aggravating either):

- Evidence the offender was not serious about commitment to children (seeing another person while wife pregnant; or one partner with child and another person pregnant by offender at same time)
- Evidence the offender had ‘familial issues’ (birth of a child), this should not have been an excuse *not* to better himself
- Not clear if aggravating but cited by judge – offender in arrears of child support payments by \$85,000
- Evidence that the offender made lifestyle choices that appeared to prevent or preclude good parenting (e.g. drug use, violence, or other elements cited by judge as not modeling good conduct to children) –
 - e.g. *R v Barilko*, quoted in *R v A.S.H.*: “The invocation of physical conflict in any period of separation from a former partner is to be deplored as it not only violates the security of the person and personal integrity of another but also because it is the antithesis of civil behaviour and tends to prolong the negative features of a relationship break-up often to the disadvantage of a child of the union.”

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