

Injustices and Miscarriages of Justice Experienced by 12 Indigenous Women

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**A Case for Group Conviction Review and Exoneration
by the Department of Justice via
the Law Commission of Canada and/or the
Miscarriages of Justice Commission**



About this Report

In conjunction with and for the women whose lived experiences are highlighted in this report, this document was developed by the incredible team of staff, interns, and advisors with whom we have the privilege of working.

Inspired by the work of Justices Harry LaForme and Juanita Westmoreland-Traoré, it is dedicated to the memory of C.D. and David Milgaard, both of whom wished to see the hopes and dreams of these women and so many others realized.

We will honour their memories and many contributions by continuing to work to make our legal system a just and fair one; including the remedying of miscarriages of justice such as those chronicled in this document.

Office of The Honourable Kim Pate, C.M.
With well appreciated support and assistance
of Indigenous Senators and Leaders

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EXECUTIVE SUMMARY

This report focuses on the circumstances faced by 12 Indigenous women who have experienced miscarriages of justice. To be clear, there are more than these 12, but these are cases we know well. We advocate that their cases be reviewed as a group in order to enable a more fulsome identification and analysis of the intersections and patterns of systemic inequality, discrimination and violence experienced by each, both prior to and throughout the criminal legal system.

Despite decades of legislative and policy efforts to address systemic racism and misogyny in the criminal legal system, overrepresentation of Indigenous women in federal prisons has continued to skyrocket. As of May 6, 2022, Indigenous women account for half of all women in federal prisons, yet represent fewer than 4% of women in Canada.

Indigenous women disproportionately experience miscarriages of justice: they are charged, prosecuted, convicted and imprisoned following systemic and

discriminatory failures of the criminal legal and prison systems to adequately recognize, contextualize or address the inequities, racism, sexism, violence and ongoing trauma of their lives.

The result is layer upon layer of compounding inequality, beginning with the circumstances that lead to Indigenous women being subject to but under-protected by the state, deputized to protect themselves and those in their care, but then disproportionately charged and criminalized when they respond to violence.

“*Call for Justice 5.14 of the National Inquiry into Missing and Murdered Indigenous Women and Girls – We call upon federal, provincial and territorial governments to thoroughly evaluate the impact of mandatory minimum sentences as it relates to the sentencing and over-incarceration of Indigenous women, girls and 2SLGBTQQIA people and to take appropriate action to address their over-incarceration.*”

MASS INCARCERATION OF INDIGENOUS PEOPLES



Sources

Admission Data: Canadian Centre for Justice Statistics, Adult Correctional Services in Canada – annual reports
 Total Population Data (Indigenous Peoples & Indigenous Women): Office of the Correctional Investigator annual reports and data release of May 5, 2022 (<https://www.theglobeandmail.com/canada/article-half-of-all-women-inmates-are-indigenous/>)

The experiences of these 12 women illustrate the following **10 key** and interconnected elements of racism and sexism that contributed to the miscarriages of justice and incarceration that they and others experience and which the National Inquiry into Missing and Murdered Women and Girls found to be part of the ongoing genocide of Indigenous Peoples:

1. Genocidal colonial forced removals from lands, institutionalization (from reserves, residential schools, mental asylums, Indian hospitals, to prisons) where Indigenous Peoples were subjected to violence and forced assimilation, and exclusion from the safety of communities due to the Indian Act resulting in intergenerational trauma, marginalization and lack of access to adequate economic, social, health and other supports;

2. Victimization, hyper-responsibilization and deputization;

3. Hyper-responsibilization and criminalization as a result of trying to survive and navigate marginalization and violence;

4. Bias with respect to police responses, particularly investigation and charging practices;

5. Bias in the exercise of prosecutorial discretion, exacerbated by the distortion of charging and plea-bargaining practices occasioned by mandatory minimum penalties;

6. Lack of application of section 718.2(e) of the Criminal Code and inadequate contextualization of racism, sexism and violence in legal defences of Indigenous women;

7. Failure to consider alternatives to punitive sentences, in particular as a result of mandatory minimum penalties;

8. Discriminatory risk assessment and classification tools, practices and policies, and consequent limited access to programs, services and conditional release within the prison system;

9. Unending nature and ongoing impacts of life sentences;

10. Perpetuation of vicious circle of children in foster care, forced separation of Indigenous women from their children and communities and greater likelihood of them ending up in prison than in post-secondary education.

As discussed at length in the report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, remedying these injustices is not a matter of policy choice. It is a legal obligation of the state, which must end the colonial violation of the Charter rights, human rights, Indigenous rights and international rights of Indigenous women.

While not wishing to prejudge the outcome of an independent review, we believe that the available evidence lays the legal and moral groundwork for the termination of sentences and exoneration of the 12 women.

Analysis of their circumstances is vital to ensure the collective and intersectional experiences of these and countless other Indigenous women and girls contributes to justice for these women and advances the need to meaningfully redress misogynist violence experienced by Indigenous women, not merely by well-intentioned (but thus far ineffective) criminal law reform, but by reconciliACTION.

INTRODUCTION

Despite decades of legislative and policy efforts to address systemic racism and misogyny in the criminal legal system, Indigenous women remain Canada's fastest growing prison population. Over the last decade, the number of Indigenous federally sentenced women increased by 60%, rising from 168 in March 2009 to 270 in March 2018.¹ As of December 2021, 32% of people in federal prisons were Indigenous, a new historic high.² As of May 2022, Indigenous women account for half of all women in federal prisons,³ yet represent fewer than 4% of Canadian women.



Indigenous women disproportionately experience miscarriages of justice: they are charged, prosecuted, convicted and imprisoned following systemic failures of the criminal legal and prison systems to adequately recognize, contextualize or address the inequities, racism, sexism and violence that they live.



Examining who ends up criminalized and imprisoned provides one of the most stark and horrific illustrations of ongoing realities of discrimination and inequality in Canada: those in prisons are disproportionately those who are most marginalized. Nearly all individuals in federal prisons were living in poverty at the time they were criminalized.⁴ Rates of disabling mental health issues are 4 to 7 times higher in prisons than in the community.⁵ 85% of all women—91% of Indigenous women alone—in federal prisons have histories of physical and or sexual abuse.⁶

Attempts to provide alternatives to criminal convictions and incarceration, from drug treatment⁷ to mental health and other special circumstance courts, to opportunities for transfers or releases of prisoners to Indigenous communities,⁸ have been narrowly interpreted and made accessible only to those facing the most minor charges and with the least complex challenges, driving instead of redressing the mass incarceration of those most marginalized.

Those most overrepresented are Indigenous women, for whom inequalities relating to gender, race, class, and ability too often intersect and are exponentially amplified.

Indigenous women disproportionately experience miscarriages of justice: they are charged, prosecuted, convicted and imprisoned following systemic failures of the criminal legal and prison systems to adequately recognize, contextualize or address the inequities, racism, sexism and violence that they live. The current conviction review process builds upon these injustices. Some systemic barriers for Indigenous women were recently highlighted by the work of Justices LaForme and Westmoreland-Traoré. Since 2003, of the 20 people who have received remedies such as new trials or appeals under the current system, all were men and all but two were Caucasian.⁹

The result is layer upon layer of compounding inequality, beginning with the circumstances that lead to Indigenous women being under-protected, deputized to protect themselves and those in their care, but then charged and criminalized when they do so. This intersecting discrimination is both amplified and exacerbated at every step of the criminal legal process.

This document focuses on the circumstances faced by 12 Indigenous women, identified only by initials until such time as a review might commence, who have experienced miscarriages of justice. To be clear, there are more than these 12, but these are cases we know well. We advocate that their cases be reviewed as a group in order to enable a more fulsome identification and analysis of the intersections and patterns of systemic inequality and violence experienced by each woman both prior to and while navigating the criminal legal system.

While not wishing to prejudge the outcome of an independent review, we believe that the available evidence lays the legal and moral groundwork for the exoneration of the 12 women. What is more, such a review would bring into sharp relief the many ways in which Canadian laws and policies intersect and converge to further victimize these women. Such analysis, combined with the review already undertaken by Justices LaForme and Westmoreland-Traoré, will assist in identifying next steps for reform of the criminal legal and conviction review processes, in addition to providing particularly accessible and appropriate remedies for Indigenous women.

The present document does not include an in-depth discussion of each woman's case, though a table is included as an annex, summarizing some key details relating to each of the women's convictions and sentences. In this document, the experiences of these 12 women are referred to illustrate the following 10 common key and interconnected elements of racism and sexism that contributed to the miscarriages of justice and incarceration that they and others experience and which the national inquiry into Missing and Murdered Women and Girls found to be part of the ongoing genocide of Indigenous Peoples:

1. Genocidal colonial forced removals from lands, institutionalization (from reserves, residential schools, mental asylums, Indian hospitals, to prisons) where Indigenous Peoples were subjected to violence and forced assimilation, and exclusion from the safety of communities due to the Indian Act resulting in intergenerational trauma, marginalization and lack of access to adequate economic, social, health and other supports;
2. Victimization, hyper-responsibilization and deputization;
3. Hyper-responsibilization and criminalization as a result of trying to survive and navigate marginalization and violence;
4. Bias with respect to police responses, particularly investigation and charging practices;
5. Bias in the exercise of prosecutorial discretion, exacerbated by the distortion of charging and plea-bargaining practices occasioned by mandatory minimum penalties;
6. Lack of application of section 718.2(e) of the Criminal Code and inadequate contextualization of racism, sexism and violence in legal defences of Indigenous women;
7. Failure to consider alternatives to punitive sentences, in particular as a result of mandatory minimum penalties;
8. Discriminatory risk assessment and classification tools, practices and policies, and consequent limited access to programs, services and conditional release within the prison system;

9. Unending nature and ongoing impacts of life sentences;

10. Perpetuation of vicious circle of children in foster care, forced separation of Indigenous women from their children and communities and greater likelihood of them ending up in prison than in post-secondary education.

“As long discussed in the report of the National Inquiry into MMIWG, remedying these breaches is not a matter of policy choice but rather a legal obligation of the state, which has violated Indigenous women’s rights in a context of colonialism.”

It must be emphasized that these injustices, from failing to consider section 718.2(e) factors to failing to allow accused women a full answer and defence, to failing to uphold women’s security of the person and liberty, represent breaches of women’s rights and violations of the state’s obligations articulated in terms of the Charter, human rights, Indigenous rights and international rights instruments. As discussed at length in the report of the National Inquiry into MMIWG, remedying these breaches is not a matter of policy choice but rather a legal obligation of the state, which has violated Indigenous women’s rights in a context of colonialism.¹⁰

Legal standards and safeguards in the child welfare system, criminal legal system and prison system that were meant to protect these women not only failed them, but were weaponized against them, resulting in a vicious intergenerational cycle and pipeline to prison.

A group review that appropriately contextualizes systemic themes of discrimination will be exemplified by its ability to explain the circumstantial experiences of these women in terms of violence, racism, and sexism. Such analysis is vital to ensure the

collective and intersectional experiences of these and countless other Indigenous women and girls contributes to justice for these women and advances the need to meaningfully address misogynist violence experienced by Indigenous women, via not merely criminal law reform but also the larger agenda of reconciliation.¹¹



10 SYSTEMIC FACTORS LEADING TO MISCARRIAGES OF JUSTICE FOR INDIGENOUS WOMEN

1. Genocidal colonial forced removals from lands, institutionalization (from reserves, residential schools, mental asylums, Indian hospitals, to prisons) where Indigenous Peoples were subjected to violence and forced assimilation, and exclusion from the safety of communities due to the Indian Act resulting in intergenerational trauma, marginalization and lack of access to adequate economic, social, health and other supports

The inequalities and injustices that these 12 Indigenous women have experienced in the criminal legal system are rooted in and must be understood in the context of decades and centuries of policies of colonial violence that dehumanize Indigenous Peoples; policies of institutional violence that fail to deliver adequate services to Indigenous Peoples; and policies of systemic violence that magnify inequalities and injustices.¹²

The economic marginalization and disruption of family, cultural and community structures associated with colonial policies such as forced taking of lands, establishment of reserves and forced removal of children through residential schools have been thoroughly and horrifically documented by countless sources, including the Truth and Reconciliation Commission (TRC) and the National Inquiry into Missing and Murdered Indigenous Women and Girls (National Inquiry into MMIWG).

Equally undeniable are the ongoing impacts of these policies for Indigenous Peoples – especially Indigenous women –

as the trauma resulting from colonial violence and racist attitudes is layered on and amplifies systemic failures to redress health, social and economic discrimination and inequalities. As noted by the National Inquiry into MMIWG, “The overcriminalization of Indigenous women is largely a result of colonialism, in and out of the penal system. Poverty, food insecurity, mental health issues, addiction, and violence, all parts of Canada’s past and present colonial legacy, are systemic factors that lead to the incarceration of Indigenous women.”¹³

Children, parents, families and communities have too often been abandoned and left to live with the consequences of colonial violence and without adequate resources and supports. The result is often referred to as “intergenerational trauma”—a “cumulative emotional and psychological wounding over the lifespan and across generations, emanating from massive group trauma experiences.”¹⁴ These policy choices to leave inequalities in place too often create the context of need or crisis in which the state intervenes to effect further forced removal, separation and institutionalization.

“The National Inquiry into MMIWG notes that, “Many women described to us their ‘graduations’ from foster care, to youth detention, to provincial institutions, to federal institutions. These ‘graduations’ show a disturbing trend.”

From early ages, each of the 12 Indigenous women referred to in this document have experienced and continue to experience the legacy of colonization, forced removal and decimation of communities.

Some women are residential school survivors themselves.

S.D. spent eleven years in residential school where she, like too many others, suffered physical, sexual, and psychological abuse, linguistic degradation and deprivation and cultural genocide.¹⁵ Sisters N.Q. and O.Q. are also residential school survivors, as were their siblings, parents, and grandparents. While at residential school, O.Q. was sexually abused by staff.¹⁶

For others, the forced state removal of children, the so-called 60s Scoop, the Indian Day School System, the Millennial Scoop and current child welfare and youth criminal legal systems have served to continue involuntary separation and institutionalization of Indigenous children on a massive scale. The colonial cycle of forced removal and institutionalization of Indigenous children away from their communities through child welfare intervention too often acts as a “pipeline”¹⁷ into the youth criminal legal system and the adult prison system, resulting in ongoing generations of children separated from their parents.

The National Inquiry into MMIWG notes that, “Many women described to us their ‘graduations’ from foster care, to youth detention, to provincial institutions, to federal institutions. These ‘graduations’ show a disturbing trend.”¹⁸

T.M. was taken from her mother when she was less than a week old and adopted by a non-Indigenous family.

L.N. was likewise adopted at three months. At 12, she was taken into the child welfare system, where authorities pointed to her reactions to force and violence used against her, including forced strip searching, to justify further institutionalization in mental health centres and jails, first for youth and then for adults.

S.N. was institutionalized as a youth and then moved from the child welfare and youth systems to a prison for adults.

R.A. provided this stark description of the link between removals from lands and institutionalization in residential schools decades ago and in prisons today:

There was approximately 30 women housed in Sask Pen, with the majority of us identifying as Native or Metis. The numbers were staggering, with a steady increase in visible minority populations making up the vast statistics of incarceration...It was akin to the residential schools that so many of our people endured for decades.¹⁹

Her words echo those of the TRC:

Current conditions such as the disproportionate apprehension of Aboriginal children by child-welfare agencies and the disproportionate imprisonment and victimization of Aboriginal people can be explained in part as a result or legacy of the way that Aboriginal children were treated in residential schools ... The impacts of the legacy of residential schools have not ended with those who attended the schools. They affected the Survivors’ partners, their children, their grandchildren, their extended families, and their communities. ... Students who were treated and punished like prisoners in the schools often graduated to real prisons. For many, the path from residential school to prison was a short one.²⁰

The National Inquiry into MMIWG concludes: “Indigenous women and girls are being criminalized as a result of colonization and their resistance to colonial violence, including systemic oppression and marginalization. Therefore, Canada is incarcerating Indigenous women and girls because of their fight against colonization or due to the impacts of colonization on them.”²¹ They found this to be genocide.

2. Victimization, hyper-responsibilization and deputization

The criminalization of each of the 12 Indigenous women must be understood in the context of the histories of physical and sexual violence that every one of them experienced and from which the Canadian legal system offered no protection or safety.

Canada has a disturbing history of violence against Indigenous women, which intimately intersects with sexism, colonialism, and racism. Today, Indigenous women are twelve times more likely to be murdered or disappeared compared to other women living in Canada.²²

Sexual violence toward Indigenous women was a crucial tactic of colonial domination in the 19th century.²³ Colonial authorities controlled Indigenous women by such measures as portraying them as “licentious and bloodthirsty.”²⁴

Today, Indigenous women who come forward to report violence continue to have their experiences dismissed, to be portrayed as aggressors, treated as if the violence is their own fault, and “seen as less worthy victims by police.”²⁵ Too many, because of harassment and violence that Indigenous Peoples experience at the hands of police or other legal authorities,²⁶ never come forward at all.

The abuse to which S.D. was subjected at residential school rendered her prey to abusive men. She married an abusive man at the age of 16.²⁷

M.C. was abandoned and sexually abused as an infant and throughout childhood. She has attempted suicide multiple times, the first time at age 13.

Beginning as young as the age of 12, L.N.²⁸ and Y.J. were trafficked and sexually exploited.

After seeking out her birth parents as a teenager, T.M. was raped by her birth father. Rather than recognizing the abuse and violence as including incestuous rape, the Correctional Service of Canada later characterized her as having engaged in a “sexual relationship with her birth father.”

R.A. drew parallels between the violence she lived at the hands of an abusive partner and the fear of uses of force against her by correctional staff, which as a pregnant woman, “made me wonder if I was going to lose yet another baby to violence, much like the first miscarriage I had when [D] had beat me.”²⁹

In every case, this violence was perpetrated with seeming impunity: each woman and girl had no one to turn to and no safe place to go. Any authorities with whom they were in contact ignored or minimized the abuse they lived. The National Inquiry into MMIWG noted a longstanding pattern of police failing to believe, open files or investigate,³⁰ in addition to the propensity of police to dismiss sexualized violence as unfounded,³¹ and horrifically, to also be perpetrators of the sexualized violence. The result was a clear message that each was responsible for protecting herself and her children. They were effectively deputized to protect themselves and failure to do so was treated as their own fault and shame.

3. Hyper-responsibilization and criminalization as a result of trying to survive and navigate marginalization and violence

Each of the 12 Indigenous women was criminalized as a result of trying to survive and negotiate marginalization and violence. The legal system and authorities that were so conspicuously absent and unresponsive as women experienced abuse sprung quickly into action to criminalize them for taking steps to try to protect themselves or others. As expressed by the National Inquiry into MMIWG, “The Canadian justice system criminalizes acts that are a direct result of survival for many Indigenous women. This repeats patterns of colonialism because it places the blame and responsibility on Indigenous women and their choices, and ignores the systemic injustices that they experience, which often lead them to commit crimes.”³²

“Each of the 12 Indigenous women experienced forms of hyper-responsibilization: racist and sexist biases and perceptions led to them being held or viewed as more responsible and more at fault than others, including male co-accused and individuals who had inflicted violence on the women themselves.”

S.D. was first criminalized as an accomplice to her abusive husband’s drug dealing. He had introduced her to drugs, which she used to attempt to anaesthetize herself to the trauma she experienced.³³ In prison, she pleaded guilty to a murder that correctional staff and prisoners alike are adamant was actually a suicide. The woman who died was like a sister to S.D. She lived with disabling health issues and prison staff left her to rely on other prisoners for such necessities as cleaning, dressing and feeding. The death was not thoroughly investigated and the inquest concluded that the cause of death was

unknown S.D. was allowed by a court to plead guilty 4 years later despite inconsistencies between her confession and the records of the death, and despite the plea being based on her feelings of intense guilt and personal responsibility, not her legal responsibility.

O.Q. likewise struggled with substance use as a result of abuse experienced at residential school. As teenagers, she and her sister N.Q. were charged with the murder of a non-Indigenous residential school caretaker. O.Q. reported wanting to protect her sister after the caretaker made repeated sexual advances toward both sisters, offering them money when they refused. He was known to offer young people a place to party, alcohol and money, usually with the expectation of sex. A fourteen-year-old male cousin of O.Q. and N.Q. confessed that he had killed the caretaker, yet legal authorities fixated on the two sisters, believing them to be more responsible.

Y.J. was charged alongside several others with killing a man believed to be abusing children, including her own, in their community. Although she played a limited role in the man’s death, she was the only one among several equally or more responsible co-accused to be charged with first degree murder, while others – including her husband – received lesser charges. Police and Crown prosecutors suggested, in the absence of any evidence, that as the mother of one of the children believed to be victimized, and a sexual abuse survivor herself, she had the strongest motive and should therefore be held more responsible than the other accused, including her child’s father. In addition to weaponizing her abuse, poverty and trauma against her, she was vilified and blamed for being a victim herself.

G.S. was criminalized for reacting with lethal force to try to protect herself from an abusive partner.

C.D. likewise used force defensively, resulting in the death of a woman involved in procuring her for sexual exploitation by a man known for abusing young women and documenting the sexual assaults that he perpetrated in videos and photos.

Each of the 12 Indigenous women experienced forms of hyper-responsibilization:³⁴ racist and sexist biases and perceptions led to them being held or viewed as more responsible and more at fault than others, including male co-accused and individuals who had inflicted violence on the women themselves. In residential school, Indigenous Peoples were taught they were bad, sinners, savage and dangerous and these perceptions were perpetuated in laws, policies and practices, media and society. Indigenous women internalize racist stereotypes about themselves and assume responsibility.

As was recently reinforced by the Naslund case,³⁵ hyper-responsibilization is particularly likely to result in miscarriages of justice for women who react with lethal force to abusers. This case shortened the sentence of a woman convicted of manslaughter in the death of her abusive partner. Errors made by the trial judge included characterizing the partner who had terrorized Ms Naslund with nearly three decades of torturous physical, psychological and sexual abuse as “vulnerable”. The judge further suggested that the woman’s failure to leave her partner indicated that violence had been negligible or that she enjoyed it, despite the well-documented reality that trying to leave abusive partners puts women at greater risk of being killed and the threats that the partner had made against Ms Naslund.³⁶

In many cases, hyper-responsibilization also means that women accept punishment for actions in the absence of legal responsibility, in which they played only a negligible role or where they may have a valid defence.

As noted by Justice Greckol in the Naslund case, “a woman subjected to ... years of egregious abuse may be accustomed to seeing herself as worthy only of harsh punishment. That does not mean the justice system should follow suit.”³⁷

4. Bias with respect to police responses, particularly investigation and charging practices

The examples of hyper-responsibilization experienced by the 12 Indigenous women and discussed above demonstrate how racist and sexist biases and assumptions can influence police investigations, and give rise to miscarriages of justice based on perceptions that Indigenous women are at fault, even in the absence of evidence.

Interactions with police are too often intimidating and traumatizing, all the more so for those with lived experience of colonial violence. For many women, experiences of force and abuse at the hands of those in positions of authority began at a young age and in situations where they were vulnerable and in need of support and assistance. If and when police may have been involved, women were often further traumatized, disbelieved and even further abused and punished.³⁸ If they managed to repel or respond to violence that they experienced with any degree of force, alternatives to charging and criminalizing the women were rarely, if ever, considered.

Police caught L.N., at age 12, drinking with four friends. Afraid of being grounded by her parents, she refused to go home. Police reacted by placing her in handcuffs and taking her to a child services centre where she was forcibly strip searched, beginning a cycle of institutionalization – mostly in segregated prison cells – that left her with irreparable

and continuing mental health issues, including a diagnosis of schizophrenia.

T.M. was first criminalized as a teenager when police apprehended her sheltering in a school. She had fled there, with nowhere else to go, to escape sexual abuse from her father. She ended up convicted of breaking and entering. Her responses to her treatment in prison resulted in multiple additional charges and a decade of isolation in segregation. Once in the mental health system, she was diagnosed with isolation-induced schizophrenia.

Currently, Indigenous women are at a significantly higher risk of being harassed, arrested, charged, and even physically or sexually abused by police or other legal authorities.³⁹ These racist, colonial and sexist biases make their way into the police investigations of Indigenous Peoples, which are more likely to be marred by “false confessions, mistaken eyewitness identification, lying witnesses, lack of disclosure and forensic error”⁴⁰ and which frequently show blatant disregard for women’s experiences with violence, viewing them as aggressors and rarely as victims.

Despite their cousin confessing to the crime for which they were being investigated, police held O.Q. and N.Q. at an RCMP detachment for several days of questioning, in violation of a court order that they be moved to a jail.⁴¹ In violation of usual procedures, the questioning to which they were subjected was not recorded, which further contributed to the breaches of their rights.⁴²

Injustices that women experience at the hands of authorities are too often compounded by failures within the court system to challenge and question situations where keepers and creators of police and correctional records are also the ones testifying in criminal cases.

These records are too often accepted as authoritative statements about the individuals to whom they relate, magnifying existing biases and power imbalances.⁴³

5. Bias in the exercise of prosecutorial discretion, exacerbated by the distortion of charging and plea-bargaining practices occasioned by mandatory minimum penalties

“This makes mandatory life sentences a powerful bargaining chip for Crown prosecutors seeking to incentivize women, especially Indigenous women, to plead guilty to lesser charges. Too often, whether because of their experiences of racism and misogyny or the lack of adequate defence representation, Indigenous women do so rather than go to trial, even when they have a legal defence.”

The experiences of women like O.Q., N.Q., and Y.J., discussed above, whom prosecutors opted to charge instead of or more harshly than others based on racist and sexist stereotypes, demonstrate the role that prosecutorial decision-making can play in miscarriages of justice for Indigenous women, in particular when charges carry mandatory minimum penalties. The risk is particularly acute where women have reacted with lethal force to protect themselves from abuse and thus face the horrifying spectre of a mandatory life sentence for murder.

When a Crown prosecutor charges a woman with first degree murder, if convicted, she faces a mandatory life sentence. She must also serve at least 25 years in prison before she is able to apply for parole, with no guarantee that parole will ever be granted. This makes mandatory life sentences a powerful bargaining chip for Crown

prosecutors seeking to incentivize women, especially Indigenous women, to plead guilty to lesser charges. Too often, whether because of their experiences of racism and misogyny or the lack of adequate defence representation, Indigenous women plead guilty rather than go to trial, even when they have a legal defence.

In 1996, the Department of Justice Self-Defence Review, overseen by Justice Lynn Ratushny, examined the cases of 98 women convicted of using lethal force while protecting themselves or their children from abusers. Many of the women whose cases Justice Ratushny sought to review had entered guilty pleas – most to manslaughter and some to second degree murder – instead of proceeding to trial. This, despite the reality that the context of their “offences” included evidence that they were acting in self-defence or defence of other(s) in their care.⁴⁴

Most were offered incentives by Crowns and/or encouraged by their own lawyers to plead guilty rather than face the potential risk of life in prison if they were found guilty of murder. That the women agreed to enter guilty pleas is rendered most understandable given a legal system replete with systemically discriminatory attitudes toward women, particularly abused and Indigenous women, and which failed to protect them from violence in the first place, as well as limited financial resources, not to mention the reality that the only witnesses to the abuse they experienced may be their own children. Even when this might assist them in establishing self-defence, most mothers will reject the prospect of putting their children through the harrowing process of testifying on their behalf in criminal court.

Supporters of mandatory life sentences characterize them as removing arbitrary discretion from the sentencing process. In reality, they shift discretion away from judges,

who are subject to stringent requirements as to how they can exercise discretion. Judges use their discretion to ensure that sentences are tailored to what is fair in the context and circumstances of a given case. They are bound by carefully structured sentencing rules and are accountable for how they use discretion because they are required to provide reasons justifying their decisions to the public.

Mandatory minimum penalties tie the hands of judges and effectively bestow Crown prosecutors tremendous discretion over sentences. Crowns decide whether or not to bring forward charges carrying a mandatory minimum penalty. By contrast to judges, Crowns can exercise this prosecutorial discretion with very little scrutiny or accountability and may be focused on obtaining a conviction, even if one may not be warranted.

In fact, as the Naslund decision exemplifies, when a Crown becomes aware of a context of spousal abuse in situations where women have used lethal force against their abuser, instead of withdrawing a murder charge, they often offer a plea bargain deal of a set prison term in exchange for a guilty plea to manslaughter. As identified by the Self-Defence Review, the result is a recipe for miscarriages of justice for women with histories of abuse. It was precisely for this reason that Justice Ratushny recommended that prosecutors be instructed to only run trials for manslaughter – not murder – in circumstances where they are prepared to accept a guilty plea and sentencing agreement for manslaughter.⁴⁵



6. Lack of application of section 718.2(e) of the Criminal Code and inadequate contextualization of racism, sexism and violence in legal defences of Indigenous women

Section 718.2(e) of the Criminal Code requires consideration of an individual's Indigenous history as part of the process for determining a fair and just sentence. Where a mandatory minimum penalty applies, the judge is precluded from doing their job and must impose the mandatory sentence. As such, for these women, charges of murder carry with them a mandatory life sentence. This reality and the inability of courts to apply s. 718.2(e) create further increased risk of miscarriages of justice for Indigenous women. The Indigenous histories of the 12 women were not adequately – if at all – considered even where mandatory minimum penalties did not foreclose this possibility.

Lawyers representing the 12 Indigenous women and others like them – including many with excellent reputations – too often fail to contextualize or even see as relevant the reality of violence and racism that these women experience, and fail to raise these considerations when defending women at trial or advising them on whether to accept a plea deal.

For example, while the abuse that Y.J. experienced was used by prosecutors to argue, without evidence, that she had a stronger motive and was more responsible than her co-accused for the death of a man suspected of abusing children, her own lawyer did not take steps to deconstruct these biased assumptions or how the violence, racism and misogyny that Y.J. experienced may have otherwise factored into her actions.

As succinctly and clearly stated by the National Inquiry into MMIWG, most charges

and convictions that Indigenous women face are property crimes tied to contexts of poverty and “[w]hen Indigenous women are incarcerated because of violent crime, it is most often a response to the violence they experience.”⁴⁶ Studies of the application of section 718.2(e) reveal that Indigenous women tend to be criminalized in three general contexts even when they represent no threat to public safety: offences against an abuser, offences coerced by an abuser, and poverty-related offences related to motherhood and obtaining the necessities of life.⁴⁷

Despite this reality, lawyers and judges alike too often fail to adequately account for contexts of racist and sexist violence and inequalities lived by Indigenous women accused of crimes. In general, Indigenous women receive harsher sentences because of decontextualization, courts fail to apply section 718.2(e) due to the minimization of Indigenous women as victims of violence, and histories of victimization may be twisted and construed in detrimental ways that may even characterize an abused woman as the aggressor.⁴⁸

“The pathologizing of women by framing them as suffering from “battered women syndrome” seen in Lavallee has evolved precisely because many experienced legal counsel struggle to accurately contextualize women’s circumstances and lack of escape options other than use of force, generally involving a weapon.”

These realities often prevent women from discussing situations of abuse and rape when they are facing charges and reinforce that they should feel guilty when they do take measures to try to protect themselves. Moreover, as we have repeatedly seen, they are also not safe from abuse, rape or extorted sex when they are in prison.

As the Lavallee case exemplified,⁴⁹ most battered women who act to defend themselves must do so proactively and frequently use a weapon—one that has generally first been used to threaten or otherwise harm them. If women act in the moment, when they are being attacked by someone generally larger and more likely to prevail in a situation of hand-to-hand combat, most end up dead.

The pathologizing of women by framing them as suffering from “battered women syndrome” seen in Lavallee has evolved precisely because many experienced legal counsel struggle to accurately contextualize women’s circumstances and lack of escape options other than use of force, generally involving a weapon.

For many of the 12 Indigenous women, failures by legal professionals to adequately contextualize and deconstruct racism and sexism resulted in experiences of intimidation and humiliation during trials. Y.J. explains that the Crown prosecutor called a man who sexually assaulted her as a witness against her and to challenge her credibility at her trial:

“The crotch was cut out of the pants I was wearing at the time of the offense that would have held [L.S.]’s semen sample. I was raped by [L.S.], who became one of the witnesses. The pants, minus the crotch, hung in the courtroom from the podium, supported by two heavy objects, only to humiliate me and allow the jury to look at me in a condescending, negative way and give rise to personal judgment. It was leading to give way to judgement and racial bias especially when [L.S.], the man who raped me, was speaking.”

The stigma and revictimization that Indigenous women who have experienced abuse face meant that women like O.Q. and C.D. were too ashamed to disclose the childhood trauma that they experienced to their lawyers. Their lawyers never inquired

fully into their Indigenous history and this context of abuse was never put on the record despite being relevant to the actions that they took to try to protect themselves.

Many women in prison who gave testimony as part of the National Inquiry into MMIWG stated that their requests for consideration of section 718.2(e) factors “were denied by their lawyers and judges.” Where these factors were considered, women “had [difficulty] in speaking ... about their lives, especially without knowing how the information about their backgrounds would be used in sentencing.”⁵⁰

In addition to failing to undertake these types of contextual analyses, lawyers representing the 12 Indigenous women too often failed to ensure clients had knowledge of their legal rights, responsibilities, and options.

Though represented by a lawyer, S.D. plead guilty to murder for the death of a friend for which she was never charged and in circumstances where she felt personally, but was not legally, responsible.⁵¹

L.N. was never informed about her right to remain silent or cautioned about the consequences of not remaining silent.⁵²

S.P.’s Indigenous history was never considered at trial. To obtain conditional release, she ended up giving up on avenues for appeal in this regard and instead took responsibility for a death in which she had no involvement.

When R.A. was charged with a crime while in prison, she was unaware how her behaviour would affect the date at which she could apply for parole:

“I told the women that I was going to plead guilty that very day. I had no intention of going through a long, drawn-out trial that would possibly prevent me from getting my security lowered and being with my baby...I didn’t even understand the concept of accelerated parole at the time because nobody explained it to me.”

7. Failure to consider alternatives to punitive sentences, in particular as a result of mandatory minimum penalties

Section 718.2(e) of the Criminal Code also requires that, before imposing a prison sentence, courts consider all penalties other than incarceration for every individual, but “with particular attention to the circumstances of [Indigenous Peoples].” This emphasis on Indigenous Peoples was discussed in *R v Gladue* and reaffirmed in *R v Ipeelee*, where the Supreme Court of Canada

“Mandatory minimums, and particularly mandatory life sentences, create situations where incorporating contextualization of racism and sexism and sensitivity to redressing legacies of colonialism into sentencing is not possible for even those judges most acutely aware of their duty to do so.”

recognized the overrepresentation of Indigenous Peoples in the criminal legal system and the need for alternatives to incarceration.⁵⁴

In *Gladue*, the SCC was clear in asserting that “Prison is to be used only where no other sanction or combination of sanctions is appropriate.”⁵⁵ Since the introduction of these provisions in the 1990s, however, the rates of over-representation of Indigenous Peoples, and especially Indigenous women, in the federal prison system have only continued to increase.⁵⁶

Because they require judges to impose a prison sentence of a certain minimum length, mandatory minimum penalties are a significant reason why judges are unable to do their duty to consider alternatives to incarceration, “effectively denying judges the ability to adequately take into account specific background as a mitigating factor.”⁵⁷

Mandatory minimums, and particularly mandatory life sentences, create situations where incorporating contextualization of racism and sexism and sensitivity to redressing legacies of colonialism into sentencing is not possible for even those judges most acutely aware of their duty to do so.

The National Inquiry into MMIWG stressed that “Mandatory minimum sentences are especially harsh for Indigenous women, girls, and 2SLGBTQQIA people as [section 718.2(e)] ... cannot be applied.”⁵⁸

As expressed by the TRC, mandatory minimum penalties “are preventing judges from implementing community sanctions even when they are consistent with the safety of the community and even when they have a much greater potential than imprisonment to respond to the intergenerational legacy of residential schools that often results in offences by Aboriginal persons.”⁵⁹

Studies indicate that even where mandatory minimum penalties do not apply, judges and lawyers too often continue to view in particular Indigenous prisons as acceptable and appropriate sanctions and to fail to consider alternatives for women whose convictions relate to attempts to survive violence and marginalization.⁶⁰

Too often, legal actors focus on adapting prisons and mechanisms for criminalization to normalize the presence, on a massive scale, of Indigenous and other racialized women in these settings. This can include programs that incorporate Indigenous teachings or ceremonies within colonial prisons or access to Elders employed by corrections whose status as such may not be recognized within Indigenous communities. These changes make others feel more comfortable about sending Indigenous women to prison, instead of pursuing decolonization of the legal system and return of imprisoned women to their communities.

This problem is exacerbated by inadequate resources, as highlighted by the TRC: “A failure to provide sufficient and stable resources for the community and treatment programs that are necessary to implement Gladue and Ipeelee helps explain why those decisions have not slowed increasing Aboriginal overrepresentation in prison.”⁶¹

8. Discriminatory risk assessment and classification tools, practices and policies, and consequent limited access to programs, services and conditional release within the prison system

Once the 12 Indigenous women were sentenced to federal prison, ill-suited and discriminatory risk assessment tools as well as Gladue reports chronicling their experiences of abuse and violence, resulted in them being placed in higher security levels and viewed as security risks.⁶² The discriminatory nature of the risk assessment and classification systems utilized by the Correctional Service of Canada results in the overclassification of women, Indigenous prisoners, survivors of violence and those with disabling mental health issues.⁶³ An egregious 2 of every 3 women classified as maximum security are Indigenous.⁶⁴

Not only does the restrictive and discriminatory security classification system create barriers to programs and opportunities for community connection that are vital to working toward release from prison, the classification in itself leads to women being wrongfully viewed and treated as violent and dangerous. It can take years—sometimes decades—to undo these characterizations.

All 12 Indigenous women were confined in restrictive and punitive prison conditions during much if not all of their

time in federal custody. Many of the women have also spent significant amounts of time in torturous conditions of segregation after being labelled as “dangerous”, often as a result of complex needs and reactions to experiences such as strip searches,⁶⁵ segregation⁶⁶ and other uses of force that make women relive, and heighten their experiences of, violence and trauma.

L.N. was one of a few women to be labelled a “dangerous offender” in Canada. The Alberta Court of Appeal struck down the designation after concluding she had been so labelled for things she said or wrote, not for what she had done. It took years to overturn the 1994 “dangerous offender” designation and L.N. was kept in segregation for all but six months of her time in custody. She was released from prison July 1, 1999, and after years of challenges addressing the significant trauma caused by her incarceration, she has built a life for herself in the community.

M.C. remains in custody, even though no longer under sentence, as a result of behaviour for which she was found not criminally responsible due to disabling mental health issues. While in prolonged segregation, she banged her head against the wall of the segregation cell, resulting in permanent physical, psychological and neurological damage. Her efforts to resist being restrained by staff resulted in efforts to declare her a “dangerous offender”. After an extensive review of her circumstances, including the reality that she had been held criminally responsible for a number of acts of self harm and while she was classified as mentally incompetent pursuant to the relevant provincial mental health legislation, the presiding judge refused the application. She nevertheless languishes inside.

S.D. spent most of three decades in segregation within various prisons, in which “tortuous isolation generated her now disabling mental health issues.”⁶⁷

Corrections eventually acknowledged that she should be in long-term care instead of a prison, but their descriptions of her as dangerous meant that no long-term care institution would accept her. Instead, she was released to the care of her family where she not only saw improvements in her health but has thrived and is now reciprocally cared for and helping to care for her family.

T.M. spent 10 years in federal custody, all in segregation, during which she developed isolation-induced schizophrenia directly linked to her extended periods in prison segregation cells and the post-traumatic stress associated with the tortures of such isolation. Eventually released to a forensic hospital, she now lives successfully in an assisted living setting in the community.

While all 12 Indigenous women sought and desired support to address their needs, corrections recharacterized such needs as risks and reacted to restrict their liberty and subject them to further trauma. Despite how Corrections labelled them, once released, all proved to be low to no risk to public safety.

9. Unending nature and ongoing impacts of life sentences

In such jurisdictions as Portugal, mandatory life sentences are deemed unconstitutional because they are recognized as cruel and unusual punishment.⁶⁸ Indeed, as of 2015, only 11 of 28 EU member states imposed a mandatory life sentence for murder.⁶⁹

Canada continues to impose life sentences that affect the lives of hundreds of federally sentenced Indigenous women, including many of the 12 Indigenous women. For those who manage to obtain conditional release, their life sentence keeps them at permanent risk of being re-ensnared in the prison system. In addition to the reality that prison sentences of any length reduce their

life chances and opportunities, life sentences perfect the genocidal agenda of permanent forced removal of the women from their children, communities and lands.

For those who manage to obtain conditional release, their life sentence keeps them at permanent risk of being re-ensnared in the prison system. In addition to the reality that prison sentences of any length reduce their life chances and opportunities, life sentences perfect the genocidal agenda of permanent forced removal of the women from their children, communities and lands.

Life sentences remain lifelong burdens. Even on parole, women like Y.J, C.D. and S.D. live under surveillance and isolating parole conditions, such as prohibitions on travel and access to family, as well as requirements to declare and have parole authorities approve friendships, employment or other relationships. Too many women end up back in prison due to allegations that they have breached these administrative conditions, until such time as they are disproved, explained or otherwise addressed to the satisfaction of correctional and parole authorities. Sometimes the breaches result in lengthy periods of reincarceration, even if the circumstances of the breach were a result of crisis, acts of desperation or inadvertence. Women can therefore spend extra years and decades in prison for behaviour that is not a threat to public safety but which violates a parole condition.⁷⁰

L.N. was subjected to an indeterminate sentence until her “dangerous offender” designation was overturned. She expressed her concerns about barriers to conditional release and never-ending surveillance, scrutiny and stigma associated with such labels and lifelong sentences that others of the 12 Indigenous women continue to endure:

“I want people to know you can't take away someone's life and tell them they are unredeemable at 21 years old. I'm not Canada's most dangerous woman. I'm [L.N.]. I'm a sister, a partner, a friend.”⁷¹

10. Perpetuation of vicious circle of children in foster care, forced separation of Indigenous women from their children and communities and greater likelihood of them ending up in prison than in post-secondary education

For the 12 Indigenous women and many others, criminalization and institutionalization perpetuate cycles of colonial violence in the form of forced separation and removal from communities, in particular for the many incarcerated women who are mothers.⁷²

When women are imprisoned, they often also face the consequent loss of their children to child welfare authorities. Even if a woman is eventually found not guilty it is often too late for her to reclaim her children.⁷³ Some 90% of imprisoned mothers have their children taken away by the child welfare system, as most were the sole supports of their children before they were imprisoned.

By comparison, approximately 10% of the children of imprisoned fathers end up in state care.⁷⁴ Studies conclude that “racialized women are more likely to lose their children, especially [Indigenous] women.”⁷⁵ An Indigenous child who ends up in care has an increased likelihood of also facing future incarceration. The National Inquiry into Missing and Murdered Indigenous Women found that incarceration resulting in separation of mothers and children constitutes a violation of children's rights under the Convention on the Rights of the Child.⁷⁶

In order to decolonize, Canada must decarcerate Indigenous women and support them in integrating in and contributing to their communities. Indeed, it was precisely this recognition that undoubtedly led Nelson Mandela to order the release of all the women with children under the age of 12 years, once he became President of South Africa.⁷⁷ He recognized that to jail a mother was to subject generations to come to continued subjugation.

RECOMMENDATIONS

1. The federal government must provide for a ***group review and exoneration of the 12 Indigenous women whose circumstances are referenced in this document.*** This could be part of the initiating terms of reference for the newly invigorated Law Commission of Canada or the anticipated Miscarriages of Justice Commission.

In addition, the following measures would help to prevent and more effectively remedy future miscarriages of justice:

2. Eliminating Mandatory Minimum Penalties:

The federal government should repeal all mandatory minimum penalties, mandatory periods of parole ineligibility, and restrictions on the use of conditional sentences in line with TRC Call to Action 32,⁷⁸ Calls for Justice 5.14 and 5.21 of the National Inquiry into MMIWG,⁷⁹ and countless other Sentencing and Law Commission reports.

3. Eliminating Over-Representation of Indigenous Peoples in Prisons: Federal, provincial, and territorial governments must deliver on the commitment outlined in TRC Call to Action 30 to eliminate the over-representation of Indigenous Peoples in prisons by the year 2025 and post detailed annual reports that explain and monitor their progress.⁸⁰

In particular, the government should focus on providing funding to Indigenous communities to implement community-based alternatives to imprisonment as highlighted by Call to Action 31.⁸¹ The TRC highlighted that: “the grossly disproportionate imprisonment of Aboriginal people, which continues to grow, in part because of a lack of adequate funding and support for culturally appropriate alternatives to imprisonment.”⁸²

Vital steps to redress this injustice include honouring Call for Justice 5.20 of the National Inquiry into MMIWG to fully implement Indigenous-specific provisions of the Corrections and Conditional Release Act, including sections 81 and 84. The ability to transfer and conditionally release Indigenous Peoples to the care of an Indigenous community is currently provided by sections 81 and 84,⁸³ but aside from via institutional healing lodges, these provisions remain barely used for the individualized placements envisioned by the legislative drafters of the Act. The National Inquiry explains that “community-based resources for Indigenous women can better address the underlying issues of incarceration – trauma, poverty, and other effects of colonization – by using the strengths of cultural practices for healing.”⁸⁴

4. Incorporating Substantive Equality and Intersectionality into the Conviction Review Process:

An intersectional approach to conviction reviews, which could be pursued through the Miscarriages of Justice Commission recommended by Justices Laforme and Westmoreland-Traoré,⁸⁵ would better recognize and redress the realities of racism, class bias and misogyny experienced by Indigenous women that lead to miscarriages of justice.

Intersectionality recognizes that violence and oppression are a particular reality for those with intersecting vulnerabilities, and that it is the responsibility of state actors and policymakers to address structural oppression through policies and programs that reflect the needs of those subjected to discrimination.⁸⁶

The goal of a revitalized conviction review process must be to ensure that the rates of Indigenous women gaining access to conviction review processes are in line with and reflect the rate at which they are over-represented in the criminal legal and prison systems.



CONCLUSION

A review of the convictions and exoneration of the 12 Indigenous women referred to in this document would acknowledge Indigenous women's experiences with racism and sexism, and redress resulting miscarriages of justice. Such a review would also underscore the need to address the failures of the criminal legal system so as to adequately contextualize and prevent further systemic violence and inequality. It would frame these failures not as a matter of policy but a matter of breaches of rights that the state has an obligation to rectify.

The government must redress inequalities within and beyond the criminal legal system that perpetuate colonialism, racism, class bias and sexism in order to uphold the rights of Indigenous women and protect them from future miscarriages of justice. In particular, the government must repeal mandatory minimum penalties and eliminate the overrepresentation of Indigenous Peoples in prisons. The conviction review process must be reformed to ensure that it reflects the realities of Indigenous women instead of creating additional layers of inequality within the criminal legal system.

Section 15 of the Canadian Charter of Rights and Freedoms imposes a duty on government to ensure that the formulation of laws and policies considers their potential differential impacts on various groups in society and to ensure that government actions do not exacerbate any pre-existing disadvantage. The current conviction review process fails to consider the long history of violence perpetrated against Indigenous women, the marginalization that they endure, and stereotypical views that have resulted in unequal and prejudicial sentencing.

The miscarriages of justice experienced by these 12 Indigenous women must be urgently reviewed as a first step toward a more equitable conviction review process and in support of Canada's commitment to reconciliation, justice, and equality.



APPENDIX: 12 INDIGENOUS WOMEN

Name	Conviction	Sentence	Trial	Time in Prison	Currently
R.A.	Initial conviction at age 21 and while pregnant, for drug trafficking and assault with weapon, with additional convictions and “dangerous offender” designation as a result of incidents while in prison, in particular as a result of separation from her daughter	Initial sentence of 3.5 years; 18 years + indeterminate sentence as a result of “dangerous offender” designation added to sentence	Found guilty of several charges of forcible confinement, including some instigated by others or that were ‘staged’ as part of attempts to secure transfers (e.g. the last two which drove the DO application were, 1. after CSC refused to honour plan to release her from seg; 2. Delay in locking up in attempt to negotiate transfer to treatment for her & Ashley Smith [last move before AS homicide])	Started federal prison sentence in 2000; conditional release in 2018; most of time in segregation	On conditional release, subject to lifelong community supervision; trying to have “dangerous offender” designation revisited
Name	Conviction	Sentence	Trial	Time in Prison	Currently
M.C.	Following abuse as a child and suicide attempts, institutionalized in prisons and mental health settings for youth and then adults beginning at age 13; most recently found NCR for assault of forensic hospital staff that resulted in return to prison and forensic hospital issuing statement re: underfunding and concluding that society had failed M.C.	Series of prison sentences beginning at age 14, often with additional charges and sentences as a result of incidents while in prison related to attempts to self-harm and disabling mental health issues	In many cases, pled guilty to charges to try to please people, including prison staff; attempt by Corrections to have M.C. declared a “dangerous offender” in 2014 rejected by court, which emphasized need for her to be in a mental health setting	In and out of institutions between 1989 and 1992, 1999 and 2006; in federal prison or forensic hospital from 2009 to present	Remains in federal prison as a result of NCR finding though no longer under sentence; kept in segregation and restraints due to self-harm

Name	Conviction	Sentence	Trial	Time in Prison	Currently
C.D.	Second degree murder; death of woman involved in procuring her for man who had videos and photos of other Indigenous women he assaulted; 19 years old	Mandatory life sentence; mandatory 10-year parole ineligibility	History of childhood trauma not discussed	Nearly three decades in federal prison beginning in 1990	Died 16 April 2022 after a lengthy battle with cancer; was on conditional release subject to lifelong community supervision by parole officer
Name	Conviction	Sentence	Trial	Time in Prison	Currently
S.D.	Initially jailed as accomplice to abusive partner's drug dealing; while in prison, convicted of second degree murder after confessing, long after investigation closed, to death of friend widely acknowledged by staff and prisoners to be a suicide	Mandatory life sentence; mandatory 10-year parole ineligibility; nearly 2 decades past parole eligibility date at time of conditional release	No; represented by lawyer but pled guilty based on feeling of personal rather than legal responsibility	More than 3 decades in prison, much of it in segregation; longest serving woman prisoner at time of release on day parole "other" in 2020	On day parole – other with family in community; full parole
Name	Conviction	Sentence	Trial	Time in Prison	Currently
Y.J.	First degree murder; death of man believed to be abusing children in the community, including her son; in absence of other evidence, Crown characterized her as more responsible than others who played more significant role in death based on fact she was a survivor of abuse	Mandatory life sentence; mandatory 25-year parole ineligibility was reduced to time served (16 years) following 15 year judicial review	Yes; initially charged with second degree murder and pled innocent, crown then changed charge to first degree murder	16 years in federal prison beginning in 1991	On conditional release subject to lifelong community supervision by parole officer
Name	Conviction	Sentence	Trial	Time in Prison	Currently
T.M.	Initially convicted of breaking and entering for sheltering at a school after fleeing abusive father, discharge of weapon in suicide attempt,	Short initial sentence was added to based on subsequent charges while in prison	Pled guilty to most charges; last charge she was found NCR based on evidence of police officers. NB – psychiatrist initially assessed her as fit based on	More than a decade in federal prison, most of it in isolation, then transferred to mental health system	In assisted living in the community; diagnosed with isolation-induced schizophrenia from segregation

	then subsequent charges as a result of in-custody responses to strip searches etc.; NCR for only act of violence in community		her state of mind at time of assessment (i.e., after being back on anti-psychotics and in custody for several weeks) but re-assessed at request of defense team		
Name	Conviction	Sentence	Trial	Time in Prison	Currently
L.N.	Criminalized and institutionalized from a young age; “dangerous offender” designation when she was 21 as part of sentencing for robbery conviction based on things she had said rather than things she had done	Series of short sentences followed by indeterminate sentence as a result of “dangerous offender” status, (overturned on appeal after 5 years)	Found guilty of armed robbery after acknowledging she cut off clothes of victim with exacto knife. Victim testified L.N. took care not to harm her in ‘street justice’ retaliation vs victim for assault resulting in miscarriage and hospitalization of L.N.’s friend	First criminalized at age 12 (1985), much of the time in prisons for youth and then adults, mostly in segregation, until released in 1999 after “dangerous offender” designation overturned	More than 2 decades living in the community; diagnosed with schizophrenia likely tied to conditions of segregation
Name	Conviction	Sentence	Trial	Time in Prison	Currently
S.N.	Convicted of second-degree murder; 15 years old, transferred up from youth system; tried and sentenced as an adult	Mandatory life sentence	Found guilty, with co-accused, of murder of group home worker.	1999 to present in federal prison, mostly in segregation, causing significant decline in mental health	In federal prison
Name	Conviction	Sentence	Trial	Time in Prison	Currently
S.P.	Manslaughter and robbery-use of a firearm; took responsibility for death of man shot by co-accused, one of whom testified against her and was apparently granted immunity	Life sentence with 7-year period of parole ineligibility and 14 years concurrent	Yes; no consideration of s. 718.2(e); successive appeals denied	15 years in federal prison, plus two years in halfway house; starting in 1999	On conditional release subject to lifelong community supervision by parole officer

Name	Conviction	Sentence	Trial	Time in Prison	Currently
N.Q.	Second degree murder; death of residential school caretaker who was propositioning her and sister O.Q.; another person confessed responsibility for death; 19 years old	Mandatory life sentence; mandatory 10-year parole ineligibility	Yes; found guilty by all-white jury; history of residential school not discussed; appeal denied	1994 to present in federal prison; brief time on conditional release but returned to prison for breach of conditions	In federal prison; applications pending for conditional release and conviction review
O.Q.	Second degree murder; death of residential school caretaker who was propositioning her and sister N.Q.; another person confessed responsibility for death; 21 years old	Mandatory life sentence; mandatory 10-year parole ineligibility	Yes; found guilty by all-white jury; history of residential school and abuse not discussed; appeal denied	1994 to present in federal prison; brief time on conditional release but returned to prison for breach of conditions	In federal prison; applications pending for conditional release and conviction review
Name	Conviction	Sentence	Trial	Time in Prison	Currently
G.S.	Convicted of murder in death of abusive partner	Mandatory life sentence	Yes; and NSCA denied appeal.	Served time in P4W and Nova	On conditional release subject to lifelong community supervision by parole officer

GLOSSARY

Term	Definition
Accelerated Parole	Accelerated Parole is a conditional release process aimed at streamlining the parole decision-making process for individuals serving federal prison terms (two years or more) who are deemed non-violent and a low risk to public safety. Accelerated parole reviews were introduced to try to expedite what is otherwise a lengthy process that generally results in prisoners serving significantly longer than the minimum time required in custody (one-third of their sentence) before being allowed to apply to serve the remainder of their prison sentences in the community subject to the structure and supervision determined appropriate by the Parole Board of Canada. Most are released on day parole, which generally requires individuals to reside at a halfway house throughout the period of their day parole.
Battered Women Syndrome	First acknowledged by the Supreme Court of Canada in 1990 in <i>R v Lavallee</i> : when a woman shot and killed her abusive partner after he gave her his gun and advised that he would be back to kill her after their house guests left. The law of self-defense was developed at a time when women (and children) were considered the property of the men who fathered or married them. As such, the manner in which women or children who are abused are able to defend themselves has tended to be interpreted through this lens. “Battered women syndrome” was coined and identified by psychologists to explain situations where women act in ways perceived as out of character and are described as “snapping” and having a break with reality, when, in fact, their responses might better be characterized as reasonable responses to unreasonable violence perpetrated against them. Legally, we are talking about the manner in which battered women are able to defend themselves or others in their care. Rather than pathologizing women by defining them as suffering from a syndrome, we are attempting to ensure the myths and stereotypes about battering are challenged and that the abuse and women’s responses—particularly the use of lethal force—are understood within the context of misogynist violence. We know, for instance, that women are at greatest risk when they leave or announce their intention to leave an abusive relationship. In addition, if they engage in the type of hand-to-hand combat generally considered the way men might fight and defend themselves, most women end up dead.
Classification Systems	Correctional services and other prison authorities assess and classify prisoners according to the risk they perceive individuals would pose to public safety if they were released or otherwise ended up in the community at the time of assessment. The classification tools employed by corrections have been identified

	<p>as discriminatory on the basis of sex, race and disability in numerous court cases, as well as by the Canadian Human Rights Commission, the Correctional Investigator, and the Standing Senate Committee on Human Rights (<i>Human Rights of Federally-Sentenced Persons</i> (2021) at 64, https://sencanada.ca/content/sen/committee/432/RIDR/reports/2021-06-16_FederallySentenced_e.pdf).</p>
Colonial Violence	<p>The United Nations defines colonial violence in the <i>UN Declaration on the Rights of Indigenous Peoples</i> as “historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,” (at 3). The final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG) explained it as Canada’s imposition of “laws, institutions, and cultures on Indigenous Peoples while occupying their lands. Racist colonial attitudes justified Canada’s policies of assimilation, which sought to eliminate First Nations, Inuit, and Métis Peoples as distinct Peoples and communities” (at 4).</p>
Conditional Release	<p>Conditional release is the portion of a prison sentence that may, if authorization is granted by the parole board, be served in the community under the supervision of parole officer(s) and subject to the structure and conditions imposed by the Parole Board of Canada. Conditional release is designed to assist in the successful and safe integration of prisoners into the community.</p> <p>Types of conditional release include:</p> <ul style="list-style-type: none"> - Temporary Absences: Escorted or unescorted, used for treatment, and medical reasons, work, family/community contact, personal development, etc. - Day Parole: Allows for participation in community-based events and projects to prepare for full parole or statutory release. Prisoners must return nightly to a residential facility and there may additional conditions attached. - Full Parole: Serving part of one’s sentence in the community under specific conditions. Typically follows a successful day parole. (https://www.canada.ca/en/parole-board/services/parole/types-of-conditional-release.html)
Conditional Sentence	<p>Another name for a conditional sentence is “house arrest”, because it involves the serving of a jail sentence in the community in an individual’s home under strict supervision (https://www.legalaid.on.ca/faq/conditional-sentence-house-arrest/).</p>
Decolonization	<p>Decolonization is recognized as a long-term process involving the bureaucratic, cultural, linguistic and psychological divesting of colonial power from the federal and other government bodies to Indigenous leadership.</p>

Deputized	In the context of violence against women, it is generally well recognized that the historical failure of state actors and society to adequately address violence has effectively resulted in the transfer of responsibility to those who are victimized to protect themselves and/or those in their care. This happens in more and less tangible ways, from messages about how to dress and comport oneself to more overt misogynistic and racist presumptions of contributory responsibility for self-protection.
Hyperresponsibilization	Canadian law is often built around expectations that individuals take responsibility for their actions and nowhere is this truer than in matters of criminal law. In the context of violent victimization of women, women and particularly those who are racialized, have a disability or a mental illness, are poor, are discriminated against on the basis of sexual orientation or identity, etc., discriminatory ideas, attitudes, as well as myths and stereotypes are often employed in ways that effectively result in the transferring of legal responsibility onto those whom the system is presumed to protect. When actions of women and particularly Indigenous women to resist violence perpetrated against them result in them being criminalized—and too often imprisoned—, groups such as the Native Women’s Association of Canada and the Canadian Association of Elizabeth Fry Societies have identified it as the “hyperresponsibilization” of these women (Canadian Association of Elizabeth Fry Societies & Native Women’s Association of Canada, <i>Women and the Canadian Legal System: Examining Situations of Hyper-Responsibility</i>).
Institutionalized	Institutionalization refers to the forced habituation of individuals to institutional settings. In this context, we are referring to the forced removal and detention of Indigenous Peoples from their families, communities and land to reserves, residential and day schools, child welfare, juvenile and adult detention (https://cwrp.ca/publications/what-does-truth-and-reconciliation-commission-trc-report-summary-say-about-indian).
Intergenerational Trauma	The cumulative impact across generations of physical, emotional and psychological harm occasioned by historical and ongoing forced removal and disconnection from land, community and family.
Intersectionality	Introduced by Kimberle’ Crenshaw, a leading scholar of critical race theory, intersectionality theory studies the overlapping and cumulative manner in which multiple forms and structures of discrimination and oppression combine, intersect and exacerbate the experiences of those marginalized by gender, race, class, sexual orientation, ability, etc.
Isolation-induced Schizophrenia	A diagnosis of schizophrenia where the genesis of the serious mental illness is identified as primarily rooted in the patient’s experiences of isolation and sensory deprivation occasioned by their solitary confinement or segregation within prison.

Judicial Discretion	The power afforded to judges to make legal decisions according to their evaluation of the circumstances of the case and guided by precedent and principles of law and sentencing and sentencing submissions, but not bound by inflexible rules such as mandatory minimum penalties.
Mandatory Minimum Penalties	A sentence where the minimum punishment is predetermined by law and judges are not permitted to do their jobs to determine appropriate sentences by exercising their judicial discretion.
Marginalization	The act of placing a person in a position of lesser importance, influence or power and treating them as insignificant or peripheral.
Risk Assessment	In a prison and criminal legal context, this refers to the process of identifying and evaluating the risks people pose to public safety and the likelihood they will harm others or otherwise break the law in the future. As described above, it is also used in the security classification of prisoners and has been the subject of legal challenges because of the discriminatory nature of the assessment tools utilized by correctional authorities.
Segregation	Also referred to as solitary confinement or many other names within prison and other institutional contexts. It involves the practice of isolating an individual in custody to a prison cell or unit with limited to no human contact for days, weeks, months and even years on end.
Systemic Discrimination	Organizational structures, policies, practices and/or attitudes that disadvantage, stereotype and stigmatize individuals or groups on the basis of their inherent characteristics and thereby limit their right to the opportunities enjoyed by those who do not experience ableist, sexist, racist, classist, ageist, etc., discrimination.
Victimization	Actions of other(s) that harm an individual or group of individuals.

ENDNOTES

- ¹ Department of Justice, Overrepresentation of Indigenous Peoples in the Canadian Criminal Justice System: Causes and Responses, <https://www.justice.gc.ca/eng/rp-pr/jr/oip-cjs/p3.html>.
- ² Office of the Correctional Investigator, Proportion of Indigenous Women in Federal Custody Nears 50%, <https://www.oci-bec.gc.ca/cnt/comm/press/press20211217-eng.aspx>.
- ³ OCI data release cited in Patrick White, “‘Shocking and shameful’: For the first time, Indigenous women make up half the female population in Canada’s federal prisons” (Globe and Mail, 5 May 2022). <https://www.oci-bec.gc.ca/cnt/comm/press/press20211217-eng.aspx>.
- ⁴ Hugh Segal, “Tough on poverty, tough on crime” (Toronto Star, 20 Feb 2011), https://www.thestar.com/opinion/editorialopinion/2011/02/20/tough_on_poverty_tough_on_crime.html.
- ⁵ Mental Illness and the Prison System (CAMH), <https://www.camh.ca/en/camh-news-and-stories/mental-illness-and-the-prison-system>.
- ⁶ The Correctional Investigator of Canada, Annual Report of the Office of the Correctional Investigator 2011-2012 (Ottawa: Minister of Public Works and Government Services Canada, 2012) at 7.
- ⁷ Drug Policy Alliance, Drug Courts Are Not the Answer: Toward a Health-Centered Approach to Drug Use: https://drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer_Final2.pdf.
- ⁸ The Correctional Investigator of Canada, Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act (Ottawa: Minister of Public Works and Government Services Canada, 2012) at 3, <http://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20121022-eng.pdf>.
- ⁹ Hon. Harry LaForme & Hon. Juanita Westmoreland-Traore, A Miscarriages of Justice Commission (Department of Justice) at 6, <https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/mjc-cej/docs/a-miscarriages-of-justice-commission-published-version.pdf>.
- ¹⁰ Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls at 201, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf: “Perhaps one of the strongest features of a human rights-based approach, as Brenda Gunn sees it, is that it takes these basic issues, related to safety, out of the realm of policy and into the realm of law. ... This approach places Indigenous women, girls, and 2SLGBTQIA people as rights holders, to whom Canada and other governments have obligations. While these rights may be articulated in services, the fact that they are rights places an onus on governments to look at these issues as beyond the level of simple policy making.”
- ¹¹ The Truth and Reconciliation Commission of Canada, <https://nctr.ca/about/history-of-the-trc/truth-and-reconciliation-commission-of-canada/>.

¹² Canadian Association of Elizabeth Fry Societies & Native Women's Association of Canada, "Women and the Canadian Legal System: Examining Situations of Hyper-Responsibility" (2008) 26:3 Canadian Woman Studies at 76-77, <https://cws.journals.yorku.ca/index.php/cws/article/view/22118>.

¹³ Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls at 636, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf.

¹⁴ Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls at 112, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf, citing Maria Yellow Horse, "The Historical Trauma Response Among Natives and Its Relationship with Substance Abuse: A Lakota Illustration" (2003) 35:1 Journal of Psychoactive Drugs, at 7, <https://doi.org/10.1080/02791072.2003.10399988>.

¹⁵ Senator Kim Pate, "The Story of S: A Study in Discrimination and Inequality" in William Trudel & Lorene Shyba (eds), *Women in Criminal Justice* (Durville Publications, 2018) at 78.

¹⁶ Media coverage archived with the office of Senator Pate.

¹⁷ Ontario Human Rights Commission, *Interrupted childhoods: Over-representation of Indigenous and Black children in Ontario child welfare*, <https://www.ohrc.on.ca/en/interrupted-childhoods#5.Results>.

¹⁸ Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls at 635, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf.

Further, these interconnections and progressions must be understood in terms of shifting state modes of colonial control over Indigenous Peoples, not only within the trajectories of individual women, but across time and into the present (see e.g. Elspeth Kaiser-Derrick, *Implicating the System: Judicial Discourses in the Sentencing of Indigenous Women* (Winnipeg: University of Manitoba Press, 2019) at 71-82). For example, for the Public Inquiry into the Administration of Justice and Aboriginal People of Manitoba (the Aboriginal Justice Inquiry), Justices Alvin C. Hamilton and C. Murray Sinclair report that "[t]he child welfare system was doing essentially the same thing" as residential schools, by removing Indigenous children "from their families, communities and cultures" (Public Inquiry into the Administration of Justice and Aboriginal People, Report of the Aboriginal Justice Inquiry of Manitoba (1991) at Vol 1, Chapter 14, <http://www.ajic.mb.ca/volume.html>). Similarly, the TRC finds that this removal and forms of control operative in residential schools functioned as "more akin to life in a prison," and that residential schools "were more of a child-welfare system" (Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: The Summary Report of the Truth and Reconciliation Commission of Canada*, at 137-38, https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf).

¹⁹ R.A., *A Solitary Perspective* (unpublished, archived with the office of Senator Pate) at 6.

- ²⁰ Honouring the Truth, Reconciling for the Future: The Summary Report of the Truth and Reconciliation Commission of Canada at 145-46, https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf.
- ²¹ Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls at 644, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf.
- ²² Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls at 56, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf.
- ²³ Sherene H Razack, "Gendered Racialized Violence and Spatialized Justice: The Murder of Pamela George" (2000) 91 Canadian Journal of Law and Society at 98, <https://doi.org/10.1017/S0829320100006384>.
- ²⁴ Sherene H Razack, "Gendered Racialized Violence and Spatialized Justice: The Murder of Pamela George" (2000) 91 Canadian Journal of Law and Society at 98, <https://doi.org/10.1017/S0829320100006384>.
- ²⁵ Department of Justice, Understanding the Overrepresentation of Indigenous People in the Criminal Justice System, <https://www.justice.gc.ca/socjs-esjp/en/ind-aut/uo-cs>.
- ²⁶ Samantha Loppie, Charlotte Reading & Sarah de Leeuw, Indigenous Experiences with Racism and Its Impacts (National Collaborating Centre for Indigenous Health), <https://www.nccih.ca/docs/determinants/FS-Racism2-Racism-Impacts-EN.pdf>.
- ²⁷ Senator Kim Pate, "The Story of S: A Study in Discrimination and Inequality" in William Trudel & Lorene Shyba (eds), Women in Criminal Justice (Durvile Publications, 2018) at 78.
- ²⁸ Legal decision archived with the office of Senator Pate.
- ²⁹ R.A., A Solitary Perspective (unpublished, archived with the office of Senator Pate) at 16.
- ³⁰ Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls at 648, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf: "In many of the testimonies the National Inquiry heard, families shared how stereotypes and victim blaming served to slow down or to impede investigations into their loved ones' disappearances or deaths. The assumptions tied to Indigenous women, girls, and 2SLGBTQIA people by police as "drunks," "runaways out partying," or "prostitutes unworthy of follow-up" characterized many interactions, and contributed to an even greater loss of trust in the police and in related agencies."
- ³¹ Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls at 628, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf: "The National Inquiry heard from many witnesses who discussed their reluctance to reach out to the police for help. The underreporting of interpersonal violence, such as intimate partner and sexual violence, is well documented among all victims of these crimes in Canada. In the case of Bernice C.'s daughter, for example, the RCMP didn't take a statement when her parents tried to report her missing, and although police could have

questioned the man who was last seen with her daughter, the delay in doing so and his murder mean that those answers may never be found.”; Robyn Doolittle, “The story behind The Globe’s Unfounded series” (Globe and Mail, 3 February 2017); Human Rights Watch, *Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia, Canada*, <https://www.hrw.org/report/2013/02/13/those-who-take-us-away/abusive-policing-and-failures-protection-indigenous-women>.

³² Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls at 637, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf.

³³ Senator Kim Pate, “The Story of S: A Study in Discrimination and Inequality” in William Trudel & Lorene Shyba (eds), *Women in Criminal Justice* (Durvile Publications, 2018) at 78.

³⁴ Canadian Association of Elizabeth Fry Societies & Native Women’s Association of Canada, “Women and the Canadian Legal System: Examining Situations of Hyper-Responsibility” (2008) 26:3 *Canadian Woman Studies* at 94, <https://cws.journals.yorku.ca/index.php/cws/article/view/22118>.

³⁵ *R v Naslund*, 2022 ABCA 6, <https://canlii.ca/t/jlpbr>.

³⁶ Elizabeth Sheehy, “Helen Naslund appeal offers a look into how justice system fails women who kill their abusers” (Toronto Star, 13 January 2022), <https://www.thestar.com/opinion/contributors/2022/01/13/helen-naslund-appeal-offers-a-look-into-how-justice-system-fails-women-who-kill-their-abusers.html>.

³⁷ *R v Naslund*, 2022 ABCA 6 at para 128, <https://canlii.ca/t/jlpbr>.

³⁸ Human Rights Watch, *Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia, Canada*, <https://www.hrw.org/report/2013/02/13/those-who-take-us-away/abusive-policing-and-failures-protection-indigenous-women>.

³⁹ Samantha Loppie, Charlotte Reading & Sarah de Leeuw, *Indigenous Experiences with Racism and Its Impacts* (National Collaborating Centre for Indigenous Health), <https://www.nccih.ca/docs/determinants/FS-Racism2-Racism-Impacts-EN.pdf>.

⁴⁰ Kent Roach, “The Wrongful Conviction of Indigenous People in Australia and Canada” (2015) 17 *Finders Law Journal* at 203, <https://www.innocencecanada.com/assets/Uploads/PDFs/Kent-Roach-WC-of-Indigenous-People.pdf>.

⁴¹ Media reports archived with the office of Senator Pate.

⁴² Media reports archived with the office of Senator Pate.

⁴³ Emma Cunliffe, "Charter Rights, State Expertise: Testing State Claims to Expert Knowledge" (2020) 94 *Supreme Court Law Review*, https://commons.allard.ubc.ca/fac_pubs/536/.

⁴⁴ Justice Lynn Ratushny, *Self Defence Review: Final Report* (Submitted to the Minister of Justice of Canada and the Solicitor General of Canada) at 23-24, <https://www.securitepublique.gc.ca/cnt/rsrscs/lbrr/ctlg/dtls-en.aspx?d=PS&i=3236435>.

⁴⁵ Justice Lynn Ratushny, *Self Defence Review: Final Report* (Submitted to the Minister of Justice of Canada and the Solicitor General of Canada), <https://www.securitepublique.gc.ca/cnt/rsrscs/lbrr/ctlg/dtls-en.aspx?d=PS&i=3236435>.

⁴⁶ *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, at 636, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Calls_for_Justice.pdf.

⁴⁷ Charlotte Baigent, "Why Gladue Needs an Intersectional Lens: The Silencing of Sex in Indigenous Women's Sentencing Decisions," (2020) 32:1 *Canadian Journal of Women and the Law*, at 19-23.

⁴⁸ Charlotte Baigent, "Why Gladue Needs an Intersectional Lens: The Silencing of Sex in Indigenous Women's Sentencing Decisions," (2020) 32:1 *Canadian Journal of Women and the Law*, at 11.

These concerns about lawyering practices were highlighted over thirty years ago by the Aboriginal Justice Inquiry of Manitoba (Public Inquiry into the Administration of Justice and Aboriginal People, Report of the Aboriginal Justice Inquiry of Manitoba (1991) at Vol 1, Chapter 13, <http://www.ajic.mb.ca/volume.html>), which preceded the implementation of section 718.2(e), and still remain today.

⁴⁹ *R v Lavallee*, [1990] 1 SCR 852, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/599/index.do>.

⁵⁰ *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* at 641, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf.

⁵¹ Senator Kim Pate, "The Story of S: A Study in Discrimination and Inequality" in William Trudel & Lorene Shyba (eds), *Women in Criminal Justice* (Durvile Publications, 2018) at 80.

⁵² Legal decision archived with the office of Senator Pate.

⁵³ R.A., *A Solitary Perspective* (unpublished, archived with the office of Senator Pate) at 20.

⁵⁴ *R v Gladue*, [1999] 1 SCR 688, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1695/index.do>; *R v Ipeelee*, 2012 SCC 13, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/8000/index.do>.

⁵⁵ *R v Gladue*, [1999] 1 SCR 688 at 33-36, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1695/index.do>.

⁵⁶ Charlotte Baigent, "Why Gladue Needs an Intersectional Lens: The Silencing of Sex in Indigenous Women's Sentencing Decisions," (2020) 32:1 *Canadian Journal of Women and the Law* at 2, <https://doi.org/10.3138/cjwl.32.1.01>.

- ⁵⁷ Marie Manikis, "The Recognition of Prosecutorial Obligations in an Era of Mandatory Minimum Sentences of Imprisonment and Over-Representation of Aboriginal People in Prisons" (2015) 71 SCLR (2d) at 280, <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1313&context=sclr>.
- ⁵⁸ Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls at 645, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf.
- ⁵⁹ Honouring the Truth, Reconciling for the Future: The Summary Report of the Truth and Reconciliation Commission of Canada at 174, https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf.
- ⁶⁰ Charlotte Baigent, "Why Gladue Needs an Intersectional Lens: The Silencing of Sex in Indigenous Women's Sentencing Decisions," (2020) 32:1 Canadian Journal of Women and the Law at 26.
- ⁶¹ Honouring the Truth, Reconciling for the Future: The Summary Report of the Truth and Reconciliation Commission of Canada at 173, https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf.
- ⁶² Kelly Struthers Montford and Kelly Hannah-Moffat, "The Veneers of Empiricism: Gender, Race and Prison Classification" (2021) 59 Aggression and Violent Behaviour at 2, <https://doi.org/10.1016/j.avb.2020.101475>.
- ⁶³ Commission of Inquiry into certain events at the Prison for Women in Kingston, http://www.justicebehindthewalls.net/resources/arbours_report/arbours_rpt.htm; Canadian Human Rights Commission, Protecting Their Rights A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women (2003), <https://www.chrc-ccdp.gc.ca/sites/default/files/fswen.pdf>; Ewert v. Canada, 2018 SCC 30; Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls at 645, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf: "The maximum security classification for incarcerated Indigenous women and 2SLGBTQQIA people represents sex-based discrimination that places, punishes, or rewards them on the basis of a set of non-Indigenous expected or compliant behaviours. This security classification further discriminates by limiting federally sentenced Indigenous women from accessing services, supports, and programs required to facilitate their safe and timely reintegration."
- ⁶⁴ Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls at 635, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Calls_for_Justice.pdf: "In a letter dated June 29, 2018, to Minister Goodale, Correctional Investigator Dr. I. Zinger wrote as follows: Based on snapshot data, as of June 20, 2018 the Office reports that there were 61 maximum security women in federal custody, 41 of whom (or 67.2%) are Indigenous. Younger Indigenous women were found to be overrepresented in the Secure Units ... These women were not benefitting from the range of services, programs and supports to which Indigenous women in federal custody are entitled under the law."
- ⁶⁵ Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls at 645, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf: "Strip-searches within the correctional systems in Canada are state-sanctioned sexual assault, and violate the human rights and dignity of women

and girls. Strip-searching violates Mandela Rules 52.1, which states that intrusive searches, including strip- and body-cavity searches, should be undertaken only if absolutely necessary.”

⁶⁶ Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls at 645, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf: “The mental and physical distress that segregation can cause amounts to cruel, inhumane, and degrading punishment that should be characterized as a violation of human rights and is institutional violence against women.”

⁶⁷ Senator Kim Pate, “The Story of S: A Study in Discrimination and Inequality” in William Trudel & Lorene Shyba (eds), *Women in Criminal Justice* (Durville Publications, 2018) at 77.

⁶⁸ See e.g. Anabela Miranda Rodrigues et al, *Promoting Non-discriminatory Alternatives to Imprisonment Across Europe: Non-Custodial Sanctions And Measures in the Member States Of The European Union - Portugal* (EU, 2021), <https://www.uc.pt/site/assets/files/422661/portugal.pdf>.

⁶⁹ EU, European Commission, *Study on Minimum Sanctions in the EU Member States*, (Brussels, 2015) at 42, http://ec.europa.eu/justice/criminal/document/files/rep_ort_minimum_sanctions_en.pdf.

⁷⁰ Vivien Stern, *Creating Criminals: Prisons and People in a Market Society* (Halifax: Fernwood Publishing Ltd., 2006) at 38.

⁷¹ Media reports archived with the office of Senator Pate.

⁷² Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls at 637, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf: “The overincarceration of Indigenous women results in Indigenous children’s being placed in another institutionalized colonial system.”

Indeed, some Indigenous women become criminalized in ways that intersect with their fears of the apprehension of their children by child welfare systems (see e.g. Elspeth Kaiser-Derrick, *Implicating the System: Judicial Discourses in the Sentencing of Indigenous Women* (Winnipeg: University of Manitoba Press, 2019) at 240-43), and their own attempts to provide for their children (Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba* (1991) at Vol 1, Chapter 13, <http://www.ajic.mb.ca/volume.html>).

⁷³ Canadian Association of Elizabeth Fry Societies & Native Women’s Association of Canada, “Women and the Canadian Legal System: Examining Situations of Hyper-Responsibility” (2008) 26:3 *Canadian Woman Studies* at 97, <https://cws.journals.yorku.ca/index.php/cws/article/view/22118>.

⁷⁴ “The Story Behind the Lost Daughters Campaign.” The Howard, 2008, at 4; Charlene Wear Simmons, *Children of Incarcerated Parents* (California Research Bureau, 2000).

⁷⁵ “Canadian Association of Elizabeth Fry Societies & Native Women’s Association of Canada, “Women and the Canadian Legal System: Examining Situations of Hyper-Responsibility” (2008) 26:3 *Canadian Woman Studies* at 97, <https://cws.journals.yorku.ca/index.php/cws/article/view/22118>.

- ⁷⁶ Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls at 645, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf: “The incarceration of women resulting in the separation of the mother and child is a violation of the child’s rights under the Convention on the Rights of the Child (CRC).”
- ⁷⁷ President of the Republic of South Africa and the Minister of Correctional Services v. John Phillip Peter Hugo, CCT 11/96, <http://www.saflii.org/za/cases/ZACC/1997/4.pdf>.
- ⁷⁸ Truth and Reconciliation Commission of Canada: Calls to Action, Call to Action 32, https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf: “We call upon the federal government to amend the Criminal Code to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences.”
- ⁷⁹ Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Call for Justice 5.14 (“We call upon federal, provincial and territorial governments to thoroughly evaluate the impact of mandatory minimum sentences as it relates to the sentencing and over-incarceration of Indigenous women, girls, and 2SLGBTQQIA people and to take appropriate action to address their over-incarceration”), 5.21 (“We call upon the federal government to fully implement the recommendations in the reports of the Office of the Correctional Investigator and those contained in the Auditor General of Canada (Preparing Indigenous Offenders for Release, Fall 2016); the Calls to Action of the Truth and Reconciliation Commission of Canada (2015); report of the Standing Committee on Public Safety and National Security, Indigenous People in the Federal Correctional System (June 2018); the report of the Standing Committee on the Status of Women, A Call to Action: Reconciliation with Indigenous Women in the Federal Justice and Corrections Systems (June 2018); and the Commission of Inquiry into certain events at the Prison for Women in Kingston (1996, Arbour Report) in order to reduce the gross overrepresentation of Indigenous women and girls in the criminal justice system”), https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf.
- ⁸⁰ Truth and Reconciliation Commission of Canada: Calls to Action, Call to Action 30, https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf: “We call upon federal, provincial, and territorial governments to commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade, and to issue detailed annual reports that monitor and evaluate progress in doing so.”
- ⁸¹ Truth and Reconciliation Commission of Canada: Calls to Action, Call to Action 30, https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf: “We call upon the federal, provincial, and territorial governments to provide sufficient and stable funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders and respond to the underlying causes of offending.”
- ⁸² Honouring the Truth, Reconciling for the Future: The Summary Report of the Truth and Reconciliation Commission of Canada at 137, https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf.

⁸³ Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Call for Justice 5.20, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf: “We call upon the federal government to implement the Indigenous-specific provisions of the Corrections and Conditional Release Act (SC 1992, c.20), sections 79 to 84.1.”

⁸⁴ Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls at 643, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf.

⁸⁵ Hon. Harry LaForme & Hon. Juanita Westmoreland-Traore, A Miscarriages of Justice Commission (Department of Justice), <https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/mjc-cej/docs/a-miscarriages-of-justice-commission-published-version.pdf>.

⁸⁶ Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls at 104, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf.