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Aboriginal Mothers Facing Incarceration

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Janine's Story: A Single Mother Facing Incarceration in Ontario

This paper chronicles the situation of a young Aboriginal mother[i] who has come into contact with the criminal justice system. The goal of telling this story is to highlight the pertinent issues for Aboriginal mothers who are facing incarceration. Specifically, it will demonstrate how certain time-related provisions in the Child and Family Services Act[ii] have a disproportionate impact on Aboriginal mothers who are interacting with the criminal justice system. This story is meant to demonstrate the circumstances and challenges facing a subset of Aboriginal women and is not intended to be used to make any generalizations about Aboriginal peoples or women.

How it Begins: Contact with the Criminal Justice and Child Welfare System for an Aboriginal Mother

“Aboriginal women and their children suffer tremendously as victims in contemporary Canadian society.”[iii]

Janine is a 24 year old Aboriginal woman. She is a single mother of two children. Janine lives in an apartment off reserve in a town in northern Ontario but is within close proximity to the reserve where she was born. She has developed strong ties to her community. Janine and her kids visit the reserve often and regularly participate in cultural activities in her community.

One afternoon, the police arrive at Janine's apartment that she shares with her two children, Nathan, who is six, and Carrie, who is three. A witness has identified Janine as being involved in a theft. When the police arrive, they search Janine's house and find the stolen goods. Janine is arrested. Because Janine is the sole caregiver for her two children, the police officers call the local Children's Aid Society, who arrive shortly thereafter and apprehend Nathan and Carrie.

Janine is charged with theft under \$5,000 and breach of probation. The Crown is concerned that Janine may not appear in court because she has family in another province. Subsequently, she is denied bail on the ground that she may flee from justice. Janine is moved to the Vanier Centre for Women in Milton, four and a half hours away from her home community, to be held in remand awaiting her trial. As evidenced through her breach of probation charge, this is not the first time Janine has run into trouble with the law as an adult. She pled guilty to a theft charge two years prior and was ordered to pay a fine and was put on probation.

While Janine is being transferred to the Vanier Centre, the Children's Aid Society begins working on finding a placement for Nathan and Carrie. Janine is concerned. If convicted, her lawyer told her she is potentially facing up to two years in provincial prison. Janine was in and out of foster care as a child and does not want her children to grow up in a foster home. She also does not want to lose her children. The minute Nathan and Carrie come into the care of the Children's Aid Society either by way of agreement or court order a clock starts ticking to find a suitable long-term solution for their placement.[iv]

The Clock is Running: Section 70 of the Child and Family Services Act

“Studies have shown that native children admitted into care are less likely than non-native children to be returned to their parents.”[v]

Once Nathan and Carrie were taken into the care of the Children’s Aid Society, the society has a certain period of time to determine where they should be placed permanently. Section 70 of the Ontario CFSA articulates the time limits that a Children’s Aid Society has to find a plan of permanency for a child that has been taken into its care or custody.

Section 70(1) states that:

Subject to subsections (3) and (4), the court shall not make an order for society wardship[vi] under this Part that results in a child being a society ward for a period exceeding,

(a) 12 months, if the child is less than 6 years of age on the day the court makes an order for society wardship; or

(b) 24 months, if the child is 6 years of age or older on the day the court makes an order for society wardship.

Section 70(2) clarifies that when calculating the time period, temporary care or special needs agreements under ss. 29(1) or 30(1) and temporary orders under s. 51(2)(d) shall be counted.[vii] Section 29(1) refers to agreements where a parent, such as one in Janine’s current situation, is temporarily unable to care for his or her child(ren), while s. 29(6) sets out parallel time limits as in s. 70(1). Therefore, even if a court order was not granted for society wardship and an agreement was made for temporary care, the same time limits would apply.[viii]

Nathan has been in the care of a Children’s Aid Society on one other occasion. He spent three months in foster care after his junior kindergarten teacher called the society with concerns about Nathan being malnourished. The Children’s Aid Society visited Janine’s home and interviewed neighbours. The child protection worker suspected Janine had problems with substance abuse and apprehended Nathan under s. 37(2)(b) of the CFSA. Janine completed a treatment program and the society concluded that Nathan was able to return home. This is relevant because s. 70(2.1) stipulates that the time in care within the past five years referred to in s. 70(1) is cumulative.[ix] Therefore, any time that a child has been in a society’s care within the last five years counts toward the time limit.

There are only two statutory exceptions to the time limits in s. 70.[x] The first exception is an extension where an appeal has been commenced under s. 57(1) of the CFSA but has not yet been concluded or where the court has adjourned a status review hearing under s. 65 of the CFSA.[xi] The extension is granted only until an appeal has been disposed of (including the completion of any new hearing ordered on appeal) or an order is made to vary a child’s status under a s. 65 order.[xii] The second exception is where the court may grant a one time six month extension if it is in the child’s best interests to do so, subject to paragraphs 2 and 4 of s. 57(1).[xiii]

The applicable timeline for Janine is 12 months since both her children are under the age of six.[xiv] The implications of s. 70 (and s. 29) are that if the child welfare matter is not resolved

within a year, the society must either return Nathan and Carrie to Janine's custody or make an application for Crown wardship (following which a child may remain in a foster or group home, or may be adopted). If Janine is incarcerated, the former option may not be available.

It is important to note that s. 70 (and s. 29) refers to a time limit for a child to be in society care. Therefore, if a child were apprehended from a parent or guardian and placed with a family member or in a customary care arrangement[xv] the clock would stop running and there would be no statutory time frame in which a permanent decision must be made.

An All Too Familiar Pattern: Intersection of the Child Welfare and Criminal Justice Systems

“The endless cycle of Native incarceration and recidivism will only be broken if the underlying causes of this situation are identified, addressed and dealt with in a realistic and holistic fashion. Otherwise, the endemic poverty, under-education and ensuing frustration will continue to generate anti-societal responses.”[xvi]

When she was a child, Janine's father was physically and verbally abusive toward Janine, her older brother and her mother, Paula. When Janine was five years old, her father went to jail on an assault conviction. Shortly after he returned home, he left and Janine has not seen him since. Paula struggled with alcohol abuse and had difficulty caring for Janine and her brother, especially after Janine's father left. As a result, Janine was in and out of foster care, while her brother spent much of his youth in group homes. Eventually, Janine went to live with her grandmother. In her teen years Janine got involved with a rough crowd and got into trouble with the law. She has a minor youth criminal record but had never spent a protracted period of time in youth detention.

As an Aboriginal person interacting with the criminal justice system, Janine's story is not unique. A joint study by the Correctional Service of Canada, the Department of Justice Canada and the Assembly of First Nations found that approximately two thirds of Aboriginal people in prison stated they had interacted with the child welfare system (spent time in foster or group homes or had been adopted) during their childhood, compared to about one third of non-Aboriginal inmates.[xvii] This same study notes that Aboriginal inmates were more likely to have had interaction with the criminal justice system as youths and to have had family members involved in crime.[xviii] Moreover, a marked overrepresentation of Aboriginal people in the criminal justice system has been well-documented in Canada, and has been specifically remarked upon in Ontario.[xix] There is a particular overrepresentation of Aboriginal women in the criminal justice system, in both federal and provincial corrections institutions.[xx]

An Incarcerated Aboriginal Single Mother's Plight

“Aboriginal women's pain from their incarceration is magnified by their loneliness and guilt of not being with their children. In addition, disrupting crucial bonding years reduces a woman's chance of successful reintegration into her community upon release if she cannot have a positive relationship with her children.”[xxi]

At 18, Janine became pregnant with her first child, Nathan. After Nathan was born, her grandmother helped Janine care for him. Janine has not had contact with Nathan's father since Nathan's birth. Once her grandmother passed away, Janine moved in with a new partner and was soon pregnant with her second child, Carrie. Her relationship with her partner was marred by verbal and physical abuse. Not long after Carrie was born, her relationship with her partner dissolved and she was left to care for the children on her own.

As a single mother, Janine is like many other women who interact with the criminal justice system. According to Correctional Service Canada “[t]wo thirds of incarcerated women are mothers of children under five years of age, are often single parents, and for which living apart is an ordeal for both the mothers and their children.”[xxii] The apprehension of children whose parents are incarcerated or being held in custody on remand is generally restricted to single parents since apprehension is unnecessary if there is another available and competent parent.[xxiii] This is particularly true for single mothers of young children as they are “prevalent amongst female inmate populations, while single fathers are not known to be a statistically important group in prisons.”[xxiv] In a paper on Aboriginal women offenders, the Native Women's Association of Canada identified that Aboriginal women are often single parents.[xxv] This phenomenon illustrates the need to focus on Aboriginal women offenders, like Janine, when examining parental rights and child welfare issues arising from the incarceration of Aboriginal people.

Aboriginal women who are interacting with the criminal justice system, such as Janine, along with their children are disproportionately affected by the harm caused by the apprehension of children, largely because Aboriginal women are overrepresented in Canadian prisons.[xxvi] The Ontario Women's Justice Network has noted that women most likely to be incarcerated include, among others, women living in poverty, single mothers, women with histories of abuse and addictions, and Aboriginal women.[xxvii]

A report prepared for the British Columbia Civil Liberties Association also highlights additional factors that contribute to the disproportionate effect of child apprehension on Aboriginal women and children, including the “historical disruption of Aboriginal parenting traditions” and the lack of culturally appropriate foster and group homes for Aboriginal children who are separated from their families.[xxviii]

Women Incarcerated in Provincial Institutions

“Most women in provincial prisons serve sentences of two months or less. But even a short sentence, along with a period of time in remand can cause a woman to lose her children, her home, and her job (if she has one).”[xxix]

Even if Janine were to be acquitted at her trial, the time limits in s. 70 (and likewise s. 29) of the CFSA may still have implications for her and her children as there may have been a considerable period of time that has elapsed while she was being held in remand. Separation of mother and child as a result of interaction with the criminal justice system is not only a concern for Aboriginal women who are incarcerated long-term but also those who are held in remand awaiting bail hearings or trial, often in provincial institutions.

In 1991/92, 31% of the detained population in Ontario was being held in remand (compared to those who had been incarcerated following sentencing).[xxx] In 2007/08, this figure jumped to 65%.[xxxii] The increase in remand may be attributed to several factors, including delays in bail hearings because of few court and legal resources, a lack of preparation for bail hearings and an increase in the number of days required to process court cases because of stretched court resources and complex cases.[xxxiii] The impact of the 1997 amendments to the Criminal Code of Canada[xxxiiii] provisions that add a third ground on which bail can be denied where there is “any other just cause or where it is necessary to maintain confidence in the administration of justice” has also contributed to an increase in the number of people being held remand in Ontario.[xxxv]

The trend of more people being held in remand directly affects women. According to the Elizabeth Fry Society of Toronto, since 2003 more women charged with an offence under the Criminal Code are spending time remanded in prison awaiting their trials.[xxxvi] Whatever the reasons, as more people, including women, are being held in remand, it follows that more single mothers will likely be among this population, contributing to the separation of mother and child.

Janine is worried that if she is convicted and sentenced to a provincial institution that her interaction with her children will be limited during her incarceration. She has heard that federal prisons have programs for incarcerated mothers including the Mother-Child Read Aloud program, transportation for visiting family members and family resource centres.[xxxvii] However, she is unsure of what might be available to her in provincial jail.[xxxviii] Such concerns may be well-founded, despite the fact that the majority of women in Ontario prisons are mothers.[xxxix] It has been argued that the needs of women serving provincial sentences are often overlooked since they are serving shorter sentences than their counterparts in federal prisons.[xl] As an extension of this, complaints have been raised about the amount and quality of programming in provincial institutions compared to what is available in federal prisons.[xl]

Several sources have identified the lack of appropriate facilities near their home communities as problematic for Aboriginal women offenders as they are not only physically but also “geographically separated long-term from their communities, families, children,”[xli] which can be particularly difficult for Aboriginal women.[xlii] Although being separated geographically from one’s community may be more of a problem for Aboriginal women serving federal sentences as they may serve all or part of their sentence in another province, it is still a problem for Aboriginal women serving provincial sentences. Ontario is a large province and has one dedicated institution for women serving provincial sentences.[xliii]

Janine’s situation is a good illustration of this problem. Currently at the Vanier Centre for Women in Milton, Janine is hours away from her family. This could contribute to Janine’s feeling of isolation and loneliness, as the distance between the prison and where her children end up being placed—presumably in or near her home community—may prevent frequent family visitations.[xliv] The problem of regular visitation because of geographic distance is made more precarious because of the reliance on a caregiver who is willing and able to bring the children to visit Janine.[xlv]

Loss in Aboriginal Communities: Incarceration Cycles and Sentencing

“With Aboriginal people, we need to connect to the road they are going down. We need to work with their communities when they tell us they are ready. We need to listen to ways in which Aboriginal women in prison can be brought closer to home and to their Native ways.”[xlvi]

Janine’s story is illustrative of another cycle that was referred to earlier in her story, whereby children of incarcerated parents are more likely to be incarcerated themselves than those whose parents have not been incarcerated. Studies have shown that children of incarcerated parents are two to three times more likely to be incarcerated than the average population.[xlvii] A recent study of provincially incarcerated women in Ontario indicated that 40% of the women surveyed had been separated from a parent as a child because of parental incarceration.[xlviii]

For Janine, and other Aboriginal women who have been in contact with the criminal justice system, the pattern is of great concern. The pattern not only increases the chances of Aboriginal mothers being incarcerated but it also has negative long-term effects for children. Janine is well aware that children suffer from their mother’s absence during incarceration. Where bonds between mother and child are disrupted by the child’s removal, the child’s emotional development may be hindered, manifesting in withdrawal from human interaction and detachment from affectionate relationships.[xlix] It has been indicated that regular visitation may lessen the effects of temporary separation on children who are separated from their mothers.[l] The damage goes beyond the family unit since the women are the primary caregivers and sources of stability in Aboriginal communities; the entire community suffers from their absence.[li]

Janine has heard that if she is convicted that there are special principles, known as Gladue principles, taking into account her Aboriginal heritage that are to be applied by a sentencing judge. She is curious, however, whether a sentencing judge would consider Nathan and Carrie when imposing a sentence. Because her particular charge carries a maximum sentence of two years less a day, she may be eligible to serve a community sentence, and she thinks that her status as a mother might make this a more compelling option.[lii]

The case law dealing with the sentencing of Aboriginal mothers does not provide a clear answer to Janine’s quandaries about how or if a sentencing judge would consider her status as a mother. In an informal survey of sentencing decisions involving Aboriginal mothers, there were few decisions where a judge explicitly considered the offender’s maternal status as a mitigating factor. [liii] There are no decisions on the issue coming from the Supreme Court of Canada. Although there is no clear guidance or principles emanating from the case law, there have been limited instances where judges have expressly acknowledged both the historic pattern of “family dislocation”[liv] among Aboriginal families and personal circumstances[lv] where separation from family and community might occur. This, however, should be contrasted against a case where a judge expressly said that decisions relating to children and family should not be factored into the sentencing decision and should be “played out” in a different forum, namely Family Court.[lvi]

Section 718.2(e) of the Criminal Code requires a sentencing judge to apply Gladue principles to take into consideration an Aboriginal person’s background in sentencing, but does not contemplate the consideration of an offender’s parenthood, or more specifically, motherhood.

Stopping the Clock: Kin Care

“The mothers were well aware that the fate of the mother-child relationship would be entirely dependent on the alternate caregiver and therefore, it became necessary to choose a person whose support could be counted on. Unfortunately, this was not always possible.”[lvii]

Janine has had a tumultuous relationship with her mother, Paula, over the years. Yet since Janine’s arrest, Paula has shown an interest in taking care of Nathan and Carrie. Janine was not averse to this, particularly because it would mean Nathan and Carrie would be able to stay in their community and would not have to live in foster care, possibly in a non-Aboriginal home, like Janine did as a child. The process of making alternate care arrangements for children in the event that a mother is incarcerated has been identified as a priority for incarcerated mothers, but a complicated decision.[lviii] For example, a single mother who is faced with possible incarceration must find someone who is financially able to care for her child(ren) while choosing someone who will be dependable in terms of maintaining the mother-child relationship through visitations and a plan where the child is returned to the mother upon her release.[lix] This is further complicated in the Aboriginal context as culturally appropriate placements in or near the Aboriginal community are important for Aboriginal children and cultural retention in communities.

Because Nathan and Carrie were apprehended by the Children’s Aid Society, another complicating factor in finding alternate care arrangements for children is that the children are in society care and the society is now ultimately responsible for finding or approving an interim placement. Since Nathan and Carrie are both under the age of six, the society has one year to find a plan of permanency. However, the time can essentially be frozen if Nathan and Carrie are placed with a family member outside the care of the society while Janine is unable to care for them. This would increase the chances of the children being returned to Janine after she is released (either from remand or following a potential sentence).

After Janine and Paula speak about care arrangements for Nathan and Carrie, a plan is proposed to the Children’s Aid Society. However, following an examination into the circumstances of the potential placement, the family service worker has raised some concerns. First, they are concerned about Paula’s past interaction with the Children’s Aid Society. Second, they are concerned about Paula’s past substance abuse problems. Finally, they are concerned about the condition of Paula’s home as a safe environment for Nathan and Carrie.

It has been raised as a concern that the standards set for placements by Children’s Aid Societies and in the CFSA and accompanying regulations do not meet the reality of many Aboriginal families that tend to have a lower socio-economic status and a higher probability of having had contact with the child welfare and/or criminal justice systems.[lx] As in Janine’s situation, oftentimes the systemic problems affect several generations and therefore kin arrangements may not be a viable option. This may be particularly true where it is a mainstream Children’s Aid Society dealing with the family rather than a mandated Aboriginal child welfare agency as permitted in Part X of the CFSA. Cultural bias may play a role in the way that Children’s Aid Societies view the appropriateness of kin arrangements. Aboriginal child welfare agencies may be more culturally sensitive to the needs and understand the complexity of situations in Aboriginal communities. Therefore, they may be both more apt in assessing kin care placements in Aboriginal homes and more flexible in making these determinations.[lxi]

Moving Forward

“‘White tape’ restricts and standardizes us. What happened to the concept of freedom and a fair society?”^[lxii]

There are many issues facing Aboriginal single mothers interacting with the criminal justice system. What will transpire for Janine and her children is dependent on considerations such as: the outcome of her trial; whether a sentencing judge considers her status as a mother a mitigating factor in sentencing her (if she is convicted); what kin care arrangements can be secured and approved; total time spent in custody, including remand; and programming in provincial prisons.

From a family law reform perspective, there is room for amendments to the Child and Family Services Act, in particular to s. 70 (and s. 29), to reflect a more culturally sensitive approach to the time limits given the documented patterns of interaction with state institutions and the overrepresentation of Aboriginal women in the criminal justice system who are separated from their children. There may also be space within the Ontario child welfare scheme to include provisions specifically related to the consideration of Aboriginal kin care arrangements to ensure that standards and guidelines are culturally appropriate.

The use of culturally attuned programs, such as talking circles, to deal with child welfare disputes^[lxiii] may also be helpful with respect to working to find a solution within the allocated time frames in the CFSA. For example, talking circles may help resolve the child welfare matters more quickly than regular court channels and may facilitate the arrangement of a kin placement.

Although sentencing falls under the purview of Parliament, there may be steps the province can take in reforming corrections in Ontario. Offering more culturally specific programming for Aboriginal mothers and support for visitation such as subsidizing transportation or accommodations for visiting family members may be helpful in redressing some of the issues facing provincially sentenced Aboriginal mothers (including those held in remand).

Finally, both the child welfare system as it pertains to Aboriginal mothers and children and the corrections system in Ontario are reactive systems in that they respond to the harm or issue after it has already manifested itself in some form. Arguably, additional resources should be focused on addressing the root causes of the patterns of interaction with state institutions and developing preventative programming for Aboriginal women and families.

Endnotes

[i] The characters in this narrative are fictitious and are not based on a particular person. Rather, the characters are based on research and observations of a number of Aboriginal mothers in prison.

[ii] R.S.O. 1990, c. C.11 [CFSA].

[iii] A.C. Hamilton and C.M. Sinclair, Report of the Aboriginal Justice Inquiry of Manitoba, Vol. 1, The Justice System and Aboriginal People (Winnipeg: Queen’s Printer, 1991) at 475.

[iv] There are two ways in which a child may come into the care of a Children's Aid Society following apprehension: by way of a court order; or through "temporary care agreements" which are voluntary agreements when the parent is temporarily unable to care for a child. This will be discussed further, but for the purposes of this discussion, the distinction is not relevant. See s. 70(2) CFSA. See also Durham Children's Aid Society, "What is Foster Care?" online: Durham Children's Aid Society <<http://www.durhamcas.ca/FosterCareWhatIs.php>>.

[v] Lauren Sasaki, "The Contribution of the Child Welfare System to the Deterioration of Aboriginal Culture and the Need for Aboriginal Control" (1994) 1 *Aboriginal Women's Law Journal* (Native Women's Association of Canada).

[vi] Society wardship refers to a situation where a child has been removed from the parent(s) or guardian(s) and an order has been made whereby the Children's Aid Society exercises the rights of the parent.

[vii] Special needs agreements under s. 30(1) are used where a parent is unable to provide the necessary services required by a special needs child. Section 51(2)(d) refers to a child being put in the care and custody of the Children's Aid Society under a temporary order during an adjournment of a hearing.

[viii] With respect to temporary care agreements, s. 29(6.1) explains that the time limits in s. 29(6) also include time in care as a society ward and under temporary orders. Because the time limits in ss. 70 and 29 are equivalent, the distinction between whether a child was taken into society care by way of an agreement or court order becomes irrelevant for the purposes of telling Janine's story.

[ix] Section 29(6.2) parallels s. 70(2.1) regarding the cumulative nature of time in care with respect to temporary care agreements.

[x] With respect to the time limits in s. 29(6), the agreement including extensions cannot extend beyond the time periods stated.

[xi] CFSA, *supra*, note 2 s. 70(3).

[xii] *Ibid.* Section 65 refers to variations of a child's status under supervision or society wardship orders.

[xiii] CFSA, *supra* note 2 s. 70(4); paragraphs 2 and 4 of s. 57(1) refer to society wardship under which a child can only remain for a 12 month period.

[xiv] For Nathan, however, since he has spent three months in care, the relevant time period is nine months.

[xv] A customary care arrangement is defined in s. 208 as "the care and supervision of an Indian or native child by a person who is not the child's parent, according to the custom of the child's band or native community."

[xvi] Gabriel Dumont Institute of Native Studies and Applied Research in Correctional Service of Canada, *Creating Choices: Report of the Task Force on Federally Sentenced Women*, Chapter III “The Voices of Others Who Care” online: Correctional Service of Canada <<http://www.csc-ccc.gc.ca/text/prgrm/fsw/choices/choice4e-eng.shtml>>.

[xvii] S. Trevethan, S. Auger, J-P. Moore, M. MacDonald, and J. Sinclair. *The Effect of Family Disruption on Aboriginal and Non-Aboriginal Inmates* (Ottawa: Correctional Services of Canada, Department of Justice & Assembly of First Nations, September 2001), online CSC: <http://www.csc-ccc.gc.ca/text/rsrch/reports/r113/r113_e.pdf> at ii, 18-19, 21.

[xviii] *Ibid.* at 26.

[xix] Ministry of Community Safety & Correctional Services, *A Safe, Strong, Secure Ontario: Strategic Plan 2008-2013* (October 2008) online: MCSCS <<http://www.mcscs.jus.gov.on.ca/stellent/groups/public/@mcscs/@www/@com/documents/webasset/ec069601.pdf>>.

[xx] Hamilton & Sinclair, *supra* note 3 at 498.

[xxi] Lee Anne Schiendein, “The Aboriginal Healing Lodge: A First Step” (1992), 56 Sask. L. Rev. 427 (QL) at 6.

[xxii] Correctional Service of Canada, “Mother-Child Program”, online: Correctional Service of Canada <<http://www.csc-ccc.gc.ca/text/prgrm/fsw/pro02-5-eng.shtml>>.

[xxiii] Megan Vis-Dunbar, “Child Apprehensions in BC Correctional Facilities” Presented to the Board of the British Columbia Civil Liberties Association (November 10, 2008), online: British Columbia Civil Liberties Association <http://www.bccla.org/positions/children/08Child_Apprehensions.pdf> at 7.

[xxiv] *Ibid.*

[xxv] Native Women’s Association of Canada, “Aboriginal Women and the Legal Justice System in Canada,” online: NWAC <<http://www.nwac-hq.org/en/documents/nwac-legal.pdf>>.

[xxvi] Vis-Dunbar, *supra* note 23 at 7.

[xxvii] Ontario Women’s Justice Network, “Women in Provincial Institutions”, online: Ontario Women’s Justice Network <http://www.owjn.org/owjn_2009/index.php?option=com_content&view=article&id=60&Itemid=67>.

[xxviii] Vis-Dunbar, *supra* note 23 at 7.

[xxix] Elizabeth Fry Society of Toronto (March 2008) “Imprisonment but not Sentenced” 24:2 *Out for Change* in “Women in provincial institutions”, online: Elizabeth Fry Society of Toronto

<<http://efrytoronto.org/publications/newsletters/Efrytoronto%20Newsletter%20March%202008.pdf>> at 1.

[xxx] Statistics Canada, “Custodial Remand in Canada 1986/87 to 2000/01” in Juristat: Canadian Centre for Justice Statistics by Sara Johnson (Catalogue no. 85-002-XIE, Vol. 23, no. 7, 2003) online: <<http://dsp-psd.communication.gc.ca/Pilot/Statcan/85-002-XIE/0070385-002-XIE.pdf>> at 9.

[xxxii] Ministry of Community Safety & Correctional Services, supra note 19 at 7.

[xxxiii] John Howard Society of Ontario, Remand in Ontario: A Backgrounder (September 2005), online: John Howard Society of Ontario <<http://www.johnhoward.on.ca/pdfs/remand.pdf>> at 3.

[xxxiiii] R.S., 1985, c. C. 46 [Criminal Code].

[xxxv] John Howard Society, supra note 32 at 3.

[xxxvi] Elizabeth Fry, supra note 29 at 1; see also Rebecca Kong and Kathy AuCoin, “Female Offenders in Canada” online: Statistics Canada <<http://www.statscan.gc.ca/pub/85-002-x/2008001/article/10509-eng.htm>>.

[xxxvii] Correctional Service of Canada, “Programs and Activities Intended for Inmates and Parolees”, online: Correctional Service of Canada <<http://www.csc-scc.gc.ca/text/fami/news/contrib0506-eng.shtm>>.[xxxviii] A number of “Treatment Programs” are listed on the Ministry of Community Safety and Corrections website at <http://www.mcscs.jus.gov.on.ca/english/corr_serv/adult_off/treat_prog/treat_prog.html>. Parenting classes is listed among these, along with life management skills and other counseling programs. However, there is no specific mention of mother-child specific programs or family support programs. There has been much less attention given to what is available in provincial institutions compared to what is available at the federal level.

[xxxix] Elizabeth Fry, supra, note 29.

[xl] Ontario Women’s Justice Network, supra note 27.

[xli] One of the women interviewed at Grand Valley Institute for Women (GVIW) mentioned that she and her sister both asked for federal sentences following their convictions as they realized that after years spent in and out of provincial institutions that they were not getting the help that they needed through programming. Also, one of the correctional services officers at GVIW noted that the caliber of programming available at the federal level is far superior than that offered in provincial prisons. This makes sense based on the fact that women are serving shorter sentences in provincial prisons and therefore there may not be the demand or the justification for a variety of programming, including parenting classes, and other Mother-Child programs.

[xlii] NWAC, supra note 25 at 2.

[xlii] See Mary Ellen Turpel, “Critical Perspectives on Family Law: Race, Gender Class – Home/Land” (1991) 10 Can. J. Fam. L. 17-40 (QL). Turpel discusses the value of “home land” in relation to matrimonial real property. The principles she articulates relating to the significance of the community as an epicenter for family, culture and language equally apply to issues of separation of Aboriginal women from their communities. See paras. 36-37.

[xliii] Elizabeth Fry Societies of Ontario, “Facilities for the Incarceration of Women in Ontario”, online: Council of Elizabeth Fry Societies of Ontario <<http://www.cefso.ca/prisons.html>>.

[xliv] Schiendein, supra note 21 at 6.

[xlv] Vis-Dunbar, supra note 23 at 4.

[xlvi] Jeff Christian, District Director, Alberta/Northwest Territories District in Correctional Services Canada, Creating Choices: Report of the Task Force on Federally Sentenced Women, Chapter III “The Voices of Others Who Care”, online: Correctional Service of Canada <<http://www.csc-ccc.gc.ca/text/prgrm/fsw/choices/choice4e-eng.shtml>>.

[xlvii] Vis-Dunbar, supra note 23 at 5.

[xlviii] Ibid.

[xlix] Ibid at 4.

[l] Ibid.

[li] Schiendein, supra note 21 at 6.

[lii] There was a recent case in the Saskatchewan Court of Appeal involving an Aboriginal mother where the judge took into consideration that hardship incarceration has brought to the children, who had to be separated living with different family members, and varied the offender’s sentence so that she could serve the remainder of the sentence in the community. See R v. McLeod [2009] S.J. No. 497; 2009 SKCA 93 (Sask. C.A.).

[liii] A judge in Manitoba did expressly note that the accused’s “status as a mother of two young children” was a mitigating factor in sentencing. R. v. MacDougall [2009] M.J. No. 400; 2009 MBQB 299. See also R. v. Waskewitch [2007] S.J. No. 718 at para 30.

[liv] R. v. Brooks [2008] N.S.J. No. 519 at para. 76.

[lv] R. v. Batisse [2009] O.J. No. 452 (Ont. C.A.) at para. 37. Although the hardship of separation was acknowledged and the sentence was reduced, the Court of Appeal did not find the circumstances warranted interfering with the trial judge’s decision to incarcerate.

[lvi] R. v. Elias [2009] Y.J. No. 83; 2009 YKTC 59 at para. 33.

[lvii] Abstract of Julie J. Fournier L'expérience des meres justiciables: Leurs perceptions de leur role de mere lors de l'incarcération et du retour en communaute. Master's Thesis, (Ottawa: University of Ottawa, 2000), online: Correctional Service of Canada <http://www.csc-scc.gc.ca/text/pblct/forum/e141/141i_e.pdf>at 1.

[lviii] Ibid.

[lix] Ibid.

[lx] This was a point that was raised in a consultation led by the Association of Native Child and Family Services Agencies of Ontario and Native Child and Family Services. It was also echoed by the Director of Social Services from a First Nation community in Northern Ontario.

[lxi] This was noted as a difference between Aboriginal child welfare agencies and mainstream child welfare agencies by the legal services department at Native Child and Family Services.

[lxii] Noel Knockwood, Elder, in Correctional Services Canada, Creating Choices: Report of the Task Force on Federally Sentenced Women, Chapter III "The Voices of Others Who Care", online: Correctional Service of Canada <<http://www.csc-scc.gc.ca/text/prgrm/fsw/choices/choice4e-eng.shtml>>.

[lxiii] The use of alternative dispute resolution (ADR) was not specifically discussed in relation to Janine's story, but may be relevant to her situation, and is worth considering in greater detail.

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