Canada's Mother-Child Program and Incarcerated Aboriginal Mothers: How and Why the Program is Inaccessible to Aboriginal Female Offenders

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1. INTRODUCTION: FEMALE OFFENDERS ARE A GROWING POPULATION

Historically, females have accounted for a small amount of criminal offending in Canada and research consistently demonstrates that women are far less likely to commit crimes than men. Most female offenders are accused of property crimes and the involvement of women in serious violent crime is highly infrequent. When women are charged with criminal offences, their cases are more frequently stayed or withdrawn in comparison to males and women are less frequently found guilty.[2]

Despite this data, the number of women serving sentences in federal prisons in Canada has increased by more than 50%in the last decade[3] and these women are more likely to be younger, single and Aboriginal.[4] Furthermore, two thirds of these women are mothers and are the primary or sole caregivers for their children,[5] which results in an estimated 20,000 Canadian children each year who are affected by the imprisonment of their mothers.[6]

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2 Statistics Canada, "Female Offenders in Canada", by Rebecca Kong & Kathy AuCoin, in *Juristat*, Catalogue No 85-002-XIE, vol 28, no 1, online: < www.statcan.gc.ca/pub/85-002-x/2008001/article/10509-eng.htm > [Kong & AuCoin].

3 Elizabeth Fry Society of Ottawa, "Women in Prison Up 50%", online: < www.efryottawa.com/documents/womeninprisonup50.pdf > [Women in Prison Up 50%].

4 Kong & AuCoin, *supra* note 2.

5 Correctional Service Canada, "Creating Choices: The Report of the Task Force on Federally Sentenced Women" (April 1990), online: < www.csc-scc.gc.ca/women/toce-eng.shtml > at 123 [Creating Choices]; Women in Prison Up 50%, *supra* note 3.

6 Ruth Elwood Martin & Brenda Tole, "Supporting the Health of Mothers and Their Babies in the Context of Incarceration", *Transition* (guest post), The Vanier Institute of

It is these kinds of demographics among federally sentenced women and their children that prompted the development of Correctional Service Canada's (CSC) Mother-Child Program (MCP). This program allows women to apply to have their young children live with them in prison while they serve their sentence.

Mother-child units and programs that allow incarcerated women to keep their new-born babies in prison with them are "considered normal practice in most countries in the world", including Australia, Brazil, Chile, Denmark, Egypt, England, Finland, Germany, Ghana, Greece, India, Italy, Kyrgyzstan, Mexico, the Netherlands, New Zealand, Russia, Spain, Sweden, Switzerland, some U.S. states, and Wales.[7] By developing mother-child programs, at both the federal and some provincial levels, Canadian corrections joined "the majority of nations in the world"[8] by allowing incarcerated women and their children to stay together as a family.

The purpose of this article is to explore CSC's Mother Child Program in order to demonstrate that the program has the potential to positively impact Aboriginal families in ways that accord with the bests interests of the child but that the program is particularly difficult for Aboriginal women to access. I will first outline the effects of separation on children and mothers. Next, the history and development of the MCP will be discussed, followed by an examination of the criteria and goals of the program. Then, current barriers to accessing the MCP will be explored. I will then discuss the MCP and its relation to Aboriginal women and the best interests of the child. Next, I will consider the tools that could be used to help reshape the program and ensure that Aboriginal mothers have greater access to it.

2. EFFECTS OF SEPARATION ON CHILD AND MOTHER

Unsurprisingly, children are negatively affected by the imprisonment of their parents; however, children typically experience greater harms when their mother is incarcerated. Continuity of the bond between a mother and child is essential for normal development during different stages of the child's life. Consequently, children of mothers in prison have been identified as among the most vulnerable groups by the United Nations Committee for the Rights of the Child.[9]

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the Family, online: < http://vanierinstitute.ca/supporting-health-mothers-babies-context-incarceration/ > [Martin & Tole].

7 *Ibid.*

8 Carmen Hamper, "Can Life in Prison be in the Best Interests of the Child?" (2014) 41 Ohio NUL Rev 201, online < https://law.onu.edu/sites/default/files/201%20-%20Hamper.pdf > at 201 [Hamper].

9 Michal Gilad & Tal Gat, "US v My Mommy: Evaluation of Prison Nurseries as a Solution for Children of Incarcerated Women" (2013) 37 NYU Rev L & Soc Change 371, online: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id = 2171328 > at 380 [Gilad & Gat].

The negative consequences and effects of mother-child separation due to imprisonment have been well-documented and researched. There are various trends that emerge with respect to this separation for children at different life stages, as well as incarcerated mothers.

(a) Effects on children

(i) Infant children

Research indicates that mother-child bonding during infancy is critical for the child's development. During the early months of life, this bonding contributes to the infant's development of a sense of security and trust in their surroundings.[10] When an infant is separated from their mother, this disruption to attachment can result in an infant who is distressed, un-soothable, and withdrawn.[11] Infants separated from their mothers are also more likely to experience depression.[12]

Practical consequences from mother-infant separation due to incarceration may include the infant's placement in foster care and changes in routine if care of the infant is different, shared or divided among primary caregivers.[13]

Another practical consequence of mother-infant separation is the termination or disruption of breastfeeding.[14] Infants who are unable to breastfeed could be at "increased risk for diabetes, allergies and gastrointestinal and respiratory infections."[15] Not only does breastfeeding have health and nutritional benefits, but it also can contribute to psychosocial development.[16]

(ii) Pre-school children

Pre-schoolers who are separated from their mothers experience various behavioural and emotional consequences. Often these children will be distressed from changes or alterations to their routines. They may experience depression, loneliness, anger, confusion and sadness, as well as feelings of abandonment and rejection. Pre-schoolers may also show delay or regression in milestones and might blame themselves for their mothers' imprisonment. Children in this age

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[10] *Ibid*, at 381.

[11] Alison Cunningham & Linda Baker, "Waiting for Mommy" (2003) Centre for Children and Families in the Justice System, online: <www.lfcc.on.ca/WaitingForMommy.pdf> at 26 [Cunningham & Baker].

[12] Sarah Brennan, "Canada's Mother-Child Program: Examining Its Emergence, Usage and Current State" (2014) 3:1 Canadian Graduate Journal of Sociology and Criminology 11, online: <http://cgjsc-rcessc.uwaterloo.ca/index.php/cgjsc/article/view/84/47> at 12 [Brennan].

[13] Cunningham & Baker, *supra* note 11.

[14] *Ibid.*

[15] Martin & Tole, *supra* note 6.

[16] *Ibid.*

group may develop inappropriate expressions of emotions, such as aggressiveness.[17]

These children also experience various practical consequences, which may include change in residence and routine, the involvement of child protective services, separation from siblings, and the need to changes schools.[18]

(iii) School-aged children

Maternal imprisonment also has effects on school-aged children. Emotionally, these children may experience reactive depression, embarrassment and vulnerability. They may be more concerned about their mother's safety since they are better able to understand where she is. If the child is separated from their siblings at this age, this may also increase distress and feelings of isolation.[19]

In terms of practical consequences, these children may need to change schools, be separated from siblings, and have involvement with child protective services.[20]

(iv) Adolescents

Adolescents also experience various emotional and behavioural consequences linked to maternal incarceration. These children will often experience confusion, loneliness, self-blame, guilt, shame, stigma and anger.[21] Adolescents who are separated from their mothers due to imprisonment are prone to delinquency, poor school performance, mental illness, sleeping and eating disorders, sexual promiscuity, and drug and alcohol abuse.[22]

These negative consequences associated with maternal incarceration at each stage of child development lead to children of incarcerated parents being six times more likely to experience incarceration themselves later on in life.[23] While the impacts on children are of primary concern and are far-reaching and difficult to reverse, incarcerated mothers also experience various emotional and behavioural consequences when separated from their children.

(b) Effects on mother

For many incarcerated mothers, separation from their children is the most traumatic aspect of prison and many of these women experience separation anxiety.[24] Some women may feel suicidal after being separated from their children and many feel guilty and worried for their children.[25] Incarcerated

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17 Cunningham & Baker, *supra* note 1, at 28.

18 *Ibid.*

19 *Ibid*, at 33.

20 *Ibid.*

21 *Ibid*, at 44.

22 Hamper, *supra* note 8, at 205.

23 *Ibid*, at 206.

24 *Ibid.*

mothers also experience feelings of shame, embarrassment, fear, bitterness and despondency.[26] These emotions and concerns greatly contribute to negative mental health for mothers during their time in prison.

Mothers who give birth while incarcerated and return to prison without their newborn infants are typically given milk-binding pills and antidepressants. This kind of situation causes many mothers to experience debilitating grief, despair and hopelessness, which leads many of these women to "resort to substance use as a coping strategy."[27]

The federal MCP is an intervention that has the potential to reduce these negative effects on both children and their mothers by allowing children and mothers to maintain and foster their emotional, physical and familial bond.

3. HISTORY AND DEVELOPMENT OF THE MOTHER-CHILD PROGRAM

The development of the MCP is linked to the Task Force on Federally Sentenced Women's 1990 report called *Creating Choices*.[28] The Task Force was established to address the issues facing federally sentenced women in Canada, and specifically those serving their sentences at Kingston, Ontario's Prison for Women. Geographical isolation was identified as a serious issue for these women, particularly for mothers since such isolation made visitation with their children challenging. Physical distance compounded by transportation needs and travel costs were identified as difficulties for organizing visits between mothers and their children.[29]

The Task Force made several recommendations in *Creating Choices*, a number of which pertained to incarcerated mothers and their children. The Task Force emphasized the importance of the mother-child bond and decided that "new facilities must provide a home-like environment and sufficient flexibility to enable a child or children to live with their mother".[30] The Task Force determined that the opportunity for mothers and children to live together should be "based on the rights and needs of the children, mothers and significant others in each individual case" and that any woman who lists ongoing responsibility for her children as a part of her personal plan must be offered a number of child oriented programs, such as "parenting skills; parenting at a distance; communication skills; and child development."[31]

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[25] Anne E Jbara, "The Price They Pay: Protecting the Mother-Child Relationship Through the Use of Prison Nurseries and Residential Parenting Programs" (2012) 87 Ind LJ 1825 at 1830.

[26] Brennan, *supra* note 12.

[27] Martin & Tole, *supra* note 6.

[28] Creating Choices, *supra* note 5.

[29] Brennan, *supra* note 12, at 13, 14.

[30] Creating Choices, *supra* note 5, at 124.

[31] *Ibid*, at 144.

Furthermore, the Task Force stated that if a child is placed in foster care because of their mother's incarceration, a community worker should coordinate with the appropriate agency to "develop specialized foster homes close to the facility so that visits between mothers and children can be frequent" and if family members or partners take primary responsibility for the child while the mother is incarcerated, then CSC "will provide the necessary funding to enable them to bring the child or children to visit their mother at regular intervals and for varying lengths of time."[32]

The attention paid to the mother-child relationship in the Task Force's final report and their recommendations to foster a continuation of this relationship while the mother is incarcerated resulted in the creation of the MCP.

4. CRITERIA AND GOALS OF THE PROGRAM

The overriding goal of the MCP is "to facilitate, maintain and develop the mother-child bond"[33] by providing "a supportive environment that fosters and promotes stability and continuity for the mother-child relationship".[34] At its inception, the MCP had three main components: (1) full-time residency of the child with their mother in the facility; (2) part-time or occasional residency of the child at the facility; and (3) regular visits of the child to the facility.

(a) Full-time residency

The aim of the full-time residency component is to "give mothers the opportunity to fulfill their parental role when this is in the best interests of the child."[35]

Participation in the program is optional and there are a number of criteria that the mother and child must meet in order to be accepted into the full-time residency component of the MCP. The mother must have responsibility for the child, such as a biological connection, legal custody or permission of the legal guardian, and must be prepared to look after the child 24 hours a day. The director of the facility and the mother will determine what is in the best interests of the child by considering stable ties between the child and mother, the physical and mental health of the mother, and the results of an assessment interview. The mother must also be committed to volunteering at the day care service and will

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[32] *Ibid*, at 145.

[33] Correctional Service Canada, "In the best interest of the child: The mother-child program", Forum on Corrections Research 7:2, online: < www.csc-scc.gc.ca/research/forum/e072/e072h-eng.shtml > [In the best interest].

[34] Correctional Service Canada, "Glube and Panel Recommendation Review" (20 December 2013), online: < www.csc-scc.gc.ca/publications/005007-9008-eng.shtml > [Glube and Panel].

[35] Correctional Service Canada, "Study of the Mother-Child Program", by Rachel Labrecque, FSW No-24, online: < www.csc-scc.gc.ca/publications/fsw/fsw24/toce-eng.shtml > .

need to establish emergency action plans, such as the use of a babysitter. Further, if the mother and child are accepted into the full-time residency program, the mother must be prepared to cooperate with authorities in order to ensure visits between the child and other family members who reside outside of the facility.[36]

In order for a child to be accepted into the full-time residency program, they must also meet certain criteria. Children under the age of five can participate in the program, but there must be an assessment of the child's health, annual or semi-annual assessments of their physical and mental health, consent of a judge or child protection authorities if necessary, and the consent of the child if it can be ascertained. Finally, the child's need for stability must be considered.[37]

Once accepted into the full-time program, children are able to stay with their mothers, go to the facility's day care centre (which shall be offered by the facility and run by qualified staff), or attend pre-school programs in the community. Children must always be accompanied by an adult and are not free to move everywhere about the facility. The children may go to institutions within the community, such as health or recreational services, and can visit their relatives.[38]

(b) Part-time or occasional residency

The aim of the part-time or occasional residency component is "to maintain the mother-child ties established under the program of full-time residency."[39] In other words, the goal of the part-time or occasional residency program is to continue to foster the mother-child ties once the child grows beyond the age cap of the full-time program.

The criteria for mothers and children in the part-time program are the same as the full-time residency program but children must be between the ages of 5 and 12. Children have access to the same facilities as children in the full-time residency program. Part-time residency allows children to have sleepover visits on weekends and holidays and occasional residency allows them to sleepover one weekend per month and one holiday per year.

(c) Regular visits

The aim of the regular visits component is to ensure that visits by the child are "part of the continuum of normal activities of everyday life."[40]

These visits are not a privilege that can be refused and all women are eligible to see any child registered on their visiting list, except those women who have had their visiting rights refused by a judge or child protection authorities.[41]

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[36] *Ibid.*

[37] *Ibid.*

[38] *Ibid.*

[39] *Ibid.*

[40] *Ibid.*

[41] *Ibid.*

(d) Application, approval and redress process

In order to apply for participation in the residency programs, mothers must complete the Mother-Child Program Residential Application. Once the application is received, a parole officer will schedule a meeting with the Mother-Child Coordinator (typically a staff member employed as a Social Program Officer) in order to review the application. If the inmate applicant is eligible for the program, the Mother-Child Coordinator will then request an assessment from child protective services and consult with mental health professionals to determine whether there are any concerns.[42]

Once all information has been gathered, the parole officer will complete an Assessment for Decision within 30 days and share it with the applicant mother. The parole officer then provides a recommendation to the Institutional Head, who renders a decision. It is important to note that in order for the Institutional Head to even consider an application, local child protective services must support the mother's application. Once a decision is made, the parole officer must provide the applicant mother with a copy of the decision within five working days.[43]

If the applicant is approved for participation in the program, the Mother-Child Coordinator will meet with the mother to complete the application process. If the applicant receives an unfavourable recommendation, she is given two working days to submit a rebuttal to the Institutional Head, who will provide the applicant mother with a final decision in the form of a written notice including the associated reasons.[44]

Some critics argue that programs such as the MCP should not exist because, after breaking the law, offenders should not be granted the privilege of parenting.[45] Despite this kind of backlash, the MCP and its components were first piloted in July 1996 at Saskatchewan's Okimaw Ohci Healing Lodge, with several other facilities following suit in 1998.[46]

Since the implementation of the MCP in the late 1990's, the number of female offenders and mothers in federal prisons has increased, but use of the MCP has been very low. As of 2013, most federal institutions either had the program but had no participants, or did not have any room for the program at all.

This extremely limited use of the MCP has been linked to a number of barriers, including the physical environment and institutional culture that exist in

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[42] Correctional Service Canada, "Institutional Mother-Child Program", Commissioner's Directive No 768 (18 April 2016), online: < www.csc-scc.gc.ca/politiques-et-lois/768-cd-eng.shtml > [Directive].

[43] *Ibid.*

[44] *Ibid.*

[45] Gilad & Gat, *supra* note 9, at 389.

[46] Glube and Panel, *supra* note 34.

prisons, and, most significantly, the changes that occurred to the program criteria in 2008.

5. BARRIERS TO THE USE OF THE MOTHER-CHILD PROGRAM

One barrier contributing to the low participation rate in the MCP is the physical environment of prisons. CSC's directives state that inmate accommodation for single occupancy is priority over the MCP. Given the previous Conservative government's tough-on-crime agenda, inmate populations and overcrowding in prisons have increased, leaving very little, if any, space for the MCP to physically exist and operate.[47]

Another barrier to participation in the MCP is institutional culture. The success of and participation in the MCP is impeded because institutions are "becoming more punitive as opposed to having an emphasis on rehabilitation and healing."[48] This approach can be attributed to the security classification of inmates and the inclusion of secure units. Since each federal facility in Canada has multiple levels of security, there are secure units for maximum security female offenders which require "constant staff presence and an increase in the use of static security measures".[49] These additional security requirements for the secure units can "[exacerbate] the power imbalance between staff members and inmates present in the institutions"[50] which can in turn cause inmates to act out in order to balance that power. Research indicates that the probability of misconduct increases with custody level and therefore, the inclusion of maximum security units in the facilities that house female offenders makes for a riskier and more dangerous environment that is not conducive to children.[51]

The most significant barriers to accessing the MCP are the changes that occurred to the program eligibility criteria in 2008.

(a) 2008 Changes to the Mother-Child Program

In June 2008, then Minister of Public Safety, Stockwell Day, announced a number of changes to the eligibility criteria for the MCP. These changes were: excluding all female offenders from the program who have been convicted of serious crimes involving violence, children, or those of a sexual nature; restricting the part-time program to children who are under the age of six; and requiring the support of local child protective services before participation in the program will be approved.[52] These changes came to the program as a result of a review of the

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47 Brennan, *supra* note 12, at 22, 23, 19.

48 *Ibid*, at 23.

49 *Ibid*, at 24.

50 *Ibid*, at 24.

51 *Ibid*, at 24.

52 Public Safety Canada, News Release, "Archived — Minister Day Tightens Rules for Mother-Child Program to Ensure Child Protection" (27 June 2008), online:

MCP in February 2008 that was prompted by the very contentious and highly publicized case of Lisa Whitford.

In July 2006, Lisa Whitford shot and killed her partner, Anthony Cartledge, in Prince George, British Columbia. At the time of the shooting, Ms. Whitford was a few weeks pregnant with Mr. Cartledge's baby. During the criminal case that ensued, the details of Ms. Whitford's life were provided to the court.[53]

Ms. Whitford is an indigenous woman who was raised by an alcoholic mother. She was sexually abused by her mother's boyfriend when she was a child and began using drugs and alcohol by the age of 11. By age 14, Ms. Whitford was living on the streets in Calgary and at age 17 she was strangled and raped by a friend. She had been to the emergency room at least 41 times. During their relationship, Mr. Cartledge physically and emotionally abused Ms. Whitford.[54]

In March 2007, while on remand at the Alouette Correctional Centre for Women, Ms. Whitford gave birth to her daughter and under the provincial jail's mother-baby program she was able to keep the infant with her in custody. Ultimately, Ms. Whitford pleaded guilty to manslaughter and was sentenced to six years in prison. After she was sentenced, a judge and the British Columbia Ministry of Children and Family Development determined that Ms. Whitford could bring her child with her to the federal penitentiary.[55]

News that a child was going to live in a prison with her convicted mother spread quickly and headlines and stories began to surface. This prompted Minister Day to call for a review of the MCP in federal prisons in order to guarantee that the interests of the child are the program's primary focus. He also expressed concern about "the message that is sent to serious offenders when they are permitted to retain custody of a child while incarcerated."[56]

As a result of the review, the changes to eligibility for the MCP were implemented and unsurprisingly, these changes would have made Ms. Whitford ineligible to participate in the program based on her conviction for manslaughter.

These changes to the eligibility criteria present barriers to accessing the program. First, by restricting eligibility for the MCP by the nature or type of offence, the majority of female offenders are automatically excluded from the program. As of 2010, 66% of federally incarcerated women were serving

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< http://www.marketwired.com/press-release/minister-day-tightens-rules-for-mother-child-program-to-ensure-child-protection-874017.htm > .

53 Sidney Cohen, "Broken Bonds: Why a jail's nursery is empty after its last mom left", *Metro Toronto* (2 December 2015), online: < http://www.metronews.ca/features/broken-bonds/2015/12/2/It-all-falls-apart.html > .

54 *Ibid.*

55 *Ibid.*

56 Unnati Gandhi, "Bringing up baby while behind bars", *The Globe and Mail* (15 February 2008), online: < http://www.theglobeandmail.com/news/national/bringing-up-baby-while-behind-bars/article1051816/ > .

sentences for violent offences and thus were automatically ineligible for the MCP.[57]

Second, the change in age eligibility for children in the part-time program from 12 years of age to those under six excludes a vast number of children from being a part of the MCP. Age restrictions are problematic because "there is no "magic age" at which mother/child bonding is no longer important or necessary" and "creating arbitrary age demarcations [. . .] is inappropriate given the aims of [mother-child programs]".[58] As discussed above, the effects of mother-child separation due to maternal incarceration occur throughout the stages of a child's life and extend well into adolescence. By lowering the age for participation in the MCP, CSC effectively ignored these consequences.

The physical environment of federal prisons and the institutional culture within them, along with the 2008 eligibility changes, compound to create barriers to the MCP that are extremely difficult if not impossible for incarcerated mothers to overcome. Many of these barriers to the program, along with several others, are evidently clear and exacerbated for federally sentenced Aboriginal mothers.

6. ABORIGINAL WOMEN, THE BEST INTERESTS OF THE CHILD AND THE MOTHER-CHILD PROGRAM

Aboriginal women are the fastest growing prison population in Canada.[59] Aboriginal women represent one quarter of the female offender population in federal prisons while Aboriginal women represent only 3% of adult females in the Canadian population.[60] The average Aboriginal woman in a federal prison is 27 years old, with a limited education, is unemployed, and is the sole support parent for two or three children.[61] As such, many incarcerated Aboriginal mothers would benefit from participation in the MCP and their acceptance into the MCP would also be in the best interests of their children.

The overriding basis for all decisions within the MCP is the best interests of the child.[62] Given the effects of separation on incarcerated mothers and their children and Canada's sad history of separating Aboriginal children from their families, in most cases it would certainly be in the best interests of an Aboriginal child to remain with their mother while she is incarcerated, so long as the child will be safe.

Unfortunately, the majority of incarcerated Aboriginal mothers are excluded from the program or are unlikely to apply for participation in the program,

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57 Brennan, *supra* note 12, at 26.

58 *Ibid.*

59 Elizabeth Sheehy, *Defending Battered Women on Trial*, (UBC Press, 2014) at 16 [Sheehy].

60 Kong & AuCoin, *supra* note 2.

61 Canadian Association of Elizabeth Fry Societies, "Aboriginal Women", online: <www.caefs.ca/wp-content/uploads/2013/04/Aboriginal-Women.pdf> [Canadian Association].

62 In the best interest, *supra* note 33.

based upon security classification, the nature of their offences, and the required involvement of child protection services.

(a) Security classification

Many Aboriginal women are excluded from participation in the MCP due to their security classification. In order for a mother to be eligible to apply for her child to reside with her in a federal prison through the MCP, she must be classified as minimum or medium security.[63] Once incarcerated, Aboriginal women are more likely to be classified as maximum security inmates.[64] Aboriginal women are overrepresented in maximum security populations and represent 45% of maximum security female offenders.[65]

This overrepresentation of Aboriginal women in the maximum security population can be attributed to the Custody Rating Scale. This tool is used by CSC to determine the classification of offenders but has been based and tested on a white male population. The scale assesses various aspects such as "employment, marital status, family situation, associates, social interaction, substance abuse, community functioning, personal and emotional orientation and attitude." The over-classification of Aboriginal offenders, and especially female Aboriginal offenders, as maximum security is likely due to the fact that the scale fails to account for cultural or gender issues. For example, the history of systemic discrimination against Aboriginal people causes many Aboriginal women to distrust and question the actions of governmental bodies, including the correctional system. When weighed on the Custody Rating Scale, this apprehension causes Aboriginal women to be viewed as uncooperative, which then counts as a strike against them on the assessment. Aboriginal women are at a higher risk for over-classification because the scale does not consider the systemic and historical factors that affect the lives, circumstances and experiences of Aboriginal women. Because the scale applies individually, it fails to account for the collective experiences and history of Aboriginal people and how historical episodes such as residential schools, the sixties scoop, and discriminatory policies and laws have contributed to the overrepresentation of Aboriginal men and women in the criminal justice system.[66]

When put into practice, the scale reveals a middle-class bias and applying such normative constructs to Aboriginal people fails to account for colonization. The application of such a risk assessment tool to an Aboriginal woman fails to evaluate or recognize the link between the factors that led to her involvement in

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[63] Directive, *supra* note 42.

[64] Sheehy, *supra* note 59, at 299.

[65] Canadian Association, *supra* note 61.

[66] Mandy Wesley, "Marginalized: The Aboriginal Women's experience in Federal Corrections" (23 May 2012), online: <www.publicsafety.gc.ca/cnt/rsrcs/pblctns/mrgnlzd/mrgnlzd-eng.pdf> at 23, 24 [Wesley].

criminal activity and her unique life circumstances and will therefore perpetuate discriminatory practice and continue over-classification.[67]

As long as this scale continues to be used by CSC for risk assessment, federally sentenced Aboriginal mothers will continue to be disproportionately over-classified to maximum security and the non-maximum security requirement for acceptance into the MCP will disproportionately exclude Aboriginal mothers.

(b) Nature of offences

Another requirement that disproportionately bars Aboriginal mothers from the MCP is the exclusion of women who have been convicted of serious crimes involving violence. A significant portion of federally sentenced Aboriginal women have committed violent offences — 75% of Aboriginal women in federal custody have current violent offences on their records, compared to 70% of all males.[68]

Since Aboriginal women are overrepresented among the population of female offenders serving time for violent offences, they are disproportionately disqualified from participation in the MCP.[69]

The exclusion of female offenders who are found guilty of crimes involving violence logically covers battered and abused women who kill their partners in self-defence, although CSC has failed to define what is a serious crime involving violence.[70] The inclusion or exclusion of these female offenders, both Aboriginal and non-Aboriginal, in the MCP is worth exploring because it was Lisa Whitford, an Aboriginal and domestically abused woman, that prompted the eligibility criteria changes in 2008.

(i) Battered women who kill in self-defence

The exclusion of women from the MCP if they have committed a serious offence involving violence is an insurmountable and cruel barrier for battered women who kill their partners out of self-defence, particularly for Aboriginal women.

Aboriginal women are "dramatically more likely to be the victims of intimate femicide than other women" and are disproportionately represented in studies concerning battered women who kill their abusive partners.[71] Aboriginal women are more likely to suffer injuries as a result of spousal violence and are more likely than non-Aboriginal women to state that they fear for their safety and lives

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67 *Ibid* at 25.

68 Kong & AuCoin, *supra* note 2.

69 Wesley, *supra* note 66, at 21.

70 *Ibid* at 22.

71 Sheehy, *supra* note 59, at 15, 16. In her study, Elizabeth Sheehy used legal and news databases to search for cases from 1990 to 2005 where women were charged with killing their male partners. From these findings, she formed a case study of ninety-one such women who made claims of prior abuse. Thirty-seven of these women were identified as Aboriginal.

as a result of spousal violence.[72] Aboriginal women are also more likely to experience emotional and financial abuse from their spouses.[73]

Battered Aboriginal women who do ultimately kill their abusive partners are far more likely to plead guilty and waive their right to argue self-defence,[74] which only increases their numbers in prisons. This increased pressure to plead guilty has been linked to a number of factors.

One contributing factor is that many Aboriginal people have limited understanding of their legal rights, court procedures, and resources like legal aid. Furthermore, most Aboriginal people enter guilty pleas because they are afraid of exercising their legal rights or because they do not understand the legal concept of guilt and innocence.[75]

Another contributing factor is that many abused Aboriginal women (and non-Aboriginal women) use alcohol and drugs as a survival strategy to numb the physical and emotional pain that comes with domestic violence. When these women kill their partners during a blackout from substance use, a claim of self-defence is handicapped.[76]

A prior criminal record can also increase pressure for Aboriginal women to plead guilty. If an Aboriginal woman proceeds to trial and takes the stand, she can be cross-examined on her prior record which might make her appear to be violent and untrustworthy.[77]

The greatest pressure that Aboriginal women face in these cases is that they are frequently described as the aggressors. In her research, Elizabeth Sheehy discovered that "[w]itnesses, prosecutors, and judges state emphatically that the accused Aboriginal woman is not a battered woman or not a *real* battered woman." This characterization is completely inconsistent with the statistics and data that indicate Aboriginal women are more likely to experience intimate partner violence. Furthermore, in all of her research cases involving Aboriginal women, Sheehy found that the women had witnesses to the partner violence, including family, friends, and people in the community. Also, Aboriginal women are more likely than other women to call police for help and almost always kill their partners during an on-going and violent altercation.[78]

Given these factors, Sheehy argues that "[o]n average, Aboriginal women ought therefore to have a better shot at acquittal than other women",[79] but the

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[72] Statistics Canada, "Violent victimization of Aboriginal women in the Canadian provinces, 2009", by Shannon Brennan, in *Juristat* Catalogue No 85-002-X, online: <http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11439-eng.htm#a4>.

[73] *Ibid.*

[74] Sheehy, *supra* note 59, at 16.

[75] *Ibid*, at 193.

[76] *Ibid*, at 196.

[77] *Ibid*, at 197.

[78] *Ibid.*

[79] *Ibid*, at 198.

intense pressures to plead guilty means that many of these women will completely forgo their right to argue self-defence at a trial and will simply plead guilty. This results in more Aboriginal women in prisons who will be classified as maximum security and will be unable to qualify for the MCP by virtue of their conviction for an offence involving violence.

While their cases may involve violence, battered women who kill their partners out of self-defence should not be excluded from the MCP, whether they are Aboriginal or not. The majority of battered women who kill their partners in self-defence are not at risk for recidivism and do not pose a threat to their children or others.[80] Arguably, more damage would be done to a child and a family by separating the child from their mother since the child has already lost their father. Therefore, an argument could be made that it would be in the best interests of the child to remain in the custody and care of their mother, even if their mother is incarcerated for killing her abusive partner in self-defence. But the MCP criteria exclude battered women who kill their abusers since the act qualifies as a serious crime involving violence.

(c) Involvement of child protective services

For the small number of incarcerated Aboriginal mothers who can overcome the barriers of the non-maximum security and non-violent crime criteria, the requirement of child protective services involvement will likely deter many of these mothers from applying for the MCP. The necessary involvement of child protection services may discourage Aboriginal mothers from the program given the painful history of government policies passed to remove Aboriginal children from their families, such as those relating to the residential school system and the 60's scoop. Furthermore, distrust and suspicion of child protection services by Aboriginal communities continues due to the more common and modern phenomenon of Aboriginal children being removed from parental care and placed in foster care by child protection agencies.[81]

(i) Aboriginal children in foster care

Despite government apologies for the residential school system, Aboriginal children are still being disproportionately apprehended by child protective agencies. In Canada, 48% of children in the foster care system are Aboriginal even though Aboriginal children represent only 7% of the Canadian population aged 14 and under.[82] Studies into these kinds of statistics show that the majority of child apprehensions are over concerns of neglect and not abuse, with serious questions raised about how culture and poverty play a role in defining neglect. [83]

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[80] Natasha Bakht, *Advanced Family Law*, class discussion, comment made by Professor Bakht (Faculty of Law, University of Ottawa, 7 April 2017).

[81] Wesley, *supra* note 66, at 21.

[82] Statistics Canada, "Living arrangements of Aboriginal children aged 14 and under", by Annie Turner, Catalogue No 75-006-X (13 April 2016), online: < https://www.statcan.gc.ca/pub/75-006-x/2016001/article/14547-eng.htm > .

Child protection apprehension of Aboriginal children is extremely prevalent in Alberta and unfortunately, so are deaths among these apprehended children. Only 9 per cent of the province's children are Aboriginal but they account for 78 per cent of children who have died in foster care since 1999.[84]

These shocking statistics contribute to the distrust for government and child protection agencies among Aboriginal parents. Given Canada's sad history and the overrepresentation of Aboriginal children in the foster care system, the necessary involvement of child protection agencies in the MCP will likely discourage many Aboriginal mothers from applying to the program.

These various barriers raised by the admission criteria for the MCP serve to further isolate Aboriginal mothers from their children and Aboriginal children from their families. The Mother-Child Program has the potential to keep Aboriginal families together and break the cycle of family separations. While the current eligibility criteria make it "highly unlikely that there will be an increase in Aboriginal women participation"[85] in the program, there are various legal tools that could help to reshape the program and ensure that Aboriginal mothers have greater access.

7. TOOLS TO HELP INCREASE ABORIGINAL MOTHERS' ACCESS TO THE MCP AND POSITIVELY IMPACT ABORIGINAL FAMILIES

There are a number of legal tools that can be used in order to alter the MCP so as to be more inclusive of Aboriginal mothers. These include the *United Nations Convention on the Rights of the Child*[86] (*CRC*), British Columbia Supreme Court's 2013 decision regarding a provincial jail's mother-baby program, recommendations from the Truth and Reconciliation Commission, and the *Gladue* sentencing principle.

(a) *U.N. Convention on the Rights of the Child*

One tool that can be used to reshape and improve access to the MCP is the *CRC*. The *CRC* was ratified by Canada in 1991 and is therefore an applicable convention to matters concerning Canadian children.[87] Under the *CRC*, the best interests of the child is the primary consideration in all actions concerning

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[83] Adrian Humphreys, "'A lost tribe': Child welfare system accused of repeating residential school history", *National Post* (15 December 2014), online: < http://news.nationalpost.com/news/canada/a-lost-tribe-child-welfare-system-accused-of-repeating-residential-school-history-sapping-aboriginal-kids-from-their-homes > .

[84] Darcy Henton, "Deaths of Alberta aboriginal children in care no 'fluke of statistics'", *Edmonton Journal* (8 January 2014), online: < http://www.edmontonjournal.com/news/edmonton/deaths + alberta + aboriginal + children + care + fluke + statistics/9212384/story.html > .

[85] Wesley, *supra* note 66, at 22.

[86] *Convention on the Rights of the Child*, UN General Assembly, 20 November 1989, UNTS 1577 [*Convention*].

children.[88] The United Nations High Commission for Refugees' *Guidelines on Determining the Best Interests of the Child*[89] (*Guidelines*) were established in the context of refugee children but the *Guidelines* provide useful insight into determining the best interest of a child in accordance with the *CRC* and can be extrapolated to Aboriginal children who are separated from their mothers due to maternal incarceration.

The *Guidelines* provide that an assessment of the best interests of the child is to determine a durable solution for the individual child.[90] In making this assessment, a best interest determination should be a child-focused approach, ensure that specific care and protection is provided to a child, allow for a review of the situation of a child in a comprehensive manner that ensures decisions are aligned with the provisions and spirit of the *CRC*, and allow for the child's opinion to be heard while giving appropriate weight to their views given their age, maturity and developing capacities.[91]

These criteria as identified by the *Guidelines* can and should be used by CSC when evaluating the best interests of a child for the MCP. A child-centered approach to determining participation in the MCP aligns with the *CRC* and shifts the focus from the criminal past of the incarcerated mother to the future development of the child. With regard to Aboriginal mothers and their children, a comprehensive review of the background of a child allows for consideration of factors such as colonization and how separation of the child from their mother may lead to the continuation of colonial consequences like dislocation and detachment. The inclusion of the child's wishes and preferences in this best interests assessment is more prudent for older children who may qualify for the part-time residency program through the MCP and should be a part of CSC's decision on participation.

(b) Provincial mother-baby program and the 2013 British Columbia Supreme Court decision

Another tool that can be used to improve access to the MCP is the British Columbia case of *Inglis v. British Columbia (Minister of Public Safety and Solicitor General)*.[92] This case was launched by two former inmates of the Alouette Correctional Centre for Women after British Columbia Corrections

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87 In the case of *Baker v. Canada (Minister of Citizenship Immigration)*, 1999 CarswellNat 1124, 1999 CarswellNat 1125, [1999] 2 S.C.R. 817 (S.C.C.), Justice L'Heureux-Dubé emphasized that the *CRC*, as a piece of international human rights law, plays an important part in interpreting domestic law.

88 *Convention*, *supra* note 86, art 3.

89 UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child*, (May 2008), online: <http://www.unhcr.org/4566b16b2.pdf>.

90 *Ibid*, at 22.

91 *Ibid*, at 23, 24.

92 *Inglis v. British Columbia (Minister of Public Safety and Solicitor General)*, 2013 BCSC 2309, 2013 CarswellBC 3813 (B.C. S.C.) [*Inglis*].

terminated the provincial facility's Mother Baby program. Under this program, women who would be giving birth during their time in the facility could apply to have their babies live with them after the delivery so long as the province's child protection ministry determined it would be in the infant's best interests. Two previously incarcerated mothers launched a constitutional challenge arguing that the decision to cancel the program violated the constitutionally protected rights of the mothers and babies affected by the program's termination.[93]

Justice Carol Ross made several findings of fact, including that the program had a successful record with no incidents of harm or injury to infants and with positive outcomes for mothers and babies, the decision to cancel the program was based on cost and not on an apprehension of harm to the infants. There had been no evaluation of the program or its risks and benefits before the decision was made to cancel the program.[94] After hearing from many expert witnesses, Justice Ross found that rooming in is the best practice for mothers and babies and is associated with health and social benefits for both. Further, breastfeeding has important health and psychosocial benefits for mother and babies, and secure attachment to a primary caregiver is important to the baby's psychological and social functioning. Interruptions to attachment put the child at risk for future developmental deficits and psychological and social issues. Finally, individualized assessment is key with respect to the best interests of the child.[95]

After making these findings, Justice Ross concluded that the section 7 right to security of the person under the *Canadian Charter of Rights and Freedoms*[96] (*Charter*) includes the interests of mothers and infants to stay together. Cancelling the facility's Mother Baby program removed an important option for achieving the best interests of the child. Consequently, babies will be separated from their mothers during a critical period in their lives and mothers will suffer the adverse consequences of the separation.[97]

Justice Ross found that the decision to cancel the program was contrary to the principles of fundamental justice since the decision was arbitrary, overbroad and grossly disproportionate. She found that there was no legitimate state objective since the decision to cancel the program was based on considerations that did not account for the constitutional rights of mothers and infants. The standard of guaranteed safety for the infants was an impossible and inappropriate standard, there was no investigation into the program before it was cancelled, the evidence did not support any apprehension of harm, and the

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93 *Ibid*, at paras. 1, 2.

94 *Ibid*, at para. 4.

95 *Ibid*, at para. 6.

96 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act, 1982* (UK), 1982, c. 11.

97 *Inglis*, *supra* note 92, at para. 11.

decision removed an individualized process based on the best interests of the child and replaced it with a complete exclusion.[98]

Justice Ross also found a violation of section 15 of the *Charter*, which protects against discrimination, because the program's termination exacerbated the disadvantage experienced by incarcerated mothers and their babies. Since the program was implemented to assist members of this disadvantaged and vulnerable group, its cancellation widened the gap of discrimination.[99]

Ultimately, the judge concluded that the decision to cancel the program could not be saved by section 1 of the *Charter* and gave the provincial government six months to fix the issues of unconstitutionality and administer the program.[100]

Specific attention was given to Aboriginal mothers in prisons. Justice Ross found the significant overrepresentation of Aboriginal women in the provincial female prison population to be a fact.[101] She also found incarcerated Aboriginal mothers and their babies to be a particularly disadvantaged group due to the "history of dislocation of Aboriginal families caused by state action."[102] She found that the provincial Mother Baby program was a "significant step forward in the amelioration of the circumstances" for Aboriginal mothers and children and therefore its cancellation was particularly discriminatory and damaging to this population.[103]

Even though this is a decision regarding a provincial program and is not binding on CSC, Justice Ross' decision is informative and should be instructive for CSC in its application of the federal MCP.[104] It is possible that the issues, arguments and judicial reasoning in the case can be used as footholds to improve access to the federal MCP for Aboriginal women, particularly given the judge's emphasis on individualized assessment and decision-making for mother child programs.

(c) Recommendations of the Truth and Reconciliation Commission

The recommendations made by the Truth and Reconciliation Commission are another tool that can be used to increase access to the MCP for Aboriginal women, particularly as they relate to child welfare agencies and workers. In the Truth and Reconciliation Commission's *Calls to Action*, the Commission calls

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98 *Ibid*, at para. 12.

99 *Ibid*, at para. 613.

100 *Ibid*, at paras. 657, 658.

101 *Ibid*, at para. 5.

102 *Ibid*, at para. 612.

103 *Ibid*.

104 Donovan Vincent, "BC court ruling fuels talk about value of mom-tot prison programs", *The Star* (10 January 2014), online: <https://www.thestar.com/news/canada/2014/01/10/bc_court_ruling_fuels_talk_about_value_of_momtot_prison_programs.html>.

upon all levels of government to reduce the number of Aboriginal children in care by "[p]roviding adequate resources to enable Aboriginal communities and child-welfare organizations to keep Aboriginal families together where it is safe to do so, and to keep children in culturally appropriate environments, regardless of where they reside."[105]

The federal MCP represents a resource that would allow Aboriginal children to stay with their mothers, consequently reducing the number of Aboriginal children in foster care, keeping Aboriginal families together and keeping children with people who can share the child's Aboriginal culture.

The Truth and Reconciliation Commission also calls upon governments to require that "all child-welfare decision makers consider the impact of the residential school experience on children and their caregivers."[106]

This kind of training would be very important for Aboriginal mothers who apply to the MCP because child welfare involvement and approval is required by the eligibility criteria. If child welfare personnel who are involved with the MCP are properly educated about the impacts that colonialism and residential schools have on Aboriginal women, as both mothers and offenders, they might be more likely to approve Aboriginal mothers for the MCP. This kind of training would also allow child welfare workers to consider how separating a child from their incarcerated Aboriginal mother perpetuates the effects of colonialism on both the child and mother.

These recommendations from the Truth and Reconciliation Commission have the potential to increase access to the MCP for Aboriginal mothers if federal and provincial governments were to implement the suggestions.

(d) *Gladue principle*

The *Gladue* principle is another tool that, while not pertaining directly to the inner workings and programs in prisons, can be extrapolated to improve Aboriginal mothers' access to the MCP. The *Gladue* principle relates to sentencing and requires judges to "consider all available sanctions other than imprisonment, with a particular focus on the circumstances of Aboriginal offenders."[107]

This sentencing principle, codified in section 718.2(e) of the *Criminal Code*,[108] was interpreted by the Supreme Court of Canada in the 1999 case of *R. v. Gladue*.[109] In 1995, 19-year-old Jamie Gladue was charged with second-degree

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[105] Truth and Reconciliation Commission of Canada, "Calls to Action" (2015), online: <http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf> at 1.

[106] *Ibid.*

[107] Sheehy, *supra* note 59, at 161.

[108] *Criminal Code*, R.S.C. 1985, c. C-46.

[109] *R. v. Gladue*, 1999 CarswellBC 778, 1999 CarswellBC 779, [1999] 1 S.C.R. 688 (S.C.C.) [*Gladue*].

murder after she stabbed and killed her Aboriginal partner, Reuben Beaver, in British Columbia. Due to certain issues, the Crown eventually agreed to accept her guilty plea to the lesser charge of manslaughter. At her sentencing hearing, the judge did not consider Gladue's Aboriginal heritage and did not investigate the abuse that she had suffered from Beaver. She was sentenced to three years in prison.[110]

Gladue appealed her sentence all the way to the Supreme Court of Canada, where the Court determined that sentencing judges are to consider the circumstances of Aboriginal offenders, which includes attention to "[t]he unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts" and "[t]he types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection."[111]

With regard to unique systemic and background factors, the Court stated that this includes consideration of the "[y]ears of dislocation and economic development [that] have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation" which contribute to "higher incidence of crime and incarceration."[112] The Court emphasized that when a judge is sentencing an Aboriginal offender, the judge must give attention to these types of issues as they may have played a significant role in bringing the offender before the court. Where this is the case, the judge must evaluate whether prison will actually deter the offender or denounce the crime in a way that would be meaningful to the offender's community. The Court determined that in many cases, restorative sentencing will be more effective.[113]

With regard to appropriate sentencing procedures and sanctions, the Court emphasized the importance of restorative justice for Aboriginal offenders because "[a] significant problem experienced by aboriginal people who come into contact with the criminal justice system is that the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these offenders and their community." Therefore, restorative justice alternatives are extremely important when determining the appropriate sentence for Aboriginal offenders.[114]

The consideration of unique systemic and background factors and the focus on restorative alternatives under the *Gladue* sentencing principle could be extended to Aboriginal women and the MCP. When Aboriginal mothers apply

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[110] Sheehy, *supra* note 59, at 161.

[111] *Gladue*, *supra* note 109, at para. 66.

[112] *Ibid*, at para. 67.

[113] *Ibid*, at para. 69.

[114] *Ibid*, at para. 70.

for the MCP, the decision-makers, mainly the parole officer, Mother-Child Coordinator and Institutional Head, should consider the systemic and background factors that may have contributed to the Aboriginal mother being incarcerated and how her participation in the MCP can be restorative.

When screening an Aboriginal mother for participation in the MCP, decision-makers, including child welfare personnel, should look to the unique history and systemic issues that Aboriginal women and mothers face. Issues such as substance abuse, unemployment and domestic violence should be considered through the lens of the historical damage caused to Aboriginal communities by colonization and discriminatory government laws and policies. These systemic issues should not bar the participation of Aboriginal mothers from the MCP so long as the child will be safe.

Mother child prison programs are also restorative opportunities for mothers, both Aboriginal and non-Aboriginal, because they often encourage the women to "get clean and stay out of jail".[115] Incarcerated women who have their newborns taken away frequently lose hope and return to their old ways, while mothers who get to keep their infants have more motivation to get better and be good parents.[116]

With regard to Aboriginal mothers specifically, mother child prison programs are restorative in addressing historical suffering caused by state removal of children from their Aboriginal families. Mother baby programs give Canada and Aboriginal mothers "an opportunity "to address trauma as opposed to compounding trauma" experienced by incarcerated women and children of indigenous heritage".[117]

8. CONCLUSION: MOVING FORWARD

Maintaining a mother-child bond is extremely important. Research has demonstrated that interruption or severance to that bond can have lasting effects for both children and mothers. Frequently, the mother-child bond is at risk due to maternal incarceration. In response to this, prison programs, like the MCP, were designed to facilitate, maintain and develop the mother-child bond while the mother is incarcerated, through full-time residency, part-time residency and regular visits.

Despite its decades-long existence and success, CSC's Mother Child Program is rarely used and participation has been declining. This can be attributed to a number of barriers: lack of physical space for the program due to overcrowding in facilities; a greater focus in penitentiaries on punitive measures as opposed to rehabilitative and healing measures; and the MCP eligibility criteria that require

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[115] Sidney Cohen, "Broken Bonds: How living with babies in jail changed inmates' lives", *Metro News Toronto* (1 December 2015), online: < http://www.metronews.ca/features/broken-bonds/2015/12/1/A-success-story.html > .

[116] *Ibid.*

[117] *Ibid.*

the involvement of child welfare services and exclude those convicted of a serious offence or those classified as maximum security. These eligibility criteria disproportionately exclude Aboriginal mothers and discourage them from applying to the program. Aboriginal women are frequently over-classified to maximum security, overrepresented among the population of female offenders serving time for violent crimes, and are dissuaded from the MCP due to the involvement of child protection services.

The barriers to the MCP result in very low participation rates and virtually no acceptance of Aboriginal mothers. These issues demonstrate that the program needs to be reshaped to be more accessible for all incarcerated mothers but especially Aboriginal mothers.

As the MCP currently stands, it is restrictive and discouraging for Aboriginal mothers. This program truly has the potential to impact the lives of both mothers and their children in an extremely positive way, especially for Aboriginal families who have historically been torn apart by government actions and decisions. In order for the Mother Child Program to reach its full potential, CSC needs to re-evaluate their current policies, procedures and criteria. Incarcerated Aboriginal mothers represent a perfect case study as to why this is desperately required and their children are all the motivation that should be needed to spark change and improvement.