

Child Apprehensions in BC Correctional Facilities

Position Paper

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1.0 Introduction

1.1 Position

This paper adopts the position that any state practice which separates a child from his or her parent as a result of incarceration, and which does not provide for the maintenance of the parent-child relationship, undermines the goal of protecting the family as a core unit of our society. The psychological and developmental harm caused to a child as a result of separation from his/her primary caregiver and the interference with the liberty interests of the parent are unwarranted as a mere result of criminal behaviour. In particular, the decision to terminate the mother-child program at the Alouette Correctional Centre for Women (ACCW) in April 2008 (a development which has resulted in the apprehension of infants from their mothers) infringes the liberty interests of incarcerated mothers, and does not take into consideration the best interests of the affected children. References to parental liberty interests in this paper refer collectively to a parent's right to raise and make decisions for one's own child, and to be free from the psychological harm caused by the apprehension of a child. Each of these parental rights have been recognized by Canadian Courts as being included in the right to life, liberty and security of the person protected under section 7 of the Canadian *Charter of Rights and Freedom*. We believe that the decision to deprive single mothers of the possibility of residing with their infant children while incarcerated is inconsistent with the values underlying the BC *Child Family and Community Services Act* [CFCSA] and the interests reflected in the *UN Declaration of the Rights of the Child*, the *Universal Declaration of Human Rights*, and the *Canadian Charter*.

1.2 *The Values Underlying this Position*

The manner in which a society concerns itself with the interests of parents and children is dependent upon one's normative standpoint regarding the role of the family. If one adopts the value that children are members of a community and the family unit is not integral to individual development, concerns surrounding children of incarcerated parents can be adequately addressed in the community through alternate forms of care. If, however, one adopts the value that the family is the natural and fundamental group unit of society, and that parents hold a liberty interest in being able to make decisions for their children, the breakdown of this unit is unwarranted by virtue of incarceration. The latter view is strongly supported in Canadian jurisprudence and legislation as well as international Declarations pertaining to the rights of children and parents. For instance, the guiding principles of the CFCSA state that:

- (a) children are entitled to be protected from abuse, neglect and harm or threat of harm;
- (b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;
- (c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;
- (d) the child's views should be taken into account when decisions relating to a child are made;
- (e) kinship ties and a child's attachment to the extended family should be preserved if possible;
- (f) the cultural identity of aboriginal children should be preserved; and
- (g) decisions relating to children should be made and implemented in a timely manner.¹

This legislation should be interpreted in light of the *Charter* and applicable international instruments. Both the *UN Declaration of the Rights of the Child* and the *Universal Declaration of Human Rights* provide that mothers and children are entitled to special care and assistance.² The *Declaration of the Rights of the Child* further states that a child "shall, wherever possible, grow up in the care and under the responsibility of his

¹ R.S.B.C. 1996, c. 46, s. 2.

² *Declaration of the Rights of the Child*, GA Res. 1386 (XIV), 14 UN GAOR Supp. (No. 16) at 19, UN Doc. A/4354 (1959), Principle 4 [*Declaration of the Rights of the Child*]; *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948), Article 25(2).

parents, and ... a child of tender years shall not, save in exceptional circumstances, be separated from his mother”.³

2.0 The Importance of Mother-Child Programs

2.1 The Genesis of Mother-Child Programs in Canadian Prisons

Mother-child programs arose from concerns that the separation of infant children from their mothers is not in the best interests of the child and actually results in harm to the overall health and development of children. In the late 1980s and early 1990s a number of reports were prepared for Correctional Services Canada on women in the criminal justice system.⁴ Each of these reports concluded that children of incarcerated women were frequently separated from their primary caretaker when their mothers were taken into custody. Research conducted on the physical and psychological development of children, led policy makers to worry that infants separated from competent mothers as a result of incarceration were being deprived of the basic necessities essential to their physical and psychological development. Young children in particular showed signs of diminished physical, social and cognitive development as a result of not being able to form a strong attachment bond with a parent during the child’s early formative years. Infant children were also being deprived of the health and psychological benefits associated with breastfeeding.

Recognizing the need for a balance between supporting the mother-child bond and the need for children to exercise their own liberty interests in the world at large, mother-child programs in Canadian correctional facilities do not allow for children to reside in the facility beyond the age of four. It is believed that this cut-off age strikes an appropriate balance between allowing a child to reap the benefits of breastfeeding and

³ *Declaration of the Rights of the Child*, supra note 2, Principle 6.

⁴ See for example Task Force on Federally Sentenced Women, *Creating Choices: The Report of the Task Force on Federally Sentenced Women* (Ottawa: Correctional Service of Canada, 1989); Shelley Wine, *A Motherhood Issue: The Impact of Criminal Justice System Involvement on Women and Their Children* (Ottawa: Ministry of the Solicitor General Canada, 1992) [Wine]; and Rachel Lebreque, *Study of the Mother-Child Program* (Ottawa: Correctional Service Canada, 1995) [Lebreque].

developing an attachment bond with a primary caretaker and becoming an autonomous member of society.

2.2 Harm of Separation to the Child

The ability to bond with its mother during the critical months following a child's birth is of great import to the psychological integrity of the child. As noted above, research indicates that children suffer serious psychological consequences when they are unable to form a bond with a parent. It is believed that in a "normal" parent-child relationship, children develop a strong attachment bond with their primary caregiver between infancy and 2 years of age. The bond enables the child to develop emotionally and to learn to relate effectively to other people. Inadequate formation of this bond can cause damage to the child's socialization process.

The lack of an attachment bond has been linked to a permanent inability to develop human attachments, the inability to think abstractly, lack of control over aggressive impulses, and developmental regression such as loss of verbal skills, breakdowns in toilet training, eating disorders, insomnia and clinging behaviour. Disruptions to a child's emotional development that have been linked to removal of a child after this bond has formed include withdrawal from human interaction, detachment from affective relationships and similar emotional development to infants who never form this bond.⁵

The impact of temporary separation may be eased by regular visitation. However, younger children are least likely to see and communicate with their inmate mothers regularly due to their greater dependency on caretakers and the lack of verbal skills to communicate with their mothers by telephone.⁶ As regular visitation relies on a caretaker within reasonable proximity of the facility, this avenue can be highly problematic in practice. Moreover, while visitation is generally seen as beneficial to the parent, it is not clear that a disruptive relationship with various caretakers is in the best interests of the child.

⁵ Wine, *supra* note 4 provides an extensive review of the existing research in this area at 65-8.

⁶ *Ibid.* at 69.

2.3 Harm to Society

Children may not be the only innocent victims of the criminal justice system. The cost to society in providing social services to children who have been separated from their parents due to incarceration is arguably increased as a result of the parent-child separation. It is estimated that children of incarcerated parents are two to three times more likely to be incarcerated themselves than the average population. In a recent study of provincially incarcerated women in Ontario, 40% of the women surveyed had been separated from a parent as a child because of parental incarceration. The causal mechanisms underlying the correlation between parent and child criminality are not clearly understood. However, it is hypothesized that the link arises from criminal behaviour being a learned problem-solving strategy; inadequate coping skills resulting from parental absences; and stresses associated with marginalized and socially disorganized lives.⁷

2.4 Harm to the Mother

Inherent in the view that the family is the basic group unit of society is the belief that a parent's interest in caring for and making decisions for his/her child is an important exercise of individual autonomy, generally free from state interference. The right of a parent to engage in decision-making for his/her child has been recognized by Canadian courts under section 7 of the *Charter*. This interest can be overridden by the state where a parental choice may result in harm to a child. However, the state does not enjoy the general power to make decisions regarding the care of a child where the parents are competent to do so themselves.⁸

In addition to parental rights being fundamental to the adult's personal autonomy, there are profound psychological effects associated with the removal of infants from their mothers. These psychological effects are heightened in a society, such as ours, which

⁷ Alison Cunningham and Linda Baker, *Waiting for Mommy: Giving a Voice to the Hidden Victims of Imprisonment* (London, Ontario: Centre for Children and Families in the Justice System, 2003) at 12, 13 [Cunningham].

⁸ *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.*, [1997] S.C.J. No. 96, at para. 56; *New Brunswick (Minister of Health and Community Services v. G. (J))*, [1999] S.C.J. No. 47.

attaches significant stigma to the characterization of a parent as being “unfit”. As stated by Chief Justice Lamer in *New Brunswick (Minister of Health and Community Services v. G. (J.)*, *supra*, at para.61:

I have little doubt that state removal of a child from parental custody pursuant to the state’s *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent. The parental interest in raising and caring for a child is, as La Forest J. held in *B. (R.)*, *supra*, at para. 83, “an individual interest of fundamental importance in our society”. ... Further, the parent is often stigmatized as “unfit” when relieved of custody. As an individual’s status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state’s conduct.

In a study of federally incarcerated women who were separated from their children, mothers reported damage to their family ties as the most serious harm resulting from their incarceration. In particular, mothers expressed great concern for the care of their children while they were incarcerated and a fear of never regaining the trust of their children, particularly their young children.⁹

The full impact of the psychological harm caused to mothers by separation from their children is not a subject that has received much attention. However, the importance of family support and strong links with the community are recognized as important aspects of the rehabilitation of offenders. The Canadian *Corrections and Conditional Release Act* [CCRA] has as one of its overriding purposes the rehabilitation of offenders and their reintegration into the community. The CCRA also identifies family contact as necessary to the promotion of relationships between inmates and the community.¹⁰ It is not surprising then that family support and employment are considered the primary criteria for successful parole. Yet, few female inmates report actually having these community links in place upon release.¹¹ The apprehension of infants from their inmate parents can only further sever any potential links an inmate may have with his/her community.

⁹ Wine, *supra* note 4 at 71.

¹⁰ *Corrections and Conditional Release Act*, S.C. 1992, c. 20, ss. 3, 71(a).

¹¹ Mia Daubergne-Latimer, *Exemplary Community Programs for Federally Sentenced Women: A Literature Review* (Ottawa: Federally Sentenced Women Program Correctional Service of Canada, 1995) at 21-2.

2.5 The Disproportionate Effect on Aboriginal Women and Children

The harm caused by the apprehension of children from female inmates has a disproportionate effect on Aboriginal women and children as Aboriginal women are grossly overrepresented in Canadian prisons. Additional factors leading to a disproportionate effect on Aboriginal women and children include the historical disruption of Aboriginal parenting traditions and the difficulty in finding Aboriginal or culturally appropriate foster homes.

3.0 Why Mothers and Not Parents

3.1 A Profile of Female Offenders

The parental interests set out above apply equally to fathers as mothers. However, the concerns arising around the apprehension of children from incarcerated parents are generally restricted to single parents, as apprehension is unnecessary if another parent is available and competent to care for the child. Whereas single mothers of young children are prevalent amongst female inmate populations, single fathers are not known to be a statistically important group in prison populations.

A recent survey of provincially sentenced mothers in Ontario indicated that the women could generally be described as follows: young mothers with young children (half of their children were 6 or younger), high levels of unemployment (60% were unemployed at the time of arrest), early school leaving (38% had finished high school), low levels of father involvement (63% of the women were single or separated, and 43% of the children had no contact with their biological fathers), and an over-representation of Aboriginals and visible minorities (17% identified themselves as Aboriginal and 38% as a visible minority). The vast majority of the women surveyed (77%) planned to live with their children upon release. Also of note was the fact that nearly 40% of the women had

been separated from a parent as a child because of parental incarceration.¹² This profile is consistent with earlier studies of federally sentenced women.¹³

When compared with their male counterparts, female inmates are more likely to be custodial parents and are often the only significant adult involved with the child. While the vast majority of the children of incarcerated fathers are cared for by their mothers, the children of incarcerated mothers are more likely to be placed in foster care or looked after by an alternate caregiver who is not an immediate family member.¹⁴ The separation of young children from their mother not only severs the bond a child shares with its primary adult caregiver, a bond that is considered essential to the healthy emotional and behaviour development of a child, but also deprives infants of the health benefits of breast milk.

The full extent of the number of children impacted by incarceration of their mothers is unknown and further research needs to be conducted in this area. However, as of 2003, it was estimated that at least 20,000 Canadian children a year experience separation from their mothers as a result of incarceration. As penal populations continue to increase, that number has inflated accordingly. Moreover, as a result of the overrepresentation of Aboriginal people in prisons, a disproportionate number of the children separated from their mothers due to incarceration are Aboriginal.¹⁵

3.2 The Traditional View of Female Offenders

The traditional view of female offenders is that they are unfit as mothers by virtue of their criminal behaviour. Female inmates are often perceived as “male” in nature. Women who engage in crime are viewed as not only transgressing the law, but also social

¹² Cunningham, *supra* note 7 at 5, 6.

¹³ See generally Lebreque and Wine, *supra* note 4. These reports estimate that 75-80% of federally sentenced women and approximately 70% of provincially sentenced women are mothers. Research on provincially sentenced women in Ontario indicates that more than 60% of mothers in Ontario facilities are single parents and a third of their children are under the age of 5. See Cunningham, *supra* note 7 at 2.

¹⁴ Wine, *supra* note 13 at 4, 5, and 10. See also Cunningham, *supra* note 7 at 7; and Sandra Enos, *Mothering from the Inside: Parenting in a Women's Prison* (New York: State University of New York Press, 2001) at 2, 3.

¹⁵ Cunningham, *supra* note 7 at 1. While only 3% of the general population in Canada is Aboriginal, over 20% of female inmates in federal prisons are aboriginal. In the most recent study of inmate mothers in provincial facilities in Ontario, 17% of the mothers surveyed identified themselves as Aboriginal.

standards of acceptable feminine behaviour. Female offenders have traditionally been treated by the legal system as de facto males, devoid of maternal emotions, and a risk to the socialization and development of their children.¹⁶ This perspective automatically removes the possibility that contact with such a parent can ever be in the best interests of the child. Another result of this view is that the specific needs of female prisoners are generally ignored or made to conform to existing institutional norms, regulations and programs, designed with male inmates in mind.

3.3 Criticisms of the Traditional View

It is the author's view that the idea that women who engage in criminal behaviour are not socially acceptable as mothers needs to be rejected. An individual's fitness as a parent is not a point of consideration in the criminal process. The criminal process has not been developed to allow for a proper assessment of a mother's parenting abilities or the appropriateness of child apprehension. Incarceration is a serious infringement of one's liberty, which may be warranted in certain circumstances. However, if interference with a parent's liberty interest in caring for and making decisions for her child is called for, such a decision should occur in the context of proper consideration of the harms posed to the child.

The automatic apprehension of children from female inmates perpetuates the assumption that mothers who commit crimes are unfit parents whose criminal behaviour constitutes abandonment of their children. In addition to the interference with the parent's liberty interest caused by the removal of children from their inmate mother, the view that female offenders are unfit mothers is at odds with the following values reflected in the CFCSA:¹⁷

- parenting is a responsibility, not a privilege;
- the family is the preferred environment for the care and upbringing of children;
- children should only be removed from their family if the child's health and safety is at risk of immediate harm; and

¹⁶ Wine, *supra* note 13.

¹⁷ R.S.B.C. 1996, c. 46.

- all decisions regarding the placement of children should consider the best interests of the child.

4.0 Mother-Child Programs in BC

4.1 The Program at ACCW

Prior to 2004, the Burnaby Correctional Centre for Women (BCCW) housed both federally and provincially sentenced women and had a mother-child program. The program provided mothers with the possibility of having their infant children stay with them while incarcerated. Following the closure of BCCW in 2004, provincially sentenced women classified as minimum and medium security were moved to ACCW and federally sentenced women to the Fraser Valley Institution (FVI). Both ACCW and FVI continued to operate mother-child programs. A total of 12 mother-baby pairs participated in the program while it was operated at ACCW. In April 2008 the mother-child program at ACCW was terminated. Presently, women housed at FVI still have the option of maintaining custody of their young children while they are incarcerated.

The mother-child program at ACCW provided the basic services necessary to enable single mothers to fulfill their parental role while incarcerated, so long as the arrangement was in the best interests of the child. Mothers had full responsibility for their children 24 hours a day, or had to make all necessary arrangements for alternate care. The facility itself had minimal involvement in facilitating co-habitation and primary responsibility for caretaking fell on the mother.

4.2 Termination of the Program at ACCW

When the mother-child program at ACCW was cancelled there were no children participating in the program. However, there were expectant mothers at the facility and a newborn child at Fir Square whose mother was expected to return to ACCW. Upon receiving confirmation that the program was terminated, the Ministry of Children and

Family Development was prepared to immediately apprehend the infants of ACCW inmates.¹⁸

The legal authority for programming decisions within provincial correctional centres lies with the warden of the facility. Section 38 of the *BC Corrections Act Regulation* requires the person in charge of the correctional centre to establish programs designed to assist inmates to improve their education or training, and reduce the risk they present to the community. In addition, the strategic plan released by BC Corrections indicates a commitment to implementing programs directed at female and Aboriginal offenders.

Decisions relating to the custody of children of single parents who are incarcerated also fall under the authority of the Ministry of Children and Family Development. The CFCSA provides that “when deciding where to place a child, the director must consider the child’s best interests”.¹⁹ Section 30, which provides authority for removal of a child, allows for removal of a child where the director has reasonable and probable grounds to believe that the child needs protection and that the child’s health or safety is in immediate danger, or no other less disruptive measure is available to adequately protect the child.

According to the Warden of ACCW, the rationale behind the cancellation of the mother-child program at ACCW was a concern for the safety of the children. However, there are no publicly known safety incidents concerning the 12 mother-baby pairs who previously participated in the program at ACCW and the Warden has made no reference to any specific safety incident or concern. The availability of a cost-benefit analysis of continuing the service would be beneficial, although no such analysis has been provided by the Warden to the public.

¹⁸ To date one such infant has been apprehended from an ACCW inmate. In another situation, apprehension was avoided when hospital staff refused to release the mother until she was able to transfer to a transition house where she could reside with her child.

¹⁹ R.S.B.C 1996, c. 46, s. 7.

5.0 Effects of the Removal of the Program from the BC Correctional Facility

5.1 The Effects on Provincially Sentenced Women and their Children

The effect of canceling the mother-baby program at ACCW is that children will be placed in temporary care while their mothers serve relatively short sentences.²⁰ The trend amongst female inmate populations in Canada over the last decade has been towards a younger population of women (the majority being between the ages of 20 and 34) who generally serve shorter sentences. These women are more likely to have young children and to serve time in provincial, rather than federal facilities. The ability to maintain the mother-child bond is particularly important in circumstances where the mother is likely to be released before the child's reintegration into society. In such circumstances, it is possible to ensure the best interests of the child are a consistent priority from the time of development of a mother-child bond at infancy through to integration into social programs and schooling.

Mothers will have the added burden upon their release of taking legal action to regain custody of their children. If young children have been placed in foster care during incarceration, this burden can be especially difficult. Under the CFCSA, a child under five years of age who has been in temporary care for over 12 months automatically becomes a ward of the state and may be put up for adoption. This time period is 18 months for children aged 5 to 12 and 24 months for children aged 12 and over.²¹

5.2 Effects on Sentencing

The cancellation of the mother-child program in BC's provincial facility and its continuance in the regional federal facility also raises a significant concern with female offenders who are pregnant or have young children intentionally seeking federal sentences. A federal sentence involves a term of imprisonment for a minimum of 2 years whereas a provincial sentence is less than 2 years in length. In the recent BC Supreme Court case of *R. v. Whitford*, the availability of a mother-child program at the regional

²⁰ As a provincial facility, ACCW only houses inmates serving sentences under 2 years in length.

²¹ R.S.B.C 1996, c. 46, ss. 45 and 50.

federal facility, FVI, and the acceptance of the accused's new born child into the program were two factors considered in sentencing.²²

6.0 Conclusion

Incarceration represents a serious infringement of one's liberty. However, the decision to cancel the mother-baby program at ACCW infringes the liberty interests of inmate mothers beyond what is justifiable in a criminal context. The automatic apprehension of infants from female inmates fails to consider the needs of mothers and their children. The profound psychological effect of separating a mother from her newborn child can lead to significant stigma and distress in relation to the mother's interest in raising and caring for her child. The serious harm caused by separation of a young child from its mother is unwarranted in the absence of an equally serious harm to the child. The presence of any such competing harm warranting apprehension is not evident in the context of mothers incarcerated at ACCW. In recognition of the following values:

- parenting is a responsibility, not a privilege;
- separation from a parent jeopardizes the psychological and emotional development of a child;
- apprehension of a child causes significant psychological stress to the parent; and
- criminal behaviour is not in itself evidence of unfitness as a parent,

the apprehension of infants from incarcerated mothers is an unjustifiable infringement of the rights of both the parent and the child.

²² 2008 BCSC 1378.