

**LISTENING TO WHAT THE CRIMINAL JUSTICE SYSTEM HEARS
AND THE STORIES IT TELLS:
JUDICIAL SENTENCING DISCOURSES ABOUT THE VICTIMIZATION
AND CRIMINALIZATION OF ABORIGINAL WOMEN**

by

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A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

The Faculty of Graduate Studies

(Law)

THE UNIVERSITY OF BRITISH COLUMBIA
(Vancouver)

December 2012

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Abstract

Criminalized Aboriginal women continue to be overrepresented in Canadian prisons. Research demonstrates they often have extensive experiences of victimization. This thesis explores how judges navigate these issues on sentencing, primarily by examining discourses about victimization in selected judgments. This author identified and reviewed 91 decisions sentencing Aboriginal women offenders, focusing those dealing with conditional sentences where possible. This author uses the feminist theory of the victimization-criminalization continuum to inform her thesis.

Parliament attempted to respond to the overincarceration of Aboriginal peoples in 1996 with the enactment of amendments to the sentencing regime: s. 718.2(e) requires judges to consider alternatives to imprisonment for Aboriginal offenders where appropriate, and s. 742.1 offers one such alternative through the conditional sentence order. In *R. v. Gladue*, the Supreme Court of Canada directed how judges are to engage in the sentencing analysis for Aboriginal offenders. In 2012, the Court offered further clarification on this direction in *R. v. Ipeelee*. This is the context for this thesis.

The histories of victimization of criminalized Aboriginal women being sentenced generally overlap with factors that comprise the *Gladue* analysis, and are interrelated. However, this author suggests that the focuses of the victimization-criminalization continuum and the *Gladue* analysis differ: the victimization-criminalization continuum most directly focuses on gendered vulnerabilities and reactions to victimization, whereas the *Gladue* analysis most directly focuses on reverberations of colonization (and how that should impact sentencing). This author uses various judgments to examine the overlap between these analyses, highlighting decisions that successfully integrate gendered understandings of victimization histories within the *Gladue* analysis, and those demonstrating more decontextualized reasoning.

This author then discusses how judicial discourses about victimization intersect with discourses about rehabilitation and treatment. This author suggests associated problems that appear at this intersection – particularly where imprisonment is regarded as a place of healing (despite documented deleterious effects of incarceration).

Finally, this author argues that recent incursions into the conditional sentencing regime through amendments to the *Criminal Code* that restrict its availability (first through the passage of Bill C-9 and then Bill C-10) are problematic for criminalized Aboriginal women who may otherwise be sent to prison.

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Acknowledgements

I would like to offer heartfelt thanks my supervisor, Dr. Emma Cunliffe. She has been in my corner since I began my studies at UBC, and I am very grateful for her support and guidance throughout the process of writing this thesis. She challenges me, pushes my thought, and is the primary reason I decided to remain at UBC for my doctoral work. Writing this thesis has been the most difficult and rewarding academic experience of my life thus far, and I credit much of this to Emma's thoroughness, dedication, and insight. In addition to her brilliance, Emma is just a lovely person, and I feel extremely lucky that I will continue to work with her through the rest of my graduate studies. I could not ask for a better supervisor.

I also want to thank my second reader, Professor Michael Jackson. I read his book *Justice Behind the Walls: Human Rights in Canadian Prisons* in the summer before I started the LL.M. program at UBC and it made an indelible mark on me, solidifying my interest in prison issues. I have since taken his Penal Policy course, and it is with his encouragement that I have used my paintings from that class to open each chapter of this thesis. Professor Jackson's lifetime of prison work has truly inspired me, and I very much appreciate having his feedback for this thesis during its review.

Thanks also to all UBC Law faculty and staff members who have been part of my pathway to the completion of this thesis. I offer particular thanks to Joanne Chung, who has been wonderful to me since I began at UBC.

As always, I give my deepest appreciation to my family. I cannot express how grateful I am for their unfailing love and support. This thesis, like most things in my life, would not have been possible without my family. My parents have been instrumental in shaping my social conscience and how I view the world. Most importantly, they are just always there for me when I need them, and (sometimes aggravatingly) even when I do not. Finally, I want to thank my amazing sisters, Catriona and Freya. I love them more than anything, and they keep me grounded and laughing.

Dedication

To my family

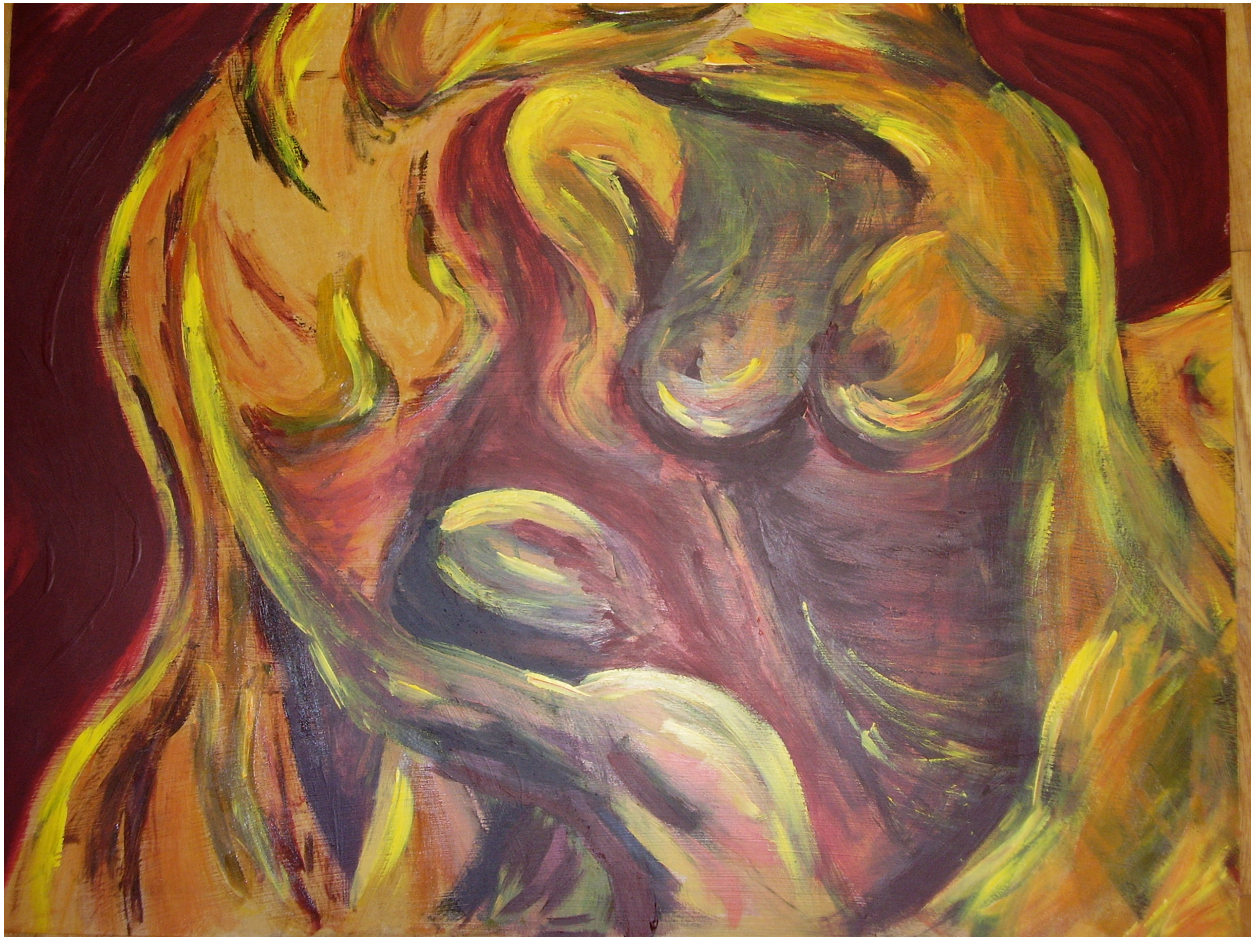
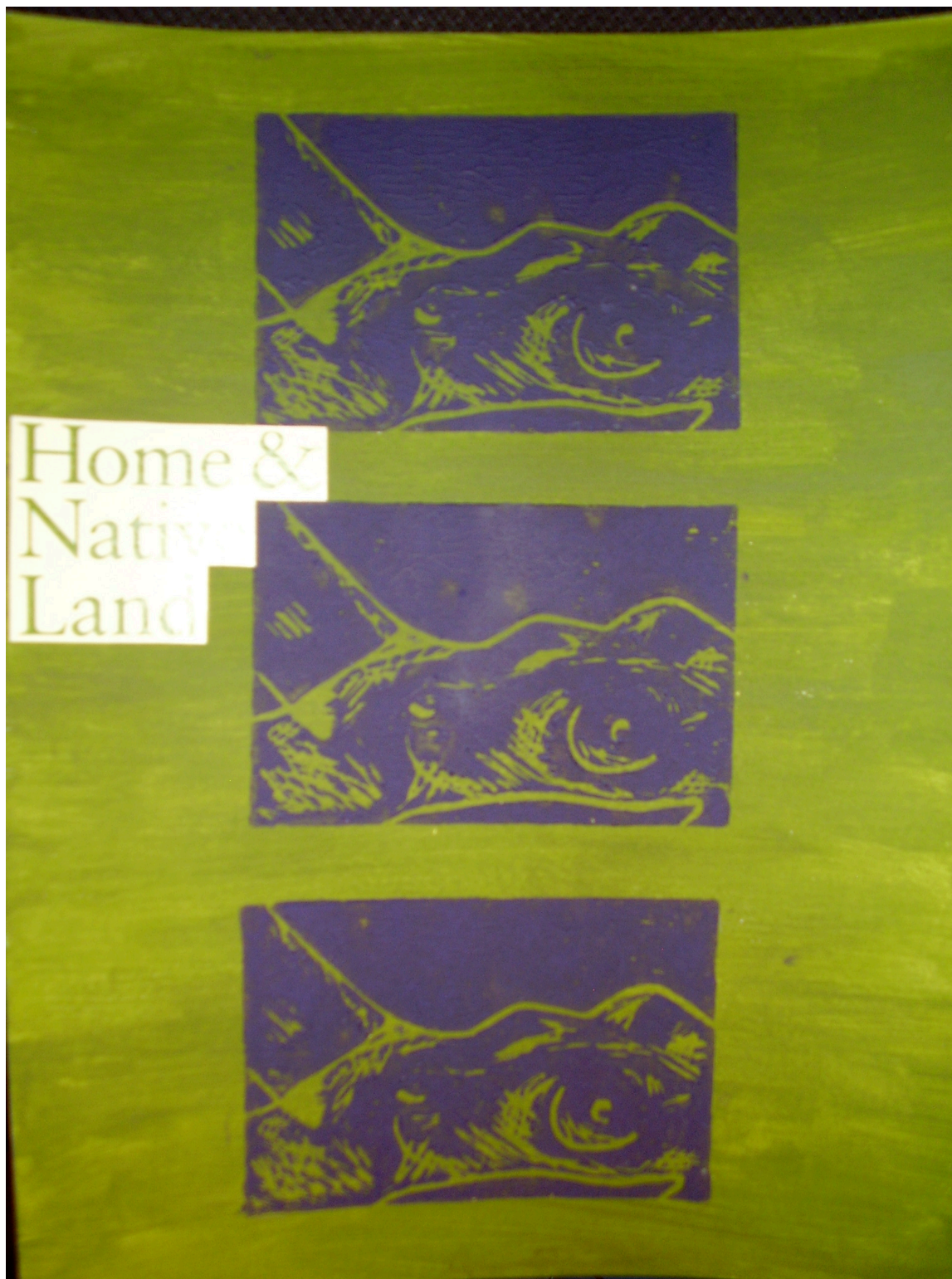


Figure 1



“Home & Native Land” (linocut in ink)

(1) Introduction And Background

1.1 Listening to what the criminal justice system hears

During my law degree at the University of Alberta (September 2006 to April 2009), I worked extensively with the clinical program Student Legal Services of Edmonton.¹ In one of my capacities there,² I regularly attended outreaches at Kindred House.³ Kindred House is a drop-in centre for street sex workers (women and transgendered people over 18 years old). It is grounded in the philosophy of harm reduction, which in this context means “meet[ing] the clients where they’re at.”⁴ Kindred House offers a safe place for its clients to take respite from the streets, supplies various health and other resources, and provides a sense of community to alleviate some of the isolation instilled by marginalization. I would sit with a fellow law student during these outreaches, sometimes offering legal information and pamphlets, periodically opening files for women who lacked other access to legal representation, intermittently talking to women who just wanted someone to talk to, and constantly aware that this space belonged to people who have been pushed to the periphery of public spaces and services. It was apparent that these women lived very hard lives, with very little support and resources, and many had been criminalized. I was appalled that the overwhelming majority of clients were Aboriginal.⁵

¹ University of Alberta, Faculty of Law, “Student Legal Services of Edmonton”, online: Student Legal Services <http://www.slsedmonton.com/>.

² University of Alberta, Faculty of Law, “Legal Education and Reform Project”, online: Student Legal Services <http://www.slsedmonton.com/education-reform/community-outreach/>.

³ Boyle McCauley Health Centre, “Services and Programs: Kindred House”, online: BMHC <http://www.bmhc.net/services/kindred.html>.

⁴ The Coordinator described the centre’s harm-reduction philosophy in these terms to me when I first attended Kindred House, although this direct quote is from her submissions to a Parliamentary body: Ottawa, House of Commons, *Subcommittee on Solicitation Laws of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, 38th Parl. 1st sess., No. 19 (31 March 2005), online: Parliament of Canada <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1723237&Language=E&Mode=1&Parl=38&Ses=1#Int-1193178>, at 31. [Ottawa, House of Commons, *Subcommittee on Solicitation Laws*]

⁵ I will use the term “Aboriginal” in this thesis, largely to retain consistency with the debates, cases, and also because it comports with the legal term (incidentally, it is more all-encompassing than First Nations because it includes Métis). However, it should be noted that the term “Aboriginal” has been broadly criticized both in Canada and internationally as yet another colonial construct that promotes divisiveness and ‘Pan-Indianism’” [Native

Program coordinator Shawna Hohendorff reported to a Parliamentary subcommittee on sex work that of her clients at Kindred House, roughly 80% are Aboriginal.⁶ This overrepresentation was also evident in the van support outreaches for street sex workers that I volunteered for with the PAR Foundation⁷ and Crossroads.⁸ It was also apparent that this overrepresentation is intergenerational; for example, during one van outreach, an Aboriginal mother and daughter approached the van together to access resources for sex workers.

My linocut/painting opening this chapter (Figure 1) symbolizes the overrepresentation of Aboriginal women in Canadian prisons – bringing different meaning to the anthemic “Home & Native Land.” I created a linocut by carving the image of a woman lying in a pose that evokes a landscape – a prisonscape – and reprinted this image three times to signify overrepresentation. Referring to the overrepresentation of Aboriginal peoples in the criminal justice system, the Royal Commission on Aboriginal Peoples (RCAP) concluded “over-representation is linked directly to the particular and distinctive historical and political processes that have made

Women’s Association of Canada, “Culturally Relevant Gender Based Models of Reconciliation” (March 2010), online: NWAC <http://www.nwac.ca/research/nwac-reports>. at 3.] without respecting individual nations, diversity among them, and their autonomy in naming themselves. The term “Aboriginal” has been problematized for “originat[ing] from ‘outside-naming’” because it is a settler term for indigenous peoples. [Joane Martel & Renée Brassard, “Painting the Prison ‘Red’: Constructing and Experiencing Aboriginal Identities in Prison,” (2008) 38(2) *British Journal of Social Work* 340 at 358. [Martel & Brassard]] Writers have resolved this issue in various ways, such as suggesting “the term *Onkwehonwe* [which] connects the common experiences of ‘Original’ peoples globally under colonial powers” [NWAC, “Culturally Relevant Gender Based Models,” *supra* note 5 at 3-4.], or referring to each nation by their indigenous name. In the spirit of the latter approach, in Chapters 3 and 4 I have endeavoured to also include the nation to which each woman offender being sentenced is connected (where judges specify the nation). “Aboriginal cultures in Canada are extremely diverse and complex in their values, beliefs, customs and traditions,” [Chris Andersen, “Governing Aboriginal Justice in Canada: Constructing Responsible Individuals and Communities through ‘Tradition’” (1999) 31 *Crime, Law & Social Change* 303 at 308. [Andersen]] and I am conscious that the term “Aboriginal” is essentializing. For an interesting discussion about identity reclamation and the Anishinabek nation campaigning to eradicate the term “Aboriginal,” see Ahni, “Anishinabek Outlaw Term ‘Aboriginal’”, online: (2008) *Intercontinental Cry* <http://intercontinentalcry.org/anishinabek-outlaw-term-aboriginal/>. For thoughtful comments about being non-Aboriginal scholars writing about Aboriginal issues but striving to do so with sensitivity and a view to assist decolonizing efforts, see Martel & Brassard, *supra* note 20 at 341-2.

⁶ Ottawa, House of Commons, *Subcommittee on Solicitation Laws*, *supra* note 4 at 33.

⁷ The PAR Foundation, online: PAR <http://www.parfoundation.ca/>.

⁸ E4C, “Crossroads”, online: E4C <http://www.e4calberta.org/crossroads.html>. For the Crossroads outreaches, part of my role was to record information about the sex workers who approached – the vast majority of the approximately thirty women using the van resources each night self-identified as Aboriginal, which the staff member drivers affirmed was representative of a typical night’s demographics.

Aboriginal people poor beyond poverty,”⁹ in a deeply entrenched “process of colonization.”¹⁰ Hohendorff commented to the Parliamentary subcommittee that her clients felt unheard and alienated from institutions with power, as if “their particular life stories” did not matter.¹¹ She explained that “I don't know all of the answers, and I think it's a complex set of problems,” but what “we need to do is to listen...so that they are part of our community, not separate.”¹² All of my paintings in the series that open each chapter of this thesis feature nude women – the women represent Aboriginal women prisoners, and I have depicted the figures naked to illustrate that at bottom, when you strip away everything else, we all share our common humanity.

In this thesis, I demonstrate the importance of Hohendorff's insight by exploring the limited histories of criminalized Aboriginal women that appear in their sentencing judgments (such as those presented through pre-sentence reports (PSRs)). Often these histories reveal layered experiences of victimization, including sustained victimizations (frequently occurring throughout these women's lives), and diverse forms of victimization (often involving violence, such as physical and sexual victimization, but also other types of victimization about which I expand below, including emotional abuse, neglect, and substance abuse). This prevalence of victimization makes the interrelation between the victimization and criminalization of Aboriginal women central to my thesis. My focus on sentencing judgments does not go far enough to respond to Hohendorff's suggestion; it remains necessary for legal and policy-based work to incorporate the actual voices of Aboriginal women themselves. Nonetheless, the presentation of

⁹ Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Canada Communication Group Publishing, 1996) at 46. [RCAP, *Bridging the Cultural Divide*]

¹⁰ *Ibid.* at 47.

¹¹ Ottawa, House of Commons, *Subcommittee on Solicitation Laws*, *supra* note 4 at 31.

¹² *Ibid.* at 32.

criminalized Aboriginal women's histories to the courts acts as one of the few ways that their lives might be "listened to" in the criminal justice system.

I am interested in what information the sentencing judge hears, and how this influences sanctions. The context in which sentencing judges learn about criminalized Aboriginal women includes the legislative requirement that they consider the unique circumstances of Aboriginal peoples and reduce reliance on incarceration (s. 718.2(e)¹³ of the *Criminal Code*¹⁴) and the Supreme Court of Canada's direction in *R. v. Gladue*¹⁵ and *R. v. Ipeelee*¹⁶ establishing a judicial framework for sentencing Aboriginal peoples. Gillian Balfour writes that

[t]he disconnect between restorative justice sentencing practices – a seemingly progressive legislative initiative – and the unrelenting coercive punishment of Aboriginal women lies, to a great extent, in the exclusion of women's narratives of violence and social isolation in the practice of sentencing law.¹⁷

For Balfour, to meaningfully import the experiences of Aboriginal women into sentencing law, courts must situate these women's criminality "in the context of gendered conditions in Aboriginal communities,"¹⁸ by considering (within the factors comprising the *Gladue* analysis) how past experiences of violence may have contributed to their coming before the courts as offenders. Balfour concludes that the ways defence counsel present their cases and how sentencing judges use *Gladue* factors both fail to "recognize the gendered conditions of endangerment in Aboriginal women's communities as a systemic factor."¹⁹

My review of the cases I have identified is guided by related questions about how the presentation and interpretation of Aboriginal women's histories impact sentencing

¹³ *Code, infra* note 14 at s. 718.2(e).

¹⁴ *Criminal Code*, R.S.C., 1985, c. C.-46. [*Code*]

¹⁵ *R. v. Gladue*, [1999] 1 S.C.R. 688. [*Gladue*]

¹⁶ *R. v. Ipeelee*, 2012 SCC 13. [*Ipeelee*]

¹⁷ Gillian Balfour, "Falling Between the Cracks of Retributive and Restorative Justice: The Victimization and Punishment of Aboriginal Women" (2008) 3(2) *Feminist Criminology* 101 at 102. [Balfour, "Falling Between the Cracks"]

¹⁸ *Ibid.* at 103.

¹⁹ *Ibid.* at 116.

determinations. It is imperative to examine how judges present and use criminalized Aboriginal women's histories to assist with sentencing determinations because the overrepresentation of Aboriginal women in the system is steadily increasing. In its 2009/2010 report, the Office of the Correctional Investigator cautions that “[t]he Aboriginal women offender population has grown by almost 90% in the last ten years, and it is the fastest growing segment of the offender population.”²⁰

1.2 Overrepresentation: The numbers, growing from colonial roots

The overrepresentation of Aboriginal peoples in the Canadian criminal justice system is stark given that in 2006 Aboriginal peoples only comprised 3.8% of the total population of Canada.²¹ It is telling that the correctional system provides the most extensive body of statistical information about Aboriginal peoples in the criminal justice system.²² Samuel Perreault writes for Juristat that “[i]n 2007/2008, Aboriginal adults accounted for 22% of admissions to sentenced custody.”²³ Statistics Canada sets out the representation of Aboriginal offenders within each segment of admissions to correctional services: Aboriginal peoples comprise 20% of the remand population; 25% of provincial/territorial sentenced custody; 18% of federal custody; 21% of

²⁰ Canada, Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2009-2010*, (Ottawa: The Correctional Investigator Canada, 2010), online: Office of the Correctional Investigator <http://www.oci-bec.gc.ca/rpt/index-eng.aspx>, at 49. [OCI, *Annual Report 2009-2010*]

²¹ Statistics Canada, *2006 Census: Analysis Series: Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations*, online: Statistics Canada <http://www12.statcan.gc.ca/census-recensement/2006/as-sa/97-558/p2-eng.cfm>.

²² See e.g. Statistics Canada: Juristat, *Victimization and Offending Among the Aboriginal Population in Canada* by J-A. Brzozowski, A. Taylor-Butts, & S. Johnson (Ottawa: Minister of Industry, 2006), online: Statistics Canada http://www5.statcan.gc.ca/access_acces/alternative_alternatif.action?l=eng&loc=http://www.statcan.gc.ca/pub/85-002-x/85-002-x2006003-eng.pdf&t=Victimization%20and%20offending%20among%20the%20Aboriginal%20population%20in%20Canada, at 18. [Juristat: Brzozowski, Taylor-Butts & Johnson, *Victimization and Offending*]. See also NWAC, “What Their Stories Tell Us: Research Findings from the Sisters in Spirit Initiative” (2010), online: Native Women’s Association of Canada <http://www.nwac.ca/media/release/21-04-10>, at 15. [NWAC, “What Their Stories Tell Us”]

²³ Statistics Canada: Juristat, *The Incarceration of Aboriginal People in Adult Correctional Services* by S. Perreault (Ottawa: Minister of Industry, 2009), online: Statistics Canada <http://www76.statcan.gc.ca/stcsr/query.html?style=emp&qt=perreault&charset=iso-8859-1&qm=1&oq=&rq=1&la=en>, at 5. [Juristat, Perreault, *The Incarceration of Aboriginal People*]

conditional sentences; and 20% of probation orders.²⁴ These figures vary substantially by province and territory and may underrepresent the Aboriginal prison population.²⁵ Nonetheless, the overrepresentation of Aboriginal peoples in prison is “consistent across all provinces and territories.”²⁶

The situation for Aboriginal women is specifically problematic. In 2009, Perreault concluded that within the overall statistics of the overrepresentation of Aboriginal peoples in prison, Aboriginal women are even more disproportionately represented “among the female correctional population than are Aboriginal males within the male correctional population.”²⁷ Statistics Canada reports that “[i]n 2010/2011, 41% of females (and 25% of males) in sentenced custody were Aboriginal.”²⁸ The 2010/2011 report from the Office of the Correctional Investigator (OCI) states about federally sentenced populations that “34% of the incarcerated women offender population is Aboriginal,” and that “[m]ore than 65% of new female admissions are serving a sentence of less than three years.”²⁹

As in criminal justice system statistics, Aboriginal women are also overrepresented in terms of the levels of victimization they experience. Shannon Brennan reports that in 2009, “close to 67,000 or 13% of all Aboriginal women aged 15 and older living in the provinces

²⁴ Statistics Canada, *Aboriginal Statistics at a Glance* by A. Bisson *et al.* (2010), online: Statistics Canada <http://www.statcan.gc.ca/pub/89-645-x/2010001/c-g/c-g014-eng.htm>.

²⁵ Various within these figures omit data from some provinces/territories, including the omission of data from the Northwest Territories in the probation and conditional sentences categories and the exclusion of Nunavut from the remand section. [*Ibid.*] These omissions may be significant because of the number of Aboriginal peoples living (and criminalized) in the north (Aboriginal peoples account for 50% of the Northwest Territories population in 2006, and 85% of the Nunavut population). [*Ibid.*]

²⁶ Canada, Statistics Canada: Canadian Centre for Justice Statistics, *Adult Correctional Statistics in Canada, 2010/2011* by M. Dauvergne (Ottawa: Minister of Industry, 2012), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11715-eng.htm#a7>. [Statistics Canada, Dauvergne, *Adult Correctional Statistics*]

²⁷ Juristat, Perreault, “The Incarceration of Aboriginal People”, *supra* note 23 at 9. See also Juristat: Brzozowski, Taylor-Butts & Johnson, *Victimization and Offending*, *supra* note 22 at 13.

²⁸ Statistics Canada, Dauvergne, *Adult Correctional Statistics*, *supra* note 26.

²⁹ Canada, Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2010-2011*, (Ottawa: The Correctional Investigator Canada, 2011), online: Office of the Correctional Investigator <http://www.oci-bec.gc.ca/rpt/index-eng.aspx>. at 50. [OCI, *Annual Report 2010-2011*]

stated that they had been violently victimized...and were almost three times more likely than non-Aboriginal women to report having been a victim of a violent crime” (irrespective of whether the “violence occurred between strangers or acquaintances, or within a spousal relationship”).³⁰ Brennan writes that Aboriginal women also report having experienced proportionally more emotional or financial abuse within their spousal relationships than non-Aboriginal women.³¹ These figures likely underreport the true numbers.³² Patricia Monture-Angus writes that statistics about violence against Aboriginal women are necessarily deficient because “[f]ocusing on a moment in time or incidents of violence, abuse or racism, counting them – disguises the utter totality of the experience of violence in Aboriginal women’s lives.”³³ This bolsters the need to think about victimization vis-à-vis Aboriginal women in a broad, comprehensive way instead of limiting the parameters of what constitutes “victimization.”

The overrepresentation of Aboriginal peoples in the criminal justice (and particularly correctional) system must be understood as directly connected to processes of colonization put in motion by colonialism. Joyce Green defines colonialism as

both an historic and a continuing wrong. A term that encompasses economic and political practices, it refers to the appropriation of the sovereignty and resources of a nation or nations, to the economic and political benefit of the colonizer. The practices by which colonialism is normalized and legitimated include racism, which

³⁰ Juristat: Statistics Canada, *Violent Victimization of Aboriginal Women in the Canadian Provinces, 2009* by S. Brennan (Ottawa: Minister of Industry, 2011), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11439-eng.htm>. at 7. [Juristat: Brennan, *Violent Victimization of Aboriginal Women*]

³¹ *Ibid.* at 11.

³² Data from the Northwest Territories, Yukon, and Nunavut are excluded from these figures. For information and statistics about victimization in the territories, see Statistics Canada: Juristat, *Criminal Victimization in the Territories* by S. Perreault & T. Hotton Mahony (26 January 2012), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11614-eng.htm>. For information and statistics about victimization and offending in the territories, see Statistics Canada: Canadian Centre for Justice Statistics, *Victimization and Offending in Canada’s Territories* by S. de Léséleuc & J-A. Brzozowski (Ottawa: Minister of Industry, 2006), online: Statistics Canada <http://www.statcan.gc.ca/pub/85f0033m/85f0033m2006011-eng.htm>. at 12 for Aboriginal peoples.

³³ Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1996) at 171. [Monture-Angus, *Thunder in My Soul*]

is encoded in law, policy, education and the political and popular culture of the colonizer.³⁴

Linda Tuhiwai Smith explains colonialism in the context of imperialism, describing colonialism as a manifestation of imperialism.³⁵ Tuhiwai Smith outlines that the interrelated “imperialism and colonialism brought complete disorder to colonized peoples, disconnecting them from their histories, their landscapes, their languages, their social relations and their own ways of thinking, feeling and interacting with the world.”³⁶ She highlights how colonialism produced the “process of systemic fragmentation”³⁷ that is felt by Aboriginal peoples through the “fragmentation of lands and cultures,” as well as through having their “identities regulated by laws and our languages and customs removed from our lives.”³⁸ Tuhiwai Smith describes this systemic fragmentation as “something we are recovering from.”³⁹ Imperialism and colonialism are together systems of domination and control, which Tuhiwai Smith describes as “the specific formations through which the West came to ‘see’, to ‘name’ and to ‘know’ indigenous communities.”⁴⁰

Similarly, other writers understand colonialism as both an instrument of structural (institutional) oppression as well as cultural oppression, which often manifest in the same practices.⁴¹ For example, the residential school system in Canada functioned as both structural and cultural colonialism, affecting Aboriginal peoples “physically, emotionally, linguistically

³⁴ Joyce Green, “Balancing Strategies: Aboriginal Women and Constitutional Rights in Canada” in Joyce Audry Green ed., *Making Space for Indigenous Feminism* (Black Point, N.S.: Fernwood Pub., 2007) 140 at 143. [Green, “Balancing Strategies”]

³⁵ Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London: Zed Books Ltd, 2008) at 21. [Tuhiwai Smith]

³⁶ *Ibid.* at 28.

³⁷ *Ibid.*

³⁸ *Ibid.* at 97.

³⁹ *Ibid.*

⁴⁰ *Ibid.* at 60.

⁴¹ Denis C. Bracken, Lawrence Deane & Larry Morrissette, “Desistance and Social Marginalization: The Case of Canadian Aboriginal Offenders” (2009) 13(1) *Theoretical Criminology* 61 at 66. [Bracken, Deane & Morrissette]

and culturally,”⁴² and consisting of: “a three-part vision of education in the service of assimilation. It included, first, a justification for removing children from their communities and disrupting Aboriginal families; second, a precise pedagogy for re-socializing children in the schools; and third, schemes for integrating graduates into the non-Aboriginal world.”⁴³ Tuhiwai Smith writes that these institutions “were designed to destroy every last remnant of alternative ways of knowing and living, to obliterate collective identities and memories and to impose a new order,” and had the effect to “silence (for ever in some cases) or to suppress the ways of knowing, and the languages for knowing, of many different indigenous peoples.”⁴⁴ This coercive seeing, naming, and knowing continues to have innumerable devastating effects on Aboriginal communities in Canada, including the virtual extinction of many Aboriginal languages.⁴⁵

In Canada, colonialism refers to the “long history of assault from Euro-Canadian political, economic, religious, and educational institutions on the social and cultural integrity of Aboriginal communities.”⁴⁶ The Royal Commission on Aboriginal Peoples reports⁴⁷ that several governmental policies directly produced the reverberating effects of colonialism. These policies include the *Indian Act*⁴⁸ which established systematic discrimination between the legal rights of most Canadians and those of certain identified Aboriginal peoples (“status Indians”); the residential schools system which fragmented families, attempted to strip Aboriginal children of their cultures, and fostered widespread abuse and neglect of those children; and the relocation of

⁴² Tuhiwai Smith, *supra* note 35 at 69.

⁴³ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Vol. I: Looking Forward, Looking Back* (Ottawa: Royal Commission on Aboriginal Peoples, 1996), online: Indian and Northern Affairs Canada http://www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html. at http://www.collectionscanada.gc.ca/webarchives/20071211055641/http://www.ainc-inac.gc.ca/ch/rcap/sg/sg28_e.html#100 [RCAP, *Report: Looking Forward, Looking Back*]

⁴⁴ Tuhiwai Smith, *supra* note 35 at 69.

⁴⁵ *Ibid.* at 148.

⁴⁶ John O’Neil, “Editorial: Aboriginal Health Governance” (2004) 1(1) *Journal of Aboriginal Health* 4 at 4.

⁴⁷ RCAP, *Report: Looking Forward, Looking Back*, *supra* note 43.

⁴⁸ *Indian Act*, R.S.C. 1985, c. I-5. [*Indian Act*]

Aboriginal communities which further alienated and disempowered peoples whose collective sense of home, culture, and spirituality is intimately tied to the land.⁴⁹ These events have deeply entrenched intergenerational effects, both on⁵⁰ and off-reserve.⁵¹ Joyce Green writes that colonialism has had a gendered impact on Aboriginal women, who “have suffered from colonialism similarly to Aboriginal men, but also in gender-specific ways, including the loss of culture, traditional territories, identity and status, children and culturally respected gender roles.”⁵² The persisting, pervasive effects of governmental policies and laws pertaining to colonization and the assimilation of Aboriginal peoples have produced “the marginalization of Aboriginal peoples, which is reflected in high unemployment rates, low levels of education, low income and inadequate living conditions.”⁵³ The overrepresentation of Aboriginal peoples in Canadian prisons must also be added to this list, as “[o]verincarceration is one of the consequences of the enduring fragmentation and loss of identity that Aboriginals experience due to colonization.”⁵⁴

Overall, there is ample evidence that colonization has decimated Aboriginal communities, set in motion the conditions that render people vulnerable to criminalization and incarceration, and produced the overrepresentation of Aboriginal peoples in the system. I discuss colonization in greater depth in Chapter 2.

⁴⁹See generally RCAP, *Report: Looking Forward, Looking Back*, *supra* note 43.

⁵⁰For a thorough and troubling article about the poverty and lack of infrastructure and resources on Aboriginal reserves, see Kazi Stastna, “Shacks and slop pails: Infrastructure crisis on Native reserves” *CBC* (26 November 2011), online: [CBC http://www.cbc.ca/news/canada/story/2011/11/24/f-first-nations-infrastructure.html](http://www.cbc.ca/news/canada/story/2011/11/24/f-first-nations-infrastructure.html).

⁵¹For an excellent, complex exploration of living in Canadian cities by Aboriginal peoples themselves (including challenges they experience, and how they challenge stereotypes), see CBC Doc Zone: 8th Fire, “8th Fire: Indigenous in the City” *CBC*, online: [CBC http://www.cbc.ca/player/Shows/Shows/Doc+Zone/8th+Fire/Full+Episodes/ID/2186429161/](http://www.cbc.ca/player/Shows/Shows/Doc+Zone/8th+Fire/Full+Episodes/ID/2186429161/).

For essays on Aboriginal peoples reclaiming spaces, cultures, and collective identities in Canadian cities, see also Heather A. Howard & Craig Proulx, eds., *Aboriginal Peoples in Canadian Cities: Transformations and Continuities* (Waterloo: Wilfred Laurier University Press, 2011).

⁵²Green, “Balancing Strategies”, *supra* note 34 at 144.

⁵³Juristat: Brzozowski, Taylor-Butts & Johnson, *Victimization and Offending*, *supra* note 22 at 20 n 5.

⁵⁴Martel & Brassard, *supra* note 5 at 341.

1.3 Thesis pathways and research questions

In the remainder of this chapter, I explain the methodology I used to identify the sentencing decisions I analyze in Chapters 3 and 4 of my thesis. I also provide background information about legislative and judicial sentencing strategies to attempt to redress the overrepresentation of Aboriginal peoples in prison. I outline the 1996 codification of the purpose and principles of sentencing, which includes the introduction of the s. 718.2(e) requirement that judges consider alternatives to imprisonment for Aboriginal peoples, and one particularly meaningful alternative – the conditional sentence order. I then discuss *Gladue*, which provides context and direction for s. 718.2(e). The Supreme Court of Canada recently affirmed and clarified *Gladue* in *Ipeelee*, which I discuss next. Finally, I provide background about conditional sentence orders, highlighting continued amendments to this sanction that restrict its availability.

In Chapter 2, I discuss the feminist theory of the “victimization-criminalization continuum.” Broadly, the victimization-criminalization continuum suggests that women’s criminality should be understood as connected to their experiences of victimization, and that women’s responses to victimization can lead to criminalization.⁵⁵ “Violence and victimization play a significant role in women’s trajectories of offending,”⁵⁶ and Aboriginal women continue to be overrepresented in the criminal justice system as both victims and as offenders.⁵⁷ The relationship between victimization and overrepresentation suggests the suitability of victimization-criminalization continuum as a lens to consider the judgments sentencing Aboriginal women offenders. I suggest that the victimization-criminalization continuum should

⁵⁵ Gillian Balfour, “Re-Imagining a Feminist Criminology” (2006) 48(5) *Canadian Journal of Criminology and Criminal Justice* 735 at 742. [Balfour, “Re-Imagining a Feminist Criminology”]

⁵⁶ Smita Vir Tyagi, “Victimization, Adversity and Survival in the Lives of Women Offenders: Implications for Social Policy and Correctional Practice” *Canadian Woman Studies* 25:1,2 (Winter 2006) 133 at 134. [Tyagi]

⁵⁷ Elizabeth Adjin-Tettey, “Sentencing Aboriginal Offenders: Balancing Offenders’ Needs, the Interests of Victims and Society, and the Decolonization of Aboriginal Peoples” (2007) 19(1) 179 at 192. [Adjin-Tettey]

be framed in terms of how victimization marginalizes women and constrains the life options available to them, which may leave them vulnerable to criminalization. I situate these issues within the processes of colonization that ricochet through Aboriginal women's lives. Colonization and the victimization-criminalization continuum lay the groundwork for my focus on how sentencing judges understand and use information about Aboriginal women's histories of victimization within the *Gladue* analysis.

In Chapters 3 and 4 I analyze decisions in which Aboriginal women are sentenced for offences for which conditional sentences are or were previously an available sanction. I focus on decisions in which conditional sentences are available because this sanction offers the most meaningful alternative to imprisonment to assist in ameliorating the overincarceration of Aboriginal peoples. My overarching interest in Chapters 3 and 4 is whether and how Aboriginal women's histories of victimization and criminalization contribute to punitive sanctions that are judicially characterized as treatment-oriented sentences. The histories of victimization presented at the sentencing hearings of criminalized Aboriginal women are often quite extensive. This underscores the importance of thinking about how sentencing judges process these histories, and how they ultimately impact sentencing determinations. In Chapter 3, I explore how judicial understandings of victimization and criminalization are demonstrated in the reasoning, with particular attention to how these judicial discourses combine, or fail to combine, with judicial consideration of *Gladue* factors.

In Chapter 4 I move to a discussion of how judicial understandings of victimization, criminalization, and *Gladue* influence sentencing outcomes and evaluate judicial discourses surrounding those orders. I focus particularly on a tendency to translate discourses about victimization, criminalization, and *Gladue* into a judicial approach that characterizes both

conditional sentence orders and prison sentences as healing-oriented. I discuss problems associated with this tendency, including the ample evidence that imprisonment exacerbates preexisting difficulties (mental health and otherwise) and engenders new problems. While I focus on discourses about rehabilitation in Chapter 4, I strive to inform my analysis with the caution that

[f]raming the problem purely in terms of mental health issues...may deflect attention from the large-scale, and, to some extent, continuing assault on the identity and continuity of whole peoples. To these organized efforts to destroy Aboriginal cultures are added the corrosive effects of poverty and economic marginalization.⁵⁸

Finally, in Chapter 5 I conclude and comment upon the role of the sentencing judge in the broader project to ameliorate the overrepresentation of Aboriginal peoples in prison. I highlight the importance of this role, and suggest that *Ipeelee* encourages judicial creativity to respond to overrepresentation. Because sentencing judges act after systemic issues have already failed Aboriginal women, I also point to the need for concurrent real change at the community level.

1.4 Methodology: Finding criminalized Aboriginal women in the judgments

I am interested in how judges negotiate the task of sentencing Aboriginal women, particularly given ubiquitous histories of victimization and the s. 718.2(e) directive and *Gladue* requirement to consider the unique backgrounds of Aboriginal offenders. Within this context, I focus on cases in which conditional sentences were an available sentencing outcome because, as I explain below, they offer the most meaningful alternative to a sentence that would otherwise be a term of incarceration. The overrepresentation of Aboriginal women is accelerating⁵⁹ concurrent with steady incursions into the conditional sentencing regime. Just when the need for alternatives

⁵⁸ Laurence J. Kirmayer, Gregory M. Brass & Caroline L. Tait, “The Mental Health of Aboriginal Peoples: Transformations of Identity and Community” (2000) 45(7) *The Canadian Journal of Psychiatry* 607 at 609.

⁵⁹ OCI, *Annual Report 2009-2010*, *supra* note 20 at 49.

to incarceration for Aboriginal women intensifies, amendments to the *Criminal Code* have eroded the availability of those alternatives. As Lindy Tuhiwai Smith writes, “research is not an innocent or distant academic exercise but an activity that has something at stake and that occurs in a set of political and social conditions.”⁶⁰

This is the backdrop against which I have selected the cases for my study. To study the discourses in judicial reasoning for Chapters 3 and 4, I have consulted the largest body of cases I could reasonably amass – 91 decisions in total. Many provincial/territorial level sentencing judgments are not published,⁶¹ which limits the scope of research that may be conducted on sentencing practice.⁶² Due to my focus on judicial treatment of criminalized Aboriginal women’s histories of victimization and *Gladue* factors, I isolated sentencing decisions for Aboriginal women spanning between the date *Gladue* was decided (April 23, 1999) and those of my searches (May-July 2011). I have focused exclusively on sentencing decisions issued by courts of first instance. I will not discuss every case I consulted (although a complete list of cases appears in Appendix B⁶³), as I have selected the cases most appropriate to a discussion of victimization and criminalization issues.

These decisions include many in which conditional sentences feature prominently, although I also consider cases in which the only sanction discussed is incarceration in a federal institution. For example, in some judgments dealing with manslaughter, the judges did consider

⁶⁰ Tuhiwai Smith, *supra* note 35 at 5.

⁶¹ “[N]ot all trial and sentencing decisions are reported. For example, a judge will write a decision if he or she believes that the case is significant or will contribute in an important way to case law.” Balfour, “Falling Between the Cracks”, *supra* note 17 at 111.

⁶² Andrew Welsh & James R.P. Ogloff, “Progressive Reforms or Maintaining the Status Quo?: An Empirical Evaluation of the Judicial Consideration of Aboriginal Status in Sentencing Decisions” (2008) 50(4) *Canadian Journal of Criminology and Criminal Justice* 491 at 511. [Welsh & Ogloff]

⁶³ See Appendix B for a chart of all of the 91 decisions I reviewed. In the chart, I have indicated the case name, the most serious offence for which that Aboriginal woman was being sentenced, whether a conditional sentence order was sought by counsel or independently considered by the judge, what sanction was ordered in the end, and whether that offender would still be eligible for a conditional sentence order on the same facts after the most recent (2012) amendments to the conditional sentencing regime (I introduce these amendments below).

conditional sentences, whereas in other manslaughter cases with facts closer to murder, the judges exclusively considered longer terms of federal imprisonment – I included both types of cases. The utility of conditional sentences (as alternatives to imprisonment) to respond to *Gladue* is undercut with each amended restriction (2007,⁶⁴ and again in 2012,⁶⁵ which I discuss below). As such, it is useful to also examine cases where conditional sentences are dismissed (outright, or after consideration), to further explore judicial discourses about the victimization and criminalization of Aboriginal women. However, because of my focus on judicial discourses about the histories of victimization of criminalized Aboriginal women, it is helpful to foreground conditional sentences because of their restorative justice orientation, to examine how judges connect histories of victimization and *Gladue* factors with this healing-oriented sanction.

I performed extensive searches on CanLII,⁶⁶ and subsidiary although still thorough searches on Westlaw Canada⁶⁷ and each of the provincial/territorial courthouse websites that post judgments (I consulted all provincial/territorial courthouse websites; some separately post decisions whereas others point to CanLII). I performed my first and most substantial searches on CanLII.⁶⁸

On CanLII, I experimented with various search terms in an effort to maximize my returns, and with the greatest accuracy. I found that the most effective search terms (to supply the

⁶⁴ For the Parliamentary stages of Bill C-9, see *Canada Bill C-9, An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment)*, 1st Sess., 39th Parl., 2007, online: Parliament of Canada <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=2172003>. [Canada Bill C-9 Stages]

⁶⁵ For the stages of Bill C-10, see *Canada Bill C-10, An Act to Enact the Justice for Victims of Terrorism Act and to Amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts (Safe Streets and Communities Act)*, 1st Sess., 41st Parl., 2012, online: Parliament of Canada <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=5120829&View=6>. [Canada Bill C-10 Stages]

⁶⁶ CanLII is the online jurisprudence database supplied by the Canadian Legal Information Institute. Canadian Legal Information Institute, CanLII, online: CanLII <http://www.canlii.org/en/>.

⁶⁷ Westlaw Canada, online: Westlaw Canada <http://www.westlawcanada.com/>.

⁶⁸ I concentrated on CanLII because I support its free, open informational access distribution, I believe it to be comprehensive in its database, and its search function is easy to use.

most cases, and catching the most judgments sentencing Aboriginal women) were “718.2 AND woman OR female OR Ms.” (without quotation marks). The search term “718.2” was appropriate because it isolates sentencing decisions, and should catch Aboriginal offenders because it includes s. 718.2(e) (I omitted the “(e)” to catch the judgments that listed the secondary principles of sentencing in sequence such that s. 718.2 appeared separate from the reference to subsection “e”). I chose the attached search terms “AND woman OR female OR Ms.” because I needed to reduce the total returns in a way that maximized my potential to recover Aboriginal women offenders. I found these terms useful because within the CanLII searching options, this search should return all judgments (that reference s. 718.2) containing any of the words “woman” or “female” or “Ms.” – many judges at refer to the offenders as “Ms. [Last Name]” at some point in the judgment, and I hoped to turn up any remaining cases lacking this reference with “woman” or “female” (such as “she is a [X age] woman,” or “First Nations woman,” or “female offender”). I initially performed this search in two installments: once restricting the date range from 1999 (*Gladue*) to 2007 (when the 2007 s. 742.1 amendments entered into force), and a second search changing the date range to 2007 until 2011 (current to the year I performed the searches). In retrospect, performing these searches in two installments was unnecessary, although it would not have impacted the results returned (it simply meant I retrieved duplicates for 2007). Where appropriate, I also reference further s. 742.1 amendments that entered into force in 2012 after the writing of this thesis, but my methodological decisions preceded this second wave of amendments.

I read these judgments to identify which involved the sentencing of Aboriginal women offenders. This involved clicking on every returned item. For some cases, the process was fast, such as where it was clear from the offender’s name in the headnote that the offender was a

woman. For other cases, I read further, looking for such cues as pronoun use. Once I identified the cases sentencing women, I then ascertained which were Aboriginal women. To this end, I first searched within each judgment (using “control + F”) using the following terms in sequence: Aboriginal, Gladue, nation, band, and reserve. Often the retrieval of one of these terms would clarify that the offender was an Aboriginal woman, making the process straightforward. Sometimes none of these terms would produce any instances in the judgment – where these searches were unsuccessful, I read/skimmed the entire decision. It was important to conduct these closer readings where it was unclear whether the woman offender was Aboriginal because this directly speaks to the issue of judges failing to engage in a thoroughgoing *Gladue* analysis. For the more elusive cases, I tried to be attuned to the various cues that might be of assistance. For example, some cases nowhere clearly stated that the offender was Aboriginal, but did make references that on closer read caused me to suspect she was (such as references to her relationship with community Elders, or referencing the First Nations community in which she was raised). Throughout this process, I eliminated any appeals (to retain my concentration on courts of first instance) and decisions sentencing youth.

After these initial, systematic CanLII searches, I performed supplementary CanLII searches, in the hope of flushing out any remaining judgments sentencing Aboriginal women. I chose more restrictive search terms (to reduce the results returned), and my search terms were the following (within dates restricted between 1999 and 2011): “aboriginal woman” (with quotes); “first nations woman” (with quotes); EXACT(woman of Aboriginal descent); sentenc AND she AND EXACT(band) NOT husband; 742.1 AND aboriginal OR “first nation” OR EXACT(nation) OR EXACT(band); 742.1 “aboriginal woman”; 718.2(e) aboriginal AND she. The rest of the process mirrored the above explanation.

To be as thorough as possible, I performed further searches on other databases. I followed largely the same processes as described above in these further searches, although using different search terms. To bolster my CanLII searches using the courthouse websites, I visited each provincial and territorial courthouse website to search the judgments posted (although I only actively searched a few databases, because often they just referred to CanLII). For the courthouse searches I did perform, I used only the search term “718.2” (without quotes) and restricted the date range from 1999 to 2011. For results returned, I used the same process as described above to identify judgments sentencing Aboriginal women.

Finally, I turned to Westlaw, a commercial database. On Westlaw, I was less ambitious in my ambit (because I had already reached diminishing returns), which meant that I used more restrictive searches to limit results. I performed searches using the following search terms: aboriginal “first nation” & 718.2(e) & 742.1 (although I abandoned this search because it returned many appealed cases); and aboriginal "nation" "first nation" & 718.2(e) & 742.1 (this time using several searches each limited to the following levels of court: provincial; territorial; superior; queen’s bench; supreme); aboriginal "nation" "first nation" & 718.2(e) & 742.1 (limited to the territorial level). Then I performed two searches using the “find in headnote” field, using these search terms: aboriginal woman, and first nation woman. I discerned which judgments sentenced Aboriginal women using the same process as in my first CanLII searches.

Across all databases and all searches, in total I canvassed 5639 cases (including the inevitable duplicates returned) to ascertain those sentencing an Aboriginal woman. After determining which cases conform to these parameters (and eliminating duplicates by consolidating lists), I developed a body of case law amounting to a total of 91 decisions⁶⁹ spanning from the date *Gladue* was decided (April 23, 1999), through the date the 2007

⁶⁹ See chart at Appendix B.

conditional sentencing amendments entered into force (December 1, 2007), and until July 2011 (the outer end of the May-July 2011 period I conducted the searches). After isolating the decisions sentencing Aboriginal women, I further parsed the decisions, endeavouring to select those in which conditional sentences were actively discussed among the sentencing options or may have been available given the offence in question. Regarding the latter, as explained above, I included cases in which conditional sentences were not considered (but could have been on different facts). In addition, I did not want to exclusively isolate judgments where conditional sentences were actively discussed because I wanted to include cases from which the 2007 amendments would remove that alternative where it may otherwise have been available before the amendments, as well as cases that perhaps (per superficially explored *Gladue* factors) should have considered conditional sentences. The cases I have selected provide the backbone of the discussion in Chapters 3 and 4 below.

To analyze these cases, I used a qualitative approach. First, I read the cases in depth, making note of emergent themes. I coded for these themes by using consistent shorthand to denote repeated instances of related issues. Generally, the issues I coded for included judicial comments and discourses about the following: gendered violence; women's histories of victimization and how judges understand their pathways into criminalization (including judicial usage of pre-sentence reports (PSRs)); *Gladue* analyses; community issues (such as available resources within, and community support or resistance to community sentences); risk factors (including past compliance/non-compliance with court orders); the 2007 conditional sentencing amendments; and framing sentences (both prison and conditional sentences) as healing-oriented. I targeted my subsequent readings and review of the cases toward these identified themes.

1.5 Aboriginal women along the victimization-criminalization continuum

Aboriginal women experiencing victimization are at heightened vulnerability to criminalization because their marginalization already narrows their options. Justice Arbour has identified systemic limitations experienced by criminalized Aboriginal women, who generally “enter the prison system at a younger age, have lower levels of education and employment, deal with greater problems of substance abuse which in turn plays a greater role in their offending, and experience higher incidences of physical and sexual abuse.”⁷⁰ It is useful to think about the sentencing of Aboriginal women with reference to the victimization-criminalization continuum because of the disproportionately extensive histories of victimization many Aboriginal women offenders experience. Additionally, because these histories must be presented to courts sentencing Aboriginal offenders in the form of *Gladue* factors, it becomes important to understand the interplay between how judges discuss and use Aboriginal women offenders’ histories of victimization and their *Gladue* factors (in terms of whether/how the goals of *Gladue* are furthered). I draw on the victimization-criminalization continuum in this context, with a view to understanding how sentencing judges respond to Aboriginal women offenders’ backgrounds and needs when ordering sanctions.

Due to the interwoven issues comprising the victimization-criminalization continuum (about which I elaborate in Chapter 2), I use the term “victimization” expansively throughout this thesis. As I use it, “victimization” often describes experiences of violence, but also encompasses other difficulties which frequently arise through women’s modes of dealing with abuse (whether through escapism, numbing, or attempting to regain control), such as (but not

⁷⁰ Commission of Inquiry into Certain Events at the Prison for Women in Kingston, *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Commissioner: Arbour J.) (Ottawa: Public Works and Government Services Canada, 1996), online: Justice Behind the Walls http://www.justicebehindthewalls.net/resources/arbours_report/arbours_rpt.htm, at 220. [Arbour Inquiry Report]

limited to) through substance abuse. I have chosen to adopt this wide-ranging approach to the term victimization because I believe these issues are so interlaced they are impossible to disentangle, and it would be artificial to consider them in isolation. Further, it would not reflect the judicial reasoning which takes the broader view.

It is particularly necessary to employ this elastic definition of victimization for Aboriginal women offenders. Monture-Angus explains that as a Mohawk woman “[m]y experience of violence transcends my gender and also includes my experience of the state,”⁷¹ situating Aboriginal women’s experiences of violence within colonization. She writes “[t]he general definition of violence against women” (male violence) “is too narrow to capture all of the experiences of violence that Aboriginal women face.”⁷² Monture-Angus considers prevailing definitions of violence against women “relied on by dominant institutions, structures and groups” (including feminist bodies) as themselves “colonial” because such definitions omit the larger picture of colonization.⁷³ She explains that these dominant definitions preclude Aboriginal women’s own representations of the violence they experience.⁷⁴ In an effort to accommodate differential (but interlocking) impacts of colonization (including Aboriginal women’s reactions to interpersonal violence and the violence of colonization), I expand “victimization” beyond direct experiences of violence when I discuss judicial discourses in Chapters 3 and 4. For example, substance abuse often features in the cases I examine in Chapters 3 and 4, consistent with the research that “[s]ubstance abuse has been linked to women’s experiences of

⁷¹ Monture-Angus, *Thunder in My Soul*, *supra* note 33 at 171.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

victimization and violence from abusive partners.”⁷⁵ Connected to colonization, the issue of substance abuse is of particular relevance to criminalized Aboriginal women.⁷⁶

1.6 Codifying the specificity of Aboriginal peoples at sentencing

Prior to 1996, the *Criminal Code of Canada*⁷⁷ (*Code*) specified sentencing maxima and options, but the principles of sentencing were largely judge-made. Parliament radically changed the sentencing regime with amendments to the *Code* that came into force in 1996.⁷⁸ These amendments constitute “the first codification and significant reform of sentencing principles in the history of Canadian criminal law.”⁷⁹ Aspects of these amendments signal Parliamentary intention to reduce reliance on imprisonment for all offenders. Section 718.2(d), provides that “an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances.”⁸⁰ Section 718.2(e) directs that sentencing judges must consider “all available sanctions other than imprisonment that are reasonable in the circumstances,” “for all offenders,” and “with particular attention to the circumstances of aboriginal offenders.”⁸¹ The conditional sentence order was introduced by section 742.1, which gives meaning to the requirement that judges look to alternatives for imprisonment by allowing judges to order offenders to serve sentences that would otherwise be prison terms in the community (where appropriate). I discuss conditional sentences below. First, I turn to s. 718.2(e), which is central to my thesis because it explicitly requires judges to consider the circumstances of Aboriginal offenders.

⁷⁵ Tyagi, *supra* note 56 at 134.

⁷⁶ See Colleen Anne Dell & Roger Boe, “Research Reports: An Examination of Aboriginal and Caucasian Women Offender Risk and Needs Factors” (December 2000), online: Research Branch, Correctional Service of Canada <http://www.csc-scc.gc.ca/text/pblct/forum/e132/e132ind-eng.shtml>. at 10. See also Juristat: Brzozowski, Taylor-Butts & Johnson, *Victimization and Offending*, *supra* note 22 at 13.

⁷⁷ *Code*, *supra* note 14.

⁷⁸ Allan Manson *et al.*, *Sentencing and Penal Policy in Canada: Cases, Materials, and Commentary* 2d ed. (Toronto: Emond Montgomery Publications, 2008) at 481. [Manson *et al.*]

⁷⁹ Gladue, *supra* note 15 at para. 39.

⁸⁰ *Code*, *supra* note 14 at s. 718.2(d).

⁸¹ *Ibid.* at s. 718.2(e).

1.7 The purpose and principles of sentencing: An overview

The purpose and principles of sentencing are set out in s. 718 of the *Code*. The *Code* sets out the main purpose of sentencing: “to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions.”⁸² Section 718 lists that these sanctions must incorporate one or multiple of these itemized objectives: (a) denunciation; (b) deterrence (general and specific); (c) separation from society; (d) rehabilitation; (e) reparations for harm (to the victim(s) or larger community); (f) responsibility for the harm done.⁸³ Denunciation signifies societal “condemnation of the offender’s conduct,”⁸⁴ and often accompanies deterrence (the need to discourage future such conduct) in judicial reasoning. While imprisonment is commonly associated with the promotion of deterrence (both in the public consciousness and the courts), the Supreme Court of Canada has held that “[t]he empirical evidence suggests that the deterrent effect of incarceration is uncertain,” further suggesting that conditional sentences can operate to deter with punitive sanctions and public awareness.⁸⁵

Rehabilitation is considered more restorative justice-oriented for its basis in and prioritization of healing and personal/behavioural change and emphasis on reintegration into society.⁸⁶ This is often in tension with denunciation and deterrence because “[r]estorative sentencing goals do not usually correlate with the use of prison as a sanction.”⁸⁷ Any friction among the purposes of sentencing may be written into the sentencing process, reflecting that

[s]entencing, like the criminal trial process itself, has often been understood as a conflict between the interests of the state (as expressed through the aims of

⁸² *Ibid.* at s. 718.

⁸³ *Ibid.* at ss. 718(a)-(f).

⁸⁴ *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5 at para. 102. [*Proulx*]

⁸⁵ *Ibid.* at para. 107.

⁸⁶ *Gladue*, *supra* note 15 at para. 43.

⁸⁷ *Ibid.*

separation, deterrence, and denunciation) and the interests of the individual offender (as expressed through the aim of rehabilitation).⁸⁸

However, the interests of the state and those of the individual should not be understood as wholly polarized. The purposes of denunciation, deterrence, and rehabilitation should be interpreted as interconnected processes, because most prisoners will eventually return to the community. This understanding is consistent with the restorative justice paradigm.⁸⁹ “Canada has never given primacy to any one specific sentencing purpose,” affording judges the discretion and responsibility to determine which should be foregrounded depending on each case.⁹⁰ This is consistent with the inherently individualized process of sentencing.⁹¹ While some decisions within my research involve factors that militate toward a sentencing response guided by denunciation and deterrence over a more rehabilitative approach, other judgments emphasize the rehabilitation of the offender as the overriding concern. Paradoxically and problematically, the latter sometimes still produces a punitive sanction, albeit under the guise of “healing.” I use the terms “healing” and “rehabilitation” interchangeably, as seems consistent with the reading and usage of both terms in *Gladue*.⁹²

Section 718.1 requires sentences to be proportionate to both the seriousness of the offence and the degree of responsibility of the offender.⁹³ Proportionality is the fundamental principle of sentencing, and is always engaged in sentencing (however judges resolve the remaining purpose and principles of sentencing).⁹⁴ In *R. v. Nasogaluak*,⁹⁵ the SCC held that

⁸⁸ *Ibid.* at para. 42.

⁸⁹ Howard Zehr, *The Little Book of Restorative Justice* (Intercourse, PA: Good Books, 2002) at 59. [Zehr]

⁹⁰ Anthony N. Doob & Cheryl Marie Webster, “Countering Punitiveness: Understanding Stability in Canada’s Imprisonment Rate” (2006) 40(2) *Law & Society Review* 325 at 338.

⁹¹ *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 at para. 92. [*M.(C.A.)*]

⁹² See for example *Gladue*, *supra* note 15 at para. 43. Here a substantial component of restorative justice is described as the attempt “to rehabilitate or heal the offender.”

⁹³ *Code*, *supra* note 14 at s. 718.1.

⁹⁴ *Ipeelee*, *supra* note 16 at para. 37. See also *R. v. Arcand*, 2010 ABCA 363 at paras. 47-9. [*Arcand*]

proportionality predates its codification in the 1996 sentencing reforms, rooted in a “long history as a guiding principle in sentencing.”⁹⁶ In an Alberta Court of Appeal decision thoroughly detailing the sentencing regime in Canada, Fraser C.J.A., Côté and Watson JJ.A. write for the majority that Parliament positioned proportionality as the required, overarching principle to propel the determination of sentence because it provides a “common standard” “to guide the exercise of sentencing discretion.”⁹⁷ This prevents the “arbitrary application of state power,” causing the “blunt tool of punishment” to be “valid” and “morally acceptable.”⁹⁸

The “secondary principles”⁹⁹ in s. 718.2 combine to bolster the proportionality principle and form part of the proportionality analysis.¹⁰⁰ Section 718.2(b) is the parity principle, which implicates the degree of moral blameworthiness of the offender and is necessary to the proportionality analysis.¹⁰¹ It directs that sentences should be similar for similar offenders and similar offence circumstances.¹⁰² Sections 718.2(d) and (e) should be read together and jointly constitute the restraint principle.¹⁰³ Section 718.2(d) states that less restrictive sanctions should be ordered where appropriate, and s. 718.2(e) specifies that, as above, imprisonment should be ordered as a last resort where reasonable, and particularly for Aboriginal offenders.¹⁰⁴ Both of these restraint and restorative justice-oriented principles are inherent in and consistent with the proportionality principle.¹⁰⁵ The Justices for the majority in *Arcand* hold that “[t]he object of the sentencing exercise is to draw on all sentencing principles in determining a just and appropriate

⁹⁵ *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206.

⁹⁶ *Ibid.* at para. 41.

⁹⁷ *Arcand*, *supra* note 94 at para. 53.

⁹⁸ *Ibid.* at para. 54.

⁹⁹ *Ibid.* at para. 56.

¹⁰⁰ *Ibid.* at para. 61.

¹⁰¹ *Ibid.*

¹⁰² *Code*, *supra* note 14 at s. 718.2(b).

¹⁰³ *Arcand*, *supra* note 94 at para. 62.

¹⁰⁴ *Code*, *supra* note 14 at ss. 718.2(d), (e).

¹⁰⁵ *Arcand*, *supra* note 94 at para. 62.

sentence which reflects the gravity of the offence and the degree of moral blameworthiness of the offender.”¹⁰⁶ These principles operate within and guide s. 718.3, which ensures judicial discretion on sentencing within any restrictions on available sanctions for the specific offence.¹⁰⁷

The purpose and principles of sentencing operate in conjunction with one another in an “integrated framework.”¹⁰⁸ The objectives of sentencing listed within the purpose of sentencing must conform to the proportionality principle.¹⁰⁹ Sentencing judges determine how to weigh the various objectives in relation to the gravity of the offence and the offender’s degree of responsibility (proportionality).¹¹⁰ Effectively, the objectives and secondary principles of sentencing inform sentencing determinations, but in service of the proportionality principle.¹¹¹

Of the various sentencing principles, s. 718.2(e) is critical to my thesis. I will also periodically refer to how aggravating and mitigating factors are presented in the judgments. Judges must adjust sentences by accounting for aggravating or mitigating circumstances (further sentencing principles) arising from the offence or specific to the offender per s. 718.2(a) of the *Code*.¹¹² While various aggravating factors are (non-exhaustively) listed in the *Code*, there are no itemized mitigating factors.¹¹³ Instead, mitigating factors (and additional aggravating factors) develop through judge-made law. *R. v. Wells*¹¹⁴ states that *Gladue* factors “are mitigating in nature,”¹¹⁵ and this formulation is affirmed in *Ipeelee*.¹¹⁶ *Gladue* explains that “[a]ggravating

¹⁰⁶ *Ibid.* at para. 63.

¹⁰⁷ *Code, supra* note 14 at s. 718.3.

¹⁰⁸ *Arcand, supra* note 94 at para. 56.

¹⁰⁹ *Ibid.* at para. 64.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.* at para. 65.

¹¹² *Code, supra* note 14 at s. 718.2(a).

¹¹³ *Manson et al., supra* note 78 at 117. Allan Manson identifies various factors that frequently operate to mitigate, including being a first-time offender, pleading guilty and demonstrating remorse, and engaging in rehabilitative efforts after the offence. *Manson et al., supra* note 78 at 120-30.

¹¹⁴ *R. v. Wells*, [2000] 1 S.C.R. 207.

¹¹⁵ *Ibid.* at para. 38.

¹¹⁶ See *Ipeelee, supra* note 16 at para. 73.

circumstances will obviously increase the need for denunciation and deterrence,”¹¹⁷ which then has potential implications for judicial decisions about the severity of custodial sanctions ordered in terms of duration and the form of sanction.

While various factors are stipulated as aggravating in s. 718.2, the section is expansive and affords much judicial discretion.¹¹⁸ None of these factors are gender-specific, although they may have gendered effects – in 11 judgments within my research in which the offence involves violence against the Aboriginal woman’s partner, judges find this circumstance to be aggravating as required by s. 718.2(a)(ii),¹¹⁹ despite extensive histories of intimate violence that the women experienced both within that relationship and elsewhere.¹²⁰ It must also be remembered that much of Aboriginal women’s violence occurs in this domestic context,¹²¹ so they may be disproportionately subjected to this aggravating factor. As the *Code* deems that partner violence “shall”¹²² be aggravating, this subsection is prescriptive and not permissive, which may create harsher penalties for Aboriginal women in this circumstance if this contributes to the perceived need for greater denunciation and deterrence at the expense of mitigation through *Gladue* factors.

The specific issue of whether partner violence should be mandated as aggravating by the *Code* in cases where women offenders become criminalized for their own violence after

¹¹⁷ *Gladue*, *supra* note 15 at para. 115.

¹¹⁸ *Code*, *supra* note 14 at s. 718.2.

¹¹⁹ *Ibid.* at s. 718.2(a)(ii). [s. 718.2(a)(ii)]

¹²⁰ Offending within a spousal relationship is found to be aggravating in the following judgments from my research: *R. v. Gilpin*, 2002 BCSC 1876 at para. 11.; *R. v. Fisher*, 2004 CanLII 10497 (ON SC)., [2004] O.T.C. 123, 60 W.C.B. (2d) 404 at para. 18.; *R. v. Asp (R. v. C.M.A.)*, 2005 YKSC 58 at para. 45.; *R. v. Kahypeasewat (R. v. V.K.)*, 2006 SKPC 79 at para. 72.; *R. v. Heavenfire*, 2006 ABPC 228 at para. 19.; *R. v. Diamond*, 2006 QCCQ 2552 at para. 10.; *R. v. S.C.M.*, 2008 ABPC 214 at para. 12.; *R. v. Neshinapaise*, 2008 CarswellOnt 3725 (ONCJ) (WLeC), at para. 18.; *R. v. Petawabano*, 2008 QCCQ 6141 at para. 31.; *R. v. Small Eyes and Hunt*, 2008 ABPC 300 at para. 25.; *R. v. Tippeneskum*, 2011 ONCJ 219 at para. 21.

¹²¹ Joycelyn M. Pollock and Sareta M. Davis write that “[i]t is clear that violence by women is very likely to take place in the domestic sphere,” [Joycelyn M. Pollock & Sareta M. Davis, “The Continuing Myth of the Violent Female Offender” (2005) 30(1) *Criminal Justice Review* 5 at 22. [Pollock & Davis, “The Continuing Myth”]] and Aboriginal women are at a higher risk of violent victimization than non-Aboriginal women, including the most severe forms of intimate violence. [Juristat: Brzozowski, Taylor-Butts & Johnson, *Victimization and Offending*, *supra* note 22 at 5-6.].

¹²² s. 718.2(a)(ii).

surviving extensive violence within that relationship (or within similar relationships) exceeds the scope of my thesis but would be a productive topic for future research. For now, it is worth noting that the violence committed by Aboriginal women often arises against a distinct background of victimization,¹²³ demanding a contextual understanding of both ends of this spectrum of abuse to enable sensitive sentencing legislation and judicial reasoning.

1.8 *R. v. Gladue*: Fleshing out section 718.2(e)

In its 1999 decision *R. v. Gladue*,¹²⁴ the Supreme Court of Canada (SCC) gave direction to judges sentencing Aboriginal offenders in the post-1996 regime by discussing the context of and Parliamentary intention behind s. 718.2(e) and explaining how judges should engage in the analysis required by this provision. Delivered by Justices Cory and Iacobucci in a unanimous judgment, *Gladue* explains that s. 718.2(e) was intended in part to ameliorate the overrepresentation of Aboriginal peoples in the criminal justice system, and particularly its prisons. Cory and Iacobucci JJ. decried this overrepresentation as a national “crisis.”¹²⁵ Broadly, they held that the Parliamentary intention motivating s. 718.2(e) was primarily to reduce overreliance on incarceration as a sanction, expand usage of restorative justice principles to guide sentencing, and to promote consideration of how to better design sentences that will be more appropriate for and meaningful to Aboriginal offenders.¹²⁶

Cory and Iacobucci JJ. held that while the 1996 sentencing amendments signify a general amplification of restorative justice principles, restorative justice is particularly critical in the sentencing of Aboriginal offenders because “most traditional aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice. This tradition is

¹²³ See generally Juristat: Brennan, *Violent Victimization of Aboriginal Women*, *supra* note 30 at 7.

¹²⁴ *Gladue*, *supra* note 15.

¹²⁵ *Ibid.* at para. 64.

¹²⁶ *Ibid.* at para. 48.

extremely important to the analysis under s. 718.2(e).”¹²⁷ Rooted in “a model of healing rather than of punishing,”¹²⁸ restorative justice presents a different paradigm for sentencing.¹²⁹ This paradigm implicates different goals because it is relationships-oriented, expanding the view of justice processes to include interconnections between the offender, the victim(s), and the broader community, and striving to balance and respond to each parties’ needs through the sanction ordered.¹³⁰ Often sanctions consistent with restorative justice are community-based.¹³¹ Cory and Iacobucci JJ. explain that community-based sanctions are important for Aboriginal offenders because they “coincide with the aboriginal concept of sentencing and the needs of aboriginal people and communities.”¹³²

Gladue directs sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case.”¹³³ Cory and Iacobucci JJ. explain that this different mode of sentencing arises from a necessary change in the “method of analysis”¹³⁴ because s. 718.2(e) “suggests that there is something different about aboriginal offenders which may specifically make imprisonment a less

¹²⁷ *Ibid.* at para. 70.

¹²⁸ Tuhiwai Smith, *supra* note 35 at 155.

¹²⁹ Whether the period following the 1996 sentencing amendments constituted a wholesale “paradigm shift from punitive to restorative justice” has been disputed, although the 1996 amendments certainly substantially amplify the role of restorative justice in sentencing. [Kent Roach, “Changing Punishment at the Turn of the Century: Restorative Justice on the Rise” (2000) 42(3) Canadian Journal of Criminology 249 at 251-2. [Roach]]

¹³⁰ *Gladue*, *supra* note 15 at para. 71. This process of attempting to repair the harmony crime ruptures engages consideration of the factors contributing to the offence and the harms experienced by the victim(s), requiring the offender to demonstrate a sense of responsibility [Zehr, *supra* note 89 at 59.] and to make reparations to the victim(s) and the community [Proulx, *supra* note 84 at para. 18.].

¹³¹ *Gladue*, *supra* note 15 at para. 43. Restorative justice inspired community-based sentences will not always be appropriate, such as where Aboriginal women from small centres are complainants in intimate violence cases and may feel unsafe or revictimized if their attackers serve their sentences in the community. See e.g. Angela Cameron, “Stopping the Violence: Canadian Feminist Debates on Restorative Justice and Intimate Violence” (2006) 10(1) Theoretical Criminology 49. See also Emma Cunliffe & Angela Cameron, “Writing the Circle: Judicially Convened Sentencing Circles and the Textual Organization of Criminal Justice” (2007) 19(1) Canadian Journal of Women and the Law 1.

¹³² *Gladue*, *supra* note 15 at para. 74.

¹³³ *Ibid.* at para. 33.

¹³⁴ *Ibid.*

appropriate or less useful sanction.”¹³⁵ *Gladue* finds that Aboriginal peoples may be “more adversely affected by incarceration and less likely to be ‘rehabilitated’ thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.”¹³⁶ As a result, judges must be apprised of the options available in or outside of the offender’s community that could function as alternatives to imprisonment.¹³⁷

This observation about the inappropriateness of incarceration for Aboriginal peoples is borne out by research which finds that Aboriginal peoples are assessed as having higher needs in prison,¹³⁸ which translates to their being assessed as presenting higher risk (to the institution, and/or of reoffence), often grounding a harsher experience of imprisonment due to institutional decisions such as isolation through segregation or being classified at a higher level of security¹³⁹ (which imports stricter controls and supervision).¹⁴⁰ Cory and Iacobucci JJ. held that in the judicial search for alternatives to imprisonment for Aboriginal peoples,

even if community support is not available, every effort should be made in appropriate circumstances to find a sensitive and helpful alternative. For all purposes, the term “community” must be defined broadly so as to include any network of support and interaction that might be available in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks

¹³⁵ *Ibid.* at para. 37.

¹³⁶ *Ibid.* at para. 68.

¹³⁷ *Ibid.* at para. 84.

¹³⁸ See for example Juristat, Perreault, *The Incarceration of Aboriginal People*, *supra* note 23 at 15-6.

¹³⁹ Mimicking the overrepresentation of Aboriginal peoples in the system, Aboriginal peoples are disproportionately designated within the maximum-security classification level, [Patricia Monture-Angus, “Women and Risk: Aboriginal Women, Colonialism, and Correctional Practice” *Canadian Woman Studies* 19:1,2 (Spring/Summer 1999) 24 at 26. [Monture-Angus, “Women and Risk”]] “because of the violence they experience outside the prison walls, and because of their resistance strategies inside them.” [Allison Campbell, “Federally Sentenced Women and Security Classification” (July 2006), online: Prison Justice http://www.prisonjustice.ca/starkravenarticles/women_max_security_0706.html. at 5.]

¹⁴⁰ For a thorough discussion of how assessed needs are transmuted into indicators of risk, see generally Paula Maurutto & Kelly Hannah-Moffat, “Assembling Risk and the Restructuring of Penal Control” (2006) 46 *British Journal of Criminology* 438. [Maurutto & Hannah-Moffat, “Assembling Risk”]

any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.¹⁴¹

Gladue directs that the s. 718.2(e) analysis involves both consideration of systemic and background factors related to each Aboriginal offender coming before the courts, and how the offender's Aboriginal heritage or connection should influence the form of sanction.¹⁴² Specifically, judges must determine whether the sanction would be meaningful (in terms of denunciation and deterrence) to the offender's community, often implicating restorative sentencing principles.¹⁴³ Recognizing that Aboriginal communities and their customs, traditions, and beliefs are not monolithic but vary across nations, *Gladue* finds that sentencing concepts are often inappropriate to Aboriginal offenders.¹⁴⁴

Justices Cory and Iacobucci direct that it is particularly important for judges to structure community-based sentences for less serious or non-violent offences.¹⁴⁵ For more serious or violent offences, sentences will be more similar in type and duration for Aboriginal and non-Aboriginal offenders, as is more likely to be consistent with both Aboriginal and non-Aboriginal conceptions of sentencing.¹⁴⁶ While "[t]here is no single test that a judge can apply,"¹⁴⁷ much as all sentencing must be individualized, the sentencing of Aboriginal peoples engages a number of questions specific to each case:

For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the *Criminal Code*? What understanding of criminal sanctions is held by the community? What is the nature of the relationship between the offender and his or her community? What combination of systemic or background factors contributed to this particular offender coming before the courts for this particular offence? How has the offender who is being sentenced been affected by, for example, substance abuse in

¹⁴¹ *Gladue*, *supra* note 15 at para. 92.

¹⁴² *Ibid.* at para. 66.

¹⁴³ *Ibid.* at para. 69.

¹⁴⁴ *Ibid.* at para. 73.

¹⁴⁵ *Ibid.* at para. 74.

¹⁴⁶ *Ibid.* at paras. 78-9.

¹⁴⁷ *Ibid.* at para. 81.

the community, or poverty, or overt racism, or family or community breakdown? Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing? What sentencing options present themselves in these circumstances?¹⁴⁸

To answer these questions, judges must take judicial notice of the relevant systemic or background factors involved, but also may require evidence about the offender's Aboriginal circumstances, at minimum through the pre-sentence report (PSR).¹⁴⁹ Ultimately, Cory and Iacobucci JJ. characterize the duty of a judge sentencing an Aboriginal offender as being engaged in a process of substantive equality: “the fundamental purpose of s. 718.2(e) is to treat aboriginal offenders fairly by taking into account their difference.”¹⁵⁰

1.8.1 *R. v. Ipeelee*: Underscoring and bolstering *Gladue*

The SCC recently delivered a judgment strongly affirming *Gladue* and adding some clarity. Decided March 23, 2012, *R. v. Ipeelee*¹⁵¹ addresses two appeals concerning male Aboriginal offenders designated long-term offenders involving breaches of their long-term supervision orders. Writing for the majority (Rothstein J. dissented in part), LeBel J. notes that “the overrepresentation and alienation of Aboriginal peoples in the criminal justice system has only worsened”¹⁵² since the 1996 amendments, and references that “[c]ourts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society.”¹⁵³ LeBel J. reiterates *Gladue*'s directive to judges, underscoring that to provide the necessary context to sentence,

¹⁴⁸ *Ibid.* at para. 80.

¹⁴⁹ *Ibid.* at paras. 83-4.

¹⁵⁰ *Ibid.* at para. 87.

¹⁵¹ *Ipeelee*, *supra* note 16.

¹⁵² *Ibid.* at para. 62.

¹⁵³ *Ibid.*

courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.¹⁵⁴

More rigorous deployment of judicial notice may also assist with one of the two problems *Ipeelee* identifies with the jurisprudence post-*Gladue* that have “thwart[ed] what was originally envisioned by *Gladue*”¹⁵⁵: “some cases erroneously suggest that an offender must establish a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge.”¹⁵⁶ This incorrect interpretation of *Gladue* functions as an “evidentiary burden,”¹⁵⁷ which goes much farther than the *Gladue* directive to “give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts.”¹⁵⁸ This practice is inappropriate because a causal link will be prohibitively difficult for Aboriginal offenders to disentangle and establish given the complexities and interrelationships within the continuing effects of colonization.¹⁵⁹ LeBel J. adds that it does not even make sense to demand a causal connection because *Gladue* factors “do not operate as an excuse or justification for the criminal conduct,” but instead contextualize the judge’s reasoning.¹⁶⁰

The second problem *Ipeelee* discerns in the post-*Gladue* jurisprudence is the “irregular and uncertain application of the *Gladue* principles to sentencing decisions for serious or violent offences.”¹⁶¹ LeBel J. explains *Gladue*’s reference that sentences will be more similar for Aboriginal and non-Aboriginal offenders the more serious or violent the offence has led to

¹⁵⁴ *Ibid.* at para. 60.

¹⁵⁵ *Ibid.* at para. 80.

¹⁵⁶ *Ibid.* at para. 81.

¹⁵⁷ *Ibid.* at para. 82.

¹⁵⁸ *Gladue*, *supra* note 15 at para. 69.

¹⁵⁹ *Ipeelee*, *supra* note 16 at para. 83.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.* at para. 84.

“unwarranted emphasis” on this proposition, prompting “[n]umerous courts” to “erroneously [interpret] this generalization as an indication that the *Gladue* principles do not apply to serious offences”¹⁶² This is problematic because what constitutes a “serious” offence is not defined in the *Code*,¹⁶³ and it undermines the overriding *Gladue* direction that judges must consider the background and circumstances of each Aboriginal offender.¹⁶⁴ Judges have a *duty* to apply s. 718.2(e),¹⁶⁵ and to fail to apply *Gladue* when sentencing an Aboriginal offender “runs afoul of this statutory obligation,” producing “a sentence that was not fit and was not consistent with the fundamental principle of proportionality.”¹⁶⁶ Therefore, it is not sufficient for sentencing judges to detail the personal history of an Aboriginal offender but to then fail “to consider whether and how that history ought to impact on her sentencing decision.”¹⁶⁷

I demonstrate in Chapter 3 that both of the errors *Ipeelee* finds in the post-*Gladue* jurisprudence feature in the cases in my research. *Ipeelee* provides helpful comments about how *Gladue* factors conform to the overarching sentencing regime (instead of presenting a deviation):

Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely — if ever — attains a level where one could properly say that their actions were not *voluntary* and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability.¹⁶⁸

Because these systemic issues may cause Aboriginal peoples to have diminished moral culpability (which strikes at the heart of the foremost principle of sentencing, proportionality, in

¹⁶² *Ibid.*

¹⁶³ *Ibid.* at para. 86.

¹⁶⁴ *Ibid.* at para. 85.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.* at para. 87.

¹⁶⁷ *Ibid.* at para. 95.

¹⁶⁸ *Ibid.* at para. 73.

terms of the degree of responsibility of the offender), *Gladue* factors are framed as mitigating.¹⁶⁹ Moreover, following *Gladue*, LeBel J. explains that “[t]he existence of such circumstances may also indicate that a sanction that takes account of the underlying causes of the criminal conduct may be more appropriate than one only aimed at punishment *per se*.”¹⁷⁰ Restorative-justice sanctions may be necessary, as

[t]he *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community.¹⁷¹

Ipeelee clarifies that the most important consideration – as with all sentencing – should be the individualization of sentencing decisions. As such, s. 718.2(e) does not require judges to produce an artificial reduction of incarceration rates.¹⁷² Quite the contrary, *Gladue* merely requires an “individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them,” which for Aboriginal offenders requires consideration of their unique circumstances.¹⁷³ This, “to endeavour to achieve a truly fit and proper sentence,” is “the fundamental duty of a sentencing judge.”¹⁷⁴ Additionally, this must be done “in a manner that is meaningful to Aboriginal peoples” because “[n]eglecting this duty would not be faithful to the core requirement of the sentencing process.”¹⁷⁵

1.8.2 Naming colonization

In *Gladue*, Cory and Iacobucci JJ. describe that the systemic or background factors contributing to overrepresentation

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.* at para. 74.

¹⁷² *Ibid.* at para. 75.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders.¹⁷⁶

They also cite loneliness, dislocation, and community fragmentation as factors contributing to the overrepresentation of Aboriginal peoples in the system.¹⁷⁷

While Cory and Iacobucci JJ. do not name “colonialism” or “colonization” or any variations thereof,¹⁷⁸ the sources of Aboriginal overrepresentation in the system are products of *colonization*, the reverberating effects of colonialism. In *Ipeelee*, LeBel J. explicitly names colonialism as part of “the distinct history of Aboriginal peoples in Canada;” LeBel J. writes “[t]he overwhelming message emanating from the various reports and commissions on Aboriginal peoples’ involvement in the criminal justice system is that current levels of criminality are intimately tied to the legacy of colonialism.”¹⁷⁹

1.9 Alternatives to imprisonment: Conditional sentence orders

The conditional sentence order was implemented to provide an important alternative to provincial incarceration because it remains a sentence of imprisonment, but served in the community and with an amplified restorative justice orientation. The conditional sentence of imprisonment offers a unique alternative that is particularly important to the sentencing of Aboriginal peoples.¹⁸⁰ *Gladue* describes the advent of conditional sentences as “alter[ing] the sentencing landscape” for its ability to give real meaning ss. 718.2(d) and (e).¹⁸¹ The leading

¹⁷⁶ *Gladue*, *supra* note 15 at para. 65.

¹⁷⁷ *Ibid.* at para. 67.

¹⁷⁸ Toni Williams, “Punishing Women: The Promise and Perils of Contextualized Sentencing for Aboriginal Women in Canada” (2007) 55 *Cleveland State Law Review* 269 at 277 n 43. [Williams, “Punishing Women”]

¹⁷⁹ *Ipeelee*, *supra* note 16 at para. 77.

¹⁸⁰ *Gladue*, *supra* note 15 at para. 70.

¹⁸¹ *Ibid.* at para. 40.

judgment on conditional sentences is *R. v. Proulx*,¹⁸² a decision by Lamer C.J. holding that conditional sentences were intended “for less serious and non-dangerous offenders.”¹⁸³ The 1996 iteration of the conditional sentencing regime required judges to evaluate four factors when deciding whether a conditional sentence order is appropriate: conditional sentences were available only for offenders who would otherwise be sentenced to terms of less than two years imprisonment; offences that had minimum terms of imprisonment were ineligible; the offender’s presence could not present a danger to the community; and the sentence must be consistent with principles of sentencing.¹⁸⁴

Conditional sentences are associated with a restorative justice approach because they are orders of imprisonment served in the community, although punitive elements are incorporated through supervision and attached conditions that restrict the offender’s liberty (and the potential that a judge will commute the sentence to a prison sanction for offenders who breach conditions without reasonable excuse).¹⁸⁵ *Proulx* underscores the punitive quality of conditional sentences, noting the simultaneous ability for the sanction to respond to rehabilitative, denunciatory, and deterrent goals. This combination of rehabilitative and punitive features of conditional sentences distinguishes them from probationary orders¹⁸⁶ because probation “has traditionally been viewed as a rehabilitative sentencing tool.”¹⁸⁷ Additionally, a judge can order an offender to participate in treatment as a condition of a conditional sentence order whereas this can only be accomplished with the offender’s consent for a probation order.¹⁸⁸ For the women receiving conditional sentence orders in my research, treatment conditions are often attached.

¹⁸² *Proulx*, *supra* note 84.

¹⁸³ *Ibid.* at para. 21.

¹⁸⁴ *Ibid.* at para. 46.

¹⁸⁵ See *ibid.* at paras. 21-2.

¹⁸⁶ See e.g. *ibid.* at para. 23.

¹⁸⁷ *Ibid.* at para. 32.

¹⁸⁸ *Ibid.* at para. 25.

As the conditional sentence is available to certain offenders who otherwise face jail, *Proulx* holds that conditions that constrain liberty (such as house arrest or strict curfews) “should be the norm, not the exception.”¹⁸⁹ Such conditions alongside the stigma of living in the community under strict controls¹⁹⁰ ensure that “[a] conditional sentence may be as onerous as, or perhaps even more onerous than, a jail term, particularly in circumstances where the offender is forced to take responsibility for his or her actions and make reparations to both the victim and the community.”¹⁹¹ Nonetheless, Lamer C.J. still maintains that prison is generally more onerous, which encourages the imposition of lengthier conditional sentences to approximate a shorter duration of jail.¹⁹² These and other impacts of the conditional sentencing regime have been criticized for effectively widening state control and presenting a risk of “the increased use of imprisonment,” primarily due to the “extraordinary breach provisions that give the state administrative powers generally not seen in the criminal law.”¹⁹³

However, the conditional sentence order remains critical to judges’ sentencing arsenal. The conditional sentencing regime is a particularly needed sentencing alternative for Aboriginal peoples because against the backdrop of colonization and its continuing manifestations and effects, “[t]he ineffectiveness of incarceration creates a cycle of victimization, which is partly manifested in the overincarceration of Aboriginal people.”¹⁹⁴ Additionally, research shows that “the representation of Aboriginal adults is growing only in admissions to provincial and territorial sentenced custody”¹⁹⁵ (the level at which conditional sentences are relevant). *Ipeelee*

¹⁸⁹ *Ibid.* at para. 36.

¹⁹⁰ *Ibid.* at para. 105.

¹⁹¹ *Ibid.* at para. 41.

¹⁹² *Ibid.* at para. 44. See also Julian V. Roberts & Thomas Gabor, “Living in the Shadow of Prison: Lessons from the Canadian Experience in Decarceration” (2004) 44(1) *British Journal of Criminology* 92 at 108. [Roberts & Gabor, “Living in the Shadow of Prison”]

¹⁹³ Roach, *supra* note 129 at 261.

¹⁹⁴ Adjin-Tettey, *supra* note 57 at 183.

¹⁹⁵ Juristat, Perreault, *The Incarceration of Aboriginal People*, *supra* note 23 at 9.

also recognizes that the overrepresentation of Aboriginal peoples in prisons that prompted s. 718.2(e) “was generally worse in provincial institutions.”¹⁹⁶

The availability of conditional sentences is important for Aboriginal women specifically. Justice Arbour has noted that the overrepresentation of Aboriginal women is most stark in provincial prisons than federal penitentiaries¹⁹⁷ (although they are also overrepresented in federal institutions).¹⁹⁸ This suggests that restrictions on this alternative to provincial/territorial incarceration are likely to exacerbate the overrepresentation of Aboriginal women where it is already most pronounced. It is necessary to have alternatives to imprisonment at this level because proportionally more women are admitted to provincial/territorial prisons than federal penitentiaries:

[i]n 2007/2008, while women accounted for 12% of all admissions to provincial and territorial sentenced custody, they accounted for 6% of federal admissions. As well, a larger proportion of women also tend to be admitted to community sentences than custody, as women accounted for 18% of admissions to probation and conditional sentences in 2007/2008.”¹⁹⁹

I discuss the context of women’s criminalization in Chapter 2, but in the interim it is helpful to understand the greater proportions of women in provincial/territorial custody and alternatives to custody through Justice Arbour’s comments:

[a]s an overview, I think it is fair to say that women commit fewer crimes than men, and that the disproportion is immense and has remained more or less historically constant. Women commit fewer violent crimes than men, and even when they are convicted of the same crime as a man, the factual underpinning of the offence is often considerably different, and tends to point to a much lower risk of re-offending. Women pose a lower security risk than men. They have primary childcare responsibility in numbers vastly disproportionate to male offenders.²⁰⁰

¹⁹⁶ *Ipeelee*, *supra* note 16 at para. 57.

¹⁹⁷ Arbour Inquiry Report, *supra* note 70 at 219.

¹⁹⁸ CAEFS & NWAC, “Women and the Canadian Legal System: Examining Situations of Hyper-Responsibility” in Patricia A. Monture & Patricia D. McGuire, eds., *First Voices: An Aboriginal Women’s Reader* (Toronto: Inanna, 2009) 382 at 385. [CAEFS & NWAC, “Women and the Canadian Legal System”]

¹⁹⁹ Juristat, Perreault, *The Incarceration of Aboriginal People*, *supra* note 23 at 9.

²⁰⁰ Arbour Inquiry Report, *supra* note 70 at 199.

In this context, restrictions on the availability of conditional sentences may have gendered effects. Comments by Cynthia Chewter, Ellen Adelberg, and Claudia Currie, issued a few years after the introduction of this sanction, remain equally salient today:

conditional sentencing legislation offers a powerful new tool for those who advocate for women in conflict with the law. The legislation also helps to alleviate some of the most serious burdens that women face in the correctional system: inability to serve their sentences close to their communities, loss of their children, and potential access to a greater variety of programs and counseling.²⁰¹

Limitations on the availability of conditional sentences risk reinforcing these burdens on criminalized women. Altogether, the ongoing attenuation of judicial discretion to order conditional sentences is a cause for concern – generally, and specifically for Aboriginal women.

1.9.1 The 2007 conditional sentencing amendments

The conditional sentence has been contentious throughout its lifespan, in the political domain and within public consciousness.²⁰² Objections to or discomfort about the conditional sentencing regime primarily relate to the use or perceived use of conditional sentences for violent offences. Statistics Canada reports that in 2008-2009 the vast majority of conditional sentences were ordered for non-violent offences (including 28% related to property offences and 21% to drug offences), whereas 26% of conditional sentences pertained to violent offences.²⁰³ In this climate, Parliament passed Bill C-9: An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment),²⁰⁴ which received Royal Assent on May 31, 2007, with its amendments

²⁰¹ Cynthia Chewter, Book Review of *In Conflict with the Law: Women & the Canadian Justice System* by Ellen Adelberg & Claudia Currie, eds., *Canadian Woman Studies* 19:1,2 (Spring/Summer 1999) 215.

²⁰² See *Arcand*, *supra* note 94 at para. 43.

²⁰³ Statistics Canada: Juristat, *Adult Correctional Services in Canada 2008/2009* by Donna Calverley (Fall 2010), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2010003/article/11353-eng.htm#a7>.

²⁰⁴ For the text of the passed Bill C-9, see *Canada Bill C-9, An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment)*, 1st Sess., 39th Parl., 2007, online: Parliament of Canada <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=3294571>. [*Canada Bill C-9 Text*]

coming into force six months later.²⁰⁵ Still more restrictions have supplanted the 2007 amendments as part of Bill C-10,²⁰⁶ which received Royal Assent on March 13, 2012 and entered into force as the further amended s. 742.1 on November 20, 2012.²⁰⁷ The content of this newly enacted version of s. 742.1 is much more restrictive than prior iterations. All such restrictions on judicial discretion in the conditional sentencing regime undercut the utility of the sanction to respond to the overincarceration of Aboriginal peoples. I address this issue in Chapter 5, the conclusion.

Currently, the conditional sentencing regime is governed by s. 742, comprising ss. 742.1 to s. 742.7.²⁰⁸ Section 742.1 retains the original parameters: conditional sentences are still only available for imprisonment terms of less than two years and are subject to compliance with conditions; offences with codified minimum punishments are ineligible; community safety should not be endangered; and the sentence must be consistent with the purpose and principles of sentencing. The 2007 amendments made additional restrictions, but the added restriction of greatest potential relevance to Aboriginal women offenders was the stipulation that the commission of serious personal injury offences, as defined in s. 752,²⁰⁹ renders conditional sentences unavailable. In the main, section 752 defines “serious personal injury offence” as an indictable offence (excluding treason and first and second-degree murder) “for which the offender may be sentenced to imprisonment for ten years or more,” and involving “the use or

²⁰⁵ For the Parliamentary stages of Bill C-9, see *Canada Bill C-9 Stages*, *supra* note 64.

²⁰⁶ For the text of Bill C-10, see *Canada Bill C-10, An Act to Enact the Justice for Victims of Terrorism Act and to Amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts (Safe Streets and Communities Act)*, 1st Sess., 41st Parl., 2012, online: Parliament of Canada <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5465759&File=62#11>. [*Canada Bill C-10 Text*]. See also Appendix A for the reproduced full text of the current (2012) s. 742.1.

²⁰⁷ For the Parliamentary stages of Bill C-10, see *Canada Bill C-10 Stages*, *supra* note 65.

²⁰⁸ *Code*, *supra* note 14 at s. 742.

²⁰⁹ *Ibid.* at s. 752. I want to again caution that during the preparation of this thesis, s. 742.1 was as I describe here. However, on November 20, 2012, less than one month before the submission of this thesis, further s. 742.1 amendments entered into force which replace the law I describe here by adding restrictions. I expand about these 2012 amendments below.

attempted use of violence;” conduct likely to endanger or endangering another person’s life/safety; or that likely to inflict or inflicting “severe psychological damage” on another.²¹⁰

This aspect of the 2007 amendments is of particular relevance to Aboriginal women because as noted by Justice Arbour in her 1996 report for the Commission of Inquiry into Certain Events at the Prison for Women,²¹¹ Aboriginal women are often imprisoned for more violent offences and experience more periods of incarceration.²¹² Karlene Faith and Anne Near add that their experiences of imprisonment are also more punitive: in 2005, Aboriginal women comprised more than 80% of women designated to maximum-security classification, and they are overall “more likely than white women to be classified as maximum security, to be locked in segregation and to be denied parole.”²¹³ Because the violence for which they are criminalized is often more serious (and their experiences of imprisonment often harsher), the 2007 amendment removing conditional sentences as an option for cases involving serious personal injury offences may have had a disproportionate impact on Aboriginal women offenders. At this juncture, it will be important for cases in the post-*Ipeelee* jurisprudence not to overly fix on the idea (misapprehended from Cory and Iacobucci JJ.’s comment in *Gladue*) that more serious or more violent offences will more often produce sentences similar between Aboriginal and non-Aboriginal offenders.²¹⁴ Some have argued that the impacts of the 1996 sentencing reforms have been gendered,²¹⁵ contending “more Indigenous men [than women] have benefitted from

²¹⁰ *Ibid.*

²¹¹ Arbour Inquiry Report, *supra* note 70.

²¹² *Ibid.* at 221.

²¹³ Karlene Faith & Anne Near, eds., *13 Women: Parables from Prison* (Vancouver: Douglas & McIntyre, 2006) at 294.

²¹⁴ *Ipeelee*, *supra* note 16 at paras. 84-6.

²¹⁵ See for example Balfour, “Falling Between the Cracks”, *supra* note 17 at 105.

sentencing provisions for conditional sentences.”²¹⁶ Nonetheless, because a conditional sentence order most readily replaces what could otherwise be a carceral sentence, conditional sentences provide a valuable tool to address the overrepresentation of Aboriginal women in prisons.

To be clear, when I was preparing this thesis the 2007 iteration of s. 742.1 (Bill C-9) was in force – that is, I was dealing with the 2007 conditional sentencing amendments. The 2007 erosion of the conditional sentencing regime that I describe in the previous paragraphs is deepened by the 2012 amendments. Now that Bill C-10 has entered into force, it further restricts s. 742.1 by adding subsections that remove the sanction for the following offences (where they are prosecuted by indictment): those that have maximum terms of imprisonment of 14 years or life; those that have a maximum term of imprisonment of 10 years where the offence resulted in bodily harm, involved the trafficking/production of drugs, or involved a weapon; and those identified within the list²¹⁷ of offences provided. I describe my methodology in Chapter 2, but the judgments I consider in this thesis are listed in a chart at Appendix B. I mention this here because among other features of that chart, I identify which of the cases in my research would no longer be eligible for conditional sentence orders after the 2012 amendments following the passage of Bill C-10. The results are sobering: the amendments effectively all but eliminate conditional sentence orders as a possible sanction.

²¹⁶ Robyn Maynard, “Criminal (in)justice: State Violence and the Criminalization of Indigenous Women in Canada, An Interview with Gillian Balfour” *Briar Patch* 40:2 (1 March 2011) 32, online: Briar Patch Magazine <http://briarpatchmagazine.com/articles/view/criminal-injustice>, at 33.

²¹⁷ This list consists of the following offences: prison breach, criminal harassment, sexual assault, kidnapping, human trafficking, abduction of those under fourteen, motor vehicle theft, theft over \$5000, breaking and entering a place other than a home, being unlawfully in a home, and arson for fraudulent purpose. See *Canada Bill C-10 Text*, *supra* note 206.

1.10 Restrictions on judicial discretion in the conditional sentencing regime: Preliminary problems

The various permutations of the debates culminating in the 2007 amendments to the conditional sentencing regime exceed the scope of this thesis, although concerns voiced within the pushback against restrictions on judicial discretion did manifest to some degree in the cases I studied. In September 2006 the National Criminal Justice Section (“NCJS”) of the Canadian Bar Association recommended that Bill C-9 should not be enacted.²¹⁸ The NCJS cautioned that Bill C-9 trenched on judicial discretion, impeding the ability of judges to “achieve a just result,” and setting the stage for “a disproportionate impact on populations already over-represented in the justice system, notably the economically disadvantaged, Aboriginal people, members of visible minorities and the mentally ill.”²¹⁹ The NCJS expressed concern that the incursions into judicial discretion would impact the proportionality of sentences where judges are compelled to sentence more²²⁰ or less²²¹ punitively to conform to the proposed legislation. The version of Bill C-9 that passed had been amended, differing from the iteration criticized by the NCJS.²²² However, the NCJS concern about proportionality has manifested in some of the cases in my study in which

²¹⁸ The Canadian Bar Association: National Criminal Justice Section, “Bill C-9 – *Criminal Code* Amendments (Conditional Sentence of Imprisonment)” (September 2006), online: www.cba.org/CBA/submissions/pdf/06-42-eng.pdf.

²¹⁹ *Ibid.* at 5.

²²⁰ *Ibid.* at 1.

²²¹ *Ibid.* at 5.

²²² Parliament of Canada: Law and Government Division, *Legislative Summary: Bill C-9: An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment)* by R. MacKay (12 May 2006; revised 27 September 2007), online:

http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/Bills_Is.asp?lang=E&ls=c9&Parl=39&Ses=1&source=library_prb. at 1, 17. I will also note anecdotally that I read the entirety of the Bill C-9 debates in the preparation of this thesis, and while the passed version of Bill C-9 was different than the form in which it was proposed, it seems that the 2012 s. 742.1 amendments signify a complete reversion to the conditional sentencing regime that the Conservatives initially proposed (and which received much backlash by other parties) in Bill C-9. That is, it seems that the current 2012 s. 742.1 is essentially a reproduction of the vision of s. 742.1 that the Conservatives proposed in Bill C-9 and which was amended after much pushback.

probation replaces the now-unavailable conditional sentence order.²²³ Other decisions indicate that when precluded from delivering the conditional sentence order they would have otherwise imposed, judges also resort to imposing terms of incarceration.²²⁴

Nonetheless, in my case law research the effects of the conditional sentencing amendments are inconsistently represented as each case varies in terms of when the offence was committed and how long the offender had been in pretrial custody or on judicial interim release before the hearing. Because the timing of the offence relative to the 2007 amendments varies, it may be premature to find trends in the case law for the effects of the amendments. This issue implicates the principle of legality, which is “has not been expressly codified in Canada,” but is protected by the judiciary.²²⁵ Sentencing must comply with the legality principle,²²⁶ which “requires that the law must be (1) accessible, that is understandable; (2) foreseeable in its consequences; and (3) non-arbitrary in its application.”²²⁷ In my research, the earliest case which dealt with the amended s. 742.1 is a 2008 decision,²²⁸ but the pre-2007 amendments version of the conditional sentencing regime operates as late as 2010.²²⁹ Because only several years have transpired since the 2007 amendments, it is difficult to reliably track the impacts on Aboriginal women through the sentencing decisions. Nonetheless, multiple decisions specifically comment on the unavailability of conditional sentences for the offender facing sanctions due to the 2007

²²³ See for example *R. v. Audy*, 2010 MBPC 55 at para. 5 [*Audy*] in which Slough J. states “prior to the amendments to the *Criminal Code*, a Conditional Sentence Order would have been imposed.”

²²⁴ See for example *R. v. Connors*, 2010 NSPC 63 at para. 18 [*Connors*] in which Ross J. seems inclined toward a conditional sentence order given the “strong support” for the defence position advocating such, and the comments that “[h]owever, amendments to the *Criminal Code* effective December 1, 2007, appear to preclude me from even considering the possibility of a conditional sentence of imprisonment.” After concluding the amendments do indeed preclude a conditional sentence order, the judge imposes a two-year term of incarceration in a federal penitentiary for robbery.

²²⁵ *Arcand*, *supra* note 94 at para. 84.

²²⁶ *Ibid.* at para. 85.

²²⁷ *Ibid.* at para. 85, n cxxxix.

²²⁸ See *R. v. A.E.M.*, 2008 SKQB 61.

²²⁹ See *R. v. Kendi*, 2010 NWTTC 8. [*Kendi*]

amendments.²³⁰ Moreover, such restrictions on judicial discretion hamper fulfillment of the *Gladue* analysis required by s. 718.2(e) – and the legislative reasons mobilizing s. 718.2(e) (overrepresentation and broadening of the use of restorative justice) remain unchanged.

As I explain above, conditional sentence orders offer a critical alternative to imprisonment for Aboriginal women. Next, in Chapter 2, I discuss feminist theories that are helpful to understanding the context of the victimization and criminalization of Aboriginal women. I also explore colonization at greater depth. The theory of the victimization-criminalization continuum and the processes of colonization that inform the *Gladue* analysis are together critical to the sentencing of Aboriginal women. Through my discussion of these themes in Chapter 2, I lay the groundwork for my analysis of the sentencing judgments in Chapters 3 and 4. As criminalized Aboriginal women have often also experienced forms of victimization, I begin Chapter 2 by examining this intersection.

²³⁰ See for example, *R. v. Stimson*, 2010 CarswellAlta 2644 (ABPC) (WLeC); *Connors*, *supra* note 224; *R. v. Redies*, 2009 YKTC 85 [*Redies*]; and *R. v. Audy*, *supra* note 223.

Figure 2



“A Place to Live is also a Way to Live” (linocut in ink)

(2) Pathways through Feminist Theories: The Victimization and Criminalization of Aboriginal Women

2.1 Introduction

There is ample research suggesting a “link between victimization and violent offending.”²³¹ While I will focus on political and judicial understandings of the relationship between experiences of victimization and criminalization for Aboriginal women offenders,²³² “[i]t is important to note that women are involved in the justice system more as victims than offenders.”²³³ Additionally, the forms of violence women actively engage in often differ in significant ways from those of men in terms of “the seriousness, context, and outcomes of violence.”²³⁴ Much violence committed by women is connected to their gendered (and raced, classed, etc.) location and experience. Myrna S. Raeder writes that “[w]hile the continuum from victim to offender is most clearly evident in cases of women who kill their abusers, a much wider range of female crime has ties to domestic violence.”²³⁵ There is much support for the proposition “that violence by women is very likely to take place in the domestic sphere.”²³⁶ In an American study of intimate partner violence, Lisa R. Muftic, Jeffrey A. Bouffard, and Leana

²³¹ Pollock & Davis, “The Continuing Myth”, *supra* note 121 at 19.

²³² I often use the word “offender” in this thesis – for continuity, clarity, and to denote the stage of the proceedings, where I am discussing sentencing. However, I also use the term “criminalized,” and I want to acknowledge other feminist work that strives to use “criminalized” “to signal processes and practices rather than a reified identity” [Pollack, “‘I’m Just Not Good in Relationships’: Victimization Discourses and the Gendered Regulation of Criminalized Women” (2007) 2(2) *Feminist Criminology* 158 at 172. [Pollack, “‘I’m Just Not Good in Relationships’”]] “to bring attention to the social, political, economic, cultural, and psychological processes that influence crime and criminality” instead of “individualiz[ing] and pathologiz[ing]” terms [Jennifer Bernier, “Breaking Down the Walls: Building a Case for Community-Based Alternatives to Incarceration that Better Meet the Needs of Criminalized Women” *Network Magazine* 13:1 (Fall/Winter 2010/11). online: Canadian Women’s Health Network <http://www.cwhn.ca/en/node/42825>. [Bernier]]. I fully agree with their rationale for using the term “criminalized.” For this reason, and bolstering my support for the “victimization-criminalization continuum” above other theories expressing similar ideas, I will frequently use the term “criminalization” to describe the confluence of factors intersecting to bring Aboriginal women in conflict with the law.

²³³ Tyagi, *supra* note 56 at 134.

²³⁴ Lisa R. Muftic, Jeffrey A. Bouffard and Leana Allen Bouffard, “An Exploratory Study of Women Arrested for Intimate Partner Violence: Violent Women or Violent Resistance?” (2007) 22(6) *Journal of Interpersonal Violence* 753 at 771-2. [Muftic, Bouffard, & Bouffard]

²³⁵ Myrna S. Raeder, “Domestic Violence in Federal Court: Abused Women as Victims, Survivors, and Offenders” (2006) 19(2) *Federal Sentencing Reporter* 91 at 92. [Raeder]

²³⁶ Pollock & Davis, *supra* note 121 at 19.

Allen Bouffard find that “[o]verall, research points to the potential conclusion that not only are women less likely to engage in severe physical violence but also the types of violence women resort to within an abusive intimate relationship are typically more self-defensive in nature.”²³⁷

In the cases analyzed in my study, women’s criminalization seems frequently connected to past experiences of victimization, and often involves intimate partner violence, or experiences related to this abuse.

Feminist criminological discourses are significant to criminology because “it has not been fashionable to treat female offenders as victims, even if their crimes have a direct relationship to their violent victimization.” This is particularly true among groups such as “[t]raditional victims’ advocates” who continue to “see a sharp break between victims and offenders.”²³⁸ Raeder calls for the American victims’ movement to include women offenders within the purview of the victims’ community, programs, and advocacy²³⁹ and urges for the creation of “a fairer sentencing regime for offenders whose criminality is linked to the domestic violence they have suffered.”²⁴⁰ Canadian political and judicial actors and institutions must similarly develop more nuanced understandings of victimization and criminalization so that policy, law, and sentencing practices can better respond to the specificity (and diversity) among Aboriginal women offenders’ lives.

In this chapter, I draw from many feminist writers to provide the theoretical background that will undergird my thinking in subsequent chapters. First I will discuss various feminist criminological theories about how women’s victimization may contribute to their criminalization. While I will argue that these theories are substantially equivalent, I will use the

²³⁷ Muftic, Bouffard, & Bouffard, *supra* note 234 at 757.

²³⁸ Raeder, *supra* note 235 at 91.

²³⁹ *Ibid.* at 92.

²⁴⁰ *Ibid.*

language of the victimization-criminalization continuum and provide my definition of it. I will discuss criticisms of this theory, but will argue that these criticisms subside when the theory is framed expansively because “[t]he framing of an issue is about making decisions about its parameters, about what is in the foreground, what is in the background, and what shadings or complexities exist within the frame.”²⁴¹ I will then discuss ways in which women become further marginalized by victimization. Aboriginal women disproportionately experience violence, which I will introduce and then offer supplementary background to the concept of colonization to expand on Chapter 1. Criminalization and overincarceration of Aboriginal peoples operate as reverberations of colonization – perhaps as ongoing processes of colonization. I will explore the relationship between them, with particular attention to whether criminalization is a strategic extension of colonization. I will then briefly address the gendered nature of the criminalization of Aboriginal women. Finally, I will discuss the sentencing of Aboriginal women where judicial consideration of *Gladue* factors often crosses over into consideration of the level of risk the offender is projected to present and where the balance of this tension (between *Gladue* and risk considerations) falls, notably where judges resolve it by framing imprisonment as a place of treatment.

I open this chapter with my linocut/painting “A Place to Live is also a Way to Live” (Figure 2), to evoke the victimization-criminalization continuum. The maroon background suggests the background of violence (and other experiences of victimization) in the lives of many criminalized Aboriginal women. The image of the woman’s body is intended to evoke sexualized violence,²⁴² to reference the gendered nature of violence against women. This image is also

²⁴¹ Tuhiwai Smith, *supra* note 56 at 153.

²⁴² There is also a kind of violence in the frame chopping her body such that she is not depicted as a full person. Feminist media critic Jean Kilbourne argues that the dismemberment of women’s bodies in advertising reduces women to objects, connecting this to sexual violence because processes of dehumanization and objectification

based on the same pose I carved to create the linocut in Figure 1, so that there is an internal correspondence between the two paintings to again refer to colonization and the overrepresentation of Aboriginal women in prison. To indicate light contrasts on the prints of the woman's body in both Figures 1 and 2, I have used the equivalent of a drawing technique called "crosshatching," in which lines intersect to create a grid-like pattern. I intend these crosshatched "grids" to represent prison (visually, such as bars, fenced perimeters, and metal reinforcement in glass cell windows), and the way the prison experience becomes etched on both prisoners' psyches and bodies. This idea is particularly important to my discussion of imprisonment in Chapter 4. Finally, because the linocut/painting "A Place to Live is also a Way to Live" is a print, its image will be largely repeated every time it is rolled with ink and reprinted. I discuss below the concept of how experiences of victimization constrain the options available to Aboriginal women, creating vulnerability to criminalization.

2.2 Blurred pathways: Directions for the victimization-criminalization continuum

Several feminist criminological theories about criminalized women share the basic premise that women's experiences of violence and other forms of victimization should be understood as connected to how women enter the criminal justice system as accuseds.²⁴³ In her review of various feminist criminology, Joanne Belknap finds that "[p]erhaps the single most important contribution of feminist criminology is in the development of the 'pathways' perspective or approach," which she defines as advancing the proposition "that traumas and victimizations are risk factors for offending," noting the widespread research documenting "the

facilitate violence. See "Killing Us Softly 4: Advertising's Image of Women" (2010), online: youtube http://www.youtube.com/watch?v=PTlmho_RovY&feature=related.

²⁴³ Lois Presser, "The Narratives of Offenders" (2009) 13(2) *Theoretical Criminology* 177 at 191.

extensive trauma and abuse histories of female offenders.”²⁴⁴ Meda Chesney-Lind also emphasizes the significance of this insight, identifying that feminist research has pointed to sexual and physical victimization, gender, and race as generating particular (and, I would add, interconnected) pathways leading to criminality/criminalization.²⁴⁵ These modes of pathway-generation are accelerated in communities struggling with substance abuse and overincarceration.²⁴⁶

Also responding to accumulated research indicating the prevalence of prior experiences of victimization for women offenders,²⁴⁷ there are related streams of thought that convey similar ideas to the pathways theory. For example, “recent feminist research identifies the concept of ‘blurred boundaries’ between women’s victimization and offending experiences.”²⁴⁸ The “‘blurred boundaries’ thesis argues that women’s offending is intimately linked to their previous victimization.”²⁴⁹ This theory tries to “[disrupt] the dichotomy”²⁵⁰ between “victim” and “offender,” noting the instability between these ideas and identities because “the boundaries between the two categories are more often than not blurred ones.”²⁵¹

While these theories convey the same concepts I will use, I will primarily draw from the related feminist concept of the “victimization-criminalization continuum” to think about whether/to what extent such ideas are understood in judicial discourses about Aboriginal women, and what this means for the sentencing of Aboriginal women. Gillian Balfour describes that

²⁴⁴ Joanne Belknap, “‘Offending Women’: A Double Entendre” (2010) 100(3) *The Journal of Criminal Law and Criminology* 1061 at 1080.

²⁴⁵ Meda Chesney-Lind, “Patriarchy, Crime, and Justice: Feminist Criminology in an Era of Backlash” (2006) 1(1) *Feminist Criminology* 6 at 8.

²⁴⁶ *Ibid.*

²⁴⁷ Pollock & Davis, *supra* note 121 at 19.

²⁴⁸ Amanda Burgess-Proctor, “Intersections of Race, Class, Gender, and Crime: Future Directions for Feminist Criminology” (2006) 1(1) *Feminist Criminology* 27 at 44 n 2.

²⁴⁹ Dana M. Britton, “Feminism in Criminology: Engendering the Outlaw” (2000) 571 *Annals of the American Academy of Political and Social Sciences* 57 at 72.

²⁵⁰ *Ibid.*

²⁵¹ Elizabeth Comack, “New Possibilities for a Feminism ‘in’ Criminology? From Dualism to Diversity” (1999) 41(2) *Canadian Journal of Criminology* 161 at 165. [Comack, “New Possibilities for a Feminism”]

when the victimization-criminalization continuum theory first emerged over twenty years ago, it suggested that “women’s lawbreaking behaviours (drinking and drugging, prostitution, and violence) were understood to be strategies to cope with the impact of abuse,”²⁵² and “women’s victimization (sexual exploitation, domestic violence, rape) was viewed as a cause or pathway into violence, addiction, prostitution, or fraud.”²⁵³ This formulation has been criticized, as I discuss below. I believe that notwithstanding problems feminists have identified with this theory, within a certain formulation it remains useful to understand how many women in the system may have come into heightened vulnerability to criminalization through their experiences of victimization. Balfour contends that the victimization-criminalization continuum “has not been adequately theorized or debated,”²⁵⁴ which leaves space to expand it beyond problems identified within it. In this thesis, I will use the victimization-criminalization continuum to signify that women’s experiences of victimization constrain their available options, which (particularly for already marginalized women) magnifies their vulnerability to criminalization.

For my purposes, I do not observe any substantial difference among the blurred boundaries, pathways, and victimization-criminalization continuum theories. All allow for nuances within the blurriness, branching paths, and shifting continuum of identities and experiences. Additionally, in substance all three modes of understanding emerge from evidence connecting women offenders’ experiences of victimization to their criminalization and support this formulation. Moreover, because I have chosen to adopt an expansive definition of “victimization” to include a range of marginalizing experiences (often connected to violence, but not limited to that experience), any nuanced distinctions among these theories dissipate. I will primarily refer to the victimization-criminalization continuum simply because it most explicitly

²⁵² Balfour, “Re-Imagining a Feminist Criminology”, *supra* note 55 at 742.

²⁵³ *Ibid.*

²⁵⁴ Balfour, “Falling Between the Cracks”, *supra* note 17 at 110.

connects these experiences, although I will periodically reference the pathways theory interchangeably. Ultimately, these feminist theories all seek to explain the same issues, all sharing the fundamental premise that the culmination of life experiences, including victimization, contributes to women's criminalization. Much as the issues within women's lives are impossible to disentangle, these feminist theories are necessarily enmeshed with each other, and not isolable.

2.3 Where victimization constrains women's options and support: The victimization-criminalization continuum

The victimization-criminalization continuum has been criticized on the basis that it suggests a determinative relationship between women's victimization and criminality, that women's criminality can be directly explained through their experiences of victimization, and dealt with likewise.²⁵⁵ This "recent feminist scholarship has challenged the over-determined role of abuse in women's lives, cautioning that such a strategy renders women responsible for how they cope with abuse, justifying the imprisonment of women based on their assumed need for treatment."²⁵⁶ This work also contends that the victimization-criminalization continuum "follow[s] the psychologizing and individualizing logic of the criminal justice system."²⁵⁷ These criticisms share the same foundations as the concept of "responsibilization," which features in much feminist writing about women in the correctional system. Kelly Hannah-Moffat outlines that responsibilization is the process through which "individuals (as opposed to the 'state') are increasingly expected to be responsible and accountable for their own risk management and self-

²⁵⁵ See generally, Balfour, "Re-Imagining a Feminist Criminology", *supra* note 55.

²⁵⁶ Balfour, "Re-Imagining a Feminist Criminology", *supra* note 55 at 743.

²⁵⁷ *Ibid.*

governance.”²⁵⁸ This focus deflects attention and responsibility for supporting women’s needs in the community away from government provision of funding and services.²⁵⁹ As there is a pattern in the cases in my study where prison is presented as a place of healing and necessary for healing, I will consider the individualization of issues that should be understood as functions of systemic problems in Chapters 3 and 4 where I examine judicial discourses about the victimization and criminalization of Aboriginal women offenders.

Related criticisms argue that the victimization-criminalization continuum does not leave sufficient space for recognition of women’s expressions of agency, as agency disrupts the problematic determinative ideas that victimization leads to criminality. As Smita Vir Tyagi writes,

[t]hat women offenders experience such high degrees of abuse and trauma, which often form pathways into offending, should not be assumed to translate into women’s lack of agency. One should not infer that women offenders are simply the sum total of their victimization, addictions and traumatic life experiences.²⁶⁰

Elizabeth Comack explains that incorporating agency is useful to subvert essentialist ideas about victimization and criminality, because historically the categorization of women as victims has had the effect of devaluing feminist insights and focus.²⁶¹ Comack suggests that “dualistic thinking”²⁶² elicits and propels criminal justice-oriented responses (such as decisions about the degree of punitive response warranted by offending behaviour) bereft of more careful thought and attention to “the wider contexts in which people encounter their troubles” and the necessity of making changes at that level as opposed to merely the reactive end.²⁶³ I understand “agency”

²⁵⁸ Kelly Hannah-Moffat, “Re-Forming the Prison – Rethinking our Ideals” in Kelly Hannah-Moffat & Margaret Shaw, eds., *An Ideal Prison? Critical Essays on Women’s Imprisonment in Canada* (Halifax: Fernwood Publishing, 2000) 30 at 39 n 4.

²⁵⁹ Balfour, “Re-Imagining a Feminist Criminology”, *supra* note 55 at 743.

²⁶⁰ Tyagi, *supra* note 56 at 134.

²⁶¹ Comack, “New Possibilities for a Feminism”, *supra* note 251 at 164.

²⁶² *Ibid.* at 165.

²⁶³ *Ibid.* at 166-7.

to mean “our capacity to make choices.”²⁶⁴ Philosophically, Emma LaRocque describes that this translates into “moral agency,” which is rooted in “what makes us human.” Because agency is fundamental to our sense of humanity and autonomy, the denial of our abilities to make choices strips that away. As such, because “colonization or any other form of coercion is a form of dehumanization”²⁶⁵ that undercuts Aboriginal peoples’ right to and ability to exercise self-determination (at the individual and collective levels), the issue of agency takes on greater significance for Aboriginal women.

To avoid the agency-denying conception of the victimization-criminalization continuum and allow for fuller appreciation for how women enact violence, feminist conceptions of female offending must incorporate fuller understandings of how experiences of violence and other victimizations impact women and how these experiences constrain women’s available options and support. This assumes particular significance for marginalized women whose range of choices is already circumscribed by the limits of their lives (such as the narrowed options available to low-income women in small, remote communities). Dana M. Britton notes the delicacy required to achieve this conceptual balance: “[m]irroring overall trends in feminist theory, the best of this work is moving toward a nuanced and contingent conception of women’s agency, one that sees women neither exclusively as victims nor as unfettered actors.”²⁶⁶

The idea that agency is expressed within the constrained options available to victimized women is reflected in studies of criminalized women. For example, in a study I will expand on below, Dana DeHart finds that “most women in our sample possessed a component of choice in

²⁶⁴ Emma LaRocque, “Métis and Feminist: Ethical Reflections on Feminism, Human Rights and Decolonization” in Joyce Audry Green ed., *Making Space for Indigenous Feminism* (Black Point, N.S.: Fernwood Pub., 2007) 53 at 61. [LaRocque]

²⁶⁵ *Ibid.*

²⁶⁶ Britton, *supra* note 249 at 62.

committing their crimes,”²⁶⁷ and that recognizing the “cumulative impact of victimization” is necessary to understanding “why women chose illegitimate over legitimate pathways.”²⁶⁸ As such, thinking about victimization in terms of marginalization and the morass of limited options and support that women must navigate allows for the element of agency that the victimization-criminalization continuum has been criticized for precluding. The issue of agency is nonetheless still fraught in this context, because while no one makes life choices unencumbered by externalities, for many victimized women their remaining options are extremely few and precariously augment their vulnerability to coming into conflict with the law. Smita Vir Tyagi writes

[v]iolence and victimization play a significant role in women’s trajectories of offending. Studies have repeatedly shown that women’s pathways into crime most often involve running away from physical and sexual abuse or abusive relationships. The trajectory into criminal behaviour is motivated by survival and as a response to victimization.”²⁶⁹

For many of these women trying to escape violence (or other forms of victimization), there is not much to run to.

In their study, Kathleen J. Ferraro and Angela M. Moe illustrate the degree of constraints and dearth of community support for some women. Ferraro and Moe find that some women view prison as a reprieve from the threats in their lives on the outside (including feeling safe from abusive partners while incarcerated,²⁷⁰ receiving the shelter and minimal care that women who lived on the street otherwise lacked,²⁷¹ and the relief at being removed from their community

²⁶⁷ Dana D. DeHart, “Pathways to Prison: Impact of Victimization in the Lives of Incarcerated Women” (2008) 14(12) *Violence Against Women* 1362 at 1378. [DeHart]

²⁶⁸ *Ibid.* at 1376.

²⁶⁹ Tyagi, *supra* note 56 at 134.

²⁷⁰ Kathleen J. Ferraro & Angela M. Moe, “Mothering, Crime, and Incarceration” (2003) 32(1) *Journal of Contemporary Ethnography* 9 at 23. [Ferraro & Moe]

²⁷¹ *Ibid.* at 25.

triggers for substance abuse²⁷²). Where imprisonment functions as something of a respite, women become vulnerable to criminalization, having nothing left to lose. Ferraro and Moe highlight that this perception of imprisonment speaks more to the “complex problems”²⁷³ marginalized women face in the community with minimal supports that cannot be fixed through sentencing initiatives.²⁷⁴

However, I do not want to overemphasize this depiction of prison as a refuge, in part because much evidence suggests that imprisonment generally exacerbates preexisting life and mental health issues and foments new such issues,²⁷⁵ and equally because I did not see evidence of this perspective on prison in the judgments discussed in Chapters 3 and 4.²⁷⁶ In addition, Ferraro and Moe study the narratives of thirty women in a southwestern county prison in the United States, and the dissonance between social issues (such as health care and other aspects of the social security net) in this context versus the Canadian context means Ferraro and Moe’s findings cannot be directly transposed on the lives of Canadian criminalized women. Nonetheless, their findings speak to the scope of just how narrowed some women’s options can be, and within which these women are vulnerable to criminalization.

Most federally-sentenced women are mothers; the Correctional Investigator reports that 77% have children, and more than half have experienced some involvement with Children’s Aid.²⁷⁷ It is more difficult to obtain information about the profiles of women serving sentences in

²⁷² *Ibid.* at 30.

²⁷³ *Ibid.* at 36.

²⁷⁴ *Ibid.*

²⁷⁵ See e.g. Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & McIntyre, 2002) at 18. [Jackson, *Justice Behind the Walls*]

²⁷⁶ In the cases discussed in Chapters 3 and 4, defence counsel seeks alternatives to imprisonment where appropriate, and periods of imprisonment in women’s lives as reported in PSRs and otherwise presented to the court generally read as damaging experiences.

²⁷⁷ OCI, *Annual Report 2010-2011*, *supra* note 29 at 50.

provincial prisons,²⁷⁸ although there is research showing that the majority of women serving time in the provincial correctional system are also mothers, and usually single parents.²⁷⁹ Motherhood and its associated responsibilities and financial demands (including how it can constrain life choices) becomes straining for incarcerated women whose abilities to maintain relationships with their children are compromised by their separation, and may be difficult for women to balance alongside compliance with supervisory orders once released into the community.²⁸⁰

In their interview-based research, Ferraro and Moe find that issues relating to the custody of women offenders' children are interrelated with other issues, predominantly substance use. For some women in Ferraro and Moe's study, their substance abuse occasioned the removal of their children.²⁸¹ Those women who lost their children to state care (due to substance abuse and other reasons) often simultaneously lost any motivation to seek treatment or otherwise regain control over their addictions and became further embroiled in these struggles.²⁸² Women's respective senses of control over their own lives are undermined when the state removes their children into its custody, and substance use may represent an attempt to reassert some form of control. Alternatively, distressed women forcibly separated from their children may turn to substance use having "nothing [left] to lose,"²⁸³ or who simply use because that feels better (and is more readily achievable than other ways of coping) than their challenging realities. At these junctures, women become more susceptible to criminalization, so issues related to motherhood can impact women's pathways to prison or other criminal sanctions.

²⁷⁸ I had difficulty finding information about provincially-sentenced women in my own research, and Jennifer Bernier too references that compared with the federal level, there is a dearth of information about provincial correctional systems and the women within them. See Bernier, *supra* note 232.

²⁷⁹ See e.g. Jennifer Bernier's study of 32 women who were in provincial correctional institutions or who had previously spent time in provincial custody across Atlantic Canada. *Ibid.*

²⁸⁰ Ferraro & Moe, *supra* note 270 at 36.

²⁸¹ *Ibid.* at 26.

²⁸² See e.g. Ferraro & Moe, *supra* note 270 at 27, 33.

²⁸³ *Ibid.* at 30.

Taking all of these varying experiences into account, it becomes apparent that women have different, and sometimes very constricted, options depending on where they are located socio-economically, and in other ways. Accordingly, victimization can be seen as narrowing women's options such that criminality looms larger as an option – perhaps more accessible (even necessary), less distasteful, or less catastrophic where violence and other traumas have been felt in women's lives. Alternatively, often victimization isolates women from social supports and narrows their options such that few options exist at all for these women, who become more susceptible to becoming criminalized. This depiction is different than suggesting a determinative relationship between victimization and criminalization; instead, it merely points to the strains in marginalized women's lives.

In this context, the victimization-criminalization theory remains helpful in understanding women's criminalization and socio-legal responses to it. Karlene Faith explains that “victimization cannot be named as ‘the’ cause of crime” in part because while many criminalized women have experiences of victimization, the proportion of victimized women who later offend is quite small relative to the number of victimized women who do not.²⁸⁴ As such, she contends “[t]he continuum, then, does not follow deterministically from victimization to criminalization.”²⁸⁵ Instead, Faith suggests

[t]he continuum from victimization is arbitrarily drawn according to power relations as constructed through racially divided and class-based social structures, in tandem with the authority of law and other dominant discourses such as medicine, social sciences and welfare, which all serve selective law enforcement practices.²⁸⁶

²⁸⁴ Karlene Faith, *Unruly Women: The Politics of Confinement and Resistance* (Vancouver: Press Gang Publishers, 1993) at 108. [Faith, *Unruly Women*]

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*

In this light, a woman's criminalization is more properly seen as connected to her experience(s) of victimization as refracted through her (shifting) intersectional positioning.

Intersectionality is a feminist theory holding that feminism is not advanced by a focus exclusively on gender as an analytical category for "understanding and combating inequality."²⁸⁷ Instead, intersectionality posits that gender is just one category of identity that operates in conjunction with other such categories to create a distinct experience²⁸⁸ – an experience of "'interlocking' oppressions."²⁸⁹ Intersectionality offers a more complex way to advance feminist goals because it is more nuanced and can better explain and be applied to the different experiences and situations within the multiplicity of women. For example, intersectionality seeks to provide the framework to understand how gender, race, and class are interrelated experiences within interrelated systems of oppression that fuse together and bolster each other. These interconnections are complicated and personal, but Lorelei Means comments about feminist priorities from the United States context that "'[w]e are *American Indian* women, in that order. We are oppressed, first and foremost as American Indians, as peoples colonized by the United States of American, *not as women*.'"²⁹⁰ Although, the relationship among the various intersections within Aboriginal women's lives is encumbered by complexity, as the *processes* of colonization are not severable from other oppressions: "the subjugation of Indigenous communities depended on the subjugation of women."²⁹¹

²⁸⁷ Joanne Conaghan, "Intersectionality and the Feminist Project in Law" in Emily Grabham *et al*, eds., *Intersectionality and Beyond: Law, Power and the Politics of Location* (New York: Routledge-Cavendish, 2009) 21 at 21. [Conaghan]

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.* at 36.

²⁹⁰ Cited in Verna St. Denis, "Feminism is for Everybody: Aboriginal Women, Feminism and Diversity" in Joyce Audry Green ed., *Making Space for Indigenous Feminism* (Black Point, N.S.: Fernwood Pub., 2007) 33 at 40. [St. Denis]

²⁹¹ Rauna Kuokkanen, "Myths and Realities of Sami Women: A Post-Colonial Feminist Analysis for the Decolonization and Transformation of Sami Society" in Joyce Audry Green ed., *Making Space for Indigenous Feminism* (Black Point, N.S.: Fernwood Pub., 2007) 72 at 81. [Kuokkanen]

Faith's incorporation of intersectional ideas in the victimization-criminalization continuum is useful for its incorporation of systemic factors, like poverty and colonization, which contribute to women's vulnerability to victimization. I envisage the continuum as non-linear, with many incursions and redirections from external forces (broad, structural issues like poverty and discrimination, as well as events within women's lives often stemming from those structural issues such as relationship dissolution or the removal of children by the state). Visually, perhaps the continuum would look something like a web instead of a vector.

Faith rejects notions that the "victim" identity indicates passiveness or powerlessness, but instead offers that the myriad ways women navigate and survive abuse are demonstrations of their agency and choice.²⁹² Criminality should be understood as within these modes of orientation and survival, perhaps indicating "women's resilience and capacity for positive action as well as negative reaction against social injustices."²⁹³ The agency that can be inferred in women's criminal behaviour may take different forms, and criminalized women's choices are and will continue to be constrained by systemic forces. That is, the victimization-criminalization continuum should reflect the often-limited options available to women who become criminalized. These constricted options can be related to the suggestion that "women's experiences in the criminal justice system have been thematically linked by abandonment."²⁹⁴ This abandonment can be conceptualized both at the personal level (such as that from women's families or communities) and marginalization at that state or structural level (such as the deplorable condition of many Aboriginal communities).

²⁹² Faith, *Unruly Women*, *supra* note 284 at 108.

²⁹³ *Ibid.* at 109.

²⁹⁴ Danielle Dirks, "Sexual Revictimization and Retraumatization of Women in Prison" (2004) 32(3/4) *Women's Studies Quarterly* 102 at 108. [Dirks]

Notwithstanding criticisms of the victimization-criminalization continuum, it remains a helpful lens to understand women in conflict with the law. Equally, it is instructive to take a wider view (from a singular focus on women's criminalization) to incorporate discussions about how manifestations of the continuum operate in (or fails to enter) judicial reasoning on sentencing. I will use the victimization-criminalization continuum in the latter respect in this thesis to explore discourses of victimization, criminalization, and where they intersect and impact Aboriginal women at sentencing. I referenced the following quote from *Ipeelee* in Chapter 1, but I return to LeBel J.'s words again here to emphasize the importance of thinking about the relationship between victimization and criminalization in the sentencing of Aboriginal women:

Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely — if ever — attains a level where one could properly say that their actions were not *voluntary* and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability.²⁹⁵

2.4 Shifting pathways: Structural dislocation²⁹⁶ and layered victimizations

Dana D. DeHart calls attention to expanding research that positions victimization as a pivotal force that may propel/accelerate women along a “‘pathway’ to crime,” singularly or alongside “other factors such as poverty, family fragmentation, school failure, and physical and mental health problems.”²⁹⁷ DeHart identifies a direct correlation between victimization and criminality for some women in her study.²⁹⁸ DeHart's study consists primarily of interviews with 60 women (approximately half African-American, half White) at an American maximum-

²⁹⁵ *Ipeelee*, *supra* note 16 at para. 73.

²⁹⁶ DeHart, *supra* note 267 at 1370.

²⁹⁷ *Ibid.* at 1362.

²⁹⁸ *Ibid.* at 1365.

security state prison, and also includes various prison demographic and criminal record documentation, and some related media reports.²⁹⁹ The women's lives include "a range of victimization and criminal experiences"³⁰⁰ and their convictions vary in type and severity from shoplifting to murder. The open-ended interview approach used engaged responses pertaining to "family and relationship history, physical and psychological victimization, lifetime delinquency and crime, and interactions with social service and justice systems."³⁰¹

DeHart draws from earlier work to underscore that victimization and its effects "serve to 'structurally dislocate' women from 'legitimate' social institutions" such as "push[ing] girls and women out of families and peer groups, homes, schools or workplaces, and institutions of worship,"³⁰² as well as creating family disruption experienced by mothers whose children are removed into state care.³⁰³ Through this process, victimization further marginalizes women by limiting or removing access to aspects of our social structure and resources, which restricts their available options for support.³⁰⁴ Without these avenues, it becomes even more difficult for women to leave abusive relationships, and particularly for women who lack the independent financial stability or housing to rely on.³⁰⁵ Victimization impacts women's physical and mental health,³⁰⁶ and women's support networks have already been contracted within controlling, abusive relationships.³⁰⁷

While DeHart's research emerges from the United States, it applies to the effects of victimization for women in Canada. The Native Women's Association of Canada (NWAC)

²⁹⁹ *Ibid.* at 1363.

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² *Ibid.* at 1370.

³⁰³ *Ibid.* at 1371.

³⁰⁴ *Ibid.* at 1366.

³⁰⁵ *Ibid.* at 1371.

³⁰⁶ *Ibid.* at 1368.

³⁰⁷ *Ibid.* at 1371.

reports that with few options available to Aboriginal women in or leaving abusive relationships, they become “forced into situations or coping strategies that increase their vulnerability to violence,” including remaining in abusive situations or entering new ones, sex work, homelessness, and substance abuse.³⁰⁸ Research documents a specific nexus between intimate violence and substance abuse, particularly for marginalized women.³⁰⁹ Statistics Canada reports that substance abuse may be used as a coping mechanism to deal with experiences of victimization, and can increase an individual’s vulnerability to reacting with inappropriate violence or being herself further victimized.³¹⁰ Statistics Canada also describes the frequent connection between substance abuse and criminalization (such as committing offences to support an addiction or where substance abuse becomes entwined within a broader experience of criminality).³¹¹ Chronic poor housing situations in Aboriginal communities (falling beneath the criteria of “safe, secure, affordable or appropriate”) also constrain the options available to women struggling with these issues.³¹² Offenders generally demonstrate a prevalence of “dual, multiple, or overlapping sources of vulnerability,”³¹³ and processes of colonization deepen and tighten these entwined vulnerabilities for Aboriginal women.

DeHart’s work is also helpful to understand the victimization experiences of criminalized Aboriginal women because her study highlights that the “*cumulative* impact of victimization over the life span”³¹⁴ of incarcerated women differentiates their histories and experience from

³⁰⁸ NWAC, “What Their Stories Tell Us”, *supra* note 22 at 13.

³⁰⁹ Tyagi, *supra* note 56 at 134.

³¹⁰ Canada, Statistics Canada: Canadian Centre for Justice Statistics, *Criminal Justice Indicators: 2005*, (Ottawa: Minister of Industry, 2005), online: http://www5.statcan.gc.ca/access_acces/archive.action?loc=/pub/85-227-x/85-227-x2002000-eng.pdf. (Authors: Gannon *et al.*, Editor: Rebecca Kong) at 171. [Statistics Canada, Gannon *et al.*, *Criminal Justice Indicators: 2005*]

³¹¹ *Ibid.*

³¹² NWAC, “What Their Stories Tell Us”, *supra* note 22 at 12.

³¹³ Cindy A. Peternej-Taylor, “Conceptualizing Nursing Research with Offenders: Another Look at Vulnerabilty” (2004) 28(4) *International Journal of Law and Psychiatry* 348 at 350. [Peternej-Taylor]

³¹⁴ DeHart, *supra* note 267 at 1374 [emphasis added].

those of non-incarcerated women.³¹⁵ This finding is highly relevant for Aboriginal women whose extensive histories of victimization are disproportionately high.³¹⁶ The high volume of victimizations also contributes to how women become dislocated from social supports:

[m]ost of the women suffered multiple traumas and were victimized in multiple ways (e.g., child abuse and neglect, adult relationship violence, sexual violence). The varied impacts of polyvictimization (i.e., experiencing simultaneous episodes of different types of victimization) had potential to create ripple effects in multiple arenas in the women's lives, causing overall disruption and pushing the women out of the mainstream. Often, the intersection of losses seemed to create uniquely difficult situations.³¹⁷

Describing polyvictimization as “unrelenting trauma,”³¹⁸ DeHart reports the conclusion from related quantitative studies that the “sheer number of victimizations” is more indicative of the difficulties women may experience than “any particular type.”³¹⁹ The accumulation of victimizations produces “a tangle of barriers that the women faced in finding legitimate pathways in life,”³²⁰ accelerating their structural dislocation.

Such experiences of victimization often do not unfold in a linear manner, victimizations (in)directly leading to criminal activity; instead, these experiences may overlap and fluctuate in an “entanglement of victimization and crime” – knotting ever more tightly the more women become enmeshed in the system.³²¹ In their study comparing physical and sexual revictimization (adult victimization following experiences of child abuse) of incarcerated women against those of inner-city nonincarcerated women, Chantal Poister Tusher and Sarah L. Cook find that incarcerated women were more likely to experience revictimization.³²² While they acknowledge

³¹⁵ *Ibid.*

³¹⁶ See e.g. Juristat: Brennan, *Violent Victimization of Aboriginal Women*, *supra* note 30.

³¹⁷ DeHart, *supra* note 267 at 1374.

³¹⁸ *Ibid.* at 1375.

³¹⁹ *Ibid.*

³²⁰ *Ibid.* at 1378.

³²¹ *Ibid.* at 1377.

³²² Chantal Poister Tusher & Sarah L. Cook, “Comparing Revictimization of Two Groups of Marginalized Women” (2010) 25(10) *Journal of Interpersonal Violence* 1893 at 1906.

that it is “currently unclear how patterns of violence and incarceration intersect throughout women’s lives,”³²³ the finding that there *is* an intersection between victimization and incarceration is significant and deserves attention.

DeHart suggests that understandings about how the cumulative impacts of multiple victimizations may influence options available to women has import at a variety of stages of processing through the justice system, such as “implications for rehabilitation and accountability, including recommendations during pretrial services, sentencing, correctional programming, and conditions of release.”³²⁴ My thesis is animated by an interest in institutional (legal and correctional) perceptions and responses to women’s rehabilitative needs based on differing understandings of how experiences of victimization impact their criminality. In Chapters 3 and 4, I will consider whether/how such understandings are reflected in the presentation of women’s histories (generally through pre-sentencing reports (PSRs)) and how related judicial reasoning leads to rehabilitation-related discourses and sanctions.

2.5 Violence against Aboriginal women

Drawing primarily from the 2004 General Social Survey,³²⁵ Jodi-Anne Brzozowski, Andrea Taylor-Butts, and Sara Johnson find that Aboriginal women are at greater risk of experiencing violence than non-Aboriginal women,³²⁶ including a particularly high risk of

³²³ *Ibid.* at 1907.

³²⁴ DeHart, *supra* note 267 at 1378.

³²⁵ Juristat: Brzozowski, Taylor-Butts & Johnson, *Victimization and Offending*, *supra* note 22. This research did not contain information from the Northwest Territories, Yukon, or Nunavut [at 16], and data from reserves was “likely underrepresented” [Douglas A. Brownridge, “Understanding the Elevated Risk of Partner Violence against Aboriginal Women: A Comparison of Two Nationally Representative Surveys of Canada” (2008) 23(5) *Journal of Family Violence* 353 at 365. [Brownridge]]. It should also be noted that “[r]esearch has shown that crime rates on reserves are higher than crime rates outside reserves” (although “[t]hese differences have been attributed (at least in part) to differences in the nature of policing in these communities”), and that “most Aboriginal people do not live on reserves.” [Juristat: Brzozowski, Taylor-Butts & Johnson, *Victimization and Offending*, *supra* note 22 at 9.]

³²⁶ Juristat: Brzozowski, Taylor-Butts & Johnson, *Victimization and Offending*, *supra* note 22 at 5.

spousal violence³²⁷ in which they are also much more likely “to suffer the most severe forms of spousal violence.”³²⁸ In a subsequent article based on the 2009 data,³²⁹ Shannon Brennan reports that Aboriginal women living in the provinces (excluding the territories) are almost three times as likely as non-Aboriginal women to experience violent victimization³³⁰ (across relationship types, including stranger, acquaintance, and spousal violence).³³¹

The “polyvictimization”³³² and “unrelenting trauma”³³³ experienced by many Aboriginal women – continuous and various experiences of victimization – should be situated within the broader context of processes of colonization. These levels of violence speak to how Aboriginal women experience colonization in a gendered way. In her capacity as the Vice President of the National Action Committee on the Status of Women and a member of the Aboriginal Women’s Action Network (BC), Fay Blaney commented in 2000 about “systemic and institutionalized discrimination” faced by Aboriginal women that “we do have patriarchy and we have colonialism within our Aboriginal communities, not only historically, but today.”³³⁴ Joyce Green writes that “[s]ome Aboriginal cultures and communities are patriarchal, either in cultural origin or because of incorporation of colonizer patriarchy.”³³⁵ Green understands colonialism in

³²⁷ *Ibid.* at 6.

³²⁸ *Ibid.*

³²⁹ This article notes that because a different research question was used to identify Aboriginal peoples in each study, the results should not be directly compared. [Juristat: Brzozowski, Taylor-Butts & Johnson, *Victimization and Offending*, *supra* note 22 at 17 n 3.].

³³⁰ Juristat: Brennan, *Violent Victimization of Aboriginal Women*, *supra* note 30 at 7.

³³¹ *Ibid.* at 9.

³³² DeHart, *supra* note 267 at 1374.

³³³ *Ibid.* at 1375.

³³⁴ However, some other Saskatchewan Aboriginal women attending this conference expressed reservations about Blaney’s statement. Provincial Association of Transitional Houses (PATHS), *Restorative Justice: Is it Justice for Battered Women?: Should the Saskatchewan Government Allow/Institute the Use of Restorative Justice Strategies for Family Violence Cases Throughout the Province/in Only Certain Communities/Only Under Certain Circumstances/with Certain Safeguards?: Report on PATHS’ April 2000 Conference*. Saskatoon, 2000. (Saskatoon: PATHS, 2000), online: PATHS <http://www.hotpeachpages.net/canada/air/rjConfdoc.html>. at 23.

³³⁵ Joyce Green, “Taking Account of Aboriginal Feminism” in Joyce Audry Green ed., *Making Space for Indigenous Feminism* (Black Point, N.S.: Fernwood Pub., 2007) 20 at 22. [Green, “Taking Account of Aboriginal Feminism”]

an intersectional way, noting it is “closely tied to racism and sexism.”³³⁶ She describes that these -isms have been “directed at Indigenous people,” but have also been internalized by some Indigenous political cultures in ways that are oppressive to Indigenous women.”³³⁷ Douglas A. Brownridge explains “the elevated risk for violence against Aboriginal women is not due to any single risk factor but, rather, a constellation of variables that may be linked to the larger experience of colonization.”³³⁸ Andrea Smith, a Cherokee scholar, connects intimate violence against women in Indigenous societies to colonization.³³⁹ I will discuss colonization in greater depth below.

Most of Aboriginal women’s experiences of violence are not reported to the police.³⁴⁰ This mirrors the general data that most violence against women goes unreported – and incidents that are reported are not always recorded in police files, often not producing a conviction, “and rarely result in incapacitation.”³⁴¹ As Aboriginal women’s experiences of victimization are generally underreported to police, the PSRs of Aboriginal women offenders may often signify the first time these experiences enter the consciousness of the criminal justice system. This is significant to how Aboriginal women’s histories of victimization are understood and shaped in judicial reasoning in sentencing decisions, because these histories are often substantial, having accumulated before the women come into conflict with the law. That is, Aboriginal women’s experiences of violent victimization become apparent to state institutions when the women themselves are sentenced as offenders, some time after the continuum has been impelled into motion.

³³⁶ *Ibid.*

³³⁷ *Ibid.* at 22-3.

³³⁸ Brownridge, *supra* note 325 at 366.

³³⁹ Kuokkanen, *supra* note 291 at 81.

³⁴⁰ Juristat: Brennan, *Violent Victimization of Aboriginal Women*, *supra* note 30 at 9.

³⁴¹ Kim Pate, “Advocacy, Activism and Social Change for Women in Prison” *Canadian Woman Studies* 25: 3,4 (Summer 2006) 81 at 82. [Pate, “Advocacy, Activism and Social Change”]

Any discussion of the victimization of Aboriginal women must address missing and murdered women in Canada, as they are disproportionately Aboriginal women. Many of these women have been pushed out of (“structurally dislocate[ed]”³⁴² from) safe social spaces, and in the survival street sex trade many have “suffered some tragic life event that led them to the streets.”³⁴³ The data within Statistics Canada’s General Social Survey regarding violence against Aboriginal women only include the violent crimes of sexual assault, robbery, and physical assault, but do not include missing and murdered women.³⁴⁴ To address these lacunae and to give voice to the stories of silenced women, the Sisters in Spirit initiative within the Native Women’s Association of Canada (NWAC) reported in 2010 on its review of 740 cases of missing and murdered women spanning the twenty years prior. Within these cases, Sisters in Spirit report that 582 involve Aboriginal women.³⁴⁵ Of those 582 cases, 20% are missing women and girls; 67% died from homicide or negligence; 4% police have dismissed as non-criminal cases but continue to be considered suspicious by the women’s support networks; and the circumstances of 9% of the cases remain unclear.³⁴⁶ Despite the already troubling scope of these findings, Sisters in Spirit cautions that these numbers may be conservative and the extent of these forms of violence against Aboriginal women is likely much wider.³⁴⁷

Of the women the research did identify as Aboriginal, over half of the women were young (under age 31).³⁴⁸ While the project could only obtain family information for about a third of the total 582 women, most of these women were mothers, which Sisters in Spirit notes produces

³⁴² DeHart, *supra* note 267 at 1370.

³⁴³ Larry Campbell, Neil Boyd, & Lori Culbert, *A Thousand Dreams: Vancouver’s Downtown Eastside and the Fight for its Future* (Vancouver: Greystone Books, 2009) at 142.

³⁴⁴ Juristat: Brennan, *Violent Victimization of Aboriginal Women*, *supra* note 30 at 9.

³⁴⁵ NWAC, “What Their Stories Tell Us”, *supra* note 22 at 17.

³⁴⁶ *Ibid.* at 18.

³⁴⁷ *Ibid.* at 17.

³⁴⁸ *Ibid.* at 23.

intergenerational effects in the loss experienced by their children.³⁴⁹ Most of the incidents happened in urban areas of Western Canada, although the cases were distributed across Canada.³⁵⁰ While almost half of the cases studied remain unsolved,³⁵¹ of cases containing information about the offender, Sisters in Spirit reports that overwhelmingly the offenders are men,³⁵² both Aboriginal and non-Aboriginal men,³⁵³ and in the context of many types of relationships.³⁵⁴ Finally, while information was incomplete about the victims and any sex work involvement (this information was only available for about 25% of the 582 women), there was some prevalence of sex work.³⁵⁵ Sisters in Spirit is careful to note that sex work is not causally related to these women becoming missing or murdered, but instead that “many women arrive at that point in the context of limited options and after experiencing multiple forms of trauma or victimization.”³⁵⁶ This depiction reflects my interpretation of the victimization-criminalization continuum. Sisters in Spirit locates the problem of missing and murdered Aboriginal women in the aftermath and continued effects of colonization, which necessitates attention to traumas faced by Aboriginal men too (and not just women), because it is all interconnected.³⁵⁷

2.6 Gendered intersections in the criminalization of Aboriginal women

As victimization functions to displace women from the social institutions that support and connect us to each other, it further marginalizes women who are already marginalized within a confluence of intersectional disadvantages. Some feminists have exposed the limits of intersectionality to the feminist project because it “tells us little about the wider context in which

³⁴⁹ *Ibid.* at 24.

³⁵⁰ *Ibid.* at 25-7.

³⁵¹ *Ibid.* at 27.

³⁵² *Ibid.* at 30.

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.* at 31.

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.* at 33.

such experiences are produced, mediated and expressed”³⁵⁸ and specifically is not sufficiently instructive about how inequalities form or the “relations of subordination” in which they are produced.³⁵⁹ However, intersectionality still assists in thinking about the sentencing of Aboriginal women. Its utility is evident in Gillian Balfour’s argument that colonization has created uniquely vulnerable conditions for Aboriginal women to be victimized, contributing to the uneven application and effects of the 1996 sentencing amendments for Aboriginal men versus Aboriginal women, and permitting the “incarceration spiral”³⁶⁰ of Aboriginal women to persist.

Identifying the dissonance between sentencing practices that have restorative underpinnings and the goal to address the overincarceration of Aboriginal peoples (s. 718.2(e) and s. 742.1) and Aboriginal women’s escalating imprisonment rates, Gillian Balfour explores “the exclusion of women’s narratives of violence and social isolation in the practice of sentencing law.”³⁶¹ In the 1980s and 90s, the federal government prompted Canadian police departments to use mandatory charging policies for domestic violence calls to address violence against women, except the incidental effect became that marginalized women (often racialized and poor) were increasingly charged within these policies too.³⁶² Often Aboriginal women (particularly in remote areas) did not receive proper police responses when they sought assistance for the violence to which they were subjected in their relationships, which sometimes resulted in their being later charged for their own violence in self-defence.³⁶³ Balfour also notes that Aboriginal women living on reserves are charged in much higher proportions than

³⁵⁸ Conaghan, *supra* note 287 at 29.

³⁵⁹ *Ibid.* at 41.

³⁶⁰ Balfour, “Falling Between the Cracks”, *supra* note 17 at 115.

³⁶¹ *Ibid.* at 102.

³⁶² *Ibid.* at 103. For a study of how mandatory charging policies for domestic violence police calls in the United States has had similar deleterious impacts on women, see e.g. Muftic, Bouffard, & Bouffard, *supra* note 234.

³⁶³ Balfour, “Falling Between the Cracks”, *supra* note 17 at 103.

Aboriginal women living off-reserve.³⁶⁴ Balfour situates Aboriginal women's vulnerability to victimization within processes of colonization, describing that the "legacy of colonialist policies such as the reserve system and residential schools, as well as the destruction of traditional economies and cultural institutions, have created such conditions."³⁶⁵

Balfour characterizes the mandatory charging policies as retributive strategies that fail to respond to feminist concerns and fail to protect Aboriginal women.³⁶⁶ However, restorative sentencing practices included in the 1996 sentencing amendments have also failed to benefit Aboriginal women. Noting that Aboriginal women's rates of incarceration are increasing at a greater rate than those of Aboriginal men, Balfour suggests that these amendments have produced gendered effects.³⁶⁷ As a result, Balfour writes that there is a "fault line"³⁶⁸ between retributive and restorative justice policies and Aboriginal women have "fallen between the cracks,"³⁶⁹ because neither punishment philosophy has managed to reduce the overrepresentation of Aboriginal women in the system. Balfour describes these issues as "the confluence of victimization, criminalization, and incarceration of Aboriginal women"³⁷⁰

Significantly, Balfour argues that the systemic and background factors required for consideration by *Gladue* should include gendered understandings of violence experienced by Aboriginal women, but are not sufficiently recognized as such in sentencing decisions.³⁷¹ For example, she examines the transcripts from *Gladue* and finds that the evidence of domestic abuse experienced by Jamie Gladue was not taken into account on sentencing whereas Gladue's own

³⁶⁴ *Ibid.* at 104.

³⁶⁵ *Ibid.* at 115.

³⁶⁶ *Ibid.* at 104.

³⁶⁷ *Ibid.* at 105.

³⁶⁸ *Ibid.* at 102.

³⁶⁹ *Ibid.* at 116.

³⁷⁰ *Ibid.* at 114.

³⁷¹ *Ibid.* at 113.

violence (for which she was charged) was aggravating.³⁷² Moreover, the Crown dismissed Gladue's own experiences of violence within her relationship, and the trial judge supported this erasure.³⁷³ I discussed in Chapter 1 the frequency with which the violence committed by Aboriginal women sentenced in the decisions I consulted is aggravating under the *Code*, but is not situated within the context of their own (often extensive) experiences of abuse. To respond to these problems, Balfour suggests that defence counsel must change their "lawyering strategies" such that they actively engage with Aboriginal women's histories of victimization and incorporate these histories as *gendered* systemic and background factors that must be considered within the s. 718.2(e) analysis.³⁷⁴ However, for these strategies to be effective, there must be meaningful alternatives to incarceration available.

2.7 Revisiting the colonization that never left

I discussed colonization in Chapter 1, and will expand here. Douglas A. Brownridge explains that "[c]olonization theory essentially argues that the problems faced by many Aboriginal peoples have their roots in Aboriginal peoples' historical experiences."³⁷⁵ As Aboriginal peoples continue to suffer the effects (and ongoing manifestations) of colonization, understandings of these processes must inform criminal justice laws and policies affecting Aboriginal peoples. Juristat notes that some researchers contend "that the long-term effect of colonization has been the marginalization of Aboriginal peoples, which is reflected in high unemployment rates, low levels of education, low income and inadequate living conditions,"³⁷⁶ and Brownridge references research connecting substance abuse to the "the social and cultural

³⁷² *Ibid.*

³⁷³ *Ibid.* at 114.

³⁷⁴ *Ibid.* at 115.

³⁷⁵ Brownridge, *supra* note 314 at 355.

³⁷⁶ Juristat: Brzozowski, Taylor-Butts & Johnson, *Victimization and Offending*, *supra* note 22 at 20 n 5.

distress of Aboriginal peoples' past and continuing colonization."³⁷⁷ All of these marginalizing effects have been correlated with both victimization and criminalization.

Processes and effects of colonization are felt both for Aboriginal peoples living in urban environments as well as those living on reserve, as recognized in the *Gladue* proclamation that alternatives to incarceration must be explored for Aboriginal peoples living in urban, rural, and reserve settings³⁷⁸ because s. 718.2(e) applies to all Aboriginal peoples irrespective of where they live.³⁷⁹ The vast majority of Aboriginal peoples live off-reserve in urban centres today³⁸⁰ (in larger numbers in Western Canada),³⁸¹ often because their communities lack necessary support to care for their basic needs, especially health and social services.³⁸² For many Aboriginal peoples, this urbanization carries with it feelings of isolation and alienation from their cultures, whilst often failing to convey access to the resources and services needed.³⁸³ However, some authors also point out that Aboriginal peoples living in cities "actively make the urban place their space"³⁸⁴ (such as through participating in friendship centres),³⁸⁵ and that it is essentializing and misrepresentative to confine Aboriginal experiences to more traditional, stereotypical settings.³⁸⁶ Instead, Aboriginal communities and individual and collective identities

³⁷⁷ Brownridge, *supra* note 325 at 365.

³⁷⁸ *Gladue*, *supra* note 15 at para. 84.

³⁷⁹ *Ibid.* at para. 91.

³⁸⁰ Cindy Blackstock *et al.*, *Keeping the Promise: The Convention on the Rights of the Child and the Lived Experiences of First Nations Children and Youth* (Ottawa: First Nations Child & Family Caring Society of Canada, 2004) at 47. [Blackstock *et al.*]

³⁸¹ *Ibid.* at 46.

³⁸² *Ibid.* at 44.

³⁸³ *Ibid.* at 49.

³⁸⁴ Heather A. Howard & Craig Proulx, "Transformations and Continuities: An Introduction" in Heather A. Howard & Craig Proulx, eds., *Aboriginal Peoples in Canadian Cities: Transformations and Continuities* (Waterloo: Wilfred Laurier University Press, 2011) 1 at 4. [Howard & Proulx, "Transformations and Continuities"]

³⁸⁵ For a discussion of community-building through Aboriginal friendship centres in cities, see Heather A. Howard, "The Friendship Centre: Native People and the Organization of Community in Cities" in Heather A. Howard & Craig Proulx, eds., *Aboriginal Peoples in Canadian Cities: Transformations and Continuities* (Waterloo: Wilfred Laurier University Press, 2011) 87. [Howard, "The Friendship Centre"]

³⁸⁶ Howard & Proulx, "Transformations and Continuities: An Introduction", *supra* note 384 at 8.

shift, change, and may be amorphous.³⁸⁷ Nonetheless, despite these positive ways of reasserting control and reclaiming their identities, the overrepresentation of Aboriginal peoples in prisons is a stark reminder that their communities continue to suffer the effects of colonization. I will discuss aspects of colonization below, although an exhaustive examination of the colonization of Aboriginal peoples exceeds the scope of this thesis.

The government's forced relocation of Aboriginal communities is one of the many events that relegated Aboriginal peoples to the margins. Colonization was executed without consultation, and practices including these forced relocations of Aboriginal communities worsened a "decline in living standards, social and health problems, and a breakdown of political leadership."³⁸⁸ The Royal Commission on Aboriginal Peoples (RCAP) reports that the relocations "must be seen as part of a broader process of dispossession and displacement, a process with lingering effects on the cultural, spiritual, social, economic and political aspects of people's lives."³⁸⁹ This "may have contributed to the general malaise gripping so many Aboriginal communities and to the incidence of violence, directed outward and inward."³⁹⁰

In one of the most damaging forms of colonialist policy, the Canadian government and Christian churches jointly began the residential school system in the 1800s. Closures began in the 1940s³⁹¹ but the final residential school closure was not until 1996.³⁹² During this period, many thousands of Aboriginal children were effectively "legally kidnapped," and forced into residential schools – often far away from home, and for many years.³⁹³ NWAC reports that

³⁸⁷ *Ibid.* at 15.

³⁸⁸ RCAP, *Report: Looking Forward, Looking Back*, *supra* note 43.

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid.*

³⁹¹ Blackstock *et al.*, *supra* note 380 at 153.

³⁹² NWAC, "What Their Stories Tell Us", *supra* note 22 at 7.

³⁹³ Lindy-Lou Flynn, "Plains Indian Ways to Inter-tribal Cultural Healing in Vancouver" in Heather A. Howard & Craig Proulx, eds., *Aboriginal Peoples in Canadian Cities: Transformations and Continuities* (Waterloo: Wilfred Laurier University Press, 2011) 227 at 228. [Flynn]

across the period in which residential schools were active, 150 000 Aboriginal children attended.³⁹⁴ Clearly, it became a painfully entrenched part of Aboriginal societies.³⁹⁵ Replete with horrific neglect and abuse of every sort (even preventable deaths),³⁹⁶ these institutions attempted to eradicate Aboriginal culture³⁹⁷ and Aboriginal communities were left without resources to attempt to cope with the various traumas.³⁹⁸ This process of forced assimilation profoundly disrupted Aboriginal family structures, community coherence, educational systems, and cultural integrity.³⁹⁹ Cherokee scholar Andrea Smith highlights “the link between state violence and interpersonal violence” through the example of the residue of abuse from “boarding schools.”⁴⁰⁰ Roland Chrisjohn, Sherri Young, and Michael Maraun powerfully argue that the “Indian Residential Schools were genocide.”⁴⁰¹ They assert that the forced transfers of Aboriginal children, suppression of Aboriginal culture, forced assimilation practices, and the infliction of serious mental harm on Aboriginal peoples as members of a group constitute genocide because “cultural genocide is genocide.”⁴⁰² In turn, Chrisjohn, Young, and Maraun contend “the federal government of Canada bears primary responsibility for adopting and implementing an explicitly genocidal policy,”⁴⁰³ although they also locate responsibility with the

³⁹⁴ NWAC, “Arrest the Legacy: From Residential Schools to Prisons” (2012), online: Native Women’s Association of Canada <http://www.nwac.ca/gendering-reconciliation> at 1 (in Insert 1). [NWAC, “Arrest the Legacy”]

³⁹⁵ For a list of the residential schools the Truth and Reconciliation Commission included in its mandate, see Truth and Reconciliation Commission of Canada, “Residential School Locations” *Truth and Reconciliation Commission of Canada*, online: Truth and Reconciliation Commission of Canada <http://www.trc.ca/websites/trcinstitution/index.php?p=12>. Note that while there are approximately 140 institutions listed and it may be a complete or near-complete list, this may not comprise an exhaustive list of residential schools as it only represents those considered by the Truth and Reconciliation Commission.

³⁹⁶ While these abuses resist categorization because they are interrelated, for a list of such abuses see for example Roland Chrisjohn, Sherri Young, & Michael Maraun, *The Circle Game: Shadows and Substance in the Indian Residential School Experience in Canada* (Sylx territory on the Penticton Indian Reserve, BC: Theytus Books, 2006) at 49-51. [Chrisjohn, Young, & Maraun]

³⁹⁷ Blackstock *et al.*, *supra* note 380 at 153.

³⁹⁸ *Ibid.* at 154.

³⁹⁹ NWAC, “What Their Stories Tell Us”, *supra* note 22 at 7.

⁴⁰⁰ Kuokkanen, *supra* note 291 at 81.

⁴⁰¹ Chrisjohn, Young, & Maraun, *supra* note 396 at 63.

⁴⁰² *Ibid.* at 60-3.

⁴⁰³ *Ibid.* at 61.

churches.⁴⁰⁴ The widespread relationship rupture and suppression of Aboriginal languages and cultures continues to have corrosive effects for Aboriginal peoples and their communities. These continued effects are often called “intergenerational effects” or “intergenerational trauma.”⁴⁰⁵

The *Indian Act* was enacted in 1876, acting as a legal instrument through which Aboriginal peoples could be controlled, over everything from their very membership in Aboriginal nations (by creating status laws that excluded Aboriginal peoples who do not meet “legislated identity criteria”⁴⁰⁶) to their lands and resources.⁴⁰⁷ Historically, this statute had many oppressive features such as its attempts to suppress Aboriginal culture by such provisions as that prohibiting potlatches and other ceremonies,⁴⁰⁸ and restricting the mobility of Aboriginal peoples.⁴⁰⁹ The status laws have been particularly deleterious for Aboriginal women whose status became contingent on their marital state.⁴¹⁰ Membership status is significant for Aboriginal peoples on a number of levels, including the impacts on their senses of identity and the legal repercussions (as the *Indian Act* connects status to Aboriginal rights and title).⁴¹¹ Without suggesting that all Aboriginal societies were devoid of gender oppression before colonialism,⁴¹² the *Indian Act* also said to have “abolished the traditional matriarchal society for a patriarchal one,”⁴¹³ disrupting

⁴⁰⁴ *Ibid.* at 51.

⁴⁰⁵ NWAC, “What Their Stories Tell Us”, *supra* note 22 at 8.

⁴⁰⁶ Howard & Proulx, “Transformations and Continuities”, *supra* note 384 at 6.

⁴⁰⁷ Flynn, *supra* note 393 at 228.

⁴⁰⁸ *Ibid.* at 229.

⁴⁰⁹ Sadie Donovan, “Challenges to and Successes in Urban Aboriginal Education in Canada: A Case Study of Wiingashk Secondary School” in Heather A. Howard & Craig Proulx, eds., *Aboriginal Peoples in Canadian Cities: Transformations and Continuities* (Waterloo: Wilfred Laurier University Press, 2011) 123 at 126.

⁴¹⁰ For example, David R. Newhouse writes “[m]y mother was born a status Indian, became a non-status Indian upon enfranchisement, and became a status Indian again upon marriage to my father, a status Indian.” He also describes how he continues to be affected, because “[a]s a result of the arcane membership rules of the Indian Act, I am considered to have 50% Indian blood, 50% non-Indian blood.” [“Urban Life: Reflections of a Middle-Class Indian” in Heather A. Howard & Craig Proulx, eds., *Aboriginal Peoples in Canadian Cities: Transformations and Continuities* (Waterloo: Wilfred Laurier University Press, 2011) 23 at 29.

⁴¹¹ Regna Darnell, “Nomadic Legacies and Contemporary Decision-Making Strategies between Reserve and City” in Heather A. Howard & Craig Proulx, eds., *Aboriginal Peoples in Canadian Cities: Transformations and Continuities* (Waterloo: Wilfred Laurier University Press, 2011) 39 at 41-2. [Darnell]

⁴¹² Green, “Taking Account of Aboriginal Feminism”, *supra* note 335 at 23.

⁴¹³ *Ibid.* at 22.

traditional Aboriginal social orders and reducing the standing of Aboriginal women.⁴¹⁴

The *Indian Act* remains in existence today,⁴¹⁵ retaining much of its oppressiveness and power over Aboriginal peoples “from cradle to grave”⁴¹⁶ and requiring Aboriginal communities/nations to “still face up to the essentialized legal norms of Indian-ness perpetuated in the Canadian Indian Act.”⁴¹⁷ For example, while 1985 amendments to the *Indian Act* through Bill C-31 permitted the reinstatement of membership status to Aboriginal women whose status was previously rescinded, if an Aboriginal woman who had married a non-Aboriginal man reclaims this status and they have a child who also marries a non-Aboriginal person, her child loses Aboriginal status.⁴¹⁸ Additionally, the government did not provide the resources necessary to reserve communities to be able to support the increased numbers of Aboriginal peoples that returned after the reinstatement of their status following these amendments, adding strain to already compromised communities.⁴¹⁹

The *Indian Act* was amended in 1951, permitting provincial and territorial child welfare authorities to remove Aboriginal children from their homes and reassign them to generally non-Aboriginal families, causing dislocation, cultural loss, and sometimes abuse.⁴²⁰ Thousands of Aboriginal families were subjected to this upheaval, particularly between 1960 and 1980.⁴²¹ Even against this history, NWAC reported in 2010 that there are more Aboriginal children in

⁴¹⁴ See e.g. St. Denis, *supra* note 290 at 37-8. However, there is some debate about whether traditional Aboriginal societies actually represented gender equality. See for example LaRocque, *supra* note 264 at 55.

⁴¹⁵ *Indian Act*, *supra* note 48.

⁴¹⁶ Flynn, *supra* note 393 at 229.

⁴¹⁷ Marianne Ignass, “‘Why Is My People Sleeping?’ First Nations Hip Hop between the Rez and the City” in Heather A. Howard & Craig Proulx, eds., *Aboriginal Peoples in Canadian Cities: Transformations and Continuities* (Waterloo: Wilfred Laurier University Press, 2011) 203 at 204.

⁴¹⁸ Darnell, *supra* note 411 at 45.

⁴¹⁹ Howard, “The Friendship Centre”, *supra* note 385 at 102.

⁴²⁰ NWAC, “What Their Stories Tell Us”, *supra* note 22 at 8.

⁴²¹ *Ibid.*

state custody than ever before.⁴²² In another form of Aboriginal overrepresentation, Aboriginal children are vastly disproportionately represented within the number of overall Canadian children in care.⁴²³

Sisters in Spirit identify that child welfare policies must be revisited because Aboriginal children are generally removed into care for different reasons than are non-Aboriginal children – predominantly for neglect (more frequently than for abuse), and stemming from substance misuse, housing shortages and inadequacies, and poverty generally.⁴²⁴ It is necessary to recognize that these phenomena (substance abuse, poor housing, and poverty writ large) combine in different ways for Aboriginal communities than other, non-Aboriginal communities struggling with the same problems. This is where ongoing processes and effects of colonization have distinct, intersectional impacts. For example, there is research demonstrating that controlling for these issues (i.e., when these social ills are found in other families and communities), Aboriginal families and communities remain more likely than non-Aboriginal families and communities to be subjected to intervention by child welfare authorities.⁴²⁵

Blackstock *et al* emphasize “the institutionalization of Aboriginal children is a profound concern for Aboriginal peoples.”⁴²⁶ I would add that this is also a profound concern for the criminal justice system, as the intergenerational trauma and fragmentation in Aboriginal communities contributes to the criminalization of Aboriginal peoples. Additionally, there is research indicating a connection between being removed into state care in childhood with coming into conflict with the law.⁴²⁷ This research also suggests a relationship between being

⁴²² *Ibid.*

⁴²³ *Ibid.*

⁴²⁴ *Ibid.*

⁴²⁵ Blackstock *et al.*, *supra* note 380 at 159.

⁴²⁶ *Ibid.* at 155.

⁴²⁷ NWAC, “What Their Stories Tell Us”, *supra* note 22 at 10.

involved in state child custody with later becoming involved in sex work.⁴²⁸ Further, it should be spelled out that in both of these two institutional structures (the state child custody system and the criminal justice system, particularly its prisons), Aboriginal peoples continue to be alarmingly overrepresented, and both structures involve some of the most marginalized people in our society.

2.7.1 Criminalization: A branch or strategy of colonization?

Patricia A. Monture argues that “[c]riminalization of Indigenous populations, which results in the present rates of overrepresentation, is in fact a *strategy* of colonialism and it is therefore seen globally.”⁴²⁹ I am somewhat conflicted about the term “strategy” because it implies deliberateness, defined as “a plan, method, or series of maneuvers or stratagems for obtaining a specific goal or result.”⁴³⁰ Historically, there have definitely been government-designed strategies (such as those discussed above) that have been directed toward various abhorrent goals, including that of assimilation and the cultural destruction of Aboriginal peoples, ostensible ownership of the land comprising the territories of Aboriginal nations, and control over Aboriginal peoples. NWAC describes such strategies as “by all definitions, cultural genocide,”⁴³¹ and these strategies continue to have reverberating effects in the lives of Aboriginal peoples, and this is certainly evident in the mass poverty within Aboriginal communities and the overrepresentation of Aboriginal peoples in the justice system, among other definitive indicators. However, it seems that these continuing problems function more as tidal ripple effects than express strategies in the way that previous iterations of colonization seem (such as the residential

⁴²⁸ *Ibid.*

⁴²⁹ Patricia A. Monture, “Confronting Power: Aboriginal Women and Justice Reform” *Canadian Woman Studies* 25:3,4 (Summer 2006) 25 at 26 [emphasis added]. [Monture, “Confronting Power”]

⁴³⁰ *Dictionary.com*, online: Dictionary.com <http://dictionary.reference.com/>, s.v. “strategy”.

⁴³¹ NWAC, “Arrest the Legacy”, *supra* note 394 at 4 (in Insert 1).

school system).

Certainly, the criminalization of Aboriginal peoples represents a manifestation of how processes of colonization are extended. That is, processes of colonization seem to be maintained in two primary ways: initially because the widespread, pervasive poverty effected through colonization creates conditions that make Aboriginal peoples vulnerable to criminalization, and subsequently because the effect of criminalization (particularly incarceration) is to exacerbate problems association with colonization (such as continued cultural alienation and the ongoing disruption of Aboriginal families and fragmentation of their communities). NWAC emphasizes the relationship between the cultural/familial devastation characteristic of residential schools and that inherent in the overincarceration of Aboriginal peoples: “Canadian correctional institutions continue the legacy of separating Aboriginal children from parents, while holding them in environments where racism and discrimination thrive.”⁴³²

The issue of whether criminalizing practices are representative of strategies of colonization is perhaps difficult to affirm in the face of such initiatives as the government legislating s. 718.2(e) to ameliorate the overincarceration of Aboriginal peoples. Equally, however, the government continues to undercut those sentencing reforms with the 2007 and 2012 conditional sentencing amendments. While those regressions may be motivated by an ostensible concern for victims (i.e., not directed at Aboriginal peoples), they will likely have the effect of contributing to the further overincarceration of Aboriginal peoples.

It may be helpful to consider that Sisters in Spirit decries the child welfare system’s apprehension strategy inherent in removing children from Aboriginal families for its inattention to the long-term consequences of this practice.⁴³³ Sisters in Spirit describe this as a “focus”⁴³⁴ of

⁴³² *Ibid.*

⁴³³ NWAC, “What Their Stories Tell Us”, *supra* note 22 at 9.

state custodial services and do not use the term “strategy,” however as these removals represent action predicated on an institutional focus, they should be regarded as a form of strategy. In this light, perhaps it is useful to consider incarceration as another form of strategy, at least because it represents an institutional focus wherein the mode of dealing with social problems (with colonialist foundations) in Aboriginal communities is to remove people from the community and confine them. This is not merely a matter of “ask[ing] what it is about crime that makes punishment an appropriate response to it,”⁴³⁵ but rather “what about the crime of Aboriginal peoples makes incarceration an appropriate response” – a question to which *Gladue* responds following s. 718.2(e) that “there is something different about aboriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction.”⁴³⁶

Yet despite this legislative and judicial pushback signaling that the overrepresentation of Aboriginal peoples in prisons is a “crisis”⁴³⁷ that must be addressed from a number of avenues, not least at sentencing, Aboriginal peoples continue to be disproportionately represented in Canadian prisons. Monture argues that imprisonment and colonialism share “[p]ower, control, and isolation” as “key components” that “are now embedded.”⁴³⁸ Perhaps continued overincarceration in the face of attempts at the opposite speak to processes of institutionalization that persist independently of discrete law and policy changes because they become inveterate – hardened, but retaining momentum within these structures. This kind of institutionalization is built into the continued overincarceration of Aboriginal peoples, evidenced by its resistance to respond to attempts to address the problem. It is conceptually helpful to consider Kimberlé

⁴³⁴ *Ibid.*

⁴³⁵ R. A. Duff & D. Garland, “Introduction: Thinking about Punishment” in Antony Duff & David Garland, eds., *A Reader on Punishment* (Oxford: Oxford University Press, 1994) 1 at 4.

⁴³⁶ *Gladue*, *supra* note 15 at para. 37.

⁴³⁷ *Ibid.* at para. 64.

⁴³⁸ Monture, “Confronting Power”, *supra* note 429 at 28.

Crenshaw's depiction of intersectionality here. Crenshaw suggests that forms of subordination such as classism, racism, and patriarchy are enacted in repetitive ways that leave tracks through which the "traffic" of power and decision-making travel, creating patterns and conditions where these dynamics are replicated and become systemic.⁴³⁹ This framework is useful to understand how legal and policy processes and decisions become institutionalized, solidified, and resistant to change.

It does appear that there have been various institutional practices that have predominated in different historical periods and that (functionally) seem to supplant each other as the primary modes of retaining control over Aboriginal peoples. That is, for example, Lindy-Lou Flynn writes that as the pattern of removing Aboriginal children into residential schools began to dissipate in the 1950s, the child welfare system "quickly rose up to take its place."⁴⁴⁰ Whether because of a form of "strategy" or merely that gutters in the institutional landscape are resistant to being redirected and policies flow through these channels, there have been governmental forms of control over Aboriginal peoples that preponderate in any given time. Perhaps the disproportionate criminalization and incarceration of Aboriginal peoples is one of the primary institutionalized ways through which Aboriginal peoples are controlled in today's Canada, and perhaps this effect of continued forms of control is more significant than whether it is designed as a direct or indirect strategy. Finally, perhaps it is unnecessary to attempt to definitively conclude whether criminalization is an institutional strategy. For example, referring to the "motives" of the developers of the residential school system, Chrisjohn, Young, and Maraun argue that even they could be known, they "don't explain anything": "[t]here is no need to posit

⁴³⁹ Kimberlé Crenshaw, "A Tale of Two Movements: Intersectionality, Gender, and the Prison Industrial Complex" (Lecture delivered at the UCSB Multicultural Centre Theatre, 18 May 2006), Regents of the University of California, online: youtube <http://www.youtube.com/watch?v=d1v9E83yTNA>.

⁴⁴⁰ Flynn, *supra* note 393 at 229.

and argue about the personal attitudes, values, morals, or ‘whatevers’ of these men, when the political, economic, social, and legal inducements for them to act in a particular manner are so crystal clear.”⁴⁴¹

The criminalization of Aboriginal peoples is much muddier and more complex now, because the government and judiciary have both framed it as an appalling national problem. However, the institutionalization of ways of controlling Aboriginal peoples functions as colonization, whatever its intents. For example, the *Indian Act* sanctioned the removal of Aboriginal children into state care, and this should be regarded as an institutional strategy of colonization. Because there were three times as many Aboriginal children in state care in 2004 as at the peak of the residential school system⁴⁴² (after the period in which such child removal was a more express policy), it is clear that the strategy of colonization that ostensibly reached its height between the 1960’s and the mid-1980’s (the “Sixties Scoop”)⁴⁴³ has continued (and accelerated) in much the same form through today. In this respect, perhaps it does not matter whether we call criminalization a “strategy” of colonization or not. Perhaps it only matters that Aboriginal peoples continue to suffer similar (and intergenerational) effects from today’s policies and laws. Whether Aboriginal peoples experience an extension of colonization strategies or are marginalized by different strategies that convey similar effects (by exacerbating longstanding problems or creating new problems), in the end it all begins to blur together.

Above thinking about whether criminalization is a strategy of colonization, it may be more helpful to think about how colonization (as a series of institutionalized processes) is resistant to developments in law that seek but fail to produce decolonizing ends. Deborah Bird Rose’s

⁴⁴¹ Chrisjohn, Young, & Maraun, *supra* note 396 at 30.

⁴⁴² Blackstock *et al.*, *supra* note 380 at 154.

⁴⁴³ NWAC, “What Their Stories Tell Us”, *supra* note 22 at 8.

concept of “deep colonizing”⁴⁴⁴ practices is instructive here. Rose explores how institutions that are motivated by decolonizing objectives or organizing principles (such as truth and reconciliation commissions) can actually bolster the very processes of colonization they strive to dismantle.⁴⁴⁵ Rose writes in the Indigenous land claim context in Australia, examining one such claim to find that the experiences of Indigenous women were not properly considered in the institutional process of collecting evidence about their society, and the contributions they did make were required in a form that was in contradistinction to the gender norms within their community.⁴⁴⁶ This has the result of denying them full participation in otherwise decolonizing institutions, and thereby compounding the very processes of colonization challenged.

Applying Rose’s analysis to the overincarceration of Aboriginal peoples in Canada, s. 718.2(e) and *Gladue* are together a manifestation of the institutional decolonizing strategy to ameliorate the overrepresentation of Aboriginal peoples in prisons, and over fifteen years after the implementation of the 1996 sentencing amendments Aboriginal peoples continue to be vastly overrepresented in the system. Following Rose’s example, perhaps one of the intrinsic problems with these decolonizing strategies is the minimal opening for meaningful consultation with Aboriginal communities (such as through sentencing circles) and the operation of these strategies within the very adversarial legal system in which Aboriginal peoples are overrepresented (as opposed to equally incorporating Aboriginal justice traditions, or greater movement toward Aboriginal self-government). Nonetheless, I would argue that at minimum colonization certainly has cut deep tracks that current socio-legal practices are routed through, and deep enough that even attempts to divert them (such as s. 718.2(e)) have not yet proved successful.

⁴⁴⁴ Cited in Elena Marchetti, “Intersectional Race and Gender Analyses: Why Legal Processes Just Don’t Get It” (2008) 17(2) *Social & Legal Studies* 155.

⁴⁴⁵ See the discussion in Elena Marchetti, “The Deep Colonizing Practices of the Australian Royal Commission into Aboriginal Deaths in Custody” (2006) 33(3) *Journal Of Law And Society* 451 at 461-2.

⁴⁴⁶ *Ibid.* at 462.

Perhaps Monture's most important point vis-à-vis criminalization as a strategy of colonization is that criminality by Aboriginal peoples cannot be reduced to individualistic understandings but must instead be situated within their colonialist past.⁴⁴⁷ In this sense, colonization is reinforced by criminalization. Other indigenous activists expand that "such things as mental illness, alcoholism and suicide, for example, are not about psychological and individualized failure but about colonization or lack of collective self-determination."⁴⁴⁸ Monture explains that widening the lens past the individual "is not intended to make victims of Aboriginal people or of all prisoners but rather its purpose is to provide a necessary and historic, contextual and structural analysis of the problem at the centre of the question being examined."⁴⁴⁹ This analysis is fundamental to the *Gladue* framework. For Aboriginal women, colonization has produced conditions in which they are "affected by higher levels of poverty, lower educational attainment, higher unemployment, poorer physical and mental health and lack of housing"⁴⁵⁰ – all of which are further strained for Aboriginal single mothers.⁴⁵¹ The victimization of Aboriginal women must be contextualized against the backdrop of colonization⁴⁵² – critical in the face of what Monture describes as the lack of a "sustained [Canadian] analysis" of the relationship "between colonialism and the oppression of women."⁴⁵³

⁴⁴⁷ Monture, "Confronting Power", *supra* note 429 at 27.

⁴⁴⁸ Tuhiwai Smith, *supra* note 35 at 153.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ NWAC, "What Their Stories Tell Us", *supra* note 22 at 11.

⁴⁵¹ *Ibid.* at 12.

⁴⁵² Anna Hunter, "The Violence that Indigenous Women Face" *Canadian Dimension* 39:2 (March/April 2005) 34 at 34.

⁴⁵³ Monture, "Confronting Power", *supra* note 429 at 26. Monture credits the work by the Task Force on Federally Sentenced Women [see The Task Force on Federally Sentenced Women, "Creating Choices: The Report of the Task Force on Federally Sentenced Women" (April 1990), online: Correctional Service of Canada http://www.csc-scc.gc.ca/text/prgrm/fsw/choices/toce-eng_shtml. [TFFSW, "Creating Choices"] for modeling an example of how research into social problems can centrally position colonialism [at 28].

2.8 The tension within and slide from *Gladue* factors to risk factors to treatment

Reviewing eighteen judgments sentencing Aboriginal women from 2005 to 2006,⁴⁵⁴ Toni Williams seeks to understand how Aboriginal women continue to be overincarcerated despite the mutual goals of s. 718.2(e) and the conditional sentencing regime to reduce reliance on imprisonment. Williams argues that because s. 718.2(e) effectively requires judges to identify and weigh such factors as “emotional trauma, familial failings and community dysfunction” through application of the *Gladue* test, this provision operates to import a contextualized, intersectional analysis into the sentencing process.⁴⁵⁵

However, Williams concludes that despite feminists’ best intentions for the use of intersectionality, the “intersectionalized constructions of Aboriginal women” in the cases “may not reliably shield them from imprisonment in part because of how courts have integrated intersectionality claims into decision-making processes that are organized around controlling risk.”⁴⁵⁶ That is, calculations of the degree of risk presented by the offender (risk of reoffence, risk to public safety – and in the prison context, risk to institutional security) have assumed increasing prominence in penal policies and in the sentencing process,⁴⁵⁷ and the factors used to assess those levels of risk are largely the same as those engaged by the *Gladue* analysis.⁴⁵⁸

⁴⁵⁴ See Toni Williams, “Intersectionality Analysis in the Sentencing of Aboriginal Women in Canada: What Difference Does it Make?” in Emily Grabham *et al.*, eds., *Intersectionality and Beyond: Law, Power and the Politics of Location* (New York: Routledge-Cavendish, 2009) 79. [Williams, “Intersectionality Analysis”]

⁴⁵⁵ *Ibid.* at 94.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ Maurutto & Hannah-Moffat, “Assembling Risk”, *supra* note 140 at 438. Paula Maurutto and Kelly Hannah-Moffat write that risk assessment based in standardized, ostensibly objective criteria, “[a]ctuarial risk,” “has taken on a hegemonic dominance that supercedes other models of governance, such as welfare and disciplinary forms of regulation.”

⁴⁵⁸ Williams, “Intersectionality Analysis”, *supra* note 454 at 80, 92.

The concept of risk assessment manifests in different forms in the sentencing domain than in prison, although ultimately both are concerned with ensuring public safety.⁴⁵⁹ On sentencing, judicial decisions are informed by risk assessment instruments including projections of the risk of reoffence in PSRs⁴⁶⁰ and psychiatric reports, which assist particularly with determining whether (and for what duration) an offender must be separated from society. “Risk” operates in prison variously, but the most obvious form of risk management occurs when correctional authorities assess prisoners through a series of standardized questions to determine what level of security is needed to contain any threat they are deemed to pose. This takes place at both federal⁴⁶¹ and provincial⁴⁶² institutions.

It should also be noted that against the increased prevalence of risk instruments and analysis in the justice system (particularly in the prison setting), the idea of risk itself might itself be dissonant with Aboriginal knowledge and worldviews. Patricia Monture-Angus writes that

⁴⁵⁹ In the sentencing process, public safety is always germane to the determination of the sanction and is an inherent concern in the sentencing principle that offenders must be separated from society where necessary (s. 718(c) of the *Code*). In the federal prison domain, public safety is an express consideration within penitentiary placement decisions (*Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 28(a). [*CCRA*]) and is also engaged when correctional authorities decide whether to assign a minimum, medium, or maximum security classification designation (*CCRA, ibid.* at s. 30; *Corrections and Conditional Release Regulations*, SOR/92-620, s. 18.).

⁴⁶⁰ For the provision of the *Criminal Code of Canada* dealing with PSRs, see *Criminal Code, supra* note 14 at s. 721.

⁴⁶¹ For the Policy Bulletin and scoring tables (called the Custody Rating Scale) used by the Correctional Service of Canada to establish where to place each prisoner (in terms of the security level attached to the institution itself) and the level of security each prisoner should be assigned within that institution (minimum, medium, or maximum, involving escalating degrees of isolation and punitiveness), see Commissioner of the Correctional Service of Canada, “Security Classification and Penitentiary Placement: Commissioner’s Directive 705-7 (2010-02-10), online: Correctional Service of Canada http://www.csc-ccc.gc.ca/text/pley/cdshtm/705-7-cd-eng_shtml. For a critical analysis of the increased penal dependence on and fidelity to risk assessments, see e.g. Maurutto & Hannah-Moffat, “Assembling Risk”, *supra* note 140. For a study of how the standardization of risk assessments obscures gender difference and may be problematic for women prisoners, see Kelly Hannah-Moffat “Gendering Risk at What Cost: Negotiations of Gender and Risk in Canadian Women’s Prisons” (2004) 14(2) *Feminism & Psychology* 243. [Hannah-Moffat, “Gendering Risk at What Cost”] For a thoughtful argument that the correctional process of assessing risk becomes gendered because women prisoners present different life histories and experience imprisonment differently than men, see Kelly Hannah-Moffat, “Moral Agent or Actuarial Subject: Risk and Canadian Women’s Imprisonment” (1999) 3(1) *Theoretical Criminology* 71. [Hannah-Moffat, “Moral Agent or Actuarial Subject”]

⁴⁶² For an example of the factors considered by provincial correctional authorities to inform security classification, see BC Corrections which outlines similar factors as those used at the federal level: Ministry of Justice, “Correctional Facilities in British Columbia: Sentence Management Process” (9 May 2007), online: Government of British Columbia, Corrections <http://www.pssg.gov.bc.ca/corrections/in-bc/details/management.htm>.

risk management “is contrary to how I was raised as an Aboriginal person to think about relationships.”⁴⁶³ Monture-Angus writes that these “individualized instruments” are inherently flawed because they fail to incorporate “the impact of colonial oppression on the lives of” Aboriginal peoples.⁴⁶⁴ She argues that risk instruments (such as the scales used to help determine a prisoner’s security classification level) do not really measure the risk presented by that person, but instead “merely [affirm] that Aboriginal persons have been negatively impacted by colonialism.”⁴⁶⁵

Williams suggests that because primary factors evaluated within institutional decision-making are alternately *Gladue* factors in the sentencing process and risk factors in prison machinery, there is dissonance producing a conflict between the goal of *Gladue* factors to reduce overincarceration and that of penal risk factors to inform the necessary level of punitiveness.⁴⁶⁶ Moreover, this conflict becomes effectively internalized within sentencing discourses. Judges must navigate between the level of risk and personal needs assessed for the offender (as determined primarily based on the PSR and the judge’s own evaluation) against the *Gladue* directive to look to alternatives for imprisonment for Aboriginal offenders.⁴⁶⁷ For example, an offender may be assessed to present a high risk because of her criminal history and substance abuse, which may militate toward a punitive sanction designed to separate the offender from society – whereas this may be in tension with *Gladue* factors that would formulate these (otherwise “risky”) factors in the context of colonization and might point to the inappropriateness of a prison sanction. Williams asserts that s. 718.2(e) functions as a conduit for intersectional concerns to become retranslated as risk factors, which in turn undercut the ability

⁴⁶³ Monture-Angus, “Women and Risk”, *supra* note 139 at 26.

⁴⁶⁴ *Ibid.* at 27.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ Williams, “Intersectionality Analysis”, *supra* note 454 at 92.

⁴⁶⁷ *Ibid.*

of s. 718.2(e) to ameliorate the overrepresentation of Aboriginal offenders in prison because elevated risk projections suggest harsher sanctions.

In her study, Williams finds that judges making community orders (largely conditional sentence orders) resolve the tension by either formulating sentences that are guided by rehabilitation and reintegration (healing-oriented, including imposing minimal confinement and discretionary conditions) or by focusing on the risk assessed for the offender and amplifying the punitive features of the conditional sentence (such as ordering lengthier sentences with more restrictive terms).⁴⁶⁸ For some cases in her study in which judges order incarceration, Williams finds that judges paradoxically cast their decisions in a restorative light, focusing on rehabilitation, but then deliver a punitive sanction, while “construct[ing] the prison at least to some extent as a therapeutic environment, a place of safety, healing and growth for a defendant whose life in the community marks her as both victimizer and victimized.”⁴⁶⁹ I will discuss this trend in Chapter 4. Williams expresses concern that the *Gladue* analysis facilitates a stereotypical representation of Aboriginal women offenders in which they are “over-determined by ancestry, identity, and circumstances.”⁴⁷⁰ She writes that sentencing courts translate the intersectional inquiry required by s. 718.2(e) into “[c]laims about Aboriginal women with a simple narrative that constructs Aboriginal families as incubators of risk, Aboriginal communities as containers of risk and the prison as a potential source of healing intervention in the defendant’s life.”⁴⁷¹

These judicial discourses about the victimization and criminalization of Aboriginal women are instructive because overemphasis on one of these aspects of women’s pathways can impact sentencing outcomes. Elizabeth Comack writes that the dichotomy some discourses

⁴⁶⁸ *Ibid.* at 92-3.

⁴⁶⁹ *Ibid.* at 94.

⁴⁷⁰ *Ibid.* at 95.

⁴⁷¹ *Ibid.* Also see Williams, “Punishing Women”, *supra* note 178 at 285.

construct between victims and offenders is “premised on an individualistic focus” producing a dynamic framing that “victims require therapy and counseling; offenders deserve punishment.”⁴⁷² Because judges are most directly in a position to determine whether a sentence should be more rehabilitative or punitive, it is helpful to explore whether judicial discourses reflect this dichotomized thinking. To this end, I will discuss how judges understand and represent Aboriginal women offenders’ victimization and criminalization in Chapter 3, and how they respond to these issues in Chapter 4. I will also explore the degree to which the discourses about Aboriginal women offenders in my cases demonstrate an individualistic focus (beyond the necessary individualization of sentencing) at the expense of engaging contextualized understandings of how colonization and community/relational issues impact sentencing.

The dynamic in which judges focus on rehabilitation in sentencing reasoning but then order a punitive sanction speaks to how institutional structures become embedded and solidify in ways that are resistant to feminist-inspired initiatives. The fixed nature of such structures, impervious to feminist strategies (or, alternatively, retranslating them such that they act opposite to the goal of women’s equality) was also seen above in Balfour’s discussion of how mandatory charging policies only served to criminalize already marginalized women. Similarly, Colleen Anne Dell, Catherine J. Fillmore, and Jennifer M. Kilty demonstrate how the Correctional Service of Canada has implemented the philosophy of women-centred corrections recommended by the Task Force on Federally Sentenced Women⁴⁷³ in ways that are antithetical to that gender-sensitive vision (such as by constructing women’s self-harm as an institutional threat and responding with punitiveness).⁴⁷⁴ These examples demonstrate where rigid institutional

⁴⁷² Comack, “New Possibilities for a Feminism”, *supra* note 251 at 165.

⁴⁷³ TFFSW, “Creating Choices”, *supra* note 453.

⁴⁷⁴ Colleen Anne Dell, Catherine J. Fillmore & Jennifer M. Kilty, “Looking Back 10 Years after the Arbour Inquiry: Ideology, Policy, Practice, and the Federal Female Prisoner” (2009) 89(3) *The Prison Journal* 286 at 296.

structures cannot accommodate feminist impulses, which becomes even more troubling as the already limited options available to Aboriginal women on sentencing continue to be curtailed by government conditional sentencing amendments.

This idea of feminist concepts being (re/mis)translated when introduced into an institutional and procedural framework that is not itself motivated by feminist concerns is critical to my thinking about how the judges in my study cast and respond to Aboriginal women's histories of victimization. Parallel to Williams' analysis, my research suggests that PSRs and associated *Gladue* factors operate as entry points for judicial cognizance of how these women's experiences of victimization relate to their criminalization, and how judges resolve these experiences has direct implications on the kind of sanction ordered. The respective histories of Aboriginal women (including violence experienced and committed) are presented to sentencing courts in various forms (such as counsel submissions, judicial notice, and PSRs) that often include recommendations regarding the level of risk that a given offender is likely to pose to the community if given a conditional sentence. The very structure of PSRs in particular renders it difficult to read these women's backgrounds (including any experiences of victimization) as anything *but* connected to their offending.

2.9 The pathway to the cases in my study

In Chapter 3, I demonstrate that judges sometimes use something of a victimization-criminalization continuum lens to process and evaluate offenders; at other times judges do not adopt this lens and instead simply deemphasize or bracket past experiences of victimization. When judges do employ a kind of victimization-criminalization lens, they sometimes do so to infer risk (or accord with that in PSRs) and sentence more harshly. Critically, in most cases the women's histories read and are presented as if their criminalization is related to their experiences

of victimization, but judges are informed and respond to these depictions in different ways. Balfour describes that sentencing law functions to exclude “women’s narratives of violence and social isolation,” producing the “disconnect” she describes between “restorative justice sentencing practices” and “the unrelenting coercive punishment of Aboriginal women.”⁴⁷⁵ Examining how women’s histories (of victimization, offending, and other) are deployed in the cases gives insights into how they impact sentencing outcomes. To this end, I will explore the cases in my study for what versions of these experiences within Aboriginal women’s lives are presented, and the degree to which judges contextualize these experiences within the systemic and background factors tied to colonization.

⁴⁷⁵ Balfour, “Falling Between the Cracks”, *supra* note 17 at 102.

Figure 3



“Best for Everyone to Drop Out” (charcoal, with photo)

(3) Judicial Engagement with the Victimization-Criminalization Continuum

3.1 Introduction: Criminalized Aboriginal women's stories of victimization and listening to what sentencing judges hear

The histories of victimization of the Aboriginal women sentenced in the cases I have identified become part of judicial reasoning through such instruments as the pre-sentencing report (PSR) and *Gladue* factors. In this chapter, I explore judicial discourses about the victimization histories of the Aboriginal women in my study. I discuss where these discourses align with and depart from ideas introduced by the victimization-criminalization continuum – such as where judges recognize how experiences of victimization constrain women's options, and what implications this recognition has in judicial reasoning. I also explore the relationship between the victimization-criminalization continuum and *Gladue* factors. As histories of victimization generally overlap with *Gladue* factors, often concepts related to the victimization-criminalization continuum lens and *Gladue* factors will be intertwined. However, I suggest that while both the continuum and the *Gladue* analysis often share *facts* presented to the courts about Aboriginal women's lives, the analytical *focus* of each differs: the victimization-criminalization continuum most directly focuses on gendered vulnerabilities and reactions to victimization, whereas the *Gladue* analysis most directly focuses on reverberations of colonization (and how that should impact sentencing).

In some judgments, the offender's experiences of victimization are considered in a way that deepens the *Gladue* analysis by contextualizing these victimizations within colonization. These cases demonstrate a symbiotic relationship between the *Gladue* and victimization-criminalization analyses. In other decisions, this relationship is less apparent, such as cases in which the *Gladue* analysis is either cursory or largely bracketed out of the judgment (the latter, bracketing, transpires where judges note having considered *Gladue* factors but neglect to explain

how or to what effect). In these cases, discourses about victimization and criminalization are more differentiated from the *Gladue* analysis. The judgments that present more dilute *Gladue* analyses include judicial minimization of the applicability of *Gladue* factors where an intelligible connection between the offender's experience as an Aboriginal woman and her offence has not been established. Such cases illustrate one of the main problems identified by *Ipeelee* in the post-*Gladue* jurisprudence, which clarifies that this connection must not be required in a causal way, but instead simply to contextualize. In these cases where the *Gladue* analysis is cursory, I examine the balance of the judicial discourse for how the women's histories of victimization are presented, and how these histories relate to the reasoning about sentence.

As discussed in Chapter 2, each of the cases I examine features the sentencing of an Aboriginal woman. While I identified and reviewed 91 cases in total through my various case law searches in online databases, I do not discuss all of them but instead draw out the decisions that most clearly represent themes related to victimization, criminalization, and *Gladue* factors. In this chapter, I concentrate on those judgments that offer the clearest discourses related to victimization, criminalization, and the *Gladue* analysis – some of the decisions I discuss below are laudable for their nuanced navigations within these issues, whereas other decisions are hampered by shallower understandings.

For the most part, in this chapter I deal with the judgments in a self-contained way, by delving into detail for each case and exhausting that discussion before moving to the next case. While I discuss the below decisions within various identified themes, the structure of my discussion still presents each judgment largely separately. I have chosen this format primarily to retain the individual integrity of each criminalized Aboriginal woman's life and sentencing narrative. As I explain in Chapter 1, Program Coordinator Shawna Hohendorff at Kindred House

(the daytime shelter for street sex workers in Edmonton) has emphasized that her clients felt that institutions with power consider “their particular life stories” peripheral and insignificant.⁴⁷⁶ Because part of my goal is to foreground the victimization histories of criminalized Aboriginal women such that they are pulled in from that periphery and recognized for their intrinsic significance, I think it is appropriate to organize my discussion around each woman’s story (her story as told to the courts) instead of partitioning the narratives and disconnecting them from the women at the centre. Hohendorff stated we must “listen...so that they are part of our community, not separate.”⁴⁷⁷ By focusing on each judgment (for the most part) separately, I aim to “listen” to what the criminal justice system hears – what information judges receive about the women’s histories of victimization and criminalization (within colonization), and how judicial understandings connected to these issues influence sentencing reasoning. To this end, to demarcate and foreground each woman’s court “story,” I include subheadings presenting each Aboriginal woman’s name for each of the main decisions discussed within the sections below.

My drawing that opens this chapter, “Best for Everyone to Drop Out” (Figure 3), symbolizes the devastating effects of isolation and our human need for healthy, loving relationships. The Aboriginal women I discuss in this chapter have experiences of victimization that often relate to abusive relationships, and these experiences and relationships have profoundly isolating effects that can augment vulnerabilities (including vulnerabilities to criminalization). This is the only drawing in my painting series. I have used a technique involving “blacking out” the background with charcoal to form the “ground” of the drawing. Then I used a malleable eraser to expose the white paper underneath where the light hits the woman’s body, to pull out the light (the inverse of conventional drawing in which dark lines are

⁴⁷⁶ Ottawa, House of Commons, *Subcommittee on Solicitation Laws*, *supra* note 4 at 31.

⁴⁷⁷ *Ibid.* at 32.

laid to create positive space). Through this, I was aiming for the effect of the woman's body and the shadows being part of each other – a comment on the mental health effects of isolation. Further, this technique of blacking out the background with charcoal and erasing the woman's figure into existence can be understood as how our experiences shape us and our options/trajectories – how experiences of victimization contour the criminalization of Aboriginal women. The theme of isolation underlying this drawing also refers to systemic isolation, the kind of structural alienation and aloneness felt by the Aboriginal women street sex workers at Kindred House who Hohendorff related felt abandoned and unheard.⁴⁷⁸ I fixed the photo of a purple pansy to this otherwise colourless drawing to represent hope.⁴⁷⁹

3.2 Judicial navigations along the victimization-criminalization continuum

Some decisions in the cases I identified maintain a more rigid dichotomy between “victim” and “offender” than others, while others suggest that “victim” and “offender” are not mutually exclusive categories. Some judges directly correlate histories of victimization with later offending. For example, in *R. v. M.P.*⁴⁸⁰ Smith J. relates the victimization in M.P. and her co-accuseds' past to their offending and comments broadly on how victimization is often then reproduced as violence. Noting M.P.'s Aboriginal heritage,⁴⁸¹ Smith J. describes her personal history. M.P.'s life involved abuse and neglect in her biological family, after which she cycled through group homes via Child and Family Services in her youth. She has two children with a substance-addicted man “who subjected Ms. M.P. to a great deal of physical abuse” that she never reported “out of fear of further

⁴⁷⁸ *Ibid.* at 31.

⁴⁷⁹ Michael Jackson writes about giving prisoner Gary Weaver a blue wildflower in segregation, later learning that Weaver carefully tended to it and kept the flower alive for sixty days, his “small floral torch of hope” [Jackson, *Justice Behind the Walls*, *supra* note 275 at 617]. The purple pansy is a photo I took after the outdoor pots I abandoned sprung beautiful life despite my complete inattention to gardening – a juxtaposition bringing into relief my own privilege and advantages, and highlighting the painful specificity of the isolation of imprisonment (and that of victimization).

⁴⁸⁰ *R. v. R.K.*, 2001 CanLII 26261 (MB PC).

⁴⁸¹ *Ibid.* at para. 86.

reprisal.”⁴⁸² One of her children was removed into state care and another died.⁴⁸³ Stating “[o]bviously, she has suffered from disadvantage and is a product of her difficult background,”⁴⁸⁴ Smith J. later provides that “[n]one of the three offenders before me had the loving, nurturing start in life that every child in our community deserves. Far from it. All were criminally victimized as children and adolescents.”⁴⁸⁵ Smith J. clearly connects this victimization to later criminality,

[c]ould more have been done to protect them in their formative years or to help them overcome their dysfunctional backgrounds? It is not for me to say. I only make the observation that the community should be concerned with the fact that too often children are victimized. Violence, cruelty and mistreatment in childhood and adolescence so often beget violence and cruelty to others when these children grow up.⁴⁸⁶

This judicial representation of the victimization-criminalization continuum foregrounds the significance of victimization in an offender’s early life and depicts a causal relationship between early victimization and later offending, in that M.P. is described as “a product of her difficult background.”⁴⁸⁷ Smith J. also recognizes the limits of both the role of the sentencing judge and her comments about the cycle of victimization and criminalization, observing that “[i]t is not for me to say”⁴⁸⁸ whether the cycle could have been averted. I return to the limits of sentencing in Chapter 5.

Some judges in my study characterize the personal histories of Aboriginal women offenders in a manner that reflects Dana DeHart’s finding that the intersection of cumulative, “unrelenting”⁴⁸⁹ traumas constitutes the type of victimizations that often pervade the lives of criminalized women. Such judicial acknowledgments of polyvictimization include Barnett J.’s

⁴⁸² *Ibid.*

⁴⁸³ There is no information about that child’s death, other than the comment it happened “tragically.” [*Ibid.* at para. 87.]

⁴⁸⁴ *Ibid.* at para. 86.

⁴⁸⁵ *Ibid.* at para. 123.

⁴⁸⁶ *Ibid.* at para. 124.

⁴⁸⁷ *Ibid.* at para. 86.

⁴⁸⁸ *Ibid.* para. 124.

⁴⁸⁹ DeHart, *supra* note 267 at 1375.

comment in *R. v. Lilley*⁴⁹⁰ that Diane Lilley’s PSR “tells the story of a woman who has had a life characterized by continuous trauma, the sort of life that most people would just shake their head at in disbelief” because she “has suffered a lot of abuse.”⁴⁹¹ In *R. v. Batisse*,⁴⁹² Gordon J. describes that Brenda Batisse “has seen and experienced more grief than any one person should.”⁴⁹³ Sometimes this language and the inherent understanding of the cumulative effects of repeated experiences of violence emerge directly from PSRs and judges adopt the same framework. For example, in *R. v. Chouinard*⁴⁹⁴ the PSR expressed that “the count is not in years of abuse, but in a lifetime of it.”⁴⁹⁵ Ratushny J. incorporated this understanding from the PSR into her reasoning by adopting the phrase “lifetime of abuse”⁴⁹⁶ and using that framework to situate her decision within rehabilitative concerns instead of imposing a sentence of incarceration.

I will discuss how Ratushny J. uses this understanding of Chouinard’s “lifetime of abuse”⁴⁹⁷ to contextualize her conduct during the offence in greater detail below. For now, it is sufficient to note that Ratushny J. recognizes the polyvictimization in Chouinard’s life, using a lens akin to the victimization-criminalization continuum to find that Chouinard was enmeshed in a “life’s cycle of substance abuse and victimization,”⁴⁹⁸ and positions her criminalization within this cycle. Other judges discuss the unrelenting traumatization in many Aboriginal women’s lives by locating it within the general context of the reverberations of colonization. For example,

⁴⁹⁰ *R. v. Lilley*, 2004 YKTC 38.

⁴⁹¹ *Ibid.* at para. 3.

⁴⁹² *R. v. Batisse*, 2008 CarswellOnt 8590 (Ont. Sup. Ct. Jus.) (WLeC). [*Batisse*]

⁴⁹³ *Ibid.* at para. 25.

⁴⁹⁴ *R. v. Chouinard*, 2005 CarswellOnt 10610 (Ont. Sup. Ct. Jus.) (WLeC). [*Chouinard*]

⁴⁹⁵ *Ibid.* at para. 11.

⁴⁹⁶ *Ibid.* at para. 22.

⁴⁹⁷ *Ibid.* at paras. 11 and 22.

⁴⁹⁸ *Ibid.* at para. 22.

in *R. v. Pepabano*⁴⁹⁹ Bonin J. comments: “[n]o doubt the accused has unfortunately lived in a dysfunctional milieu, in relation with [sic] the numerous traumas experienced by many First Nations communities.”⁵⁰⁰ Other judges fail to contextualize Aboriginal women offenders’ victimization and criminalization within colonization, which I discuss with respect to the specific cases featuring that omission.

In this section, I examine cases featuring various judicial discourses related to the victimization-criminalization continuum. First I discuss *R. v. Shenfield*,⁵⁰¹ in which the judge offers a sensitive appreciation for the vulnerabilities of the offender with respect to her victimization and the offence for which she is being sentenced. Then I discuss *R. v. Woods*,⁵⁰² a decision with a clear judicial statement about the victimization-criminalization continuum, although more complicated where the judge situates issues related to that offender’s victimization within both mitigating and aggravating factors. *R. v. Dennill*⁵⁰³ offers some problematic reasoning by decontextualizing the offender’s experiences of victimization (and her broader experience as an Aboriginal woman). I discuss how the judge’s attribution of that offender’s problems to her choices and not systemic factors should have been informed by the victimization-criminalization continuum, in terms of how victimization narrows women’s alternatives. As above, I explore the largely very nuanced decision *Chouinard* for its articulation of issues related to victimization. Finally, I examine *R. v. Kahypeasewat*.⁵⁰⁴ For this judgment, I go into greater depth, because it engages several important issues. The judicial discourse is generally attentive to this offender’s experiences of victimization. The judge decides that she has

⁴⁹⁹ *R. v. Pépabano*, 2005 CanLII 48584 (QC CQ). [*Pépabano*]

⁵⁰⁰ *Ibid.* at para. 20.

⁵⁰¹ *R. v. Shenfield*, 2008 ABPC 47. [*Shenfield*]

⁵⁰² *R. v. Woods (R. v. C.I.W.)*, 2007 SKPC 54. [*Woods*]

⁵⁰³ *R. v. Dennill* 2010 CarswellNWT 104 (WLeC); 2010 NWTSC 98, [2011] A.W.L.D. 2098. [*Dennill*]

⁵⁰⁴ *R. v. Kahypeasewat (R. v. V.K.)*, 2006 SKPC 79. [*Kahypeasewat*]

battered woman syndrome, and also importantly finds that her offence is derivative of such experiences – although problematically also finding her offence aggravating because the victim was her (abusive) spouse. Looming over the whole decision is the troubling possibility that her offence was actually self-defence, so I discuss the issue of pressures to plead guilty. *Kahypeasewat* is noteworthy for its pronouncement that Aboriginal peoples individually and collectively internalize the violence of colonization. This critical point is seldom explicitly made in the cases in my study; in fact, I did not find any other judgments highlighting this concept.

3.2.1 Jillian Shenfield

In *R. v. Shenfield*,⁵⁰⁵ there is a nuanced judicial portrait connecting Jillian Shenfield's offence to her vulnerabilities, contributing to her receiving a suspended sentence for the duration of an 18-month probation order for trafficking. In response to their request to purchase cocaine, Shenfield had informed two undercover police officers that she could contact someone. She physically transferred the cocaine to the officers when that person arrived and insisted he would only "go through her."⁵⁰⁶ Anderson J. found this constituted trafficking, but noted that her "primary motivation was to assist the persons posing as users, herself being a user."⁵⁰⁷ In this case, for the purposes of discussing the victimization-criminalization continuum and judicial understanding of those dynamics, victimization primarily refers to addiction (and the ways it amplified her vulnerabilities).

While her experiences from her childhood and youth are not disclosed in the decision, Shenfield is "of aboriginal origin with ties to the Saddle Lake First Nation," and she now has

⁵⁰⁵ *Shenfield*, *supra* note 501.

⁵⁰⁶ *Ibid.* at para. 5.

⁵⁰⁷ *Ibid.* at para. 6.

children who are “no longer in her care.”⁵⁰⁸ She is described as having “trouble coping with many aspects of life,” and an addiction to cocaine.⁵⁰⁹ On sentencing, Anderson J. reflects on Shenfield’s pathway into sex work and criminality, commenting that “[h]er addiction led her to the street and all of the dangers, exploitation and vulnerabilities that surround life on the street.”⁵¹⁰ The judge expands this view, commenting

[t]his not a case where Ms. Shenfield exploited the vulnerabilities of others to enrich herself. On the contrary, she was targeted precisely because of her own obvious vulnerabilities and her predictably easy exploitation. She was a known drug user, selling herself on the street to support her drug habit. She was not on the street to promulgate the sale of drugs. Ms. Shenfield epitomizes the victim of the very exploitation that our drug laws, including the harsh sentencing guidelines for commercial predators, strive to prevent.⁵¹¹

Anderson J. here recognizes that Shenfield was vulnerable person who depended on others (to support her addictions), implicating the power imbalance inherent in her interactions with the undercover police and the dealer during the offence. This depiction further fleshes out the narrative of the victimization-criminalization continuum by integrating how others perceived and capitalized on her vulnerabilities with the judge’s understanding of her identity as a vulnerable drug user, culminating in a fuller picture of how Shenfield’s victimhood contributed to her offence.

Anderson J. also recognizes Shenfield’s vulnerability and victimhood when deciding that while it was unclear from evidence at trial whether Shenfield kept a piece of cocaine for herself, nothing “turns on that in relation to sentence” and that “if she did capitalize on this event to get a small amount of drugs without having to turn a trick, I am not going to punish her for that.”⁵¹²

This recognition of Shenfield’s vulnerable, intersectional experience demonstrates judicial

⁵⁰⁸ *Ibid.* at para. 2.

⁵⁰⁹ *Ibid.*

⁵¹⁰ *Ibid.*

⁵¹¹ *Ibid.* at para. 23.

⁵¹² *Ibid.* at para. 6.

sensitivity that meaningfully impacts sentencing. This judgment represents a fairly unique portrayal of the victimization-criminalization continuum for its holistic view of the offender's vulnerabilities and how that expansive interpretation of what it means to be an offender (and how victimhood can contribute to criminality) can impact sentencing.

3.2.2 Candace Woods

The overlap between *Gladue* factors and the victimization-criminalization continuum is intimated in *R. v. Woods*,⁵¹³ where the judge effectively substitutes a version of the victimization-criminalization continuum for *Gladue* factors to guide the sentencing analysis. In *Woods*, Whelan J. sentences Candace Woods to a conditional sentence of two years less a day for robbery, among other lesser offences. Woods had displayed a knife and demanded money from a restaurant till. She was a sex worker and carried the knife “for protection,”⁵¹⁴ and her “[c]ounsel advised that she was high on morphine and had not slept in several days.”⁵¹⁵ Whelan J. describes that she “is a member of the Muskoday First Nation,”⁵¹⁶ whose parents are elders and separated when she was young, precipitating a cycle in which would have conflict with her mother over her substance use until her mother “insisted on her leaving the home” in her early adolescence.⁵¹⁷ She “became involved in the street and drug culture” and sex work.⁵¹⁸ When she was four years old, Woods was sexually abused by a family friend. Her addictions began in her youth, and she fluctuated between treatment and sobriety. One of these relapses was triggered by the grief and guilt Woods felt over the murder of her sister after having introduced her sister to the street and

⁵¹³ *Woods*, *supra* note 502.

⁵¹⁴ *Ibid.* at para. 5.

⁵¹⁵ *Ibid.* at para. 7.

⁵¹⁶ *Ibid.* at para. 11.

⁵¹⁷ *Ibid.* at para. 13.

⁵¹⁸ *Ibid.* at para. 13.

drug culture.⁵¹⁹ Her addictions persisted through her relationship with her common-law partner, who was also mired in substance abuse. However, after completing the Women’s Substance Abuse Program in pretrial custody and following her release on an undertaking, Woods maintained sobriety. She was the primary caregiver for her baby. I return to issues about her pretrial custody and treatment in Chapter 5.

Whelan J. explains that Woods “committed the substantive offences to support her drug habit.”⁵²⁰ Contextualizing this pattern when discussing mitigating factors, Whelan J. cites that she “was repeatedly victimized at an early age,” and notes that “[e]xperience in this Court has shown that the pattern of behavior, evidenced in her record and the offences for sentencing today, is typical of many young persons who have been sexually abused. Her offences are related to a lifestyle of substance abuse and prostitution.”⁵²¹ This analysis represents a clear judicial pronouncement on the operation of the victimization-criminalization continuum in Woods’ life, and notably situates it within mitigating factors. However, equally and seemingly paradoxically, Whelan J. also positions Woods’ substance abuse (itself a form of victimization within my definition, and, as the judge states, connected to Woods’ experiences of victimization by sexual abuse) within aggravating factors, as her “addictions problems” have “been a significant factor in her offending and unstable lifestyle.”⁵²² This complicates the narrative about victimization and criminalization, because it seems that the judge connects Woods’ substance abuse to her victimization as a child and finds this mitigating, while simultaneously finding her substance

⁵¹⁹ See *ibid.*, at paras. 13-4, 16.

⁵²⁰ *Ibid.* at para. 16.

⁵²¹ *Ibid.* at para. 44.

⁵²² *Ibid.*

abuse aggravating when decontextualized and connected to “her offending and unstable lifestyle.”⁵²³

Nonetheless, it is noteworthy that Whelan J. engages in an analysis that largely resonates with the victimization-criminalization continuum and then likens it to the *Gladue* analysis: “I believe that the Pre-Sentence Report, submissions, and my discussion of aggravating and mitigating factors, above, reflects something of the type of analysis anticipated in *R. v. Gladue*.”⁵²⁴ Whelan J. does not mention taking judicial notice of *Gladue* factors. However, her description of “the type of analysis anticipated in *R. v. Gladue*”⁵²⁵ is otherwise broadly consistent with the *Ipeelee* reiteration of the *Gladue* direction about this analysis: in addition to taking “judicial notice of the broad systemic and background factors affecting Aboriginal people generally,” “additional case-specific information will have to come from counsel and from the pre-sentence report.”⁵²⁶ Because there is no explicit discussion of the *Gladue* analysis outside of this reference, the victimization-criminalization continuum discourse that emerges from the reasoning (via the discussion of the PSR and the mitigating factors, including Woods’ history of victimization) effectively substitutes for the *Gladue* analysis, or is at minimum emphasized over a more explicit *Gladue* analysis. Generally, *Woods* offers an example of how permutations of the victimization-criminalization continuum may function in place of a more definitive, circumscribed discussion of *Gladue* factors. This underscores the utility in thinking about how the victimization-criminalization continuum and *Gladue* factors interact and overlap in judgments.

⁵²³ *Ibid.*

⁵²⁴ *Ibid.* at para. 49.

⁵²⁵ *Ibid.*

⁵²⁶ *Ibid.* at para. 59.

The *Gladue* analysis is not presented as explicitly as would be helpful, although Whelan J. does position rehabilitation and alternatives to incarceration as “weighty considerations.”⁵²⁷ Within the brief direct reference to the *Gladue* analysis, Whelan J. makes reference to having “been mindful of the seriousness of this robbery, especially given the threat of violence.”⁵²⁸ This is the type of statement that risks the problem *Ipeelee* distills from the post-*Gladue* jurisprudence that judges have incorrectly interpreted serious offences preclude the *Gladue* analysis.⁵²⁹ However, noting that Woods “has experienced disadvantage but she has also experienced the benefits of a strong cultural heritage through her parents who are Elders,”⁵³⁰ alongside her rehabilitative progress and compliance with restrictive bail conditions, ultimately Whelan J. decides to craft a sentence consistent with Woods’ further rehabilitation, in the community.

3.2.3 Kara Dennill

In *R. v. Dennill*,⁵³¹ *Gladue* factors are deemphasized and the victimization-criminalization continuum that emerges from the judgment does allow for recognition of agency but in a way that effectively supplants systemic factors. Kara Dennill is sentenced to 19 months imprisonment cumulatively for two separate trafficking offences after she twice sold cocaine to undercover police officers. Lauding the PSR as “very thorough and, in my view, a balanced pre-sentence report,”⁵³² Schuler J. discloses its contents: Dennill is “an Inuit woman”⁵³³ who “grew up in a supportive and encouraging adoptive family.”⁵³⁴ However, “interventions by Social Services” began following her “difficult behaviour” when Dennill “began to drink and use

⁵²⁷ *Ibid.* at para. 49.

⁵²⁸ *Ibid.*

⁵²⁹ *Ipeelee*, *supra* note 16 at para. 84.

⁵³⁰ *Woods*, *supra* note 502 at para. 49.

⁵³¹ *Dennill*, *supra* note 503.

⁵³² *Ibid.* at para. 8.

⁵³³ *Ibid.* at para. 33.

⁵³⁴ *Ibid.* at para. 10.

drugs” as a youth,⁵³⁵ ultimately becoming involved in the youth criminal justice system.⁵³⁶ She was a “victim of abuse by individuals outside her family.”⁵³⁷ Dennill has a young child who is cared for by her parents due to “her unsettled lifestyle”⁵³⁸ which the judge later clarifies “by that I mean drinking, taking drugs, and staying out late at night and because she does not follow through on things.”⁵³⁹

Schuler J. notes “[i]t appears that many resources have been tried but she has not always followed through with them and has from time to time run away from home and from facilities she was placed in.”⁵⁴⁰ Schuler J. later comments

[a]lthough Ms. Dennill has clearly had some traumatic experiences in her life, as described in the pre-sentence report, she has also had a supportive family and, it seems, a good family life. The difficulties she has had appear to have resulted, at least in part, from choices she has made about the people she associates with and the lifestyle she leads rather than any systemic factors that have affected her as an aboriginal woman.⁵⁴¹

Dennill’s experiences that precipitate her “unsettled lifestyle”⁵⁴² and “difficulties”⁵⁴³ would be understood through a victimization-criminalization lens as relating less to pure “choices she has made”⁵⁴⁴ as the judge declares, and more to how her experiences of victimization have limited her range of choices, and how she has navigated her life within those narrowed options. The *Gladue* analysis should augment this understanding by providing the context of the role of colonization in constricting her life options.

⁵³⁵ *Ibid.* at para. 10.

⁵³⁶ *Ibid.*

⁵³⁷ *Ibid.*

⁵³⁸ *Ibid.* at para. 9.

⁵³⁹ *Ibid.* at para. 11.

⁵⁴⁰ *Ibid.* at para. 10.

⁵⁴¹ *Ibid.* at para. 34.

⁵⁴² *Ibid.* at para. 9.

⁵⁴³ *Ibid.* at para. 34.

⁵⁴⁴ *Ibid.*

It would be illuminating to know the circumstances of Dennill's Inuit birth family; while there are myriad reasons she may have been put up for adoption, it is at minimum possible that systemic factors arising from colonization were involved. It is difficult to understand how Schuler J. decides her experience as an Aboriginal woman is effaced or largely irrelevant because she was raised in a "a supportive family" within "a good family life."⁵⁴⁵ Furthermore, there is insufficient information provided (perhaps in the PSR, but certainly in the judgment) about how Dennill may have been culturally affected by growing up in an adoptive, perhaps non-Aboriginal (unspecified) family. Her tendency to "run away from home and from facilities she was placed in"⁵⁴⁶ is presented merely within the general discussion of her youth and may relate to the judge's comment that she "does not follow through on things"⁵⁴⁷ – although in fairness the judge does not expressly connect this perception of her failure to follow through with her history of running away. It is conceivable that Dennill felt alienated from her birth family and culture, unsettled within her adoptive family, and disconnected from the institutions that were interceding in her life.

While this is all mere speculation, it remains difficult to understand how Schuler J. links her "difficulties" with "choices" and "lifestyle" "rather than any systemic factors that have affected her as an aboriginal woman."⁵⁴⁸ In this respect, the judgment seems to overly focus on Dennill's (decontextualized) agency at the expense of further consideration of systemic factors, which is neither consistent with the lens of the victimization-criminalization continuum nor the *Gladue* analysis. It seems that the judgment evinces a portrait of a woman who has struggled despite being raised in an ostensibly good family, and therefore a woman whose struggles are of

⁵⁴⁵ *Ibid.*

⁵⁴⁶ *Ibid.* at para. 10.

⁵⁴⁷ *Ibid.* at para. 11.

⁵⁴⁸ *Ibid.* at para. 34.

her own making, and *Gladue* factors are deemed to fall away at this juncture. Within this framework, effectively personal choices are held as antithetical to systemic factors, whereas it would be better aligned with understandings of victimization and criminalization within the *Gladue* analysis if Dennill's choices were understood to be circumscribed by systemic factors.

3.2.4 Josée Chouinard

*R. v. Chouinard*⁵⁴⁹ offers a particularly sensitive judgment where it deals with the experiences of victimization in Josée Chouinard's life and how that informs her sentence. I will highlight some judicial comments that do not comport with the direction from *Ipeelee*, although it appears that Ratushny J.'s contextualization of Chouinard's victimization plays a significant role in fashioning an appropriate sentence otherwise. Chouinard is sentenced after pleading guilty to being an accessory after the fact to manslaughter and receives a three-year sentence of imprisonment, the balance of which (after pretrial custody) is to be served conditionally in the community, followed by a two-year probation order. Ratushny J. comments that the PSR details a life that "almost takes one's breath away with sadness."⁵⁵⁰ The judge elaborates that Chouinard was repeatedly sexually assaulted in her childhood but had "some good years in foster care."⁵⁵¹ Then Chouinard "drifted into new abusive relationships and substance abuse,"⁵⁵² including her relationship with the victim. He had been the father of her two children, and "would beat her when he drank."⁵⁵³ Her two daughters were removed from her care when she was charged.

Ratushny J. decides to orient Chouinard's sentence around rehabilitation concerns instead of imposing incarceration. A significant part of this orientation derives from Ratushny J.'s

⁵⁴⁹ *Chouinard*, *supra* note 494.

⁵⁵⁰ *Ibid.* at para. 5.

⁵⁵¹ *Ibid.* at para. 7.

⁵⁵² *Ibid.*

⁵⁵³ *Ibid.* at para. 8.

consideration of Chouinard’s “lifetime of abuse” and that in her childhood Chouinard “accepted serious abuse as part of her normal life and simply went on living.”⁵⁵⁴ Ratushny J. uses this context to inform her understanding of Chouinard’s apathetic conduct after she was an accessory after the fact to a brutal manslaughter (in that Chouinard continued to drink and laughed about it with the other parties involved). Against the backdrop of Chouinard’s extensive history of victimization, the judge finds “it is not surprising she found herself reacting as she did to the abuse of the victim that night.”⁵⁵⁵ This recognition prompts Ratushny J.’s “focus on an individualized, restorative approach to sentencing to try to deter Ms. Chouinard from drifting again into criminal behaviour and to try to assist in her rehabilitation, away from her life’s cycle of substance abuse and victimization.”⁵⁵⁶ I briefly return to this case in Chapter 4 to address Ratushny J.’s comments about the inappropriateness of incarceration for Chouinard.

The judge’s formulation of the victimization in Chouinard’s life (her “lifetime of abuse,” her “life’s cycle of substance abuse and victimization,” and that her reaction to the offence “is not surprising”⁵⁵⁷) reflects the general concept behind the victimization-criminalization continuum. Additionally, it allows space for how victimization constrains women’s options and choices within those options, particularly when read with Ratushny J.’s further comments that “[a]lcoholism was part of her mother’s life, part of her father’s life and became part of Ms. Chouinard’s life and along with the alcoholism, came an inability by either mother and daughter to prevent or leave a life filled with physical abuse.”⁵⁵⁸ These insights are consistent with

⁵⁵⁴ *Ibid.* at para. 22. It should be noted that in 1997 Ratushny J. released a report reviewing the convictions of various women convicted of homicide resulting in the death of abusive partners, with a view to assessing the issue of self-defence. For a discussion of this report, see CAEFS, “Justice for Battered Women – Denied, Delayed...Diminished: Jails are Not the Shelters Battered Women Need”, online: CAEFS <http://www.elizabethfry.ca/diminish.htm>.

⁵⁵⁵ *Chouinard*, *supra* note 494 at para. 22.

⁵⁵⁶ *Ibid.*

⁵⁵⁷ *Ibid.*

⁵⁵⁸ *Ibid.* at para. 19.

Marilyn Brown's nuanced conception of agency within constraints: "the pathways perspective"⁵⁵⁹ also needs to consider the degree of autonomy which women can exercise within relationships that are often marked by dependence, abuse, and victimization."⁵⁶⁰

Despite this articulation of the accumulation of polyvictimization and how these experiences created barriers for Chouinard, the interrelation of victimization within the *Gladue* analysis is slightly weakened by one of the problems identified in the post-*Gladue* jurisprudence by *Ipeelee*. Ratushny J. does recognize per *Gladue* that "[t]he principle of restraint is particularly applicable to Ms. Chouinard as an aboriginal offender"⁵⁶¹ and sentences accordingly, ordering a just sentence consistent with *Gladue*. However, Ratushny J. also mentions "[i]t is difficult to specify which elements of Ms. Chouinard's background might be attributable to her heritage. Only her mother was aboriginal."⁵⁶² The facts do present issues that may well be attributable to colonization. However, neither the difficulty ascertaining which aspects of Chouinard's background relate to her heritage nor the fact that "[o]nly"⁵⁶³ her mother was Aboriginal should have any bearing on the *Gladue* analysis. As in my discussion about *Jankovic*, judges should not artificially restrict the multiplicity of Aboriginal identities and experiences, and (given the clarification from *Ipeelee*) they must neither expect nor require the establishment of a causal connection between *Gladue* factors and the offence in question.

⁵⁵⁹ As I address in Chapter 1, I do not distinguish the pathways perspective from the victimization-criminalization continuum given my expansive interpretation of victimization.

⁵⁶⁰ Marilyn Brown, "Gender, Ethnicity, and Offending over the Life Course: Women's Pathways to Prison in the Aloha State" (2006) 14(2) *Critical Criminology* 137 at 143.

⁵⁶¹ *Chouinard*, *supra* note 494 at para. 18.

⁵⁶² *Ibid.* at para. 19.

⁵⁶³ *Ibid.*

3.2.5 Valerie Kahypeasewat

In *R. v. Kahypeasewat*,⁵⁶⁴ the judge attributes Valerie Kahypeasewat's offence to her past experiences of victimization in a way that seems to endorse the victimization-criminalization continuum as a lens, both in the judicial discourse about these issues and also in how this discourse meaningfully impacts the ultimate sentence. Huculak J. offers a nuanced understanding of the experiences underlying the manslaughter for which the judge orders Kahypeasewat to serve a conditional sentence of two years less a day followed by two years of probation. Kahypeasewat plead guilty to manslaughter after killing a man with whom she had been in an abusive relationship after he repeatedly and aggressively "attempted to engage in intimate physical contact despite her demands to be left alone," and she finally swung at him with a knife.⁵⁶⁵ I will describe the circumstances of the offence in some detail because despite judicial sensitivity to her victimization, the facts troublingly suggest that Kahypeasewat acted in self-defence (although she pled guilty to manslaughter). Within a self-defence frame (and even outside it, within the actual confines of the judgment), it is clear how Kahypeasewat's experiences of victimization have constrained her options both broadly in her life and in the specifics of the offence circumstances.

At the sentencing circle convened for Kahypeasewat, the Crown read in the circumstances of the offence.⁵⁶⁶ Huculak J. describes that Kahypeasewat "had an on-off relationship"⁵⁶⁷ with the deceased, spanning several years. On the night of the offence, Kahypeasewat and the deceased, Frank Nadary, had been drinking with others at Kahypeasewat's brother's apartment. Nadary was harassing Kahypeasewat, and had refused to

⁵⁶⁴ *Kahypeasewat*, *supra* note 504.

⁵⁶⁵ *Ibid.* at para. 3.

⁵⁶⁶ *Ibid.* at para. 2.

⁵⁶⁷ *Ibid.* at para. 3.

leave after being asked multiple times to leave (by Kahypeasewat, and it seems by others too), including when she wanted to sleep. Nadary persisted in trying to initiate unwanted sexual contact with Kahypeasewat, who left the room, opened the front door and again asked him to leave, physically trying to push him out. Kahypeasewat explains her frustration in her statement to the police: “[h]ow many times I told him to leave, ‘get out, leave me alone’, he just wouldn't listen.”⁵⁶⁸ She threatened to call the police if he refused to leave.⁵⁶⁹ Huculak J. provides that Nadary then “attempt[ed] to smother the accused by wrapping his arms around her,” and grabbed her neck, “pulling her hair.”⁵⁷⁰ After Nadary refused to leave following her demands, Kahypeasewat discloses “I was like – it was like I couldn't breathe, like, you know.”⁵⁷¹ In a later statement to police, Kahypeasewat expands about her feelings of anger and frustration, explaining it felt “[l]ike you're having a panic attack or something. Like for me it was like that smothering feeling, anger plus it's kind of hard to breathe for me, you know, when I'm trying to get him away and I can't, it's pretty frustrating.”⁵⁷²

The judge continues that Kahypeasewat “was able to escape his grasp and began to throw various objects in his direction to deter him.”⁵⁷³ In her police statement, Kahypeasewat explains that she had been throwing cups but

I kept missing him, I was trying to get him to get out and he wouldn't leave. He kept moving around so I wouldn't hit him with the cups. That's when I grabbed the knife. I was looking, first thing I seen like, I would take it and throw it at him, but those were the cups. And then all of a sudden I had this knife and I was missing him with that, and I didn't know I connected because it was fast. I was trying to scare him out of there but I didn't realize I'd connected and it became a major big thing.⁵⁷⁴

⁵⁶⁸ *Ibid.* at para. 4.

⁵⁶⁹ *Ibid.* at para. 27.

⁵⁷⁰ *Ibid.* at para. 3.

⁵⁷¹ *Ibid.* at para. 5.

⁵⁷² *Ibid.* at para. 12.

⁵⁷³ *Ibid.* at para. 3.

⁵⁷⁴ *Ibid.* at para. 6.

The judge explains that Kahypeasewat “swung at Mr. Nadary three times, with the second strike inflicting a mortal wound on the victim.”⁵⁷⁵ Huculak J. notes “[d]espite the fact that Valerie was swinging the knife at Mr. Nadary, he continued to attempt to grab her. Valerie had intended to scare Mr. Nadary and the motion that the knife was swung was toward his arms.”⁵⁷⁶ Kahypeasewat told the police “[b]ut I didn't mean to connect, I just tried to scare him, tried to get him out of the house, the apartment. But he wouldn't leave.”⁵⁷⁷

It is critical to understand these events in the context of Kahypeasewat having been in four relationships that “involved physical violence,” including her relationship with Nadary – he “had been convicted of unlawful confinement and assault on the accused”⁵⁷⁸ (“assault causing bodily harm” which resulted in a “condition of no contact”)⁵⁷⁹. Additionally, the judgment provides that Nadary “had been released from jail about a month before the alleged offense and he had come looking for her,” and that Kahypeasewat “knew that although he was not supposed to have any contact with her, it would not deter him.”⁵⁸⁰ The entire basis of their relationship was based on Nadary's abuse: Kahypeasewat reported to the doctor authoring a report to the Court that “the victim had ‘decided’ on their relationship and added, ‘He would find me and drag me out or scare me to the point of going out with him.’”⁵⁸¹ Kahypeasewat disclosed “I felt I had to act accordingly...so I didn't get hit or screamed at.”⁵⁸²

The doctor reports that the deceased “tried to control” Kahypeasewat, emotionally abused her, and “she was in fear of the victim throughout most of their relationship and said he

⁵⁷⁵ *Ibid.* at para. 3.

⁵⁷⁶ *Ibid.* at para. 8.

⁵⁷⁷ *Ibid.* at para. 17.

⁵⁷⁸ *Ibid.*

⁵⁷⁹ *Ibid.* at para. 27.

⁵⁸⁰ *Ibid.*

⁵⁸¹ *Ibid.*

⁵⁸² *Ibid.*

frequently threatened to kill her.”⁵⁸³ Kahypeasewat also reported to the doctor that during the incident giving rise to her criminalization, after throwing cups at Nadary had no deterrent effect on his advances and she grabbed the knife, “that’s when I started swinging at the same time I had my eyes shut tight because I figured he would throw punches.”⁵⁸⁴ The doctor reports that she only opened her eyes after realizing she had “hit something.”⁵⁸⁵ The facts speak to an Aboriginal woman not merely with constrained choices, but with no meaningful choice in how to react to the ongoing abuse and harassment by the deceased. This is the troubling context of her criminalization that led to her guilty plea to manslaughter. Joycelyn M. Pollock and Sareta M. Davis write about violence committed by women “there are a number of narratives that sound much more like self-defence than aggression initiated by the female offender.”⁵⁸⁶ The circumstances of Kahypeasewat’s offence conform to this analysis.

Huculak J. details Kahypeasewat’s personal history, which includes experiences of racism; extensive sexual, physical, and emotional abuse beginning in her violent home life as a child and continuing through several violent intimate relationships; and living through the murders of her mother and one of her daughters. She developed substance abuse issues, culminating in her children being removed by Social Services. Huculak J. finds that Kahypeasewat suffered from battered woman syndrome, and this in conjunction with the *Gladue* factors are mitigating. However, Huculak J. also notes having “taken into account” aggravating factors, including “the victim was a spouse.”⁵⁸⁷ This is a reference to s. 718.2(a)(ii) of the *Code*, which the judge cites within the sentencing principles considered. As I have mentioned elsewhere, uncritical application of this principle is problematic in this context, wherein

⁵⁸³ *Ibid.*

⁵⁸⁴ *Ibid.*

⁵⁸⁵ *Ibid.*

⁵⁸⁶ Pollock & Davis, “The Continuing Myth”, *supra* note 121 at 17.

⁵⁸⁷ *Kahypeasewat*, *supra* note 504 at para. 72.

Kahypeasewat has extensive experiences of violence in relationships, including in her relationship with the deceased. It seems incongruous for the judge to both consider battered woman syndrome a mitigating factor alongside finding it aggravating that this offence involved violence against Kahypeasewat's abusive partner. To avoid s. 718.2(a)(ii), perhaps the judge could have decided that this was not a relationship contemplated by this provision. I suggest that s. 718.2(a)(ii) is neither informative nor appropriate in contexts such as Kahypeasewat's offence.

Notwithstanding this incongruence, considering Kahypeasewat's life overall, Huculak J. clearly recognizes how her experiences of victimization and other struggles have left her vulnerable to criminalization. The judge describes that

these socio-economic factors figure significantly into sentencing considerations, since Valerie Kahypeasewat's tragic upbringing, the murder of her child, racism, victimization, abuse, addictions, family dislocation, poverty, fragmentation, lack of education and employment, family dysfunction, and her shattered life all contributed in a major way to her criminal record.⁵⁸⁸

Elaborating on how the violence permeating Kahypeasewat's life also informs her sentencing, Huculak J. declares "I find that [her] stabbing of Frank Nadary was a *derivative crime* borne of the unresolved effects of past conditions of abuse, indignities and profound grief."⁵⁸⁹ The idea that this stabbing is a derivative crime stemming from the pain suffusing Kahypeasewat's life relates is quite a profound judicial statement. Additionally, it conforms well to the conception of victimization and criminalization operating along a continuum. The judge concludes with further such contextualization, noting the limits of sentencing because "[t]he socio-economic and environmental back-drop to domestic violence must also be addressed which is beyond the scope of this court."⁵⁹⁰ This comment reflects the recurrent theme that judges identify in the cases I

⁵⁸⁸ *Ibid.* at para. 59.

⁵⁸⁹ *Ibid.* at para. 72 [emphasis added].

⁵⁹⁰ *Ibid.* at para. 84.

reviewed: the criminal justice process is inadequate to respond to issues rooted in fundamental, entrenched societal inequalities that act as destabilizing forces.

Huculak J. elaborates that

[d]omestic violence in the aboriginal community is a serious issue. The factors contributing to this are complex. What sentence the accused receives will not change this. The *Gladue* factors play a prominent role in creating the conditions where violence is turned inward toward family, friends and self. The tragedy is that without significant resources and a change in the socio-economic conditions, little will change.⁵⁹¹

These comments are significant, signifying judicial understanding of the role of colonization in the internalization of violence. Linda Tuhiwai Smith explains the process of the internalization of colonization as a form of violence that is corrosive to Aboriginal peoples' individual and collective senses of self and well-being, expressed as both internally and externally-directed violence:

[o]ften there is no collective remembering as communities were systematically ripped apart, children were removed for adoption, extended families separated across different reserves and national boundaries. The aftermath of such pain was borne by individuals or smaller family units, sometimes unconsciously or consciously obliterated through alcohol, violence and self-destruction. Communities often turned inward and let their suffering give way to a desire to be dead. Violence and family abuse became entrenched in communities which had no hope. White society did not see and did not care. This form of remembering is painful because it involves remembering not just what colonization was about but what being dehumanized meant for our own cultural practices.⁵⁹²

The internalization of colonization is a complex process, and it is important that Huculak J. makes reference to this process by stating that “*Gladue* factors play a prominent role in creating the conditions where violence is turned inward toward family, friends and self.”⁵⁹³ The judge's comments about the intractable nature of these issues absent fundamental societal shifts is also critical for its recognition of how – like other forms of victimization – colonization constrains

⁵⁹¹ *Ibid.* at para. 61.

⁵⁹² Tuhiwai Smith, *supra* note 35 at 146.

⁵⁹³ *Kahypeasewat*, *supra* note 504 at para. 61.

Aboriginal women's choices at a systemic level. This framework, heeding the internalization of colonization and its expression through inward and outward violence, should undergird the sentencing of all Aboriginal offenders – but this does not always appear to be the case.

Taken as a whole, *Kahypeasewat* represents a complicated judgment, and particularly as pertains to the victimization-criminalization continuum. On one hand, it presents a nuanced understanding of how Kahypeasewat's own experiences of victimization (situated within colonization) have contributed to her "derivative crime,"⁵⁹⁴ and yields an appropriately sensitive community sentence. However, equally, it involves the sentencing of an Aboriginal woman whose offence reads as self-defence on the facts, which is amplified by her experiences of abuse in relationships generally and specifically in her relationship with the deceased.

Kahypeasewat was charged with manslaughter. It is unclear what pressures she may have experienced in her decision to plead guilty. Some studies have found that women are more likely to plead guilty,⁵⁹⁵ and the Canadian Association of Elizabeth Fry Societies (CAEFS) and the Native Women's Association of Canada (NWAC) have emphasized that their advocacy work reveals "women are susceptible to entering guilty pleas at a very high rate."⁵⁹⁶ CAEFS and NWAC raise concerns "that women face additional pressures in plea-bargaining," "especially when the context is a battering relationship,"⁵⁹⁷ as were Kahypeasewat's circumstances. CAEFS and NWAC explain that some of these pressures derive from women striving to "protect their children and sometimes to protect the batterer," noting that overcharging also leads women to pleading to more serious charges.⁵⁹⁸ Kahypeasewat had several children, two of whom were

⁵⁹⁴ *Ibid.* at para. 72 [emphasis added].

⁵⁹⁵ Barbara A. Koons-Witt, "The Effect of Gender on the Decision to Incarcerate Before and After the Introduction of Sentencing Guidelines" (2002) 40(2) *Criminology* 297 at 304.

⁵⁹⁶ CAEFS & NWAC, "Women and the Canadian Legal System", *supra* note 198 at 386-7.

⁵⁹⁷ *Ibid.*

⁵⁹⁸ *Ibid.*

present at the apartment on the night of the offence (a factor the judge found to be aggravating,⁵⁹⁹ which is problematic in the context of the abusive relationship, given that Kahypeasewat did not choose to expose her children to the deceased at all, and made strenuous, repeated efforts to induce him to leave the apartment). Elizabeth Sheehy has commented that Aboriginal women experience heightened pressures to plead guilty. Sheehy has identified possible reasons for this, including having to contend with portrayals in court material that they were the aggressor (which could result from such issues as addictions affecting memory or linguistic usage inadvertently insinuating mutual aggression), pressures arising from lengthy or serious criminal records, and access to justice issues.⁶⁰⁰ CAEFS and NWAC point to the lack of available statistics about the pressures within which women plead guilty, which means “systemic arguments cannot be made in courts that would assist women who have faced or are facing these circumstances.”⁶⁰¹

3.3 Determinative language in judicial discourses about victimization: Aboriginal women’s narrow agency within constrained options

Judges in my study frequently employ language variously suggesting a kind of predictability or inevitability when referencing Aboriginal women’s criminalization. I suggest this determinative language reflects judicial understanding of how experiences of victimization constrain Aboriginal women’s choices within already limited options. Below, I discuss several cases featuring judicial discourses that address how these criminalized Aboriginal women’s options and choices within them have been constrained by their experiences of victimization, and

⁵⁹⁹ Kahypeasewat, *supra* note 504 at para. 72.

⁶⁰⁰ Elizabeth Sheehy, “Defending Battered Women on Trial: ‘Not a Battered Woman’: Jamie Gladue” (Lecture delivered at the Faculty of Law, University of British Columbia, 1 April 2011). [Sheehy, “Defending Battered Women on Trial”, Lecture]

⁶⁰¹ CAEFS & NWAC, “Women and the Canadian Legal System”, *supra* note 189 at 386-7.

how these experiences have accelerated their vulnerability to criminalization. In *R. v. Good*,⁶⁰² Faulkner J. describes Helen Good's life as the "predictable result of neglect and abuse."⁶⁰³ Digiuseppe J. comments in *R. v. Tippeneskum*⁶⁰⁴ that June Tippeneskum's substance abuse "inevitably led her into the criminal justice system,"⁶⁰⁵ and that the abuse and neglect she experienced in her youth "created an unfortunate template for her life,"⁶⁰⁶ finding it "not surprising"⁶⁰⁷ that her criminalization reflects that template. In *R. v. Gregoire*,⁶⁰⁸ Goodridge J. finds it "not surprising" and "inevitable" that Angela Gregoire's experiences of victimization left her vulnerable to substance abuse and criminalization.⁶⁰⁹ In *R. v. Pawis*,⁶¹⁰ Reinhardt J. comments that Nicole Pawis' history of victimization culminated in "a terrible catastrophe just waiting to happen,"⁶¹¹ an offence that "was almost predictable, in hindsight."⁶¹² I discuss how these representations of the Aboriginal women's histories and criminalization relate to insights conveyed by the victimization-criminalization continuum.

3.3.1 Helen Good

In *R. v. Good*,⁶¹³ language suggesting the trajectory into criminalization predictably flowed from limits circumscribed by constrained choices is evident. In this case, Faulkner J. sentenced Helen Good to three years imprisonment for assault causing bodily harm and uttering

⁶⁰² *R. v. Good*, 2010 YKTC 96. [*Good*]

⁶⁰³ *Ibid.* at para. 22.

⁶⁰⁴ *R. v. Tippeneskum*, 2011 ONCJ 219. [*Tippeneskum*]

⁶⁰⁵ *Ibid.* at para. 6.

⁶⁰⁶ *Ibid.* at para. 19.

⁶⁰⁷ *Ibid.*

⁶⁰⁸ *R. v. Gregoire*, 2009 NLTD 21. [*Gregoire*]

⁶⁰⁹ *Ibid.* at para. 38.

⁶¹⁰ *R. v. Pawis (R. v. N.C.P.)*, 2006 ONCJ 386. [*Pawis*]

⁶¹¹ *Ibid.* at para. 86.

⁶¹² *Ibid.* at para. 87.

⁶¹³ *Good*, *supra* note 602.

death threats⁶¹⁴ (the defence had asked for two years less a day), and also designates Good a long-term offender for a ten-year period following her release. After detailing the extensive violence that Good perpetrated, Faulkner J. poses that “the obvious question is, ‘why?’”⁶¹⁵ In response, Faulkner J. outlines “Helen’s life is the predictable result of neglect and abuse that she herself has suffered at the hands of her parents, partners, caregivers, and associates. Just as predictably, she has passed on many of those effects to her children: two are dead of drug-related causes and a son has serious psychiatric problems.”⁶¹⁶ This demonstrates the judge’s understanding that Good’s experiences of victimization pervasively reduced her life options and left her vulnerable to criminalization. As the judge recognizes that her experiences of victimization have also impacted her options and choices as a mother, this also functions as an oblique reference to the intergenerational effects of colonization. However, as I discuss below, the context of colonization is not examined.

Despite judicial recognition that Good’s experiences of victimization have impeded her ability to healthily and productively navigate her life, in other respects Faulkner J. holds Good accountable to her experiences of victimization. In the context of psychological and psychiatric assessments⁶¹⁷ suggesting that Good presents a high risk to reoffend, Faulkner J. finds that “[d]espite years of therapy, the offender fails to take ownership of her violence, but continues to seek refuge in her own victimization as a justification.”⁶¹⁸ Faulkner J. does not expand in detail, but does provide that “[f]or instance, she reports and justifies assaulting men because they

⁶¹⁴ Good appealed her sentence “on the basis that the sentencing judge failed to consider her Aboriginal status pursuant to s. 718.2(e),” and that “the sentence was excessive and unfit because the judge overemphasized deterrence and denunciation to the exclusion of the objectives of rehabilitation and restorative justice,” seeking the substitution of a provincial term of imprisonment [*R. v. Good*, 2012 YKCA 2 at para. 1.]. Her appeal was dismissed. The Yukon Court of Appeal held “the sentencing judge made no error in principle, and that the sentence imposed was fit” [at para. 47].

⁶¹⁵ *Ibid.* at para. 21.

⁶¹⁶ *Ibid.* at para. 22.

⁶¹⁷ *Ibid.* at para. 10.

⁶¹⁸ *Ibid.* at para. 34.

reminded her of her father. She has never developed any notable empathy for her victims.”⁶¹⁹ Drawing from assessments examining Good’s mental health, Faulkner J. notes long-term patterns in Good’s over forty year record of violence,⁶²⁰ which often occurred after she drank⁶²¹ and was “perpetuated against defenceless victims.”⁶²² It seems the judge describes these victims as defenceless because in an assessment from a previous case, “Helen acknowledged that many of her assaults were premeditated. She would wait until her victim was too drunk to defend himself and then attack.”⁶²³ It should be noted that there are also several references to Good having also committed violence against other women and her own children.

It seems that the accumulation of serious violence over such a protracted period, her Borderline Personality Disorder and Antisocial Personality Disorder diagnoses,⁶²⁴ and the assessment ordered for this sentencing concluding that she “remains at high risk of further serious violence if she uses alcohol or other intoxicants”⁶²⁵ combine to cause her own experiences of victimization to recede into the background. This imbalance becomes problematic in that there are virtually no details offered about Good’s personal history apart from the reference to the “neglect and abuse that she herself has suffered at the hands of her parents, partners, caregivers, and associates”⁶²⁶ and her children’s struggles. It is apparent from the number of parties identified who subjected Good to neglect and abuse that her own experiences of victimization were extensive. Even without additional information about her history of victimization, it seems that Good’s life reflects how the “sheer number”⁶²⁷ of victimizations in women’s lives can

⁶¹⁹ *Ibid.* at para. 23.

⁶²⁰ *Ibid.* at para. 34.

⁶²¹ *Ibid.* at para. 16.

⁶²² *Ibid.* at para. 34.

⁶²³ *Ibid.* at para. 16.

⁶²⁴ *Ibid.* at para. 20.

⁶²⁵ *Ibid.*

⁶²⁶ *Ibid.* at para. 22.

⁶²⁷ DeHart, *supra* note 267 at 1375.

become “a tangle of barriers”⁶²⁸ that impede healthier pathways and leave women vulnerable to criminalization.

Faulkner J. does not properly contextualize Good’s violence within these circumstances. The omission of any discussion of her personal history is even starker in the effacement of Good’s Aboriginality from the judgment. This is one of the decisions that required me to be attentive to the text in order to discern whether Good was even an Aboriginal woman. Faulkner J. nowhere directly states her Aboriginal status. I have inferred that Good is Aboriginal because when discussing her “significant level of community support,”⁶²⁹ Faulkner J. comments that “the Court received a report authored by Mark Stevens, a justice worker with the Carcross Tagish First Nation”⁶³⁰ and makes reference to a “support circle”⁶³¹ convened for Good. The judge neither makes reference to s. 718.2(e) nor *Gladue*. The only direct reference to any specific portion of the s. 718.2 sentencing subsections of the *Code* is to s. 718.2(a)(ii), as Faulkner J. finds that this “statutorily aggravating factor”⁶³² applies because the offences were against her husband. I have registered my discomfort with the application of this provision to women with histories of violent victimization in intimate relationships in Chapter 1 (and maintain that sentiment for its application in this case), but here I am primarily highlighting how the judge considers this (arguably problematic) sentencing principle but fails to include any consideration of another principle, s. 718.2(e).

I discussed in Chapter 1 that in *Ipeelee*, LeBel J. holds that judges in the post-*Gladue* jurisprudence have erroneously interpreted that the *Gladue* analysis does not apply for more

⁶²⁸ *Ibid.* at 1378.

⁶²⁹ *Good*, *supra* note 602 at para. 26.

⁶³⁰ *Ibid.*

⁶³¹ *Ibid.*

⁶³² *Ibid.* at para. 28.

serious or violent offences.⁶³³ Additionally, *Ipeelee* deals with two long-term offenders; LeBel J. finds that because there is a statutory duty requiring judges to apply *Gladue* for any case involving an Aboriginal offender, this duty includes cases dealing with a breach of a long-term offender supervision order – “failure to do so constitutes an error justifying appellate intervention.”⁶³⁴ While Faulkner J. did not have the benefit of the clarity provided by *Ipeelee*, the seriousness and violence inherent in Good’s offences and criminal record should not have precluded consideration of *Gladue*, nor should her ultimate long-term offender designation have obviated the *Gladue* analysis. *Gladue* was implicated, and should have been considered to “provide the necessary *context*”⁶³⁵ to assist the judge in determining Good’s sentence. Finally, because Faulkner J. does make reference to Good’s experiences of victimization (albeit without providing a fuller description of her personal history) but fails to engage in a *Gladue* analysis, in this case judicial recognition of the victimization-criminalization continuum operates without integrating *Gladue* factors into one cohesive analysis. I will return to this case in Chapter 4, where I discuss how Faulkner J. frames incarceration as a place of healing for Good.

Like Faulkner J., other judges in my research use language of predictability in ways that demonstrate recognition of how experiences of victimization have constrained the available options for Aboriginal women: “[t]ragedy and trauma have led, not surprisingly, to substance abuse.”⁶³⁶ Some judges make the further connection to how limited options leave Aboriginal women vulnerable to criminalization, such as *R. v. Tippeneskum*⁶³⁷ where Digiuseppe J.

⁶³³ *Ipeelee*, *supra* note 16 at para. 84.

⁶³⁴ *Good*, *supra* note 602 at para. 87.

⁶³⁵ *Ipeelee*, *supra* note 16 at para. 60.

⁶³⁶ *R. v. Redhead*, 2009 MBQB 314 at para. 9. [*Redhead*]

⁶³⁷ *Tippeneskum*, *supra* note 604.

comments that “[a]lcohol and drug abuse are key factors that have contributed to Ms. Tippeneskum’s behaviour.”⁶³⁸

3.3.2 June Tippeneskum

In *Tippeneskum*, June Tippeneskum is sentenced to 3½ years imprisonment for aggravated assault for failing to disclose her HIV positive status to her partner and other less serious offences. Digiuseppe J. identifies Tippeneskum as a “member of the Attawapiskat First Nation” whose PSR portrays the “all too common picture of a young person raised in difficult circumstances, exposed to violence, abuse, and neglect.”⁶³⁹ Through child protection services, Tippeneskum rotated among her mother’s residence and foster homes during her childhood, and was “repeatedly traumatized and neglected”⁶⁴⁰ throughout. She was expelled from school, and began “abusing alcohol and drugs.”⁶⁴¹ Digiuseppe J. notes “[t]his behaviour inevitably led her into the criminal justice system, first as a youth...and then into adulthood.”⁶⁴² Her two children were apprehended and placed in the care of her extended family due to concerns about “parental substance abuse, neglect and lack of care giving skills.”⁶⁴³ Digiuseppe J. relates

the Pre-sentence Report identifies the intergenerational impact that substance abuse had on Ms. Tippeneskum’s community and on her in particular. She was exposed to violence and neglect at an early age, and the dysfunction in her family created an unfortunate template for her life. It is not surprising that her behaviour has reflected the environment of abuse and neglect she was exposed to as a child.⁶⁴⁴

Within these references to her trajectory into the justice system, Digiuseppe J. comments that Tippeneskum’s substance abuse “inevitably” led to her criminalization⁶⁴⁵ and that her

⁶³⁸ *Ibid.* at para. 8.

⁶³⁹ *Ibid.* at para. 5.

⁶⁴⁰ *Ibid.* at para. 6.

⁶⁴¹ *Ibid.*

⁶⁴² *Ibid.*

⁶⁴³ *Ibid.* at para. 7.

⁶⁴⁴ *Ibid.* at para. 19.

⁶⁴⁵ *Ibid.* at para. 6.

experiences of childhood abuse and neglect further contribute to her later criminalization being “not surprising.”⁶⁴⁶ Yet overall this judgment does not omit the recognition for agency that the victimization-criminalization continuum has been criticized for precluding. Particularly, Digiuseppe J. engages in a *Gladue* analysis, situating the “unfortunate template”⁶⁴⁷ for Tippeneskum’s within colonization by recognizing the intergenerational impacts of substance abuse on Tippeneskum and her wider community.⁶⁴⁸ This recognition situates Tippeneskum’s limited agency within choices constrained by victimization, and, more broadly, colonization.

The sense of predictability and inevitability that arises from Digiuseppe J.’s comments is nuanced by specific acknowledgments of Tippeneskum’s agency. Digiuseppe J. relates Tippeneskum’s own explanation that she “abuses substances to obliterate painful memories related to her upbringing.”⁶⁴⁹ The picture of the victimization-criminalization continuum that emerges from the case outlines her “pathway” into criminality, allowing for recognition of her agency within the circumstances of colonization. Digiuseppe J. also specifically determines that Tippeneskum’s professed understanding of how her own experiences of victimization have left her vulnerable to criminalization is a mitigating factor. Digiuseppe J. cites that “Ms. Tippeneskum has some insight into the underlying issues that have contributed to her offending behaviour, and expressed a willingness to address these issues.”⁶⁵⁰ Combined with other mitigating factors (a guilty plea and expression of remorse),⁶⁵¹ Tippeneskum’s ability to identify the victimization-criminalization continuum in her own life intersects with the judge’s understanding of her history of victimization through the lens of *Gladue* factors and functions to

⁶⁴⁶ *Ibid.* at para. 19.

⁶⁴⁷ *Ibid.*

⁶⁴⁸ *Ibid.*

⁶⁴⁹ *Ibid.* at para. 8.

⁶⁵⁰ *Ibid.*

⁶⁵¹ *Ibid.* at para. 20.

mitigate her sentence.⁶⁵² Digiuseppe J. does reference the excerpt from *Gladue* about more violent and more serious offences producing more similar sanctions for Aboriginal and non-Aboriginal offenders that *Ipeelee* clarifies has been overemphasized and misunderstood. However, Digiuseppe leaves the issue in a manner consistent with the general thrust of *Ipeelee* that ultimately sanctions for Aboriginal offenders must be individualized within the context of colonization: “[u]ltimately, as in all cases, a fit sentence depends on the particular circumstances of the offence, the offender, the victim and the community.”⁶⁵³ I return to this decision briefly in Chapter 4.

3.3.3 Angela Gregoire

Whereas the causes and intergenerational effects of substance abuse are referenced in *Tippeneskum*, in *R. v. Gregoire*⁶⁵⁴ the relationship with colonization is made more explicit and tied to determinative language. This yields a more integrated picture of the victimization-criminalization continuum and *Gladue* analysis than that emergent from *Tippeneskum*. Angela Gregoire, a “Montagnais Innu and a member of the Sheshatshiu First Nation,”⁶⁵⁵ is sentenced to a conditional sentence of two years less a day followed by probation for a further two years for impaired driving causing death and that causing bodily harm. Goodridge J. describes Gregoire as “an alcoholic” who “grew up in a home where multi-generational alcoholism existed.”⁶⁵⁶

⁶⁵² Digiuseppe J. cites *Tippeneskum*’s domestic relationship with the complainant as an aggravating factor, in keeping with s. 718.2(a)(ii) of the *Code*. However, I would distinguish this case on its facts from those that in Chapter 1 I registered my discomfort about uncritical application of s. 718.2(a)(ii) instead of more contextualized reasoning (cases involving the violence of Aboriginal women against intimate partners after histories of themselves being subjected to abuse in relationships). I would argue that this case speaks directly to the violation of trust issue that seems to animate s. 718.2(a)(ii) – as Digiuseppe J. notes, *Tippeneskum* “repeatedly deceived” her partner “over a lengthy period of time” [*Tippeneskum*, *supra* note 604 at para. 21.] by failing to inform him about her HIV positive status.

⁶⁵³ *Tippeneskum*, *supra* note 604 at para. 18.

⁶⁵⁴ *Gregoire*, *supra* note 608.

⁶⁵⁵ *Ibid.* at para. 35.

⁶⁵⁶ *Ibid.* at para. 7.

Relying on the PSR, Goodridge J. explores the cultural destruction that colonization has induced: “[g]one are many of the traditional pursuits which kept people active and in the country in small camps much of the year. Many of the traditional forms of self government which worked well in the past have been displaced. The traditional institution of the family has deteriorated.”⁶⁵⁷ The judge explains “[w]hile this cultural adjustment does not justify tolerance of criminal activity, it does help me to understand the circumstances which led Ms. Gregoire to a pattern of alcohol abuse.”⁶⁵⁸ This framework of using *Gladue* factors to contextualize the decision is consistent with *Ipeelee*.

Goodridge J. discusses the intergenerational effects of colonization through a detailed account of how alcohol abuse has been passed down Gregoire’s family and the attendant corrosive effects on family stability and cohesion. Like her grandparents, Gregoire’s parents also abused alcohol. “[T]his regularly led to violence in the family home,” a “dysfunctional home marked by frequent acts of violence, neglect, physical and emotional abuse.”⁶⁵⁹ Gregoire “reports that she was a victim of sexual assault” throughout her childhood, and she was often temporarily removed from the home by the Director of Child Welfare.⁶⁶⁰ Goodridge J. responds that “[i]t is not surprising, considering this background that Ms. Gregoire fell into a pattern of alcohol abuse herself,” given that “Ms. Gregoire’s social situation growing up inevitably led to her alcohol addiction and was a major factor in these crimes.”⁶⁶¹

This determinative-like language that Gregoire’s alcoholism is “not surprising” and “inevitably”⁶⁶² a product of her experiences of victimization superficially recalls the criticism of

⁶⁵⁷ *Ibid.* at para. 34.

⁶⁵⁸ *Ibid.*

⁶⁵⁹ *Ibid.* at para. 38.

⁶⁶⁰ *Ibid.*

⁶⁶¹ *Ibid.*

⁶⁶² *Ibid.*

the victimization-criminalization continuum that it precludes depictions of agency. However, it appears that it is precisely this lack of agency that mitigates in the form of *Gladue* factors because it allows for judicial recognition of how victimization constrained Gregoire's life options. Goodridge J. states "[t]he crimes are directly connected to Ms. Gregoire's upbringing and other systemic or background factors,"⁶⁶³ which "played a substantial role"⁶⁶⁴ and "resulted in: dysfunctional family upbringing; victim of physical and sexual abuse as a child; multi generational alcoholism in the family; low education; unemployment; lack of opportunities; depression; low income."⁶⁶⁵ Effectively, here Goodridge J. lists the various ways in which Gregoire's options have been suppressed due to her experiences of victimization (which the judge contextualizes within *Gladue* factors), clearly connecting the victimization-criminalization continuum, through *Gladue* factors, to Gregoire's offending. Goodridge J. specifically cites as mitigating that Gregoire is an "Aboriginal woman with dysfunctional family background,"⁶⁶⁶ and reintroduces recognition of her agency into the judgment with the further mitigating factors that she has the "desire to change her life," and "has discontinued alcohol consumption."⁶⁶⁷ Nonetheless, the lack of agency conveyed through the determinative language Goodridge J. employs to describe Gregoire's pathway to her offence seems to operate to mitigate. That is, by contextualizing Gregoire's experiences of victimization within the systemic and background factors of colonization, Goodridge J. recognizes how her narrowed options have contributed to her vulnerability to criminalization, and is accordingly able to sentence with sensitivity.

⁶⁶³ *Ibid.* at para. 54.

⁶⁶⁴ *Ibid.* at para. 50.

⁶⁶⁵ *Ibid.*

⁶⁶⁶ *Ibid.* at para. 51.

⁶⁶⁷ *Ibid.*

3.3.4 Nicole Pawis

In *R. v. Pawis*,⁶⁶⁸ the judge provides a very thoughtful analysis of the relationship between the victimization-criminalization continuum and the *Gladue* analysis, and in even greater depth than in *Gregoire*. Additionally, Reinhardt J. uses determinative language in relation to Nicole Pawis' victimization and subsequent criminalization, but thoroughly contextualizes this trajectory within constrained choices. Pawis is sentenced to a conditional sentence of two years less a day and three subsequent years of probation for committing aggravated assault on her child after "throwing him around in his stroller" during "an uncontrollable rage at her child for constant crying."⁶⁶⁹ Reinhardt J. draws from both the forensic report and the PSR he refers to as a *Gladue* report because it "addresses those issues mandated by the Supreme Court of Canada when sentencing an Aboriginal offender."⁶⁷⁰ From these sources, Reinhardt J. describes that Pawis is a "status Indian from the Shawanaga First Nation."⁶⁷¹ Alongside her siblings, Pawis "suffered serious abuse at the hands of her father, who she reports sexually abused her until he was forced to leave the reserve."⁶⁷² Pawis was raised by her grandmother, a residential school survivor who routinely abused her physically, emotionally, and psychologically for over ten years, kept her socially isolated, and neglected her. Pawis "suffered ostracism and abusive treatment" by classmates and teachers who "ridiculed her for being an aboriginal" and excluded her and other Aboriginal students from various activities.⁶⁷³

Reinhardt J. states that Pawis "became pregnant by a partner who was abusive to her,"⁶⁷⁴ and "knew she was not ready to care for a child."⁶⁷⁵ Pawis failed in her attempt to obtain an

⁶⁶⁸ *Pawis*, *supra* note 610.

⁶⁶⁹ *Ibid.* at para. 2.

⁶⁷⁰ *Ibid.* at para. 21.

⁶⁷¹ *Ibid.* at para. 1.

⁶⁷² *Ibid.* at para. 36.

⁶⁷³ *Ibid.* at para. 42.

⁶⁷⁴ *Ibid.* at para. 45.

abortion because she lacked health insurance coverage, and determined she could not “give him up for adoption...because of social pressure.”⁶⁷⁶ Unable to cope with the strains of motherhood, before “the assault took place she had tried to arrange for the Native Child and Family Services worker to come over and remove Shikhqim [her child] from her care temporarily.”⁶⁷⁷ With this thorough description of Pawis’ struggles through an unwanted pregnancy endured within an abusive relationship, Reinhardt J. clearly details how Pawis’ experiences of victimization constrained her options already limited by poverty and marginalization. The judge makes plain that Pawis had made a variety of attempts to exercise her agency in both her pregnancy and motherhood and each attempt was thwarted for systemic reasons.

Reinhardt J. also directly connects these restricted choices and resources to Pawis becoming vulnerable to criminalization. The judge comments that the *Gladue* report demonstrates “that the combination of this child, in the care of this mother, was a terrible catastrophe just waiting to happen”⁶⁷⁸ and that “[t]he resultant assault on Shikhqim by his mother, Nicole, was almost predictable, in hindsight.”⁶⁷⁹ Here determinative language appears again, as in previously discussed judgments, but this time thoroughly contextualizing “predictability” within a very clear explanation of how experiences of victimization curtailed Pawis’ choices. In making the ultimate determinations about Pawis’ sentence, Reinhardt J. describes “Ms. Pawis’s actions were inexcusable, but they were the result of personal social conditions that were objectively beyond her control.”⁶⁸⁰ The judge bolsters this understanding with the observation that “[s]he was a young, inexperienced, emotionally damaged and immature

⁶⁷⁵ *Ibid.* at para. 53.

⁶⁷⁶ *Ibid.*

⁶⁷⁷ *Ibid.* at para. 52.

⁶⁷⁸ *Ibid.* at para. 86.

⁶⁷⁹ *Ibid.* at para. 87.

⁶⁸⁰ *Ibid.* at para. 102.

mother trying to accomplish a very difficult task, without adequate skills, training or support.”⁶⁸¹

This background Reinhardt J. establishes helpfully sets out the events leading to the offence, including Pawis’ personal history and her recognition of her own caregiving limitations in her attempts to navigate pregnancy and motherhood decisions without support.

Within Reinhardt J.’s sensitive exploration of how Pawis’ experiences of victimization within colonization, the judge also allows entry points for recognition of her agency. For example, Reinhardt J.’s comments “[t]o her credit, she asked the Native Child and Family Services Worker...to intervene and remove the child from her care...prior to assaulting her child,”⁶⁸² adding that she “knew she was a danger to her totally dependent and helpless son, but could not find the resources either in herself, or in the community, to protect him.”⁶⁸³ These same issues become aggravating because due to the facts, Reinhardt J. must consider s. 718.2(a)(ii.1) (evidence that the offender abused someone under 18 years old in the offence)⁶⁸⁴ and s.718.2(a)(iii) (evidence of abuse of trust or authority over the victim in commission of the offence)⁶⁸⁵ of the *Code*. Reinhardt J. finds these factors aggravating because Pawis committed “a serious breach of trust” against her “totally dependent and helpless son.”⁶⁸⁶ The judge notes “[t]hese factors suggest that the appropriate result should be a sentence of incarceration.”⁶⁸⁷

However, consistent with the tenor of judicial sensitivity running through the judgment, Reinhardt J. concludes “after considerable deliberation”⁶⁸⁸ that Pawis’ history of victimization against the backdrop of colonization sufficiently mitigates to outweigh what would otherwise

⁶⁸¹ *Ibid.* at para. 103.

⁶⁸² *Ibid.* at para. 104.

⁶⁸³ *Ibid.* at para. 98.

⁶⁸⁴ *Criminal Code*, *supra* note 14 at s. 718.2(a)(ii.1).

⁶⁸⁵ *Ibid.* at s.718.2(a)(iii).

⁶⁸⁶ *Pawis*, *supra* note 610 at para. 98.

⁶⁸⁷ *Ibid.* at para. 99.

⁶⁸⁸ *Ibid.* at para. 100.

require a sentence of incarceration, permitting a conditional sentence.⁶⁸⁹ Reinhardt J. references Pawis' lack of family support to assist her parenting, and the long-term impacts of her emotionally isolated and impoverished upbringing, products of her mother's frequent absence and her grandmother's abuse.⁶⁹⁰ Reinhardt J. finds that Pawis' family circumstances "cannot be solely blamed on her."⁶⁹¹ The judge notes that Pawis has been "distracted throughout this [criminal justice] process, and we have had to adjourn the hearing on more than one occasion because she was unable to proceed without completely losing her composure."⁶⁹² *Pawis* represents a judgment that not only complies with the judicial duty toward Aboriginal offenders, but also thoughtfully integrates understandings of how victimization constrains Aboriginal women's options and foments vulnerability to criminalization within the broader context of colonization. I return to this decision in Chapter 4, where I discuss how prison is constructed in the judgment vis-à-vis rehabilitation, given the psychologist's thoughtful recommendation that Pawis' treatment needs are better served in the community and Reinhardt J.'s nuanced adoption of this view.

3.4 Decontextualizing the *Gladue* analysis: Problems in judicial reasoning about the individually and collectively victimizing colonization

Turning to focus more directly on judicial consideration of the unique systemic and background factors that inform the *Gladue* analysis, the cases I discuss in this section engage with judicial discourses about *Gladue* factors and victimization. I begin with *R. v. Whitford*⁶⁹³ because the presentation of mitigating and aggravating factors in the judgment both implicate

⁶⁸⁹ Reinhardt J. lists other mitigating factors: "[h]er attempt to have the child removed from her care, her immediate confession, her guilty plea, her stringent reporting conditions, the lack of alcohol or intoxicants as a precipitating factor, her receptivity to counselling and remedial programs offered by the aboriginal community in Toronto." [*Pawis*, *supra* note 610 at para. 107.]

⁶⁹⁰ *Pawis*, *supra* note 610 at para. 101.

⁶⁹¹ *Ibid.*

⁶⁹² *Ibid.* at para. 106.

⁶⁹³ *R. v. Whitford*, 2008 BCSC 1378. [*Whitford*]

issues related to the offender's experiences of victimization. In this way, it appears that victimization effectively both mitigates and aggravates on sentencing. The *Gladue* analysis is referenced, but it is unclear whether or to what extent this analysis actually guided the determination of sentence. In *R. v. Niganobe*,⁶⁹⁴ the judge makes a comment that seems to neutralize that offender's *Gladue* factors, to an extent, by abstracting her experience in a universalized reference – although ultimately, there is clear judicial recognition that systemic factors have constrained her life choices.

In my review of the cases in my study, I noticed repeated instances exemplifying the trend highlighted by *Ipeelee* that post-*Gladue* cases have wrongly and inappropriately required Aboriginal offenders to demonstrate a causal link showing their background and systemic factors contributed to their coming before the courts. I move to *R. v. Johnson*⁶⁹⁵ to introduce this causality problem. As I discussed in Chapter 1, this artificial requirement is inimical to the goals and spirit of *Gladue*. *Ipeelee* clarified how courts must avoid this problem by identifying that it places an unreasonable evidentiary burden on Aboriginal offenders whose experiences of colonization are so entwined that it is impossible to disentangle these effects and to distill them into a causal explanation of criminalization.⁶⁹⁶ Within the cases I discuss in this section, I present the characterizations of *Gladue* factors that do appear in these cases to emphasize how these histories should, per *Ipeelee*, have simply been used to “provide the necessary context to enable a judge to determine an appropriate sentence.”⁶⁹⁷ Equally, within the individualized sentencing

⁶⁹⁴ *R. v. Niganobe*, 2008 CanLII 54322 (ON SC). [*Niganobe*]

⁶⁹⁵ *R. v. Johnson*, 2011 YKTC 11. [*Johnson*]

⁶⁹⁶ See *Ipeelee*, *supra* note 16 at paras. 80-3.

⁶⁹⁷ *Ibid.* at para. 83.

process, these histories must be connected to the larger context and not overly particularized, as *Gladue* factors “need not be tied in some way to the particular offender and offence.”⁶⁹⁸

In *Johnson*, the judge reflects on how variability in information about background and systemic factors received by the courts affects the ability of judges to engage in the *Gladue* analysis, but this framework is problematic against the *Ipeelee* clarification that judges should not require a causal connection between *Gladue* factors and the offence in question. However, *Johnson* also represents judicial engagement with gendered issues in a way that impacts sentencing. Returning to the problem of courts erroneously requiring causal connections between *Gladue* factors and the offence, *R. v. Jankovic*⁶⁹⁹ illustrates one manifestation of this where the judge attributes the offender’s disadvantages (including experiences of victimization) to her non-Aboriginal father, and expressly not to her Aboriginal mother. I discuss why this is inappropriate. In *R. v. Bluebell*,⁷⁰⁰ the judge squarely succumbs to the same causality problem rejected by *Ipeelee* by finding the offender failed to provide evidence of a connection between her *Gladue* factors and her offence. *R. v. Collins*⁷⁰¹ presents the same problem, but here arising from the judge denying the relevance of systemic factors and instead relating the offender’s criminalization to her individual agency. This formulation is both misaligned with the *Ipeelee* clarification and also does not comport with the idea of agency within externally constrained choices from the victimization-criminalization continuum. I also use *Collins* to demonstrate how the *Gladue* analysis should involve contextualization and a shift in conceptual focus (to more restorative-oriented sanctions, where appropriate).

⁶⁹⁸ *Ibid.*

⁶⁹⁹ *R. v. Jankovic*, 2004 ABPC 162. [*Jankovic*]

⁷⁰⁰ *R. v. Bluebell*, 2011 SKQB 203. [*Bluebell*]

⁷⁰¹ *R. v. Collins*, 2009 CarswellOnt 9678 (Ont. Sup. Ct. Jus.) (WLeC). [*Collins*]

Overall, the cases I discuss in this section implicate problems in the *Gladue* analysis, which involves considerations of victimization through the overlap between *Gladue* factors and experiences of victimization. It should be noted that the problems I discuss have been elucidated by *Ipeelee*, which was decided after the below decisions transpired (so the judges whose reasoning I will discuss did not have the benefit of having consulted *Ipeelee*). I focus most directly on the *Gladue* analysis in this section because in the broader picture, when judges sentence Aboriginal women, the most sensitive *Gladue* analyses should be deepened by reference to ideas emergent from the victimization-criminalization continuum. The victimization-criminalization continuum and *Gladue* analysis have different focuses: gendered responses to and vulnerabilities from victimization and colonization and overincarceration, respectively. However, when sentencing Aboriginal women, both analyses with their respective focuses should be integrated such that the overall analysis is deepened. As such, broadly speaking, the cases I discuss in this section fail to achieve this depth – but in the final section of this chapter, I will turn to two cases that do achieve this balance.

3.4.1 Lisa Whitford

In *R. v. Whitford*,⁷⁰² the victimization-criminalization continuum that emerges suggests that experiences of victimization can act to both mitigate and aggravate on sentencing. Parrett J. sentences Lisa Whitford to six years imprisonment for manslaughter after she pled guilty to this included offence to her original charge of second-degree murder. Whitford had what she termed a “difficult relationship”⁷⁰³ with the deceased, who was violent toward her. Whitford and the deceased abused alcohol and crack cocaine together. She shot him after he approached her

⁷⁰² *Whitford*, *supra* note 693.

⁷⁰³ *Ibid.* at para. 10.

“cursing and swearing,”⁷⁰⁴ while she was pregnant. Parrett J. describes that she “is of aboriginal descent, and her mother is a member of the Nak’azdli Band,”⁷⁰⁵ with a background that is “horrendous,” “one of the bleakest cases I have ever encountered.”⁷⁰⁶

Drawing from the PSR, Parrett J. details that Whitford lived with her mother through an “unstable and abusive childhood”⁷⁰⁷ in which she was extensively sexually abused by a boyfriend of her mother. Whitford turned to drugs and alcohol, ran away to live on the streets, and had several intimate relationships that were characterized by violence and drinking.⁷⁰⁸ She “became so distressed” upon learning the father of her three children would share custody after “severing the relationship”⁷⁰⁹ with him that she dove deeper into substance abuse. Whitford received a federal penitentiary term after an attempted robbery, which later became a “revolving door” of incarceration after repeated parole violations⁷¹⁰ related to her substance abuse issues.⁷¹¹ Parrett J. recognizes that the sexual and physical violence Whitford suffered was continuous,⁷¹² stating that “[t]his is a woman who has made 41 emergency visits to the Prince George Regional Hospital over the years. On no less than five separate occasions, her jaw was broken during altercations with the men she was involved with.”⁷¹³

Interestingly, both the mitigating and aggravating factors are similar, and both reflect the violence Whitford has endured throughout her life: Parrett J. finds “little in the way of mitigating factors, save and except for the accused’s troubled background and the abuse she has suffered

⁷⁰⁴ *Ibid.*

⁷⁰⁵ *Ibid.* at para. 13.

⁷⁰⁶ *Ibid.* at para. 21.

⁷⁰⁷ *Ibid.*

⁷⁰⁸ *Ibid.*

⁷⁰⁹ *Ibid.*

⁷¹⁰ *Ibid.*

⁷¹¹ *Ibid.* at para. 19.

⁷¹² *Ibid.* at para. 18.

⁷¹³ *Ibid.* at para. 30.

over that time,”⁷¹⁴ and “little in the way of aggravating factors, save and except for the sheer and total absence of any social value arising from the accused’s lifestyle and actions.”⁷¹⁵ It appears that Whitford’s experiences of victimization effectively operate both to mitigate and aggravate sentencing. That is, her aggravating “lifestyle and actions” are inevitably connected to her victimization. Parrett J. clearly recognizes this connection when commenting that her spiral back into substance abuse and criminality from a clean period was triggered after having to share custody with an abusive ex-partner she had cut from her life and that her “revolving door”⁷¹⁶ parole violations were a product of her substance abuse problems. These issues speak to the “tangle of barriers”⁷¹⁷ that DeHart explains frustrate women’s ability to healthily and legally navigate their lives. Because experiences of victimization root the aggravating factor of the “sheer and total absence of any social value arising from the accused’s lifestyle and actions,”⁷¹⁸ and this same victimization also grounds the mitigating factors of her “troubled background and abuse,”⁷¹⁹ a complex portrait of the victimization-criminalization continuum emerges from the judgment. Nonetheless, Parrett J. does articulate that “[t]here is no doubt, in my view, that this is the history of a person with severe substance abuse problems who lacks education, conflict resolution skills, coping skills, and has continuously suffered both sexual and physical abuse.”⁷²⁰

Parrett J. does cite s. 718.2(e) of the *Code* and highlights aspects of *Gladue*.⁷²¹ However, these principles are merely stated without explanation about how this analysis actually impacts the sentence determinations. Parrett J. merely appends the comment “[a]fter a careful

⁷¹⁴ *Ibid.* at para. 33.

⁷¹⁵ *Ibid.* at para. 34.

⁷¹⁶ *Ibid.* at para. 21.

⁷¹⁷ DeHart, *supra* note 267 at 1378.

⁷¹⁸ Whitford, *supra* note 693 at para. 34.

⁷¹⁹ *Ibid.* at para. 33.

⁷²⁰ *Ibid.* at para. 16.

⁷²¹ See *Ibid.* at paras. 35-8.

consideration of all the circumstances and the principles to be applied”⁷²² to denote consideration of *Gladue*, without explaining what this consideration involved more concretely. *Gladue* describes that s. 718.2(e) requires a different “method of analysis,”⁷²³ and *Ipeelee* maintains that this constitutes a distinct “methodology.”⁷²⁴ Parrett J. does provide this methodology, denoting that

[s]ection 718.2(e) directs sentencing judges to sentence aboriginal offenders individually but also differently because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider: (a) the unique, systemic, or background factors which have played a part in bringing the particular aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.⁷²⁵

However, despite mentioning having considered this analysis, Parrett J. does not disclose what, if any, impact it has on the actual determination of sentence. Instead, Parrett J. determines Whitford must be separated from society for there to be any prospect of rehabilitation,⁷²⁶ and accepts the Crown’s range of sentence from five to eight years imprisonment – ultimately settling toward the middle of that range at six years. It seems that the PSR should have provided ample assistance in the performance and representation of the *Gladue* analysis in the judgment, because the judge describes it as “detailed and helpful.”⁷²⁷

Perhaps a more explicit discussion of the *Gladue* analysis was omitted in favour of the idea of rehabilitation through imprisonment, as Parrett J. notes that in her 19 months of pretrial custody, Whitford “appears to have made progress” by “at least for now on an institutional basis,” having “withdrawn from drugs and alcohol abuse,” and that the Ministry supports her

⁷²² *Ibid.* at para. 40.

⁷²³ *Gladue*, *supra* note 15 at para. 33.

⁷²⁴ *Ipeelee*, *supra* note 16 at para. 72.

⁷²⁵ *Whitford*, *supra* note 693 at para. 37.

⁷²⁶ *Ibid.* at para. 40.

⁷²⁷ *Ibid.* at para. 20.

having her young child with her in custody.⁷²⁸ I will discuss the issue of judges using or characterizing prison terms as sources of healing in Chapter 4. For now, it is important to note that the *Gladue* analysis has either been obviated by the portrayal of prison as treatment, or the *Gladue* analysis has been undergone but is not made transparent in the judgment. This creates a disjuncture between Parrett J.'s comments about Whitford's experiences of victimization and her *Gladue* factors, as her victimization is discussed⁷²⁹ but not (at least not expressly) integrated into the *Gladue* analysis.

3.4.2 Jeanette Niganobe

In *R. v. Niganobe*⁷³⁰ *Gladue* factors also seem to be framed in an almost neutralizing way, similar to how Whitford's experiences of victimization were effectively both mitigating and aggravating. Jeanette Niganobe is sentenced to five years imprisonment for impaired driving causing death after she drove through a red light into an intersection and collided with a police car. Whalen J. found "little of a mitigating nature,"⁷³¹ which seems to relate to the circumstances of the offence. Whalen J. goes into great depth detailing Niganobe's personal history. The judge describes that she "is a full member of the Mississauga First Nation,"⁷³² with family who are residential school survivors. Niganobe's mother routinely physically abused her and disbelieved her when she disclosed she had been sexually assaulted. Whalen J. describes that in Niganobe's youth, "brimming with anger, rebelling and acting out,"⁷³³ and "turning to alcohol," she ran

⁷²⁸ *Ibid.* at para. 40.

⁷²⁹ It is also important to recognize that the text of judgments do not and cannot fully represent the victimization histories experienced by the Aboriginal women in my thesis. Professor Michael Jackson has told me that he represented Whitford to get the Correctional Service of Canada to permit Whitford to have her daughter Jordyn with her in prison. Professor Jackson disclosed that Whitford's history of abuse is much worse than even the judgment describes. [Personal correspondence from Michael Jackson (24 November 2012), email.]

⁷³⁰ *Niganobe*, *supra* note 694.

⁷³¹ *Ibid.* at para. 64.

⁷³² *Ibid.* at para. 33.

⁷³³ *Ibid.* at para. 34.

away and was taken into foster care.⁷³⁴ She came into repeated conflict with the law, including serving time in prison while still in her adolescence. Niganobe became involved in two intimate relationships involving much substance abuse – both resulting in separation after her partners abused her. She has two children from these relationships. Adverting to the intergenerational effects of colonization, Whalen J. states that “[h]er ties to family, culture and community have been fractured, and she has had little or no sense of being wanted or belonging,”⁷³⁵ characterizing Niganobe as caught in a “cycle of dysfunction” within her family and community.⁷³⁶

Whalen J. describes this extensive background replete with violence and substance abuse as “a classic example of the problems discussed by the Supreme Court of Canada in *Gladue*.”⁷³⁷ When considering “the effect of the offender’s aboriginal origins on the sentence I otherwise think would be fit,” the judge finds “no question that Niganobe’s path in life has been affected by” *Gladue* factors.⁷³⁸ Whalen J. describes that Niganobe herself is

a product of the cycle of poverty, lack of opportunity (including education and employment), racism, substance abuse, breakdown of family and community, absence of nurture and disconnectedness characteristic of many of our aboriginal communities because of the generations before her who have suffered residential schools and other racist or paternalistic policies that have created and maintained social cauldrons of dysfunction and despair. I do not doubt that these factors have had great adverse effect in the formation of her character, views and propensities. *Those same antecedents, however, have made her resistant to many of the ordinary social and regulatory norms that must be respected and maintained for social co-existence, peace and progress in any society, no matter the race, colour or cultural origin.*⁷³⁹

⁷³⁴ *Ibid.* at para. 38.

⁷³⁵ *Ibid.* at para. 46.

⁷³⁶ *Ibid.* at para. 47.

⁷³⁷ *Ibid.*

⁷³⁸ *Ibid.* at para. 74.

⁷³⁹ *Ibid* [emphasis added].

It seems convoluted and contradictory to assert that “those same antecedents” – *Gladue* factors – which are specific to her experience as an Aboriginal woman caused Niganobe to stand outside various norms “no matter” her “race, colour or cultural origin,”⁷⁴⁰ because her Aboriginal experience is intersectional and cannot be bracketed. Niganobe’s “resistan[ce] to many of the ordinary social and regulatory norms”⁷⁴¹ should be understood as a component of the disadvantage conveyed by systemic factors, not as an aspect of her character that can be excised and abstracted “no matter the race, colour or cultural origin.”⁷⁴² The *Gladue* factors that Whalen J. describes Niganobe is a “product of”⁷⁴³ illustrate LeBel J.’s comment in *Ipeelee* that “[m]any Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development.”⁷⁴⁴ These systemic and background factors also demonstrate how victimization constrains women’s options. As such, both the victimization-criminalization continuum and *Gladue* factors operate within Whalen J.’s comments, but these understandings are undermined by the comment that Niganobe’s antisocial responses to her constrained options can be separated from these experiences and considered alongside conduct of other people (“no matter the race, colour or cultural origin”⁷⁴⁵).

Notwithstanding this problematic peripheral comment that levels Niganobe’s unique experience as an Aboriginal woman, Whalen J. decides to order a sentence “at the low end of the range suggested by the crown [sic]” because of “the mitigating effect of the offender’s aboriginal antecedents, which I recognize and have concluded played a role in her antisocial views and behavior.”⁷⁴⁶ Whalen J. explains that Niganobe “did not choose her ‘lot in life.’”⁷⁴⁷ The judge’s

⁷⁴⁰ *Ibid.*

⁷⁴¹ *Ibid.*

⁷⁴² *Ibid.*

⁷⁴³ *Ibid.*

⁷⁴⁴ *Ipeelee*, *supra* note 16 at para. 73.

⁷⁴⁵ *Niganobe*, *supra* note 694 at para. 74.

⁷⁴⁶ *Ibid.* at para. 82.

reasoning in the end demonstrates that the *Gladue* analysis (including Niganobe's experiences of victimization that inform it) meaningfully shape the sentence. Further, the judge's comment that Niganobe "did not choose her 'lot in life'"⁷⁴⁸ reflects an understanding that the systemic and background factors derived from colonization, including the victimization that Niganobe experienced throughout her life, constrained her options such that her criminalization (and, in turn, her sentencing) should reflect that her life choices have been circumscribed by factors beyond her control.

3.4.3 Juanita Johnson

In *R. v. Johnson*,⁷⁴⁹ Cozens J. comments in an oral judgment on how the variability of information connecting *Gladue* factors to the given offence produces sentencing challenges. The very positioning of a connection between *Gladue* factors and the offence in question as an issue complicating the sentencing of Aboriginal offenders unhelpfully reinforces the idea *Ipeelee* rejects that offenders must establish this connection causally. Cozens J. sentences Juanita Johnson to serve a ten-month conditional sentence for trafficking. Cozens J. outlines that Johnson "is a member of the Kwanlin Dun First Nation" whose extended family "have struggled with the fallout of, perhaps, to some extent, the residential school system." Several members of Johnson's family had substance abuse problems, and she herself struggled with addiction for several years.⁷⁵⁰ However, Cozens J. notes that "[t]here is not much in the way of information in this regard," perhaps attributable to the pre-sentence report having been completed in Alberta and not the Yukon because "[i]t is not as comprehensive as our pre-sentence reports tend to be. It

⁷⁴⁷ *Ibid.* at para. 83.

⁷⁴⁸ *Ibid.*

⁷⁴⁹ *Johnson, supra* note 695.

⁷⁵⁰ *Ibid.* at para. 11.

does not include risk assessments.”⁷⁵¹ Without the benefit of the clarification from *Ipeelee* that a causal connection between *Gladue* factors and the offence must not be required, Cozens J. outlines how variable information about *Gladue* factors complicates what many judges viewed to be the proper analysis:

[s]ometimes we are dealing with comprehensive reports that can draw a distinct link between an individual’s First Nation status and their offending. Other times, the link is less tenuous, or there is not a link, and in this case, there is not a lot of information, so we do not have a clear, strong link that would lead to Ms. Johnson’s First Nation status being a significantly contributing factor to the offence that she has been convicted of committing on this date.⁷⁵²

The *Gladue* analysis done well should incorporate gendered understandings of criminalized Aboriginal women’s experiences (such as incorporating gendered analyses of the gendered effects of victimization and colonization) – although as Gillian Balfour has found, the intersection of gender issues and colonization is insufficiently represented in judgments sentencing Aboriginal women. While the judge’s *Gladue* analysis should not have indicated the need for more information to solidify a causal connection between *Gladue* factors and Johnson’s offence, Cozens J. does seem to use a gendered lens to inform sentencing to achieve a just result. This gendered lens appears in two instances. First, Cozens J. factors Johnson’s fear of being separated from her child into the reasoning that she appreciates the consequences of her actions may harm others.⁷⁵³ Second, the judge assigns community service as part of her conditional sentence, acknowledging that “I appreciate that the community service can be more difficult when you have a young child, but there may be viable options there,” such as the possibility of “the availability of some programs that involve you and your child assisting other mothers.”⁷⁵⁴ Perhaps these gendered analyses could have contributed to a richer *Gladue* analysis had Cozens

⁷⁵¹ *Ibid.* at para. 10.

⁷⁵² *Ibid.* at para. 14.

⁷⁵³ *Ibid.* at para. 16.

⁷⁵⁴ *Ibid.* at para. 37.

J. been equipped with a more informative PSR, but without also seeking a direct link between Johnson's experience of colonization and her offence. In this decision, the *Gladue* analysis seems somewhat detached from the judge's sensitivity to gendered issues.

3.4.4 Elizabeth Jankovic

Gladue factors are minimized in *R. v. Jankovic*⁷⁵⁵ where the judge undermines the relevance of Jankovic's Aboriginal connection. Elizabeth Jankovic is sentenced to a total of two years and ten months imprisonment for robbery, having concealed her face in its commission, trafficking, and failing to comply with a probation order. She robbed an inn after assaulting the cashier with bear spray, and "was heavily involved with speed use at the time of these offences."⁷⁵⁶ Norheim J. writes that she "is of mixed aboriginal and non-aboriginal ancestry" and "holds a treaty card," adding "I note that her father was not aboriginal."⁷⁵⁷ Until Jankovic was placed into a non-aboriginal foster home at age eight, both of her parents "regularly abused alcohol and drugs," her father engaged in "inappropriate conduct" with her, and her mother was frequently absent because she feared her father.⁷⁵⁸ From this history, the judge finds "[t]he issues of disadvantage to this accused come from her treatment by her non-aboriginal father, not from her aboriginal mother."⁷⁵⁹ Given my expansive definition of victimization from Chapter 1, I would apply Norheim J.'s usage of "disadvantage" to encompass experiences and effects of victimization.

By locating the "source" of disadvantage (including victimization) in Jankovic's life as stemming from her relationship with her non-Aboriginal father (as distinct from any experiences

⁷⁵⁵ *Jankovic*, *supra* note 699.

⁷⁵⁶ *Ibid.* at para. 4.

⁷⁵⁷ *Ibid.* at para. 8.

⁷⁵⁸ *Ibid.*

⁷⁵⁹ *Ibid.*

informed by her relationship with her Aboriginal mother), Norheim J. tries to disentangle issues that are indivisible. Moreover, the judge's line of thinking seems to succumb to the problem identified by *Ipeelee* that systemic and background factors are just that, and should be used to contextualize and not to impose an impossible burden on an Aboriginal offenders to demonstrate how colonization has led specifically her to criminalization. Contrary to this clarification from *Ipeelee*, by defining Jankovic's disadvantages in relation to her non-Aboriginal father and expressly not her Aboriginal mother, Norheim J. seems to implicitly seek and deny a causal connection between Jankovic's experience as an Aboriginal woman and her offence.

The idea that such issues and experiences can be extricated from one another acts to suppress and deny the multiplicity of Aboriginal experiences. Yin C. Paradies, who "identif[ies] racially as an Aboriginal-Anglo-Asian Australian," "both colonizer and colonized,"⁷⁶⁰ discusses how binary, essentialized ideas about Indigenous identities are confining because they assume a uniform experience of Indigeneity and deny "hybrid space[s] of multiplicity."⁷⁶¹ Paradies rejects this problematic, restrictive categorization of Indigenous identities because it creates a "questioning of authenticity"⁷⁶² in which some people "who have Indigenous ancestry" "qualify" as Indigenous, and some do not.⁷⁶³ Paradies points out that this artificial characterization is damaging both on the individual and community levels, as it further fragments already fragmented communities into people "who can authentically perform Indigeneity and those who are silenced and/or rendered outside the space of Indigeneity."⁷⁶⁴

⁷⁶⁰ Yin C. Paradies, "Beyond Black and White: Essentialism, Hybridity and Indigeneity" (2006) 42(4) *Journal of Sociology* 355 at 357.

⁷⁶¹ *Ibid.*

⁷⁶² *Ibid.* at 359.

⁷⁶³ *Ibid.*

⁷⁶⁴ *Ibid.* at 361.

Norheim J. adopts the kind of exclusionary, reductionist characterization of Indigenous identity in *Jankovic* that troubles Paradies. In addition to connecting Jankovic's disadvantage to her relationship with her non-Aboriginal father, Norheim J. states "[t]his accused, while racially carrying aboriginal blood, has little or no cultural connection with the aboriginal community,"⁷⁶⁵ further abstracting Jankovic from her Aboriginal experience with the comment "[r]egardless of race, this accused has had a troubled childhood."⁷⁶⁶ Norheim J. further minimizes the applicability of the *Gladue* analysis to Jankovic's sentencing when responding to a case submitted by defence counsel, a decision that "involved an aboriginal offender," with "[i]f it is necessary for me to distinguish the *Skani* decision, I do so on the basis that Mr. Skani was an aboriginal offender who was actively involved within the aboriginal community and culture."⁷⁶⁷

Marilyn Brown widens the frame of colonization to *include* experiences of dislocation, explaining "in the post-colonial context, alienation from indigenous culture and the loss of resources it affords are important, and often unanalyzed factors, in the overrepresentation of native peoples in corrections populations."⁷⁶⁸ Perhaps Jankovic's alienation from the Aboriginal community is a product of her mother's absences to evade the man she feared and Jankovic's later upbringing in a non-Aboriginal foster home (both of which may relate to colonization). We do not know. But it is artificial and unfair to frame her lack of connection to Aboriginal culture and the community as if it somehow depreciates her Aboriginal heritage. This reasoning does not comport with the judicial duty to apply the *Gladue* analysis for all Aboriginal offenders.⁷⁶⁹

⁷⁶⁵ *Jankovic*, *supra* note 699 at para. 8.

⁷⁶⁶ *Ibid.*

⁷⁶⁷ *Ibid.* at para. 10.

⁷⁶⁸ Brown, *supra* note 560 at 152.

⁷⁶⁹ *Gladue*, *supra* note 15 at para. 82.

Finally, while Norheim J. does discuss Jankovic's "mixed aboriginal and non-aboriginal ancestry"⁷⁷⁰ within mitigating factors (although without expressly citing *Gladue* in the judgment), it is difficult to understand *how* her experience as an Aboriginal person actually factored into the sentencing process as a mitigating factor. The judge states "I do give particular attention to her aboriginal bloodline,"⁷⁷¹ although slightly undercutting this comment by adding "this is not as significant a factor" as "the steps she has taken toward rehabilitation."⁷⁷² This attention is also undermined by the above-discussed comments minimizing the relevance of her Aboriginal heritage. Further, because Norheim J. situates the disadvantages Jankovic has experienced (I again interpret this to include experiences of victimization) with how her non-Aboriginal father treated her (and in contradistinction with her Aboriginal mother's role in her life), the judge effectively separates such disadvantages from the *Gladue* analysis. As a result, the *Gladue* analysis seems to occupy a different space from the judicial view of how Jankovic's experiences of victimization have impacted her and contributed to her criminalization, which yields an impoverished conception of the victimization-criminalization continuum.

3.4.5 Lisa Bluebell

In *R. v. Bluebell*,⁷⁷³ the judge determines there is insufficient information connecting *Gladue* factors to Lisa Bluebell's offence, problematically locating that insufficiency in Bluebell's failure to make that connection for the Court. After convicting her of attempted murder alongside Bluebell's guilty pleas to lesser charges, Maher J. sentenced Bluebell to a total of six and a half years of imprisonment. The facts of the case are unclear from the judgment, although Bluebell's personal history is offered in some detail. Maher J. explains that Bluebell "is

⁷⁷⁰ *Jankovic*, *supra* note 699 at para. 8.

⁷⁷¹ *Ibid.*

⁷⁷² *Ibid.*

⁷⁷³ *Bluebell*, *supra* note 700.

a status Indian registered with the Yellow Quill First Nation” who lost connection and involvement with her community when she moved to an urban centre.⁷⁷⁴ The PSR reveals that she “sporadically attended Lestock Residential School”⁷⁷⁵ for three years in her adolescence, although there is no further information provided about her residential school experience. Bluebell’s father and youngest sister died and her mother raised her, “however her mother was addicted to alcohol and subject to domestic violence.”⁷⁷⁶ Losing her sister devastated and “impacted the accused’s life significantly,” and Bluebell “used intravenous drugs and abused alcohol.”⁷⁷⁷ This substance abuse became a feature of her intimate relationships, including one long-term relationship in which she suffered significant physical abuse. She had four children in this relationship.

It is unclear how any consideration of *Gladue* factors impacted the reasoning behind and quantum of the sentence ordered in *Bluebell*. *Gladue* factors are discussed in the judgment, although this discussion does not appear to meaningfully impact the sentence. Maher J. comments on Bluebell’s detachment from her Aboriginal community during the several years that she relocated to an urban centre, mentioning “[t]here is no evidence that the accused has significant involvement in cultural activities or practices. There was no evidence of the need of the accused to reconcile or re-enter the aboriginal community.”⁷⁷⁸ This conforms to the part of the *Gladue* analysis where the offender’s “particular aboriginal heritage or connection”⁷⁷⁹ may help inform what “types of sentencing procedures and sanctions” are appropriate to that offender. Maher J. finds “[t]here is no evidence as to alternatives to incarceration or treatment facility.”⁷⁸⁰

⁷⁷⁴ *Ibid.* at para. 14.

⁷⁷⁵ *Ibid.* at para. 15.

⁷⁷⁶ *Ibid.* at para. 5.

⁷⁷⁷ *Ibid.* at paras. 6-7.

⁷⁷⁸ *Ibid.* at para. 14.

⁷⁷⁹ *Gladue*, *supra* note 15 at para. 66.

⁷⁸⁰ *Bluebell*, *supra* note 700 at para. 14.

Perhaps even absent such evidence, other options could still have been considered – in *Ipeelee*, LeBel J. leaves space for more radical, innovative alternatives to imprisonment, noting that “[t]o the extent that current sentencing practices do not further these objectives [of deterrence and rehabilitation], those practices must change so as to meet the needs of Aboriginal offenders and their communities,” and affirming academic support for more creative sentencing.⁷⁸¹

In any event, the finding that Bluebell lacked an ongoing connection to her culture and heritage may have influenced the judge in deciding the weighting of the relevant principles, as Maher J. writes “I am satisfied that in determining an appropriate sentence I must give primary emphasis to the principles of denunciation and deterrence.”⁷⁸² It seems that Maher J. prioritized denunciation and deterrence because of offence seriousness, stating “I have reviewed several cases that state that the primary factor of denunciation and general deterrence is required in regard to a conviction for attempted murder involving violence of this nature.”⁷⁸³ In *Ipeelee*, LeBel J. is clear that offence seriousness neither obviates nor diminishes the judicial duty to meaningfully apply *Gladue*, explaining that “[n]umerous courts” have misunderstood the comment in *Gladue* about more serious and violent offences typically yielding more similar sanctions for Aboriginal and non-Aboriginal offenders, and “have erroneously interpreted this generalization as an indication that the *Gladue* principles do not apply to serious offences.”⁷⁸⁴

The judicial discussion of the systemic and background factors in *Bluebell* signifies another problem in the reasoning, as *Ipeelee* illuminates. Maher J. notes the PSR reference to Bluebell’s mother’s alcoholism and that she abused Bluebell, and makes one explicit reference to

⁷⁸¹ *Ipeelee*, *supra* note 16 at para. 66.

⁷⁸² *Bluebell*, *supra* note 700 at para. 22.

⁷⁸³ *Ipeelee*, *supra* note 16 at para. 16.

⁷⁸⁴ *Ibid.* at para. 84.

Bluebell's experience of racism, where she was "teased that she was native."⁷⁸⁵ However, when the judge refers to Bluebell's residential school experience, there is a clear illustration of the problematic causality connection repudiated by *Ipeelee*: Maher J. writes "[t]he accused was unable to identify how her experience in the Residential School or being an aboriginal person has impacted her life either as a child or an adult."⁷⁸⁶ The judge later reiterates she "has provided no specific or direct evidence about the influence of personal factors specific to herself in relation to systemic issues raised in *Gladue*."⁷⁸⁷ As discussed in Chapter 1, judicial comments to this effect place an unreasonable burden on Aboriginal offenders who should not be in the position to have to disentangle the impossibly knotted aftermath of colonialism into some elusive explanatory account of causality.⁷⁸⁸ *Ipeelee* holds that the frequent, erroneous, judicial requirement for the establishment of a link between the experiences of colonization and criminalization demonstrates "inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples."⁷⁸⁹ It should also be noted that within the fairly lengthy list of mitigating factors, *Gladue* factors are not referenced apart from the decontextualized items relating to substance abuse issues. As such, the *Gladue* analysis seems even further removed from the considerations that were actually brought to bear on the reasoning.

Viewing the judgment as a whole, Bluebell's Aboriginal status and experience are actively diminished in the judicial narrative. Her history of victimization (within colonization) is identified through references to the PSR, but undermined by references to an absence of explicit connection between this history and her offending.

⁷⁸⁵ *Bluebell*, *supra* note 700 at para. 15.

⁷⁸⁶ *Ibid.*

⁷⁸⁷ *Ibid.* at para. 19.

⁷⁸⁸ See *Ipeelee*, *supra* note 16 at paras. 81-3.

⁷⁸⁹ *Ibid.* at para. 82.

3.4.6 Susan Collins

In *R. v. Collins*,⁷⁹⁰ agency is depicted as individualized, compartmentalized from systemic factors, *Gladue* is dismissed and the representation of the victimization-criminalization continuum lies fallow. Smith J. sentences Susan Collins to 16 months imprisonment and a two-year probation order for defrauding the Ontario social assistance program for an amount exceeding \$5000. Collins worked with her co-accuseds on the Fort William First Nation Reserve in the office responsible for administering social assistance to the clients. Together they fraudulently misallocated funds, and Collins' involvement was attributed to an amount over \$68 000. Smith J. describes from the PSR that Collins "has lived all her life on the Fort William First Nation Reserve"⁷⁹¹ where she "witnessed her father's substance abuse and violence towards her mother."⁷⁹² Her "father lost his Aboriginal status through the process of enfranchisement. As a result, Collins was treated poorly, was ostracized" and "regarded as an 'outsider' because...she was no longer considered Aboriginal. She only regained this status when she remarried."⁷⁹³ She has a gambling addiction, which her family believes caused her to be susceptible to the fraudulent scheme.⁷⁹⁴ Collins is the primary caregiver for her four children.

Smith J. seems to trivialize her gambling addiction, as he responds to the submission that Collins should receive a conditional sentence in part to allow her to care for her child who has a disability with "[i]f Angela requires so much of her mother's care that jail would jeopardize her care, one cannot but wonder why the accused spent so many hours gambling away the proceeds of her share of the fraud in the local casino."⁷⁹⁵ In conjunction with this dismissive attitude,

⁷⁹⁰ *Collins*, *supra* note 701.

⁷⁹¹ *Ibid.* at para. 16.

⁷⁹² *Ibid.* at para. 17.

⁷⁹³ *Ibid.* at para. 18.

⁷⁹⁴ *Ibid.* at para. 22.

⁷⁹⁵ *Ibid.* at para. 45.

while there is much in the PSR that explores how the community has suffered through the residential school system and its aftermath, including the “dislocation of community members,” fragmentation of the family unit, destruction of “any connection to their community or heritage,” and escalated unemployment, substance abuse, family violence, and sexual abuse,⁷⁹⁶ Smith J. concludes

[n]otwithstanding the evidence that the poverty and suffering on the Fort William First Nation Reserve is considerable and that the residential school experience is in part responsible, I find that the evidence does not support the argument that systemic factors are responsible for bringing the accused before the court.”⁷⁹⁷

Smith J. relates that Collins “described being raised in a strict Catholic home, in which no attention was given to cultural or native traditions since these were viewed as contrary to the Catholic religion.”⁷⁹⁸ There is no judicial commentary expanding on this, although it is possible this background contributed to Smith J. deciding that there is no evidential connection between *Gladue* factors and Collins’ offence – perhaps an illustration of where a judge “did not think that the defendant’s Aboriginal ancestry was sufficiently authentic to invoke [section] 718.2(e).”⁷⁹⁹ Regardless, while there does seem to be ample evidence indicating how *Gladue* factors may have contributed to Collins’ criminalization, the issue is moot. Smith J.’s comments invoke the problem identified by *Ipeelee* that judges in the post-*Gladue* jurisprudence have erroneously required the establishment of a connection between systemic and background factors in the lives of Aboriginal peoples and a given offence.⁸⁰⁰ Further, Smith J. perhaps also succumbs to another problem *Ipeelee* clarified, that offence seriousness does not obviate the *Gladue* analysis.⁸⁰¹ Smith

⁷⁹⁶ *Ibid.* at para. 48.

⁷⁹⁷ *Ibid.* at para. 50.

⁷⁹⁸ *Ibid.* at para. 23.

⁷⁹⁹ Williams, “Punishing Women”, *supra* note 178 at 280.

⁸⁰⁰ *Ipeelee*, *supra* note 16 at paras. 81-3.

⁸⁰¹ *Ibid.* at para. 84.

J. decides that *Collins* is a case “where the seriousness of the crime and need for denunciation take precedence over any other considerations,”⁸⁰² including that of *Gladue* factors.

It is apparent that Smith J. focuses upon the issue of individual agency, while systemic factors merely blur ineffectually into the background: “[e]ach individual must be accountable for their own actions. Blaming others, your upbringing or minimizing one’s participation cannot, generally speaking for serious crimes such as large scale fraud, absolve a person from the consequences of their actions.”⁸⁰³ Despite her family’s belief that her gambling addiction rendered her vulnerable to the fraudulent plan, Smith J. concludes

[i]t is clear that Ms. Collins did not have an easy upbringing however the responsibility for what she has done must be hers. She made a choice to become involved in the fraudulent scheme and she actively became a key player...choose [sic] to stay involved. Her actions have hurt and divided her community.⁸⁰⁴

It should be noted that the thrust of *Gladue* is not about “blaming” her upbringing or displacing responsibility, but rather understanding how the continued effects of colonization contribute to the criminalization of Aboriginal peoples and striving to ameliorate the overincarceration of Aboriginal peoples where possible through sentencing. In *Ipeelee*, LeBel J. makes this point clear: “[s]ystemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence.”⁸⁰⁵ For a contrasting example of how another judge sentencing an Aboriginal woman frames the issue in a way that comports with *Gladue*, in *R. v. Stevens*⁸⁰⁶ Ross J. declares “[t]his sentence is also informed by *R. v. Gladue*,” adding “I say this not in the sense that her circumstances and background are causal factors for her crime. Rather, it is the shift of

⁸⁰² *Collins*, *supra* note 701 at para. 50.

⁸⁰³ *Ibid.* at para. 62.

⁸⁰⁴ *Ibid.* at para. 52.

⁸⁰⁵ *Ipeelee*, *supra* note 16 at para. 83.

⁸⁰⁶ *R. v. Stevens*, 2009 NSPC 46. [*Stevens*]

emphasis away from deterrence towards the restorative and remedial aspects of sentence that I have in mind.”⁸⁰⁷ This shift of emphasis is precisely what *Gladue* directs at its core. Without proper acceptance of the contextualization of Collins’ criminalization within colonization, the victimization-criminalization continuum discourse emergent from the judgment is similarly impoverished. *Gladue* factors are referenced but their relevance dismissed, and the agency Collins exercised in committing the offence is held as freestanding, disconnected from the systemic factors discussed in the PSR, instead of enriching the analysis with ideas about how victimization constrains choices.

3.5 Finding balance on shifting pathways: Where the *Gladue* analysis and the victimization-criminalization continuum successfully converge in judicial reasoning

Finally, in the last section of this chapter, I examine two cases that are laudable for their strong *Gladue* analyses and successful integration of that analysis with concepts presented by the victimization-criminalization continuum. Both *R. v. Shore*⁸⁰⁸ and *R. v. Audy*⁸⁰⁹ are sensitive judgments on a variety of levels, avoiding some problems identified in cases discussed above. Of particular importance, both decisions feature judges who look behind the assessed risk factors for each offender, choosing to instead foreground background and systemic factors in a manner consistent with the spirit of *Gladue*.

3.5.1 Tracey Shore

*R. v. Shore*⁸¹⁰ is significant for the nuanced judicial treatment of the relationship (or lack thereof) between the victimization-criminalization continuum and risk assessments, and its departure from the inappropriate priority *R. v. Bluebell* placed upon the offender’s ability to

⁸⁰⁷ *Ibid.* at para. 13.

⁸⁰⁸ *R. v. Shore*, 2002 SKPC 42. [*Shore*]

⁸⁰⁹ *R. v. Audy*, 2010 MBPC 55. [*Audy*]

⁸¹⁰ *Shore*, *supra* note 793.

articulate the effect of *Gladue* factors within her life. In *Shore*, Snell J. sentences Tracey Shore to a conditional sentence order of two years less a day after her guilty plea to driving while impaired and causing death. Shore was in a relationship with the deceased. After a night of drinking together, they had an argument, and Shore got into their car “to avoid physical confrontation”⁸¹¹ with him. Shore continued to drive with the deceased on the hood when he jumped on the vehicle, subsequently falling and fatally hitting his head.

The PSR makes clear that Shore got into the vehicle as an escape from the violent confrontation she feared, as the deceased was both emotionally and physically abusive to her, particularly when he was drinking.⁸¹² Snell J. effectively adverts to the victimization-criminalization continuum, commenting that “[h]er lifetime experiences with violence...no doubt had a significant effect on her decision not to stop once he was on the hood of the vehicle.”⁸¹³ Describing her personal history, Snell J. notes that Shore “is a Treaty Indian” who was adopted by her aunt and uncle because her father was incarcerated and her mother was “living a very unstable lifestyle.”⁸¹⁴ Shore’s aunt had problems with addiction and was later murdered, her uncle was physically abusive, and eventually she moved in with her father. Snell J. states that “[s]ubstance abuse and violence typified a succession of relationships.”⁸¹⁵ She first lost custody of her children after assaulting them and later regaining their care.

Unlike the judicial reasoning in *Bluebell*, irrespective of Shore’s insistence to the writer of the PSR that she “does not feel her ethnic origin has impacted her life,”⁸¹⁶ Snell J. infers the opposite. Snell J. finds

⁸¹¹ *Ibid.* at para. 3.

⁸¹² *Ibid.*

⁸¹³ *Ibid.* at para. 8.

⁸¹⁴ *Ibid.* at para. 10.

⁸¹⁵ *Ibid.* at para. 13.

⁸¹⁶ *Ibid.* at para. 24.

[i]n my view, the accused’s personal history reflects ‘the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts’ which so concerned the Supreme Court of Canada in their decision in *R. v. Gladue*. I consider this to be so regardless of the fact that the accused does not attribute any of her life experiences to her ethnic origin.”⁸¹⁷

This comment aligns well with the *Ipeelee* clarification that Aboriginal offenders must not be required to establish a connection between *Gladue* factors and the given offence.⁸¹⁸ Snell J. expands on this finding, adding

if I am wrong in that, I still consider the accused’s dysfunctional background, particularly her experiences with physical abuse as a child and throughout her common law relationships, to be of great significance in assessing her moral blameworthiness for the offence and in understanding why she committed the offence.”⁸¹⁹

Snell J.’s further comment is significant for its articulation of the relationship between the *Gladue* analysis and the operation of the victimization-criminalization continuum lens in this judgment. That is, Snell J. describes deciding that despite Shore’s opinion to the contrary, *Gladue* factors are certainly relevant – and that even if they were not, Shore’s history of victimization will inform her sentence. Here, the victimization-continuum is implicated in the *Gladue* analysis, but also stands alone as a tool to guide sensitive sentencing. It is also significant that Snell J. explicitly states that Shore’s experiences of victimization are “of great significance”⁸²⁰ in the determinations about her sentence. This analysis points to judicial appreciation of the operation of the victimization-criminalization continuum in Shore’s life, and directly connects it to what her sentence should be. Additionally, Snell J. contextualizes the otherwise aggravating factor that the victim was Shore’s partner, explaining that “this is tempered greatly by the fact that the accused resorted to the vehicle to avoid a violent

⁸¹⁷ *Ibid.*

⁸¹⁸ *Ipeelee*, *supra* note 16 at paras. 81-3.

⁸¹⁹ *Shore*, *supra* note 808 at para. 24.

⁸²⁰ *Ibid.* at para. 24.

confrontation with the victim.”⁸²¹ This demonstrates a deeper analysis of gendered violence than subsists in many other judgments, and signifies another instance in which Snell J. employs reasoning connected to the victimization-criminalization continuum in a way that has meaningful effects on the sentence ordered.

Snell J. is disinclined to uncritically incorporate the risk assessment from the PSR, cautioning “the risk assessment cannot be relied on slavishly to determine whether or not to impose a community-based sentence without regard for the personal circumstances of the offender.”⁸²² Considering her assessed risk factors (such as substance abuse problems and negative relationships), all of which intersect with *Gladue* factors (including Shore’s experiences of victimization), Snell J. highlights that Shore has managed to be relatively law-abiding *despite* these risk factors and uses this frame to depart from the risk assessment, concluding that she will “present a low risk to re-offend”⁸²³ with an appropriate sentence. The judge declares “[t]he length of the conditional sentence will be longer than a jail term would have been, in light of the fact that the accused will be allowed to serve it in the community.”⁸²⁴

A community sentence can convey its own set of problems for women offenders: Charalee F. Graydon writes

[n]on-custodial penalties such as fines, probation and community service orders, although often seen as lenient sentencing alternatives, may have a disproportionately harsh impact on many female offenders as a result either of the offender’s impecuniosity or inability to comply with the Court’s direction as a result of competing child care duties.⁸²⁵

⁸²¹ *Ibid.* at para. 40.

⁸²² *Ibid.* at para. 27.

⁸²³ *Ibid.* at para. 29.

⁸²⁴ *Ibid.* at para. 62.

⁸²⁵ Charalee F. Graydon, “Habilitation: Sentencing of Female Offenders” (1992) 5(1) *Canadian Journal of Law & Jurisprudence* 121 at 128.

However, it is apparent that Snell J. is motivated to advert to the overrepresentation of Aboriginal peoples in prison and to avoid incarceration where appropriate.⁸²⁶ For example, noting that the PSR identifies Shore’s “minimal education and lack of employment experience”⁸²⁷ as factors elevating the level of risk she presents, Snell J. understands that Shore’s childcare responsibilities prevent her from improving her education and employment situation, finding that to remove a conditional sentence as an alternative on the basis of such risk factors “would perpetuate the ‘systemic’ factors which contribute to the over-representation of aboriginal persons in the correctional system.”⁸²⁸ To protect against this consequence, Snell J. concludes “[i]n the result, I attribute less importance to those risk factors than the others which the accused could address, and has shown a willingness to address.”⁸²⁹

Within certain sentence conditions “which will curtail her freedom and provide her with help in addressing her alcohol and personal problems,”⁸³⁰ Snell J. finds Shore to present a low risk of reoffending. Because the judge makes this determination against the high assessed risk, this marks a noteworthy interpretation of the evidence – in other instances, evidence of victimization amplifies the assessed risk to reoffend and may in turn contribute to harsher sentencing results. This correlation between victimization and risk is made apparent in such cases as *R. v. S.L.N.*⁸³¹ where Williams J. writes about that offender that “[i]t was noted that she has been the victim of violence. She has been around violence a great deal of her life and she has

⁸²⁶ See e.g. *Shore*, *supra* note 808 at para. 28.

⁸²⁷ *Ibid.* at para. 27.

⁸²⁸ *Ibid.* at para. 28.

⁸²⁹ *Ibid.*

⁸³⁰ *Ibid.* at para. 29.

⁸³¹ *R. v. S.L.N.*, 2010 BCSC 405. This case is unusual within the cases I selected for review, because it deals with the sentencing of an Aboriginal woman who was already serving a life sentence when she committed the institutional offences that are the subject of this decision. While a community sentence would not be possible in this context, the offences for which she plead guilty (extortion, assault causing bodily harm, and possession of a weapon) would have made this an appropriate case for my study had these offences been committed on the outside. For this reason, I have included this case. For reference, Williams J. ordered a total sentence of 30 months imprisonment for these offences (30 months imprisonment for extortion; 24 months for assault causing bodily harm; and 18 months for weapon possession – all concurrent).

grown up in dysfunctional family circumstances. All of those are factors which indicate a higher risk of criminal re-offence.”⁸³² In *Shore*, Snell J. demonstrates how it is possible to incorporate an understanding of the victimization-criminalization continuum that recognizes how experiences of abuse may contribute to women themselves later coming before the courts without simultaneously translating that understanding to bolster a risk assessment projecting a high risk to reoffend.

3.5.2 Crystal Audy

*R. v. Audy*⁸³³ is another decision in which the judge attributes greater weight to factors other than risk assessments to guide the analysis. In *Audy* there is less explicitly focused discussion about the impact of the offender’s experiences of violence than in *Shore*, although the judgment follows similar reasoning because the judge in *Audy* directs attention broadly to *Gladue* factors (which, as I will discuss further below, must be understood as connected to victimization). In *Audy*, Slough J. sentences Crystal Audy to pay a fine and to serve an 18-month probation order for impaired driving causing bodily harm. Drawing from the PSR and included *Gladue* Report, Slough J. describes that Audy is a “member of Wuskwi Siphik First Nation,”⁸³⁴ “the product of a small, remote and impoverished First Nation community” who “frequently saw violence and substance abuse.”⁸³⁵ Her parents are “the product of the residential school system,” and Audy “was raised in foster homes and by her grandmother,” and “was victimized as a

⁸³² *Ibid.* at para. 33.

⁸³³ *Audy*, *supra* note 809.

⁸³⁴ *Ibid.* at para. 1.

⁸³⁵ *Ibid.* at para. 4.

child.”⁸³⁶ The PSR concludes that “victimization issues and her problem with depression” are among the factors that may be relevant to her sentencing.⁸³⁷

In crafting an appropriate sentence, Slough J. declares that a conditional sentence would have been imposed but is no longer available because the 2007 s. 742.1 amendments removed conditional sentences as an option for serious personal injury offences, which includes driving impaired causing bodily harm.⁸³⁸ After weighing the remaining alternatives, such as an intermittent sentence (which is unsuitable due to the “logistics and expense”⁸³⁹ involved in the necessary travel) and various incarnations of probation orders, ultimately Slough J. settles on a probation order that requires Audy to remain in her residence 24 hours per day, 7 days per week.⁸⁴⁰ Such restrictive conditions are permissible within the “primarily rehabilitative in focus” orientation of probation orders,⁸⁴¹ although it should be noted that this sentence closely resembles the common “house arrest” form of many conditional sentence orders. That is, it appears that this judge has effectively circumvented the amendments to the conditional sentencing regime in an effort to achieve a just sentence.

In fashioning this conditional sentence-like, restrictive probation order, Slough J. employs an understanding of Audy’s Aboriginal status that dissociates risk factors from *Gladue* factors and focuses on the larger problem of Aboriginal overincarceration:

In deciding between these alternatives, I must consider the finding in the Pre-Sentence Report that the offender is a “high risk to re-offend”. A number of the factors that are delineated in that finding are intrinsic to the offender’s background over which she has had very limited control, for example, being born in a remote, impoverished and deprived First Nation community. The Pre-Sentence Report indicates Ms Audy’s parents endured residential school and the resulting impact,

⁸³⁶ *Ibid.*

⁸³⁷ *Ibid.*

⁸³⁸ *Ibid.* at paras. 1, 5, and 8.

⁸³⁹ *Ibid.* at para. 11.

⁸⁴⁰ *Ibid.* at para. 15.

⁸⁴¹ *Ibid.* at para. 14.

particularly on Ms. Audy's mother, caused Ms. Audy to have an unstable upbringing. In my view, a more significant factor is that Ms. Audy is 29-years-old and has no prior criminal record. While the assessment tool utilized in the Pre-Sentence Report has its uses I must consider the fact that up to this point in spite of the factors considered the offender has been able to stay out of trouble. In these circumstances, I do not regard the finding in the Pre-Sentence Report that Ms. Audy is at high risk to re-offend as being of great significance. What is of significance is the fact that the offender is a member of a First Nation. Manitoba has a very high number of First Nation members who are incarcerated. Both the provisions of the *Criminal Code* and Supreme Court of Canada decisions interpreting those sections are clear that, when possible, incarceration should not be imposed where other sanctions are reasonably available and that this is particularly so with respect to First Nation offenders.⁸⁴²

In this respect, Slough J. chooses to look behind the pre-sentence risk assessment and examines the aspects of Audy's life that emerge from processes of colonization, factors "over which she has had very limited control,"⁸⁴³ and which must be considered with emphasis given to the overrepresentation of Aboriginal peoples in prison. Inherent in this understanding, Slough J. recognizes that colonization has constrained Audy's options such that she became vulnerable to criminalization for the same reasons that have elevated the risk she is projected to present. Interestingly, Slough J. focuses not on Audy's assessed, projected risk to reoffend, but instead on the "more significant factor that Ms. Audy is 29-years-old and has no prior criminal record."⁸⁴⁴ This reasoning demonstrates a holistic, contextualized view of her criminalization – particularly against the fact that the PSR does the opposite, by acknowledging Audy's lack of a criminal record but advancing her assessed high risk to reoffend in the face of it.

Slough J. orients the decision around issues consistent with the goals of *Gladue*: the understanding that "risk factors" must be situated within and not subsume or supplant *Gladue* factors, and the broader problem of the overrepresentation of Aboriginal peoples in prison. The respective reasoning engaged by the victimization-criminalization continuum and the *Gladue*

⁸⁴² *Ibid.* at para. 12.

⁸⁴³ *Ibid.*

⁸⁴⁴ *Ibid.*

analysis cannot be interchangeably transposed because they involve different primary focuses (gender and colonization). However, they certainly implicate shared issues, such as how experiences of victimization inform both the victimization-criminalization continuum and the contextualization of colonization. This overlap means that incorporating the primary focus of the other profitably enriches each analysis, such that the *Gladue* analysis for a criminalized Aboriginal woman is understood to have a gendered dimension, and that her experiences of victimization are understood within the context of colonization.

This interplay is evident in Slough J.'s decision to depart from the risk assessment in *Audy*. For example, Slough J. chooses to look behind the risk assessment put forth by the PSR, which identifies that (among other factors deemed relevant to Audy's projected risk) her "own victimization issues and her problem with depression"⁸⁴⁵ increase her risk level and should impact her sentence. Slough J. chooses to understand Audy's "victimization issues"⁸⁴⁶ in the context of her *Gladue* factors. The judge recognizes that Audy was vulnerable to many of the issues contributing to her elevated risk assessment for systemic reasons beyond her control, and prioritizes the goals of *Gladue* to ameliorate overincarceration above other concerns. While the judgment is concise and only briefly discusses Audy's personal history, through nuanced reasoning Slough J. sensitively complies with *Ipeelee*.

In terms of the victimization-criminalization continuum, the judge contextualizes Audy's experiences of victimization within colonization, recognizing that she has not been criminalized until this offence, and uses that framework to decide that reflexive adherence to the PSR would produce an unjust sentence per *Gladue*. Through this reasoning, Slough J. contextualizes Audy's offence within *Gladue* factors, locating the victimization-criminalization continuum in the

⁸⁴⁵ *Ibid.* at para. 4.

⁸⁴⁶ *Ibid.*

macrocosm cycle of the overrepresentation of Aboriginal peoples in prison and prioritizes the latter. This reflects how the victimization-criminalization continuum and consideration of *Gladue* factors deepen the overall analysis when read together. Slough J.'s integration of these considerations is particularly significant because the PSR evinces an antithetical view about how *Gladue* factors should inform Audy's sentence, and about her projected trajectory through victimization and criminalization (in the assessment that she presents a high risk to reoffend). This means that the judge had to wade through some conceptual and structural resistance when navigating the decision, making it more noteworthy.

Through this judicial attention to the victimization-criminalization continuum within the context of colonization, the resultant sentence both responds to *Gladue* factors and achieves the necessary "deterrence and denunciation" but "without the use of incarceration."⁸⁴⁷ Perhaps this sensitivity was partly inspired (or at least facilitated) by what the judge describes as the "valuable 'Gladue Report'"⁸⁴⁸ contained within the PSR. It does illustrate the utility (in terms of reaching appropriate sentences in the spirit of *Gladue*) of judicial understanding about how experiences of victimization impact the lives of Aboriginal women offenders. Slough J.'s reasoning demonstrates that this understanding must be refracted through a nuanced, contextualized lens that does not pay blind fealty to that trajectory to criminalization with overemphasis on risk assessments from PSRs, at the expense of the broader picture.

Shore and *Audy* are particularly significant because the judges in each case were not only able to engage in this nuanced analysis, but did so against the current of PSRs indicating the Aboriginal women involved presented high risk levels. This is significant for the inherent commitment to *Gladue* and for the judicial willingness to avoid overreliance on PSRs where

⁸⁴⁷ *Ibid.* at para. 13.

⁸⁴⁸ *Ibid.* at para. 4.

prioritizing the risk assessments would produce an unjust result. Departing from the PSRs in such cases is also commendable because of the typical judicial tides: “existing research demonstrates that the PSR plays a central interpretive role in sentencing” and “Canadian studies report an 80 per cent concordance rate between PSR recommendations and dispositions and demonstrate a high level of judicial satisfaction with these reports.”⁸⁴⁹

These issues are critical to the problem of Aboriginal overrepresentation because the judges in *Shore* and *Audy* primarily decided to depart from the risk assessments as they recognized that the extension of following those assessments would be misaligned from the goals of *Gladue*. Indeed, Kelly Hannah-Moffat and Paula Maurutto have explained that PSRs are risk-based instruments that “tend to frame offender risk quite differently from *Gladue* reports, which culturally situate offenders and incorporate racial knowledge to position criminal behaviour holistically within a wider collective history of race relations and colonialism.”⁸⁵⁰ Hannah-Moffat and Maurutto note that sometimes *Gladue* factors are interpreted as risk factors, producing the effect where “Aboriginal offenders continue to be characterized as high risk and high need.”⁸⁵¹ This signifies critical recognition that there must be a shift in emphasis away from the assessed risk factors that often reflect systemic problems and toward responding to the problem of the overincarceration of Aboriginal women at sentencing.

3.6 Conclusion: Different focuses sharing the victimization overlap

Often implicated by the discussion of *Gladue* factors, the victimization-criminalization continuum frequently appears in some form in the judgments – either implicitly through how the factors from the PSR are presented and discussed, or through distinct judicial pronouncements on

⁸⁴⁹ Kelly Hannah-Moffat & Paula Maurutto, “Re-contextualizing Pre-sentence Reports: Risk and Race” (2010) 12(3) *Punishment & Society* 262 at 264.

⁸⁵⁰ *Ibid.* at 266.

⁸⁵¹ *Ibid.* at 275.

the factors contributing to the women's offending and any related implications on sentencing. The *Gladue* analysis and the victimization-criminalization continuum contribute different focuses – the former focuses on the reverberating effects of colonization and the need to ameliorate the overrepresentation of Aboriginal peoples in prisons, and the latter focuses on gendered responses to experiences of victimization that leave women vulnerable to criminalization. However, while oriented toward different issues, both the *Gladue* analysis and the victimization-criminalization continuum implicate similar considerations. The overlap is victimization issues: the victimization-criminalization continuum obviously has victimization issues at its core, and the *Gladue* analysis engages judicial consideration of Aboriginal offenders' experiences of victimization (which, given my expansive definition of victimization, includes violence, other forms of abuse, and substance abuse), as these experiences are often tied to colonization.

Some judgments I have discussed are quite sensitive about issues related to the victimization-criminalization continuum. However, other judgments present problems in one or both of these analyses, such as where the applicability of the *Gladue* analysis is minimized because of inappropriate judicial requirements that *Gladue* factors be directly linked to the offence(s) central to the sentencings. Andrew Welsh and James R.P. Ogloff find that even in such cases, “Aboriginal status, may have an indirect [negative] effect” because “[p]rior criminal history, lower socio-economic status, and offence seriousness are more directly associated with sentencing outcome.”⁸⁵² Some cases in those I identified but did not discuss above offer impoverished representations of the issues involved by the *Gladue* analysis, making it difficult to discern how the sentencing outcome was achieved vis-à-vis *Gladue* factors. For example, in *R. v.*

⁸⁵² Welsh & Ogloff, *supra* note 62 at 495.

Evaloardjuk,⁸⁵³ Kilpatrick J. comments “Suzanne has had a disadvantaged background. The court will not review this in detail, as it was outlined at some length by her counsel in speaking to sentence.”⁸⁵⁴ Similarly, in *R. v. Elias*,⁸⁵⁵ Cozens J. states “[i]n sentencing Ms. Elias I must consider her First Nations status. I apologize to Mr. Clarke [defence counsel] who has just recently heard much of this verbatim”⁸⁵⁶ in a recent case. Most cases offer less opaque discussions of *Gladue* factors, but even those that offer more fleshed out narratives could have benefitted from the further direction offered by LeBel J. in *Ipeelee*.

Perhaps the jurisprudential landscape after *Ipeelee* will better reflect thoroughgoing *Gladue* analyses, although that remains to be seen. The most sensitive judgments I discussed above, such as *Shore* and *Audy*, emerge where judges are able to incorporate elements of both the *Gladue* analysis and the victimization-criminalization continuum in the reasoning such that the overall analysis is deepened. I leave this chapter with a quote from one of the decisions discussed above. In *Dennill*, Schuler J. comments

[i]f you are serious, Ms. Dennill, about becoming a nurse or about becoming able one day to take over the support and care of your son, then *the sentence can be your chance to get your life in order*, to put some effort into resolving your problems and to get away from your friends in the drug world, because you can be sure that they are not true friends.”⁸⁵⁷

In Chapter 4, I explore judicial discourses engaging issues of healing, rehabilitation, and treatment. In reviewing the cases for my study, I noticed a pattern wherein judges ascribe these notions to the sanctions ordered – such as portraying or structuring sentences in ways that suggest imprisonment is an opportunity for healing. I examine the issue of judicial

⁸⁵³ *R. v. Evaloardjuk*, 1999 CanLII 1156 (NU CJ). [*Evaloardjuk*]

⁸⁵⁴ *Ibid.* at para. 27.

⁸⁵⁵ *R. v. Elias*, 2009 YKTC 59. [*Elias*, 2009]

⁸⁵⁶ *Ibid.* at para. 25.

⁸⁵⁷ *Dennill*, *supra* note 503 at para. 28 [emphasis added].

characterizations of both conditional sentence orders and prison sentences as healing places against the backdrop of the victimization-criminalization continuum.

Figure 4



“Behind the Walls Without Any Ropes” (ink wash, linocut, and mixed media)

(4) The Slide from the Victimization Overlap to Judicial Discourses about Healing through Imprisonment

4.1 Introduction

In the previous chapter, I discussed judicial discourses surrounding the victimization and criminalization of various Aboriginal women offenders selected from cases in my research. In this chapter, I move to related judicial discourses about rehabilitation. In *Ipeelee*, LeBel J. agrees with the Court of Appeal's finding that the sentencing judge had performed an inadequate *Gladue* analysis, affirming that court's decision that rehabilitation should have been weighed more heavily and with greater transparency to fully conform to s. 718.2(e). LeBel J. writes that the sentencing judge did describe the offender's "history in great detail, but she failed to consider whether and how that history ought to impact on her sentencing decision."⁸⁵⁸ Similarly, in the preceding chapter I examined the judicial presentations of the histories of the criminalized Aboriginal women being sentenced, and in this chapter I look at the impacts on judicial reasoning in terms of sanctions.

I begin by discussing judicial discourses about victimization in relation to those about healing/rehabilitation. I examine sentencing decisions that contextualize criminalized Aboriginal women's victimization histories within the *Gladue* analysis and use this framework to guide the sentencing in a more restorative, rehabilitative direction. I also discuss judgments that individualize and decontextualize women's experiences of victimization and colonization in terms of the sanctions ordered. While two of the decisions I present within this discussion still yield conditional sentences, I argue that these sanctions may be understood as quite punitive, and explore some problems associated with these sentences.

⁸⁵⁸ *Ipeelee*, *supra* note 16 at para. 95.

In the second section of this chapter, I discuss where judicial discourses relating to criminalized Aboriginal women's victimization histories facilitate the idea that these women's problems are so complex as to require certain forms of specialized treatment – and most problematically, in prison. I also discuss two decisions that underscore why this idea (that criminalized Aboriginal women's victimization histories import complexities such that prison services are necessary) is problematic: both women's previous experiences of incarceration signal that they experience imprisonment in a way that exacerbates their violent/disruptive behaviour. I conclude this section with two sensitive judgments that expressly recognize the damaging effects of imprisonment, and strive to construct sentences that actually promote rehabilitation where possible.

Finally, I explore some factors complicating the task of sentencing criminalized Aboriginal women. While it is problematic for judges to look to prison specifically for rehabilitative services, equally, sometimes either the community lacks the resources that would make a conditional sentence a viable alternative to incarceration, or the judge decides the same. I discuss decisions that introduce issues to do with the availability/sufficiency of community treatment services. I explore decisions in which judges find community resources are unavailable or insufficient, as well as those wherein judges order conditional sentences. Throughout this thesis, I primarily intend to present conditional sentences in a positive light, in that they confer needed benefits in terms of their restorative orientation and consistency with the *Gladue* goal to ameliorate Aboriginal overincarceration. However, in this section I also introduce some features of conditional sentences (such as duration and abstinence conditions) that may be challenging for various criminalized Aboriginal women to complete without breaching. I conclude by discussing the inherent tension between the experience of incarceration and rehabilitation, beginning with

some statistics about Aboriginal women's reinvolvement in correctional institutions post-release. Within this discussion, I also discuss the disparity between treatment services offered in provincial and federal institutions, including where judges advert to this issue on sentencing.

My painting that opens this chapter, "Behind the Walls Without Any Ropes" (Figure 4), refers to the securitization of mental health difficulties in prison. I highlight below the inherent conflict within the institutional roles of prison psychologists and correctional officers. Both are part of the prison machinery with its institutional focus of security concerns. That is, structurally, prison staff are first invested in correctional issues, and only subsidiarily in the needs of the prisoners. This is one general example of the securitization of mental health problems in prison, but the death of Ashley Smith puts a face to this internal conflict. It is important to have her institutional story in mind when examining mental health concerns and the experience of women prisoners.

On October 19, 2007 at Grand Valley Institution for Women, nineteen-year old Ashley Smith tied a ligature around her neck in the manner she had many times before, and this time died with Correctional Service of Canada (CSC) staff watching from outside her segregation cell.⁸⁵⁹ Ashley Smith was a young Aboriginal woman.⁸⁶⁰ First becoming criminalized as a youth, Smith engaged in self-injurious behaviour while incarcerated. The Correctional Investigator reports that her reactions to attempts by correctional and health professionals to prevent or stop her self-harm often resulted in the accumulation of additional criminal charges.⁸⁶¹ After she turned eighteen and following a further conviction for offences against correctional staff, Smith

⁸⁵⁹ Howard Sapers, "A Preventable Death" (20 June 2008), online: The Office of the Correctional Investigator <http://www.oci-bec.gc.ca/rpt/index-eng.aspx> at para. 5. [Sapers, "A Preventable Death"]

⁸⁶⁰ Jena McGill, "An Institutional Suicide Machine: Discrimination Against Federally Sentenced Aboriginal Women in Canada" (Autumn 2008) 2(1) *Race/Ethnicity: Multidisciplinary Global Contexts* 89 at 90.

⁸⁶¹ Sapers, "A Preventable Death", *supra* note 859 at para. 3.

was transferred to adult federal custody. Smith spent much of her time in segregation.⁸⁶² Smith continued to self-harm, and CSC transferred her to different institutions 17 times within an 11½ month period.⁸⁶³ This volume of transfers would have been distressing and destabilizing for anyone.⁸⁶⁴ Smith’s mental health needs went unaddressed, and the Correctional Investigator reports that CSC never developed a correctional mental health plan for her.⁸⁶⁵ Finally, CSC managers made an operational policy decision that front-line CSC staff were not to intervene immediately when Smith self-harmed.⁸⁶⁶ After her death, an independent psychologist determined that Smith’s self-injurious behaviour was “in part as a means of drawing staff into her cell in order to alleviate the boredom, loneliness and desperation she had been experiencing as a result of her prolonged isolation,” and Smith’s “way of adapting to the extremely difficult and increasingly desperate reality of her life in segregation.”⁸⁶⁷

I titled my painting opening this chapter “Behind the Walls Without Any Ropes” in reference to Smith’s struggles in prison. The Correctional Investigator reports that prison staff initially responded to her self-harming behaviours (often self-strangulation) by removing ligatures from her, frequently through the use of force.⁸⁶⁸ Later, CSC employed non-intervention, “permitting [Smith] to retain ligatures in her possession for extended periods of time.”⁸⁶⁹ Both practices denote security-based responses to Smith’s vulnerabilities and underlying mental health needs. The red bars (linocut in ink) in the centre of the painting represent the securitization of

⁸⁶² *Ibid.* at para. 4-5.

⁸⁶³ *Ibid.* at paras. 17-8.

⁸⁶⁴ The Correctional Investigator finds that these transfers were largely “to address administrative issues such as cell availability, incompatible inmates and staff fatigue, and had little or nothing to do with Ms. Smith’s needs” – and each transfer further damaged Smith’s trust in correctional authorities [*Ibid.* at para. 19.].

⁸⁶⁵ *Ibid.* at para. 24.

⁸⁶⁶ *Ibid.* at para. 70-3.

⁸⁶⁷ *Ibid.* at para. 28.

⁸⁶⁸ *Ibid.* at para. 17.

⁸⁶⁹ Michael Jackson & Graham Stewart, “A Flawed Compass: A Human Rights Analysis of the Roadmap to Strengthening Public Safety” (September 2009), online: Justice Behind the Walls <http://www.justicebehindthewalls.net/news.asp?nid=78>. at 185.

mental health concerns. Evoking a food slot, this print is also a reference to the isolation Smith experienced while in the correctional system, because in “the weeks prior to her death...[she] interact[ed] with staff only through a tiny food slot.”⁸⁷⁰ The bodies of the women in the painting are leeched of detail, done in ink against an ink wash, amidst dispersed shards of the outside world (torn magazine images of nature). The combination of these images symbolizes the difficulty prisoners have trying to hold onto the outside world (the shards), and onto themselves (the drained ink bodies). The positioning of the women prisoners’ bodies is a further reference to this experience of isolation. I begin this chapter with this painting to signify the importance of reflecting on Ashley Smith’s correctional experience. Her tragic story about where institutional security issues trump mental health concerns should be remembered through my discussions of judicial sentencing discourses about treatment through imprisonment in this chapter.

As a final note, I have structured this chapter slightly differently than Chapter 3. In Chapter 3, I used subheadings with each criminalized Aboriginal woman’s name to demarcate her narrative in the judgments (my attempt to “listen” to what the criminal justice system hears). I sought to foreground the women and their (criminal justice-oriented) stories in that chapter. However, in this chapter, I move to discourses about criminal justice responses to these narratives, so to reflect that shift in focus I do not adopt personalized subheadings for each woman. This shift is intended to symbolize that the women at the centre of these judgments sometimes recede into the background (much like the women depicted in my painting at Figure 4), such as where incarceration is held out as a place of healing.

⁸⁷⁰ *Ibid.* at 182.

4.2 Two branches of the victimization overlap: Judicial contextualization of victimization through the *Gladue* analysis and decontextualized overfocus on victimization detached from systemic factors

In Chapter 3, I discussed what I have called the “victimization overlap” between the victimization-criminalization continuum lens and the *Gladue* analysis, in that each analysis has a different focus but both analyses coincide where the court considers victimization histories. In this section I examine the victimization overlap in terms of how judicial attention to criminalized Aboriginal women’s experiences of victimization (including where these experiences are implicated in *Gladue* analyses) relates to the discourses about imprisonment as healing that emerge from the judgments in my study. First, I examine several decisions in which the judges thoughtfully and appropriately contextualize the Aboriginal women offenders’ victimization histories within the *Gladue* analysis such that the sentencing lens is restorative justice-oriented. I begin my discussion of properly contextualized cases with *R. v. Pechawis*,⁸⁷¹ because the judge specifically comments that the sentence must respond to the underlying causes of criminalization, ordering a conditional sentence. Using an appropriate contextualizing framework, the judges in *R. v. Fineday*,⁸⁷² *R. v. Pawis*,⁸⁷³ and *R. v. Woods*⁸⁷⁴ also order conditional sentences. These decisions are noteworthy for their reasoning about how community sentences serve the rehabilitation needs of the women whereas imprisonment would exacerbate their problems. Finally, the judge in *R. v. Tippeneskum*⁸⁷⁵ also contextualizes that offender’s victimization and criminalization within systemic factors. While the judge ultimately orders a federal penitentiary sentence, the sentence may have been substantially longer if not for the contextual analysis.

⁸⁷¹ *R. v. Pechawis*, 2005 SKPC 25; *R. v. S.A.P.*, 2005 SKPC 25. [*Pechawis*]

⁸⁷² *R. v. Fineday*, 2007 SKPC 2. [*Fineday*]

⁸⁷³ *Pawis*, *supra* note 610.

⁸⁷⁴ *Woods*, *supra* note 502.

⁸⁷⁵ *Tippeneskum*, *supra* note 604.

Next, I turn to three decisions wherein judges individualize and decontextualize the victimization histories and criminalization of the Aboriginal women they sentence. First I discuss *R. v. Kendi*,⁸⁷⁶ in which the judge orders a conditional sentence but uses an individualizing analysis of that offender's victimization and criminalization. I examine problems associated with this sanction, which I argue is not as rehabilitative-oriented as community sentences may suggest. In *R. v. Char*,⁸⁷⁷ the judge also engages in individualizing logic, decontextualizing that offender's difficulties and offering an impoverished *Gladue* analysis, and assigns a prison sentence. Problematically, this judge defers to prison as the only place where the offender will be able to deal with those difficulties. Lastly, I discuss *R. v. Diamond*.⁸⁷⁸ This decision is not entirely aligned with the other individualizing decisions in this section, because in the end the judge rejects the author of the PSR's recommendation of a prison sentence for treatment purposes, instead ordering a conditional sentence (albeit a long sentence, and with a long probation order attached). However, it seems there are specific factual reasons motivating this choice (a community treatment centre accepted the offender). Without this support, the individualizing analysis of *Diamond* may have produced a different, more punitive result – particularly given that the judge frames that offender's personal difficulties as aggravating.

4.2.1 Contextualized judicial reasoning

In *Pechawis*, Whelan J. sentences Sharlene Pechawis to an 18-month conditional sentence for trafficking in cocaine and ritalin. Whelan J. describes the “relatively long sentence” imposed as having conditions “which both restrict personal liberty and endeavor to respond to the underlying causes of the offending, including personal counseling and addictions

⁸⁷⁶ *Kendi*, *supra* note 229.

⁸⁷⁷ *R. v. Char*, 2007 CarswellBC 1489 (BC PC) (WLeC). [*Char*]

⁸⁷⁸ *R. v. Diamond*, 2006 QCCQ 2552. [*Diamond*]

treatment.”⁸⁷⁹ The causes Whelan J. infers contributed to Pechawis’ criminalization relate to her experiences of victimization. Pechawis grew up “on the Mistiwasis First Nation Reserve” and has a “very difficult background.”⁸⁸⁰ Pechawis experienced and witnessed extensive abuse within her immediate and extended family, dealt with the suicides of two brothers and her boyfriend, and lived through an abusive intimate relationship.⁸⁸¹ She abused alcohol, although her addiction to cocaine became more pervasive and Pechawis “was selling small amounts of drugs to feed her addiction” at the time of the offences.⁸⁸² In Chapter 2, I referenced research indicating a correlation between intimate violence and substance abuse, generally and for marginalized women in particular.⁸⁸³

Whelan J.’s express intention to respond to the causes of Pechawis’ offending underscores the importance of thinking about how judges understand and represent women’s pathways into criminalization. If sentences are structured in part “to respond to the underlying causes of the offending,”⁸⁸⁴ judicial understandings of how women are propelled and propel themselves along the continuum directly impact sentencing determinations. In *Pechawis*, against the offender’s own assertion in the PSR “that she needed counseling and believed that she would benefit from the treatment offered by Mistiwasis First Nation”⁸⁸⁵ the judge conveys that such treatment should also be understood as punishment: “I might add that the programming, especially the personal counselling, may, having regard to the unaddressed problems of the Accused, be regarded by the Accused to be punitive as well.”⁸⁸⁶ This formulation of the purpose of the sentence is consistent with Kent Roach’s remark that “[a]lthough judges may be

⁸⁷⁹ *Pechawis*, *supra* note 871 at para. 48.

⁸⁸⁰ *Ibid.* at para. 5.

⁸⁸¹ *Ibid.*

⁸⁸² *Ibid.* at para. 7.

⁸⁸³ Tyagi, *supra* note 56 at 134.

⁸⁸⁴ *Pechawis*, *supra* note 871 at para. 48.

⁸⁸⁵ *Ibid.* at para. 8.

⁸⁸⁶ *Ibid.* at para. 41.

influenced by restorative justice when crafting conditional sentences and other alternatives to imprisonment, they are still imposing punishment.”⁸⁸⁷ Equally, Whelan J.’s direction that Pechawis should recognize that the community programming conditions are punitive as well as healing-oriented alludes to the “healing through punishment, punishment through healing” discourses that are the subject of this chapter.

In *Fineday*, the judicial understanding of the offender’s background and actions is contextualized beyond a purely individualized focus. Crystal Fineday is sentenced to a conditional sentence order of two years less a day followed by three years of probation for impaired driving causing death and that causing bodily harm. Fineday was “raised on the Sweetgrass First Nation,” and was removed from her mother’s care due to substance abuse issues,⁸⁸⁸ having lost her father who was alcoholic. Turpel Lafond J. observes “[f]amily breakdown and dislocation have impacted her life,” but that she “has shown remarkable commitment to overcoming poverty and the education gaps in her community.”⁸⁸⁹ The judge finds that *Gladue* considerations (including the strong support she has in the community), in addition to her youth and the absence of a criminal record, combine to make her “a suitable candidate for a restorative-based sentence.”⁸⁹⁰

Engaging one of the issues Stuart J. cited in *Elias* about the conditional sentencing regime post-*Proulx*, Turpel Lafond J. comments “[t]he length of the conditional sentence will be longer than a jail term would have been, in light of the fact that the accused will be allowed to serve it in the community.”⁸⁹¹ However, while the duration of Fineday’s sentence exceeds the prison alternative and is more punitive in that sense, Turpel LaFond J. is mindful of the

⁸⁸⁷ Roach, *supra* note 129 at 254.

⁸⁸⁸ *Fineday*, *supra* note 872 at para. 8.

⁸⁸⁹ *Ibid.* at para. 39.

⁸⁹⁰ *Ibid.* at para. 40.

⁸⁹¹ *Ibid.* at para. 62.

deleterious potential of imprisonment and the more restorative potential of a community sentence. The judge explains

[r]ehabilitative and restorative objectives may be met by a community sentence since institutional incarceration can sometimes impede the rehabilitation of an offender. Conditions of an order might be crafted to respond to the offender's specific needs. Since he or she is not imprisoned, the offender can, in appropriate cases, also contribute to the community by educating others about the perils of drinking and driving. Furthermore, the more productive a member of the community, especially a young woman, the stronger the impulse should be to keep the individual in the community given that her life would be permanently altered by exposure to prison culture, possibly in the direction of future offending.⁸⁹²

Prison is here constructed as inconsistent with rehabilitation, whereas conditional sentences are framed as more conducive to healing – in large part because of the judge's decision to centrally position *Gladue* factors and their linkage with restorative-oriented sentences, instead of individualizing the factors leading to Fineday's criminalization. Because Turpel LaFond J. contextualizes Fineday's victimization and criminalization within the *Gladue* analysis, the lens through which she sentences Fineday becomes a restorative lens, producing an outcome consistent with the goals and spirit of *Gladue*.

In *Pawis*, discussed in Chapter 3, the forensic psychologist who prepared a Forensic Report and testified for the defence at the sentencing hearing juxtaposes how Nicole Pawis would likely experience incarceration against how she would experience a community sentence. He concludes that she is at greatest risk to the community if her sentence were such that it perpetuated her “early childhood trauma, her limited education and relative social isolation,” leaving her “alienated and isolated without social and economic resources.”⁸⁹³ The psychologist recommends a community sentence “because it would ensure she participates in the needed services and programs,” whereas if incarcerated, “she might not receive the same level of

⁸⁹² *Ibid.* at para. 42.

⁸⁹³ *Pawis, supra* note 610 at para. 58.

services” and could be victimized and further isolated.⁸⁹⁴ Reinhardt J. constructs a sentence that responds to the psychologist’s concerns that “incarceration would seriously harm her, in her path to maturity and full participation in society.”⁸⁹⁵ The judge orders a conditional sentence including six months of house arrest, noting

more than six months would not be an appropriate requirement of her conditional sentence, because social isolation has been singled out by Dr. Haley as one of the determinative causes of her limited cognitive and social development. One of the most important goals for this sentence over the next five years should be to help her develop her social skills and to find ways to give her opportunities to improve her self by continuing education and employment training.⁸⁹⁶

The psychologist and in turn the judge’s concentration on how her past experiences of victimization have isolated Pawis point toward a community sanction, yielding the image that imprisonment is not a place that cultivates the connectedness and support that are critical to most people’s healing needs. This orientation, broadened past a purely individualistic focus, is facilitated by the extensive discussion of *Gladue* factors, drawn from the *Gladue* Report filed.

Similarly, in *Woods*, also discussed in Chapter 3, Whelan J. finds the PSR to be “of considerable assistance,”⁸⁹⁷ and is “satisfied based on the advice of” its author that Candace Woods’ “risk is manageable in the community, provided she is supervised under strict conditions.”⁸⁹⁸ The judge explains “[a] period of incarceration at this stage, I fear, would be counter-productive to the very significant gains by Ms. Woods.”⁸⁹⁹ She has already “started down the road to rehabilitation” and “is highly motivated to maintain her status as a responsible contributing member of our community,” having successfully complied with her restrictive bail

⁸⁹⁴ *Ibid.*

⁸⁹⁵ *Ibid.* at para. 94.

⁸⁹⁶ *Ibid.* at para. 114.

⁸⁹⁷ *Woods*, *supra* note 502 at para. 10.

⁸⁹⁸ *Ibid.* at para. 45.

⁸⁹⁹ *Ibid.* at para. 49.

conditions “despite many changes and stressors in her living circumstances.”⁹⁰⁰ The objective of rehabilitation is foregrounded, and Whelan J. fashions conditions that are less coercive than they might have been as the judge refrains from including electronic monitoring, in keeping with the recommendation by her bail supervisor. The list of optional conditions is extensive, and includes conditions such as house arrest followed by strict curfews that may undermine her ability to continue sex work to support herself, and conditions requiring treatment (both substance abuse and other forms of counseling) as directed by her probation officer. Julian V. Roberts and Thomas Gabor caution that “increasing the number of conditions generally increases the likelihood that an offender will violate a condition.”⁹⁰¹ However, due to the seriousness of the offence (robbery), “a conditional sentence is exceptional in these circumstances.”⁹⁰² In this light, it is significant that Whelan J. emphasizes Woods’ rehabilitative efforts and the continuation of that rehabilitation.

In *Tippeneskum*, DiGiuseppe J. comments that in addition to June Tippeneskum’s youth and guilty plea, “the systemic factors that may have contributed to her offending behaviour require that due consideration be given to the sentencing objective of rehabilitation.”⁹⁰³ In Chapter 3, I discussed *Tippeneskum* with respect to how the judicial discourse resonates with the victimization-criminalization continuum by recognizing the constrained choices resulting from victimization (and within colonization). DiGiuseppe J. does contextualize Tippeneskum’s criminalization within her experiences of victimization, and the inherent interconnections with colonization. There is tension in the judgment between the sentencing objective of rehabilitation and the judge’s assessment from the case law provided by counsel that for this type of

⁹⁰⁰ *Ibid.*

⁹⁰¹ Roberts & Gabor, “Living in the Shadow of Prison”, *supra* note 192 at 104.

⁹⁰² *Woods*, *supra* note 502 at para. 48.

⁹⁰³ *Tippeneskum*, *supra* note 604 at para. 25.

aggravated assault, the overriding objectives are denunciation and deterrence. It seems perhaps DiGuiseppe J. assigns a lesser sentence than may have been ordered absent the considerations within victimization and colonization, although this is nowhere stated directly. DiGuiseppe J. orders a 3½ year prison term. This sentence is not expressly oriented toward rehabilitation (and nor is it the “reformatory jail sentence” followed by a probationary term “to provide the structure and support needed to address rehabilitation”⁹⁰⁴ sought by the defence), but is significantly lesser than the 5-7 year range requested by the Crown. As such, it seems that while the aggravating factors “cry out for a significant jail term,”⁹⁰⁵ the judicial reasoning connecting systemic factors along her pathway to criminalization contributes to a potential reduction in sentence duration, despite not being otherwise geared toward rehabilitation. While again the reasoning culminating in the 3½ year determination is not definitively clear, it appears that judicial understanding of systemic factors does impact the final sentence.

4.2.2 Individualizing judicial reasoning

Gladue factors should immediately situate systemic issues in the centre of the judicial frame. However, because the relevance of *Gladue* may be variously undercut within judicial reasoning, when thinking about the operation of the victimization-criminalization continuum it is useful to reflect on whether women’s pathways to offending are properly contextualized within systemic factors or are unhelpfully and inappropriately individualized. In their analysis of federally sentenced women eligible for parole, Sarah Turnbull and Kelly Hannah-Moffat find that “women’s criminal histories were used as evidence of bad choices.”⁹⁰⁶ In their study,

⁹⁰⁴ *Ibid.* at para. 15.

⁹⁰⁵ *Ibid.* at para. 25.

⁹⁰⁶ Sarah Turnbull & Kelly Hannah-Moffat, “Under these Conditions: Gender, Parole and the Governance of Reintegration” (2009) 49(4) *British Journal of Criminology* 532 at 536. [Turnbull & Hannah-Moffat, “Under these Conditions”]

[t]hrough the decision narratives, the paroled subject is variously positioned as a victim, a follower, a recovering addict, someone who lacks sufficient impulse control and makes poor choices, and/or someone who suffers from low self-esteem. Her lawbreaking is understood not in relation to larger social and material conditions, but as a consequence of her personal failures, which are considered to be her gendered ‘risk factors’.⁹⁰⁷

These forms of the individualization of offenders’ difficulties (abstracted from systemic factors) also feature in some cases I have consulted. In this section, I turn to judgments that problematically particularize the reasoning – where individualizing judicial accounts of victimization and criminalization obscure or supplant analysis of systemic factors. I will also connect this individualization of systemic issues in the context of judicial healing discourses where appropriate.

Individualizing judicial discourses can be particularly problematic where Aboriginal women’s offences involve resisting violence. The Canadian Association of Elizabeth Fry Societies and the Native Women’s Association of Canada have written that such resistance may lead to criminalization, as “the state has effectively trained many Aboriginal women to believe they are on their own in circumstances where they face violence,”⁹⁰⁸ so they become structurally displaced and respond to violence in ways that feel/are necessary in the absence of support, which may produce criminal charges. The facts of *R. v. Kahypeasewat*, discussed in Chapter 3, seems to conform to this analysis. Largely, that decision does contextualize Kahypeasewat’s violence within her own experiences of victimization (and particularly within her abusive relationship with the deceased). The individualizing victimization discourses in the judgments I

⁹⁰⁷ *Ibid.*

⁹⁰⁸ CAEFS & NWAC, “Women and the Canadian Legal System: Examining Situations of Hyper-Responsibility: Discussion Paper by the Canadian Association of Elizabeth Fry Societies (CAEFS) and the Native Women’s Association of Canada (NWAC)” *Canadian Woman Studies* 26:3,4 (Winter/Spring 2008) 94 at 97. [CAEFS & NWAC, “Women and the Canadian Legal System” *Canadian Woman Studies*]

discuss in this section inadvertently reinforce the CAEFS and NWAC comment that the state has taught Aboriginal women that they are isolated, alone to confront problems they experience.

Shoshana Pollack describes that individualistic thinking obfuscates how social forces affect women's choices and offending: "structural factors such as poverty, systemic racism and violence against women" become "reconstructed as being a result of individual psychological and cognitive deficits."⁹⁰⁹ Pollack's comments can be telescoped to the particularization of mental health difficulties: Erin Dej argues about the medicalization and labeling of mental health problems (specifically Fetal Alcohol Spectrum Disorder (FASD) diagnoses) that "[p]sy-diagnoses reduce complex individual problems rather than seeing them as part of the social and structural inequalities facing Aboriginal communities."⁹¹⁰ In the decisions I discuss in this section, the thrust of the judicial discourses is that criminalized Aboriginal women's difficulties are similarly attributed to how they choose to orient themselves in the world, and decontextualized from *Gladue* factors.

Within the overarching paradigm in which "[s]entencing is an inherently individualized process,"⁹¹¹ judicial understandings of the victimization-criminalization continuum on sentencing can also operate to relegate systemic issues contributing to offending to the periphery of the judicial reasoning. Focusing on the individualization of problems Aboriginal women experience instead of contextualizing those issues within structural entanglements does not reflect the actual challenges that women experience in the community (where they are serving conditional sentence orders, serving the balance of their sentences on probation, or upon reintegration). Judith Rumgay writes "the stresses associated with poverty, residence in

⁹⁰⁹ Shoshana Pollack, "Taming the Shrew: Regulating Prisoners through Women-Centered Mental Health Programming" (2005) 13(1) *Critical Criminology* 71 at 73. [Pollack, "Taming the Shrew"]

⁹¹⁰ Erin Dej, "What Once was Sick is now Bad: The Shift from Victim to Deviant Identity for those Diagnosed with Fetal Alcohol Spectrum Disorder" (2011) 36(2) *Canadian Journal of Sociology* 137 at 152.

⁹¹¹ *M.(C.A.)*, *supra* note 91 at para. 92.

disadvantaged, possibly dangerous neighbourhoods, parenthood and problematic interpersonal relationships, are unlikely to disappear merely because the offender has committed herself to a pro-social identity.”⁹¹² Criminalized Aboriginal women often contend with many structural barriers (and other obstacles/struggles derived from victimization and colonization) that must be addressed at the societal level, in the absence of which these women may become recriminalized.

In *Kendi*, Schmaltz J. ultimately orders Deborah Kendi to a 15-month conditional sentence followed by one year of probation for breaking and entering, mischief, and breaches of probation. This judgment references a previous proceeding at which Crown and defence entered a joint submission recommending a prison sentence of four months followed by probation, but the judge had concerns about the appropriateness of this sentence and reserved, directing the preparation of a PSR. Schmaltz J. sought the PSR “to allow me to more fully consider Ms. Kendi’s personal circumstances.”⁹¹³ Having reviewed the PSR for this decision, Schmaltz J. concludes that she has struggled through a difficult life. The fact that Kendi is an Aboriginal offender is not mentioned in the judgment, *Gladue* factors are not discussed, and neither that decision nor s. 718.2(e) is cited. Notwithstanding these omissions, from the judgment it is at least probable that Kendi is Aboriginal, although the cues are subtle: she committed the offences in Fort McPherson (a predominantly Aboriginal community in the Northwest Territories where she has always lived), and she broke into the home of the then Chief of the community, now an elder.⁹¹⁴ This is one of the judgments I identified that required me to carefully examine the text to discern whether the offender was Aboriginal. There is no elucidated understanding of the

⁹¹² Judith Rumgay, “Scripts for Safer Survival: Pathways Out of Female Crime” (2004) 43(4) *The Howard Journal of Criminal Justice* 405.

⁹¹³ *Kendi*, *supra* note 229 at para. 6.

⁹¹⁴ I have since confirmed that Kendi is an Aboriginal woman. Professor Michael Jackson knows her family, and told me that they are a Gwitch’in family from Fort McPherson. [Personal correspondence from Michael Jackson (24 November 2012), email.]

victimization-criminalization continuum in the judgment, only allusions to Kendi's intoxication during the offences and comments that "her motivation was for the 'pure excitement'"⁹¹⁵ and "I do not know why Ms. Kendi continues to drink."⁹¹⁶ Her criminal history is detailed in an outline of her lengthy record.

Without any discussion of (or clear reference to) her life and *Gladue* factors, it is plain that the judge did not incorporate these considerations into the reasoning for the sentence ordered. Schmaltz J. expresses apprehensiveness that Kendi regards community-based sanctions as insubstantial consequences that only amplify her disrespect for court orders, finding that the need to protect the public supersedes rehabilitative goals because the rehabilitation-oriented sentences Kendi received in the past "have failed."⁹¹⁷ Nonetheless, the judge still concludes that a conditional sentence is most appropriate, drawing in part on Kendi's support system in the community and PSR assertions that she would abide by community-based conditions as ordered.

Without any discussion of Kendi's life, there are few indications in the judgment about her vulnerabilities. Schmaltz J. highlights only a few items from the overall "positive"⁹¹⁸ PSR, including its assertion that "jail is not a place she would like to come back to, and it is not like her to be in a place like this."⁹¹⁹ The judge does not expand further on Kendi's experience of imprisonment, except to emphasize that her community sentence order "is a jail sentence and it is not a lenient sentence."⁹²⁰ While the judge acknowledges that Kendi "may still have issues to deal with,"⁹²¹ neither imprisonment nor rehabilitative sanctions are portrayed as an automatic salve to those issues: "[t]he Court cannot force Ms. Kendi to change; a rehabilitative sentence

⁹¹⁵ *Kendi*, *supra* note 229 at para. 9.

⁹¹⁶ *Ibid.* at para. 12.

⁹¹⁷ *Ibid.* at para. 13.

⁹¹⁸ *Ibid.* at para. 10.

⁹¹⁹ *Ibid.* at para. 45.

⁹²⁰ *Ibid.* at para. 51.

⁹²¹ *Ibid.* at para. 11.

can provide the tools, but it is up to Ms. Kendi to use them. To date Ms. Kendi has not taken the steps to change her behaviour.”⁹²² Her rehabilitation is left to her to “[make] the choices she has to make to deal with her issues.”⁹²³

The omission of any discussion of *Gladue* factors in the decision is glaring, perhaps even highlighted further by Schmaltz J.’s specific attention to the PSR (having reserved to allow for its preparation). The decision reveals little about Kendi as a person, including her trajectory into criminalization. The list of her criminal history is presented, but only itemized. Any narrative behind it is missing – despite the grip her repeated and ongoing criminalization has had on her life, given that she first entered the criminal justice system as a youth. Schmaltz J. repeats the refrain “yet she continues to drink”⁹²⁴ twice in the judgment – three times including the judge’s reflection “I do not know why Ms. Kendi continues to drink.”⁹²⁵ The judge does not offer any insights in the decision into what difficulties underlie her substance abuse. Instead, Schmaltz J. comments “I do not see that Ms. Kendi has much insight into the repercussions of her behaviour.”⁹²⁶ Overall, the judge does not contextualize Kendi’s criminalization within systemic factors (failing to engage in any *Gladue* analysis entirely) and frames Kendi’s difficulties as her own choices in the abstract (repeating that she persists in her decision to drink, and noting that rehabilitation is contingent on her making different choices).

Noting that Kendi must take responsibility for her own rehabilitation is not itself problematic, particularly against the backdrop where Schmaltz J. observes that rehabilitative-oriented sentences Kendi had previously received “have failed.”⁹²⁷ However, it becomes

⁹²² *Ibid.* at para. 13.

⁹²³ *Ibid.* at para. 48.

⁹²⁴ *Ibid.* at paras. 10, 12.

⁹²⁵ *Ibid.* at para. 12.

⁹²⁶ *Ibid.*

⁹²⁷ *Ibid.* at para. 13.

problematic to explain Kendi's criminalization and attempts to rehabilitate purely in these particularizing terms, absent contextualization within the *Gladue* analysis. It is additionally problematic in practical terms that the judge ultimately assigns a sentence of far greater duration than was requested in the joint submission between Crown and defence. It appears that Schmalz J. strives for a rehabilitative sentence. However, this becomes less apparent given the sentence duration, in two respects. First, Schmalz J. finds "a global sentence longer than 4 months is necessary to reflect the seriousness of these offences, to achieve the goals of deterrence and parity, and to hold Ms. Kendi accountable for the harm done."⁹²⁸ Here, given the wide disparity between the requested four months plus "a period of probation"⁹²⁹ and the imposed 15 months plus one year of probation, it seems that these other considerations outweighed rehabilitation in the end. The second reason that the sentence is less rehabilitative than it may otherwise appear (given that it is to be served conditionally) is that Schmalz J. notes "I do not know whether Ms. Kendi would take any conditions seriously," and registers uncertainty about whether she "really has learned anything while awaiting sentencing, and really does want to make changes in her life,"⁹³⁰ and questions "whether Ms. Kendi's attitude has changed."⁹³¹

Moreover, Schmalz J. directly states "[i]f Ms. Kendi does not take the conditions seriously, as has been the case in the past, then I expect that she will end up serving her sentence in jail. I do not say this as a threat to Ms. Kendi, but simply stating the seriousness of and the reality of Ms. Kendi's situation."⁹³² As such, it appears that the judge lacks confidence that Kendi will be able to comply with the terms of her conditional sentence, which would mean that in the event of a breach, Kendi would likely end up serving the remainder of her sentence in

⁹²⁸ *Ibid.* at para. 49.

⁹²⁹ *Ibid.* at para. 6.

⁹³⁰ *Ibid.* at para. 47.

⁹³¹ *Ibid.*

⁹³² *Ibid.* at para. 51.

prison – and due to the disparity in duration between the joint submission and the sentence ordered, any remainder could well be longer than the four months requested in that submission.

Additionally, there are conditions attached to Kendi’s conditional sentence that depend on her remaining sober. However, equally, given her entrenched substance abuse problem, they may set Kendi up for failure. I discuss this issue in greater depth in the subsequent section when I examine judges turning to imprisonment for rehabilitative ends. For now, it is sufficient to recognize that because of the duration of her sentence, in the event of a breach Kendi’s likely effective sentence (serving the balance of her conditional sentence in prison) would be quite punitive. This result would be antithetical to both Schmaltz J.’s attempts to integrate rehabilitative concerns into her sentence and the *Gladue* analysis that should have been considered. In sum, while the judge’s decision to order a conditional sentence may at first glance appear consistent with the more restorative goals of *Gladue* than a straight imprisonment term, there are other problems with the final sentence, mostly connected to the duration of the sentence and its conditions. Research has shown that Aboriginal women are much more susceptible to breaching conditions than non-Aboriginal women, with a “breach rate” that is “almost triple that of their non-Aboriginal counterparts.”⁹³³ The edges of these problems may have been dulled had Schmaltz J. engaged in an analysis of systemic factors contributing to Kendi’s criminalization.

In *R. v. Char*, the issue of judges individualizing problems that should be contextualized against systemic dynamics is stark. Bayliff J. sentences Noreen Char to a global sentence of imprisonment for 15 months⁹³⁴ on “a series of shoplifting and breach of court order charges”⁹³⁵

⁹³³ Juristat: Statistics Canada, *Outcomes of Probation and Conditional Sentence Supervision: An Analysis of Newfoundland and Labrador, Nova Scotia, New Brunswick, Saskatchewan and Alberta, 2003/2004 to 2004/2005* by S. Johnson (Ottawa: Minister of Industry, 2006), online: Statistics Canada <http://www5.statcan.gc.ca/bsolc/olc-cel/olc-cel?lang=eng&catno=85-002-X20060079521> at 9. [Juristat: Johnson, *Outcomes of Probation and Conditional Sentence Supervision*]

⁹³⁴ Char appealed from sentence on the grounds that Bayliff J. erred and the sentence was unfit [*R. v. Char*, 2007 CarswellBC 1453 (BC CA) (WLeC) at para 5. [*Char*, BCCA]]. The British Columbia Court of Appeal allowed the

after she accumulated an extensive shoplifting record with escalating sanctions. Bayliff J. identifies that Char is an Aboriginal woman from the Redstone community.⁹³⁶ This sentencing decision marks the second legal proceeding for which Char appeared before Bayliff J., who notes having presided over Char’s family law matter in the past. In this sentencing decision, the judge comments that in the previous family law proceeding she discerned that both Char and her partner “just could not say no to drugs particularly, but also alcohol.”⁹³⁷ At that time, Char and her partner asked his parents to take care of their two children for a period, recognizing that they were struggling with substance abuse issues. The grandparents have refused to return the children. Bayliff J. finds during sentencing that Char and her partner remain “not capable of raising their children at present.”⁹³⁸

Bayliff J. acknowledges Ms. Char’s “explanation” that her offending stems from “her sense of depression over the loss of her children...is a factor.”⁹³⁹ This kind of criminalization trajectory, stemming from child custody issues, is consistent with other women’s offending patterns.⁹⁴⁰ However, Bayliff J. also comments “we also have to be realistic about how that

appeal, set aside Char’s sentence, and substituted a six-month sentence followed by one year of probation (although Char was by then entitled to statutory release, leaving her probation order) [at para. 21]. In reaching this decision, the Court of Appeal admitted fresh evidence, including a *Gladue* report, psychiatric evidence, evidence that a community justice worker would work with her, and evidence that Char was accepted to a residential treatment program.

⁹³⁵ *Char*, *supra* note 877 at para. 10.

⁹³⁶ *Ibid.* at para. 28.

⁹³⁷ *Ibid.* at para. 32.

⁹³⁸ *Ibid.* at para. 33.

⁹³⁹ *Ibid.* at para. 35.

⁹⁴⁰ See e.g. Renée Acoby’s story in Marian Botsford Fraser, “Life on the Instalment Plan: Is Canada’s Penal System for Women Making or Breaking Renee Acoby?” *The Walrus* (March 2010), online: <http://www.walrusmagazine.ca/articles/2010.03-justice-life-on-the-instalment-plan/>. Kim Pate, the Executive Director of CAEFS, explains that part of Acoby’s institutional offences was driven by her anger at the Correctional Service of Canada removing her daughter from her care. Pate comments broadly that “[m]any women in prison, when they have that kind of devastation, will implode, start self-injuring, get depressed,” and “[s]ome have suicided.” But instead of self-destructing, Pate explains that Acoby “acts” – she externalizes her rage, which often led to institutional charges [at 3]. Kathleen J. Ferraro and Angela M. Moe find in their research that women’s relationship with their children is often instrumental in their recovery from substance abuse, given the despair that accompanies the loss of those relationships [Ferraro & Moe, *supra* note 270 at 28.].

situation has come about.”⁹⁴¹ Bayliff J. states “I do not think that the fact that the children are with the grandparents is actually the problem here,” explaining that “[t]he problem is *something in what Ms. Char is bringing to the world, her way of looking at the world*, and her severe difficulties with addictions, and there may well be psychiatric issues here.”⁹⁴² For the judge, the critical question is “[w]hat is it that leads her to be so unable to exist out in the community without abusing substances and without stealing things that do not belong to her?”⁹⁴³, positioning treatment with “psychiatric attention” as the mode to answer that question, “to try to understand what the root of the addictions and psychiatric difficulties are.”⁹⁴⁴

For Bayliff J., the necessary treatment must occur in prison, “because I think it is only in jail that Ms. Char will be held in place long enough, away hopefully from substances long enough, that she can actually try to address the psychiatric issues and addictions underlying her actions and her problems.”⁹⁴⁵ The problems the judge identifies “include problems with the men in her life, the problem of children not being with her, depression and anger and disregard for the rights of others that flows from that and from other issues.”⁹⁴⁶ There is no description of Char’s personal background in the judgment, so “problems with the men in her life” are ambiguous – conceivably this is a reference to abuse, but this is speculative. It is difficult to discern anything approximating an understanding of the victimization-criminalization continuum in the absence of this background, although it is revealing that the judge comments “I have to believe that these issues flow from the root problems of how she is looking at the world, controlling impulses,

⁹⁴¹ *Char*, *supra* note 877 at para. 36.

⁹⁴² *Ibid.* [emphasis added]

⁹⁴³ *Ibid.* at para. 35.

⁹⁴⁴ *Ibid.* at para. 36.

⁹⁴⁵ *Ibid.* at para. 41.

⁹⁴⁶ *Ibid.*

dealing with addictions.”⁹⁴⁷ Bayliff J. seems to place considerable confidence in the rehabilitative possibilities of a prison sentence for Char.

Research has shown that “[i]n women, substance abuse does not occur in isolation of other needs,”⁹⁴⁸ and it is reductionist to identify “how she is looking at the world” as one of the principal destructive issues in her life without reference to what systemic factors in her life (perhaps reverberations of colonization) are refracted through that worldview. Moreover, Char’s perspective and way of thinking may have no corrective bearing on the external stresses that encumber her life and have rendered her vulnerable to criminalization.

There is no explicit reference to *Gladue* apart from a nod to the contents of s. 718.2(e) which “is of course a crucial issue here because Ms. Char is aboriginal.”⁹⁴⁹ While Bayliff J. has “given it my anxious consideration,” she “simply feel[s] unable to contemplate anything other than a substantial sentence of jail.”⁹⁵⁰ In this way, systemic factors recede into the background, in place of individualized difficulties the judge considers to predominate. This individualization of Char’s difficulties also shapes the judge’s conception and representation of imprisonment itself. Addressing s. 718.2(f),⁹⁵¹ the sentencing objective to promote a sense of responsibility in offenders and acknowledgement of the harm done, Bayliff J. finds that

I have, I suppose, a slight sliver of hope that perhaps a lengthy jail sentence with the right kind of psychiatric attention, counselling attention, might allow Ms. Char to feel a sense of responsibility, to *choose* not to steal, because until she does that, *until she is able to think in that way*, we really are simply going to be continuing to go through this process every year or so as the charges accumulate.⁹⁵²

⁹⁴⁷ *Ibid.*

⁹⁴⁸ Françoise Bouchard, “Mental Health (A Health Care Needs Assessment of Federal Inmates in Canada)” 2004 95(Supplement 1) Canadian Journal of Public Health S36 at S44. [Bouchard]

⁹⁴⁹ *Char*, *supra* note 877 at para. 46.

⁹⁵⁰ *Ibid.*

⁹⁵¹ *Criminal Code*, *supra* note 14 at s. 718.2(f).

⁹⁵² *Char*, *supra* note 877 at para. 43 [emphasis added].

Here, Bayliff J. constructs prison as a place where Char can deal with her individualized problems by changing her thought patterns.

Of the various sentencing principles, “deterrence” is dismissed on the expectation that Char is unlikely to be deterred, and “[s]eparating the offender from society” is foregrounded as the “largest sentencing principle here.”⁹⁵³ Rehabilitation seems to dominate much of the discussion, but is only expressly weighted as having “an element” in the considerations.⁹⁵⁴ Bayliff J. seems to struggle with how best to approach this sentencing task, commenting “I ask myself, what could be done here to rehabilitate and reintegrate Ms. Char? What could be done? Is there some other option to custody here? Is there something that the court should be doing differently here?”⁹⁵⁵ However, because systemic forces are not meaningfully discussed in the judgment, even these questions about the sentencing process are not contextualized.⁹⁵⁶

In an exchange with the judge before the delivery of the decision, Char herself comments “I’m seeking treatment, I know I need treatment, and that’s the first step to getting my kids back.”⁹⁵⁷ A more contextualized understanding of Char’s offending, situated within her experience as an Aboriginal woman and any related *Gladue* factors, does not preclude a finding that – consistent with the offender’s own wishes – treatment should form a component of the sentence. There is some research suggesting that for some women who experience difficulty accessing and receiving help for their addictions within their own communities, prison offers the

⁹⁵³ *Ibid.* at paras. 39-40.

⁹⁵⁴ *Ibid.* at para. 41.

⁹⁵⁵ *Ibid.* at para. 34.

⁹⁵⁶ Bayliff J.’s ability to contextualize systemic factors during the sentencing process may have been hampered by insufficient information. In the judgment from Char’s appeal, the Court of Appeal finds “I think it is clear that the sentencing judge was looking for information such as this when she asked, at the commencement of the sentencing hearing, ‘Were any reports ordered, or anything of that sort?’ I think it is equally clear in light of her comments in paragraphs 46 and 47 of her reasons...that this information would likely have had an effect on the disposition” [*Char*, BCCA, *supra* note 934 at para. 16.]. I should note that the question “were any reports ordered” does not appear in the published sentencing judgment [*Char*, *supra* note 877].

⁹⁵⁷ *Char*, *supra* note 877 at para. 2.

possibility of otherwise elusive help.⁹⁵⁸ However, the Correctional Investigator Howard Sapers has problematized the idea of treatment in prison, noting that the physical conditions of imprisonment represent deprivation, isolation, and alienation from society – all of which are damaging to people’s mental health.⁹⁵⁹ Sapers explains that because prisons are based on control, mental health struggles often receive security-driven responses. While Sapers was specifically talking about mental health concerns in federal prisons, his comments about how securitization and the fundamental punishment philosophy underpinning imprisonment are antithetical to prisoners’ mental health needs are also salient to the issue of substance abuse treatment in prisons generally. Further, beyond the inherent tension between any form of healing/treatment and imprisonment, it is also problematic to suggest that because there is some programming in prisons, prisoners will receive it – Sapers emphasizes that there are long waiting lists for prisoners trying to obtain federal programming, and that prisoners are gaining access to programs later in their sentences.⁹⁶⁰ At the provincial level, Canadian prisons are widely known to lack programming entirely.⁹⁶¹

In *Diamond*, Bonin J. sentences Elaine Diamond to a conditional sentence of two years less a day followed by a two-year probation order for the aggravated assault of her then common-law spouse. Diamond had learned he was the father of a friend’s baby, and stabbed him several times while he was visiting the friend – “under the influence of alcohol,” and “out of jealousy.”⁹⁶² Bonin J. concluded that Diamond had not “grow[n] up in a dysfunctional milieu”⁹⁶³

⁹⁵⁸ Shoshana Pollack, “‘You Can’t Have it Both Ways’: Punishment and Treatment of Imprisoned Women” (2009) 20(2) *Journal of Progressive Human Services* 112 at 117. [Pollack, “‘You Can’t Have it Both Ways’”]

⁹⁵⁹ Howard Sapers, Correctional Investigator, “Mental Health Challenges in Federal Corrections” (Lecture delivered to the North Shore Schizophrenia Society at West Vancouver Memorial Library, 7 November 2011), online: youtube <http://www.youtube.com/user/nsschizophrenia/videos>.

⁹⁶⁰ *Ibid.*

⁹⁶¹ Pollack, “‘You Can’t Have it Both Ways’”, *supra* note 958 at 118.

⁹⁶² *Diamond*, *supra* note 878 at para. 8.

⁹⁶³ *Ibid.* at para. 21.

and had parents who were “positive role models.”⁹⁶⁴ There is no sustained discussion of her personal background, so any emergent victimization-criminalization continuum is thin – although reflecting on her criminal record, the probation officer reports “that alcohol consumption has always been linked to her delinquency.”⁹⁶⁵ Diamond’s alcohol abuse features prominently in the decision. She began drinking when she was fifteen years old, at the same time her relationship with the deceased began, and alcoholism suffused their relationship within a “history of violence” that was “just as pervasive.”⁹⁶⁶

The principles involved in sentencing Aboriginal offenders are discussed in the judgment, and *Gladue* is quoted extensively, although how these considerations actually impact Bonin J.’s reasoning is not made explicit. The PSR may have lacked detail, because while it “mentions that her consumption was mainly to deal with her problems and forget painful memories,”⁹⁶⁷ Bonin J. comments “she has never mentioned what are these painful memories.”⁹⁶⁸ The judge finds “[a]n accumulation of frustration and unresolved issues are the basic causes of her crime.”⁹⁶⁹ This view presents another example of how the difficulties related to Aboriginal women’s offending (including experiences of victimization) may be individualized on sentencing at the expense of having regard to systemic factors. This in turn has potential deleterious penal consequences for women – Bonin J. writes that these individual “causes” of Diamond’s crime become “aggravating since the accused had known for years that she had those issues to work with and had done nothing about it.”⁹⁷⁰ It seems inimical to the sentencing principle of rehabilitation to formulate intractable issues (which are often connected to systemic dynamics) as aggravating in

⁹⁶⁴ *Ibid.* at para. 14.

⁹⁶⁵ *Ibid.* at para. 19.

⁹⁶⁶ *Ibid.* at para. 17.

⁹⁶⁷ *Ibid.* at para. 16.

⁹⁶⁸ *Ibid.*

⁹⁶⁹ *Ibid.* at para. 11.

⁹⁷⁰ *Ibid.* at para. 11.

this manner. Diamond may have had enough self-awareness to recognize her substance abuse was problematic, but perhaps she lacked the support, resources, services, or financial ability to address it, and she should not be further penalized on that basis.

Bonin J. asserts that “[i]t is only today when she now faces jail that she says she would accept to receive help about [her substance abuse].”⁹⁷¹ The author of the PSR recommends a prison sentence for treatment reasons, which I discuss below in the following section. Bonin J. ultimately rejects this recommendation and concludes that a conditional sentence is appropriate. The factors most persuasive for Bonin J. seem to be that a treatment centre will accept Diamond in the community, and that she is the primary caregiver of her three children. The latter is cited within mitigating factors and constructed as such, although the judge also writes “it is not a mitigating factor in itself.”⁹⁷² Bonin J. earlier references that “[a]lthough Ms. Diamond has not resolved many issues, she is described as a person who puts in priority her children and who is a good mother for them.”⁹⁷³ Moreover, her children are characterized as the route to her addressing her issues, as “[t]hey would be her main source of motivation for change.”⁹⁷⁴ This frame seems to be the corresponding side to the assertion that the state positions Aboriginal mothers to “correct the systemic conditions of poverty and violence affecting Aboriginal families and punishing her with the loss of her children if she fails.”⁹⁷⁵ That is, because the judge understands Diamond to be a “good mother” and the primary caregiver of her children, her relationship to them is then constructed as a means to resolve her own difficulties which the probation officer and the judge both reduce to individualized factors.

⁹⁷¹ *Ibid.* at para. 25.

⁹⁷² *Ibid.* at para. 28.

⁹⁷³ *Ibid.* at para. 18.

⁹⁷⁴ *Ibid.*

⁹⁷⁵ CAEFS & NWAC, “Women and the Canadian Legal System” *Canadian Woman Studies*, *supra* note 908 at 97.

Undoubtedly, as the judge comments, “[h]er children will be happy to see their mother getting back control over her life”⁹⁷⁶ and the conditional sentence ordered should allow them to be part of that process in a way that imprisonment would not. This aspect of Candace Woods’ sentence was beneficial: in *Woods*, Whelan J. notes that while on release on an undertaking before sentencing, Woods was “confined to her residence much of the time,” during which she “developed a close bond with her son and she is the primary caregiver.”⁹⁷⁷ Regardless, it would be helpful if the judgment reflected more thoroughly on the systemic factors pertaining to Diamond’s life instead of providing an almost exclusive focus on her need “to find other solutions to solve conflicts, increase her self-esteem, [and to] learn to talk about her problems.”⁹⁷⁸

There is a risk inherent in an overly individualized focus on Aboriginal women offenders’ lives that – as demonstrated in *Char* – the judge may conclude that only treatment in prison is sufficient to respond to those highly specialized needs, and without the counterbalance that *Gladue* requires a shift in focus to restorative alternatives. In Diamond’s case, a community treatment centre accepted her for a period, making this an option the judge deems appropriate – but these resources are not always available, often due to issues stemming from colonization such as poverty and the isolation of Aboriginal communities.⁹⁷⁹ As a result, it is important to take a broader view encompassing the systemic factors within Aboriginal women’s lives to protect against the concern that their difficulties will be interpreted as so particularized and complex that they can only be adequately dealt with in prison. I discuss the problem of judges constructing

⁹⁷⁶ *Diamond, supra* note 878 at para. 40.

⁹⁷⁷ *Woods, supra* note 502 at para. 14.

⁹⁷⁸ *Diamond, supra* note 878 at para. 25.

⁹⁷⁹ *Welsh & Ogloff, supra* note 62 at 510.

criminalized Aboriginal women's difficulties as so complex that they require prison programming in the next section.

4.3 The nexus between judicial understandings of the specificity of criminalized Aboriginal women's victimization histories and imprisonment

In *Char*, discussed in the previous section, it is troubling that the individualized account of Char's offending, without a representation of the victimization-criminalization continuum, seems connected to the determination that rehabilitation can only be achieved through treatment in prison. Bayliff J. pronounces that she believes Char's "situation may be so complex that she needs professional expert attention here" instead of the "sort of well-intentioned but not effective sort of miscellaneous kind of sympathy and vague support" that she might receive if "some sort of conference" was convened with her family and community.⁹⁸⁰ There seems to be a correlation between the individualization and concurrent decontextualization of Char's problems and the deemed necessity for professional treatment in prison. In *Diamond*, discussed in the previous section, the author of the PSR makes a similar recommendation to the judge that Diamond's difficulties necessitate imprisonment. Bonin J. relays this recommendation:

[t]o come to a point where she would present no risk, the probation officer is of the opinion that she needs specialised help offered in a structured environment. The probation officer says that considering the extent and the depth of her problems, she would need to work on her issues in an intensive manner and therefore would need to be in a confined environment [sic] with treatment for at least three months.⁹⁸¹

While Bonin J. departs from the probation officer's view that prison is necessary to Diamond's rehabilitation, such PSR recommendations remain disconcerting. As I discuss in Chapter 3,

⁹⁸⁰ *Char*, *supra* note 877 at para. 47.

⁹⁸¹ *Diamond*, *supra* note 878 at para. 25.

research has shown that judges rely heavily on PSRs, with an “80 per cent concordance rate” between these recommendations and judicial decisions.⁹⁸²

Many decisions I examined funnel discussions about women’s experiences of victimization into the idea that specialized treatment in a custodial setting is necessary. For example, in *R. v. Shecapio*,⁹⁸³ Cadieux J. sentences Lindy Shecapio to eight years imprisonment for manslaughter⁹⁸⁴ following her guilty plea, commenting that given her “serious alcohol abuse and addiction problem which she never tried to resolve up to now,” a “term of imprisonment in a penitentiary will provide the accused with the professional and specialized assistance that she needs to solve this problem and minimize the effects of her alcoholism on her life and that of the people around her.”⁹⁸⁵ Shecapio is a “member of the Cree nation.”⁹⁸⁶ She was exposed to her parents’ alcohol abuse and violence, and her four children were removed from her care because of her own substance abuse. Two psychiatric medical reports and an “evaluation summary” from a psychotherapist “confirm that the alcohol abuse and addiction by the accused was an important factor in the offence,” although one psychiatrist added “this alcohol abuse was not exceptional whether as to its quantity or its nature.”⁹⁸⁷ The probation officer describes that Shecapio’s “alcohol abuse and addiction has exacerbated the accused's personal and psychological problems and impaired her social functioning.”⁹⁸⁸

⁹⁸² Hannah-Moffat & Maurutto, “Re-contextualizing Pre-sentence Reports”, *supra* note 849 at 264.

⁹⁸³ *R. c. Shecapio*, 2006 QCCQ 13164. [*Shecapio*]

⁹⁸⁴ Shecapio had been drinking heavily for several days. She invited the deceased, a friend from the Native Friendship Centre of Montreal, to continue drinking with her at a neighbour’s apartment. They left together after the deceased had an argument with the neighbour. In Shecapio’s apartment, she and the deceased discussed her “medieval type dagger,” which Shecapio later used to stab him once near the heart “after the beginning of another quarrel” [*Ibid.* at paras. 3-4]. They had gone for a walk, and she had brought the dagger “concealed” [at para. 4]. After denying responsibility, Shecapio eventually told the police that she stabbed the deceased, “adding that she acted at his request because the victim was tired of his life and because he wanted her too much to love him” [at para. 6].

⁹⁸⁵ *Ibid.* at para. 28.

⁹⁸⁶ *Ibid.* at para. 10.

⁹⁸⁷ *Ibid.* at para. 13.

⁹⁸⁸ *Ibid.* at para. 14.

The Crown and defence agreed that federal imprisonment is warranted “even though the accused is an aboriginal offender.”⁹⁸⁹ Cadieux J. follows this, declaring that “it has been clearly established that”⁹⁹⁰ more serious and violent offences will likely produce similar sentences for Aboriginal and non-Aboriginal offenders (the *Gladue* reference that *Ipeelee* finds has been erroneously emphasized). As Shecapio’s personal history is sparse in the judgment, it is difficult to interpret how the judge understands and frames her experiences of victimization. Nonetheless, incarceration is favoured for its treatment options. Given that Shecapio is sentenced to eight years incarceration, there was no (community) alternative for rehabilitative services. However, the concept of prison rehabilitative services offering “specialized assistance” may be problematic in the context of more borderline decisions (hovering around the two-year range) because that image of “specialized” services may militate toward more punitive sanctions (such as a federal term at the lower end as opposed to a provincial term at the higher end, or a term of incarceration instead of a conditional sentence order).

The idea that prison is a healing place, offering specialized mental health services to offenders with challenging problems, is also evident in *R. v. D.L.W.*⁹⁹¹ Arnot J. sentences D.L.W. to four years in a federal penitentiary after she pled guilty to manslaughter. A member of Onion Lake First Nation, D.L.W. was in a relationship with the deceased with whom she has three children. He told her he no longer loved her (amidst a recurrent argument about alleged infidelities), pushed her, started to choke her, and threatened to hit her, until D.L.W. told him she intended to stab him. He responded in a “taunting and threatening manner,” approaching her and “inviting her to stab him” – and “[s]he complied.”⁹⁹² Arnot J. discusses her personal history,

⁹⁸⁹ *Ibid.* at para. 22.

⁹⁹⁰ *Ibid.* at para. 23.

⁹⁹¹ *R. v. D.L.W.*, 2007 SKPC 151. [*D.L.W.*]

⁹⁹² *Ibid.* at para. 7.

including D.L.W. having rotated through over twenty foster homes during childhood wherein she was “the victim of child abuse consisting of neglect, physical, verbal abuse by her mother and sexual abuse by a cousin” and developed substance abuse issues.⁹⁹³ Her substance abuse has persisted into adulthood, and she “was the victim of much physical abuse and violence at the hands of [the deceased] in their domestic situation.”⁹⁹⁴ Arnot J. describes that this personal background “help[s] to explain the circumstances of the offence and her personal situation,” but these circumstances “cannot excuse” that she took a life.⁹⁹⁵

After discussing various sentencing directives per *Gladue*, Arnot J. determines that a conditional sentence is not appropriate, citing inadequate resources in her community and that “[m]uch more in-depth counseling is required for Ms. [D.L.W.] before she can be re-integrated safely into the community.”⁹⁹⁶ It is somewhat surprising that the judge finds the available community resources insufficient. Defence counsel suggests D.L.W. has already made “positive steps” in that context.⁹⁹⁷ The judge later offers that “[t]he resources available to her at her home community made a praiseworthy effort in working with her for the past sixteen months” – which must have been effective, as the judge continues “I commend the dedicated people with whom she has been working for the progress they have produced.”⁹⁹⁸ Arnot J. later again intimates that the community resources are worthwhile, adding that she will benefit from them on release because they will remain “available,” offering “strong follow-up counseling and programming to her. They will no doubt augment the success we hope Ms. [D.L.W.] will achieve in an

⁹⁹³ *Ibid.* at para. 14.

⁹⁹⁴ *Ibid.* at para. 16.

⁹⁹⁵ *Ibid.* at para. 36. For Elizabeth Sheehy’s related work, see Sheehy, “Defending Battered Women on Trial”, Lecture, *supra* note 600. For a feminist perspective on the context of violence against women, including Aboriginal women, see e.g. Elizabeth Sheehy, “Misogyny is Deadly: Inequality makes Women more Vulnerable to Being Killed” (08/2010) 17(3) Canadian Centre for Policy Alternatives Monitor 18.

⁹⁹⁶ *D.L.W.*, *supra* note 991 at para. 39.

⁹⁹⁷ *Ibid.* at para. 25.

⁹⁹⁸ *Ibid.* at para. 41.

institutional setting.”⁹⁹⁹ While Arnot J. lacks confidence the community could manage the risk she has been assessed to present,¹⁰⁰⁰ the judge also finds that while on bail in the community, “[s]he abided by the conditions and availed herself of the counseling and support proffered to her by the resources in the community. She did not breach any of the conditions.”¹⁰⁰¹ It should also be noted (particularly given that defence counsel seeks a conditional sentence) that pre-trial, D.L.W. abided by these conditions and underwent counseling within “restrictive terms” that “were quite harsh, more so than some conditional sentences.”¹⁰⁰²

Despite the cumulative indications that the resources in the community are both valuable and have been well-utilized by D.L.W., Arnot J. finds “the nature, quality, and severity of Ms. [D.L.W.]’s psychological, and other significant issues require very experienced counselors working in a structured institution to create the best chance for long term success,”¹⁰⁰³ in a “specialized individualized, clinically based, therapeutic treatment plan.”¹⁰⁰⁴ The judge finds these resources “are not realistically available” in her community or provincial institutions.¹⁰⁰⁵ Research notes the disparity between federal and provincial programming; Jennifer Bernier has written that there are “relatively consistent services at the federal level and non-standardized policies, procedures, practices, and programming at the provincial level.”¹⁰⁰⁶ The “in-depth counseling and programming” the judge finds necessary for D.L.W. “to truly begin a successful path of rehabilitation” are framed as “opportunities to obtain the help she needs” and best available “in the federal female correction institution system.”¹⁰⁰⁷

⁹⁹⁹ *Ibid.* at para. 44.

¹⁰⁰⁰ *Ibid.*

¹⁰⁰¹ *Ibid.* at para. 48.

¹⁰⁰² *Ibid.*

¹⁰⁰³ *Ibid.* at para. 42.

¹⁰⁰⁴ *Ibid.* at para. 45.

¹⁰⁰⁵ *Ibid.* at para. 43.

¹⁰⁰⁶ Bernier, *supra* note 232.

¹⁰⁰⁷ *D.L.W.*, *supra* note 991 at para. 49.

It is clear that Arnot J. centres much of the sentencing reasoning around this perception of D.L.W.'s rehabilitative needs. While the judge registers concern about how the community would manage the risk she is assessed to present, Arnot J. simultaneously clarifies that she “has high risk needs, but she is not necessarily a high risk offender.”¹⁰⁰⁸ The basis for this finding is the PSR which “classifies Ms. [D.L.W.] as a ‘high risk to re-offend’ unless a variety of factors are addressed.”¹⁰⁰⁹ Kelly Hannah-Moffat and Paula Maurutto explain that increasingly, PSR policy has shifted toward an actuarial risk-based model “in which assessments and recommendations are primarily based on criminogenic risk/need” and “Gladue factors are positioned and itemized alongside (and sometimes interpreted as) risk factors.”¹⁰¹⁰ They describe that within this paradigm of amplified risk-related assessments and recommendations in PSRs, “[a]n offender’s problems are no longer situated within a broader social context.”¹⁰¹¹ Moreover, Hannah-Moffat and Maurutto observe that this risk-based policy shift does not offer much direction to probation officers about how they should “reconcile their holistic culturally situated assessments of the offender with the policy’s emphasis on criminogenic risk/need. The result is Aboriginal offenders continue to be characterized as high risk and high need.”¹⁰¹² Hannah-Moffat and Maurutto extrapolate that this PSR policy shift

reflect[s] a shift in emphasis from rehabilitation (understood within an individualized treatment model) to risk of re-offending and risk-informed rehabilitation (for which non-criminogenic factors such as remorse, future plans and physical and emotional health are no longer considered relevant and are considered difficult to target in treatment).¹⁰¹³

¹⁰⁰⁸ *Ibid.* at para. 50.

¹⁰⁰⁹ *Ibid.* at para. 25.

¹⁰¹⁰ Hannah-Moffat & Maurutto, “Re-contextualizing Pre-sentence Reports”, *supra* note 849 at 274.

¹⁰¹¹ *Ibid.* at 272.

¹⁰¹² *Ibid.* at 274-5.

¹⁰¹³ *Ibid.* at 272.

They point out that generally these policy changes pass unknown by judges.¹⁰¹⁴ Against the individualizing logic of risk-based PSRs, Hannah-Moffat and Maurutto observe “sentence recommendations and, ultimately, sentences become a mechanism to regulate offender risk through treatment interventions as determined through actuarial techniques.”¹⁰¹⁵

These problems to do with the individualizing framework and recommendations of PSRs may also be exacerbated for women. Kim Pate has identified that often PSRs are inaccurate, misleading, and unfair, presenting gendered views of women’s difficulties (for example, abusive past relationships may be depicted as evaded responsibilities and risk factors).¹⁰¹⁶ While, as above, Arnot J. makes the slippery distinction that D.L.W. “is not necessarily a high risk offender” but has “high risk needs,”¹⁰¹⁷ the implication is the same: the judge concludes that it is necessary for D.L.W. to be “in an institutional setting” “to properly address the issues identified in the Pre-sentence Report” because she “will continue to be a high risk if these factors are not dealt with effectively.”¹⁰¹⁸

The sentencing judge specifically alludes to s. 718.2(e) and relevant case law when she notes “I have considered the principles” directed by a few decisions on sentencing Aboriginal peoples (*Gladue, R. v. John*,¹⁰¹⁹ and *R. v. Laliberte*¹⁰²⁰) and finds that “a sentence of two years less a day or shorter would not serve the rehabilitation needs of the accused or properly reflect the gravity of the offence.”¹⁰²¹ The latter concern may be a related function of the problem

¹⁰¹⁴ *Ibid.* at 273.

¹⁰¹⁵ *Ibid.* at 272.

¹⁰¹⁶ Kim Pate, Lecture on Mental Health and Sentencing (Lecture delivered to the Canadian Chapter of the International Association of Women Judges at the “Judging Women: Aging, Mental Health and Culture” conference held by the National Judicial Institute and the Faculty of Law, University of British Columbia at the Fairmont Pacific Rim in Vancouver, 11 May 2011).

¹⁰¹⁷ *D.L.W.*, *supra* note 991 at para. 50.

¹⁰¹⁸ *Ibid.* at para. 44.

¹⁰¹⁹ *R. v. John*, 2004 SKCA 13.

¹⁰²⁰ *R. v. Laliberte*, 2000 SKCA 27.

¹⁰²¹ *D.L.W.*, *supra* note 991 at para. 46.

identified by LeBel J. in *Ipeelee* that sentencing judges have over-subscribed to the comment in *Gladue* that more violent and serious offences will likely produce more similar sentences for Aboriginal and non-Aboriginal offenders.

Arnot J. recommends to correctional authorities that D.L.W. be transferred to a federal institution on a reserve for Aboriginal women, the Okimaw Ohci Healing Lodge, but this remains a federal institution. Additionally, D.L.W. receives the Crown sentence recommendation of four years, far in excess of the defence submission for a conditional sentence. Altogether, it seems there is a risk that attention to *Gladue* factors, including histories of victimization, may be retranslated as specialized needs that judges determine require rehabilitative services that are exclusively available in the prison setting. Andrew Welsh and James R.P. Ogloff have written that

[j]udicial consideration of these systemic factors, as prescribed by section 718.2(e), may pose indirect problems for Aboriginal offenders. Simply put, given the significant problems experienced by a number of Aboriginal offenders and the more serious nature of their criminal history, judges may deem community-based dispositions, such as probation, to be an inappropriate means of supervision. Despite the general finding that the likelihood of a non-custodial disposition increased when judges cited rehabilitation as an important sentencing objective, in cases involving Aboriginal offenders, judges may consider the level of supervision and access to rehabilitative programs available in correctional facilities to be necessary for the [sic] successful rehabilitation.”¹⁰²²

Judicial concerns that Aboriginal women offenders need intensive treatment, and that this treatment is best administered in prison, become particularly complicated where women’s past experiences of incarceration have demonstrated that imprisonment exacerbates their problems and that programming has not proven healing/rehabilitative. These complexities are evident in *R. v. Pelletier*¹⁰²³ and *R. v. Redhead*.¹⁰²⁴

¹⁰²² Welsh & Ogloff, *supra* note 62 at 510.

¹⁰²³ *R. v. Pelletier (R. v. J.P.)*, 2011 SKQB 7. [*Pelletier*]

¹⁰²⁴ *Redhead*, *supra* note 636.

Josephine Pelletier is sentenced for robbery, arson, and assault, receiving three years and three months imprisonment followed by a seven-year supervision order. The judge also grants the Crown application that she be declared a long-term offender. Dawson J. recounts her personal history, which is replete with violence and its aftereffects. Pelletier's father was repeatedly incarcerated, and her mother had entrenched substance abuse issues and abused Pelletier's stepfather. In her childhood, Pelletier was physically, sexually, and emotionally abused, suffering in isolation when her mother refused to believe the sexual abuse. Her mother routinely evicted her unless she brought home drugs. She "turned to stealing and prostitution,"¹⁰²⁵ was first criminalized in her youth and later amassed a serious criminal record. She cycled through foster homes. In adulthood, she endured relationships marred by substance abuse and physical abuse. Dawson J. cites her "very troubled upbringing and background" as a mitigating factor that "contributed to her conduct," noting the clear application of *Gladue* factors to her sentencing.¹⁰²⁶

The emergent portrait of imprisonment from the judgment is very complex, simultaneously holding prison out as a place of treatment and the site of the acceleration of Pelletier's anti-social issues. Dawson J. relates "[t]he author of the Pre-Disposition report indicated that Ms. Pelletier had numerous issues that probably could only be addressed while she was in closed custody."¹⁰²⁷ The forensic psychologist testified at the sentencing hearing that "she would need a sentence of at least two years, as Correction Services of Canada ('CSC') has an 18 month rotation, so she would need a minimum of two years in a federal institution to go through the programming"¹⁰²⁸ and recommended that for the length of post-incarceration community

¹⁰²⁵ *Pelletier*, *supra* note 1023 at para. 25.

¹⁰²⁶ *Ibid.* at para. 169.

¹⁰²⁷ *Ibid.* at para. 36.

¹⁰²⁸ *Ibid.* at para. 114.

supervision, “the longer the better.”¹⁰²⁹ Dawson J. agrees that “[i]n the context of a long-term offender, it is important to provide sufficient time to allow for appropriate treatment regimes,” and that Pelletier “needs extensive, intensive treatment if she is ever to live a pro-social life.”¹⁰³⁰ While Pelletier had spent years in remand, the judge determines that to give her “the standard two for one credit” for this time “would be inimical to any future rehabilitation prospects,” and on this basis only counts her time in remand at a ratio of one to one.¹⁰³¹ Dawson J. makes treatment-related recommendations to correctional authorities about the administration of her sentence:

I would also recommend to the federal authorities that Ms. Pelletier be incarcerated in an institution which will ensure that she receives meaningful and intensive assistance in terms of psychological and sexual abuse counselling, substance abuse therapy, counselling which integrates her aboriginal heritage, life skills training, and occupational or vocational training.¹⁰³²

Given this representation of an offender with deeply entrenched personal challenges who must be subjected to extensive treatment in prison, and the inverse representation of prison as a place of treatment, a complicating factor emerges – imprisonment seems to exacerbate Pelletier’s issues. Her past conduct in prison becomes aggravating on sentencing because the judge notes she “has conducted herself in a similar fashion [to her conduct in the predicate offences] on previous occasions while incarcerated.”¹⁰³³ The forensic psychologist who conducted her assessment reported “Pine Grove Correctional Facility staff portray Ms. Pelletier as a very hard individual to manage and a person who has great difficulty complying with the institutional regime” whose “abilities to comply with remediation attempts, while incarcerated, were spotty at

¹⁰²⁹ *Ibid.* at para. 115.

¹⁰³⁰ *Ibid.* at para. 186.

¹⁰³¹ *Ibid.*

¹⁰³² *Ibid.* at para. 211.

¹⁰³³ *Ibid.* at para. 194.

best.”¹⁰³⁴ Additionally, the Deputy Director of Programs at that correctional facility testified that prisoners in segregation or classified to maximum-security do not have access to programming,¹⁰³⁵ and that any available programs were not “high enough intensity” for Pelletier.¹⁰³⁶ It seems that Pelletier has various treatment needs arising from poverty and a chaotic, violent upbringing; prison programming is insufficient but will be relied on; she must be separated from society; and imprisonment triggers Pelletier’s challenging behaviours. None of these factors are easily reconcilable.

Vianna Redhead is sentenced to 10 years incarceration for the attempted murder of a police officer. Redhead is “a member of the Shamattawa First Nation”¹⁰³⁷ and a *Gladue* report is referenced in the judgment. Keyser J. describes that Redhead “has lived a horrific existence,”¹⁰³⁸ and details the unrelenting violence she has witnessed and experienced. The judge declares “I appreciate that some of the *Gladue* factors in her background have contributed to her problems, sometimes significantly.”¹⁰³⁹ However, despite this recognition of the systemic dynamics within her impoverished community and the effects on her personally, Keyser J. finds her risk to the public paramount.

In one of the filed reports, Redhead is assessed as needing “long-term substance abuse treatment.”¹⁰⁴⁰ Keyser J. describes that during her pre-trial custody, Redhead has had “multiple problems with authority and instances of aggression,” attributed to attitudinal issues.¹⁰⁴¹ Keyser J. comments

¹⁰³⁴ *Ibid.* at para. 103.

¹⁰³⁵ *Ibid.* at para. 124.

¹⁰³⁶ *Ibid.* at para. 125.

¹⁰³⁷ *Redhead, supra* note 636 at para. 9.

¹⁰³⁸ *Ibid.*

¹⁰³⁹ *Ibid.* at para. 24.

¹⁰⁴⁰ *Ibid.* at para. 15.

¹⁰⁴¹ *Ibid.* at para. 16.

[u]nless there is significant change in attitude, she remains a very high risk to reoffend violently. If she cannot control her violent impulses while incarcerated, what chance does she have to successfully reintegrate into society without putting members of the public at considerable risk?¹⁰⁴²

It is problematic to equate institutional behaviour with that in the outside world, because the communities are completely dissimilar with different stressors, and “some researchers argue that there is little relationship between behaviour in prison and that outside.”¹⁰⁴³ In a correctional report commissioned about federally sentenced women, Margaret Shaw finds that it seems there is “no direct relationship” between criminal histories and institutional behaviour.¹⁰⁴⁴ Shaw finds that women prisoners’ institutional violence and disruption (including self-harming behaviour) often relate to women’s difficulties coping in an oppressive regime based on punitiveness and isolation, which actually *engenders* women’s institutional violence/disruption.¹⁰⁴⁵ Moreover, Shaw suggests that women’s institutional violence and disruptiveness “may well provide a better measure of institutional characteristics than of individual risk.”¹⁰⁴⁶ I would add that such disruption or violence might also tell us more about the general experience of imprisonment itself. Kelly Hannah-Moffat writes that “[t]he assumption that these behaviours are linked often obscures other significant issues such as the relationship of the prison environment to the production and provocation of ‘risky behaviours.’”¹⁰⁴⁷ Further, Aboriginal women often experience imprisonment such that behaviour in prison may not be reflective of how they will relate to people beyond the walls. *Gladue* recognizes this broadly, explaining that systemic and background factors cause Aboriginal offenders to be “more adversely affected by incarceration and less likely to be ‘rehabilitated’ thereby, because the internment milieu is often culturally

¹⁰⁴² *Ibid.*

¹⁰⁴³ Hannah-Moffat, “Moral Agent or Actuarial Subject”, *supra* note 461 at 80.

¹⁰⁴⁴ Corrections Branch, Ministry of the Solicitor General, *The Federal Female Offender: Report on a Preliminary Study* by Margaret Shaw (Ottawa: Solicitor General Canada, 1991) at 81.

¹⁰⁴⁵ *Ibid.* at 83.

¹⁰⁴⁶ *Ibid.* at 81.

¹⁰⁴⁷ Hannah-Moffat, “Moral Agent or Actuarial Subject”, *supra* note 461 at 80.

inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.”¹⁰⁴⁸

Patricia Monture-Angus explains that “dislocation and disconnection” are “predominate experiences of those who live within correctional institutions in Canada,” and that colonization has produced feelings of dislocation and disconnection for Aboriginal peoples.¹⁰⁴⁹ As such, Aboriginal prisoners experience a distinct sort of isolation and alienation. Further, Monture-Angus writes that Aboriginal women who reported their experiences of imprisonment to the Task Force on Federally Sentenced Women¹⁰⁵⁰ did not experience prison itself as a healing place: “[a]most all the healing experiences that the Aboriginal women who have been in prison reported lie outside the conventional prison order. They come through the bonds formed with other women in prison, through the support of people on the outside, and from the activities of the Native Sisterhood.”¹⁰⁵¹ Additionally, programming women may (or may not) receive in prison may be ineffective outside the walls due to the same idea that life in prison cannot be related to or instructive of life outside, as one former prisoner illustrates: “[a]ll they really do here is teach you how to be in jail. They don’t teach you how to survive on the outside.”¹⁰⁵² In sum, many feminist writers have argued that “violence and disorder in prisons must be seen not as the result of individual pathology but as social and situational events [because] violence is

¹⁰⁴⁸ Gladue, *supra* note 15 at para. 68.

¹⁰⁴⁹ Patricia Monture-Angus, “Aboriginal Women and Correctional Practice: Reflections on the Task Force on Federally Sentenced Women” in Kelly Hannah-Moffat & Margaret Shaw, eds., *An Ideal Prison? Critical Essays on Women’s Imprisonment in Canada* (Halifax: Fernwood Publishing, 2000) 53 at 53. [Monture-Angus, “Reflections on the Task Force”]

¹⁰⁵⁰ See TFFSW, “Creating Choices”, *supra* note 453.

¹⁰⁵¹ Monture-Angus, “Reflections on the Task Force”, *supra* note 1049 at 53.

¹⁰⁵² Elizabeth Comack, “The Prisoning of Women: Meeting Women’s Needs” in Kelly Hannah-Moffat & Margaret Shaw, eds., *An Ideal Prison? Critical Essays on Women’s Imprisonment in Canada* (Halifax: Fernwood Publishing, 2000) 117 at 121. [Comack, “The Prisoning of Women”]

gendered”¹⁰⁵³ and “the experience of imprisonment is both gendered and racialized.”¹⁰⁵⁴ For these reasons, Keyser J.’s suggestion that Redhead’s institutional violence suggests she presents a risk to public safety both does not directly follow, and is problematic for implying equivalence between life outside and behind the walls.

Keyser J. concludes “Redhead needs significant rehabilitative work in a secure facility” to deal with her “aggression” and “limited insight into the triggers for violent behavior,” both for her own well-being and to reduce her risk to others.¹⁰⁵⁵ This suggests a view of incarceration that prison has the capacity to modify behaviour, where offenders with complex behavioural difficulties (often stemming from victimization) must be sent to address those difficulties. However, even this picture of the rehabilitative power and efficacy of prison is complicated by its failure to heal and change Redhead’s conduct in past periods of incarceration: the judge comments “it is clear that her aggressive behaviour has not been curbed by the fact of incarceration at all.”¹⁰⁵⁶

A different picture of the role and impact of imprisonment emerges from *R. v. Chouinard*, wherein the community is identified as the better place for rehabilitation. I discussed Ratushny J.’s sensitivity to Josée Chouinard’s experiences of victimization in Chapter 3. Ratushny J. imposes a three-year sentence of imprisonment followed by two years of probation, but because Chouinard spent seven months in remand, the judge credits her with two-for-one custodial time (reducing her effective sentence to the remaining 22 months). As the remaining time is under two years, Ratushny J. decides a conditional sentence is available, ordering that

¹⁰⁵³ Margaret Shaw, “Women, Violence and Disorder in Prisons” in Kelly Hannah-Moffat & Margaret Shaw, eds., *An Ideal Prison? Critical Essays on Women’s Imprisonment in Canada* (Halifax: Fernwood Publishing, 2000) 61 at 61. [Shaw, “Women, Violence and Disorder in Prisons”]

¹⁰⁵⁴ *Ibid.* at 68.

¹⁰⁵⁵ *Redhead*, *supra* note 636 at para. 24.

¹⁰⁵⁶ *Ibid.* at para. 25.

Chouinard serve the rest of her sentence of imprisonment in the community. Ratushny J. concludes a community sentence is appropriate because of her understanding of how Chouinard's "lifetime of abuse"¹⁰⁵⁷ impacted her behaviour surrounding her offence. As I mention in Chapter 3, this understanding prompts the judge to develop a restorative-oriented sentence "to try to assist in her rehabilitation."¹⁰⁵⁸ Ratushny J. concentrates on "treatment and counselling" as the "primary focus" of Chouinard's sentence of imprisonment and the following probation order.¹⁰⁵⁹

The overall duration of Chouinard's sentence is long and onerous, as Ratushny J. explains that she "will be supervised for almost a four-year period"¹⁰⁶⁰ and the terms of Chouinard's probation order "are basically the same as those for your conditional sentence"¹⁰⁶¹ (although the repercussions in the event of a breach would differ, as a breach of her conditional sentence order would likely result in Chouinard serving the rest of her sentence in prison, whereas she could be newly charged for a breach of her probation order). However, it is clear that the judge was motivated to avoid sending Chouinard to prison. Ratushny J. finds that

[a] focus on specific deterrence through rehabilitation, in this way, I think, will better achieve specific deterrence than a real jail term, because Ms. Chouinard is not a person who needs to learn her lesson by being incarcerated any further. She has already served a period of pre-sentence incarceration and now, in my view, she is a person in need of highly structured, mandatory and controlled help.¹⁰⁶²

In other decisions I have discussed above, some judges decide that when criminalized Aboriginal women they sentence are "in need of highly structured, mandatory and controlled help,"¹⁰⁶³ they locate the source of that structure and control in the prison setting. Ratushny J.'s comments

¹⁰⁵⁷ *Chouinard*, *supra* note 494 at para. 22.

¹⁰⁵⁸ *Ibid.*

¹⁰⁵⁹ *Ibid.* at para. 25.

¹⁰⁶⁰ *Ibid.*

¹⁰⁶¹ *Ibid.* at para. 27.

¹⁰⁶² *Ibid.* at para. 22.

¹⁰⁶³ *Ibid.*

demonstrate another, less coercive way of thinking about and imposing structure and control – in the community.

In *R. v. Redies*,¹⁰⁶⁴ Barnett J. delivers a nuanced oral judgment that suggests prison is not an institution where healing happens. Barnett J. sentences Vanessa Redies to a global period of 12 months imprisonment and six months probation following her release (including conditional sentence-like probationary terms of house arrest for the first three months) for impaired driving causing bodily harm, amongst other offences. Barnett J. conveys distaste that as a judge, “there are times when you just cannot feel happy about what you have to do, and this is one of those times.”¹⁰⁶⁵ This sentiment seems related to having to order imprisonment for an Aboriginal woman from a community the judge understands is troubled and where many people are “traumatized,”¹⁰⁶⁶ having *Gladue* “pretty firmly in my mind.”¹⁰⁶⁷

While Barnett J. optimistically comments “I do hope that something good may be able to happen while you are at the correctional centre,”¹⁰⁶⁸ prison is not understood as a healing place in this judgment. Instead, the judge tells Redies “I have never told anybody that they were going to jail because it would be a good and useful experience for them. I think in your case a term of imprisonment is necessary.”¹⁰⁶⁹ Within the probation component of her sentence, Barnett J. assigns house arrest for a shorter duration than “it might otherwise be”¹⁰⁷⁰ due to dissatisfaction with how such orders are administered. Barnett J. is sensitive to how Redies will experience her sentence, adding that if she would prefer her sentence structured differently, the probation order

¹⁰⁶⁴ *Redies*, *supra* note 230.

¹⁰⁶⁵ *Ibid.* at para. 1.

¹⁰⁶⁶ *Ibid.* at para. 3.

¹⁰⁶⁷ *Ibid.*

¹⁰⁶⁸ *Ibid.* at para. 13.

¹⁰⁶⁹ *Ibid.*

¹⁰⁷⁰ *Ibid.* at para. 17.

could be revised and she could spend a longer period of imprisonment in Whitehorse.¹⁰⁷¹ This judicial flexibility represents an instance where “what the system hears” is heard in a reflexive way, engaging the offender in a dialogue about her own experience and needs.

Reaffirming that prison is not a place of healing, the judge comments “I think that the probation order is a more effective way of accomplishing some useful things,”¹⁰⁷² which is consistent with the legislative intent for probation orders to function as primarily rehabilitative instruments.¹⁰⁷³ Barnett J. leaves this rehabilitative function for Redies to determine vis-à-vis her own needs: “[w]ithout ordering Ms. Redies to get out of town to go to a treatment centre or to go for some specialized counselling, this I think may encourage her to do that.”¹⁰⁷⁴ In this way, Redies’ sentence supports her ability to attend a treatment program or counselling in Whitehorse without implementing such as a punitive component of her sentence (upon which a breach of that term would likely result in incarceration for the remainder of her sentence). Barnett J. describes this formulation as “a better way to do things, I hope”¹⁰⁷⁵ than a greater period of imprisonment. This decision is noteworthy for foregrounding the need for treatment, but without importing this need into the sentence in a punitive fashion.

4.4 Issues complicating the task of sentencing criminalized Aboriginal women

Sentencing is an inherently difficult process, often engaging competing issues and principles. In this section, I turn to some of these complexities in the sentencing of criminalized Aboriginal women. To explore these challenges, I first discuss decisions implicating the availability of community resources. While broadly I consider the conditional sentence order to

¹⁰⁷¹ *Ibid.*

¹⁰⁷² *Ibid.*

¹⁰⁷³ See e.g. *Proulx*, *supra* note 84 at paras. 32-3.

¹⁰⁷⁴ *Redies*, *supra* note 230 at para. 17.

¹⁰⁷⁵ *Ibid.* at para. 22.

be a necessary and positive tool for sentencing judges (and particularly for Aboriginal women), I also introduce some features of conditional sentences that may contribute to Aboriginal women's vulnerabilities to breach. In the final part of this section, I discuss the fraught relationship between incarceration and rehabilitation, including how the gap between provincial and federal treatment services further complicates the judicial task.

4.4.1 The availability of community resources

While it is problematic that some women may be sentenced to prison for rehabilitative services despite the availability and otherwise appropriateness of a community sentence, sometimes any given community resources are simply insufficient and judges lack options on sentencing. In *R. v. Petawabano*,¹⁰⁷⁶ while Chabot J. orders a penitentiary sentence of five years for manslaughter and does not discuss the prospect of a conditional sentence, the judge nonetheless comments upon the isolation of that community, and other remote communities: “[w]hen more specialized services are required or must be given more frequently than the visits of the traveling professionals coming to the community, people have no choice but to go out of the community to get the services.”¹⁰⁷⁷ The judge presents rehabilitation through imprisonment as a priority, commenting that it is “necessary for the accused to get involved in therapy and to receive the professional services needed for her condition, both psychological and psychiatric.”¹⁰⁷⁸ The final sentence falls within the four years submitted by defence counsel and the six presented by the Crown (so imprisonment at the provincial level is excluded in the judgment), but for cases where conditional sentences are considered, the availability of community resources becomes critical. As Timothy F. Hartnagel explains in the context of youth

¹⁰⁷⁶ *R. v. Petawabano*, 2008 QCCQ 6141. [*Petawabano*]

¹⁰⁷⁷ *Ibid.* at para. 43.

¹⁰⁷⁸ *Ibid.* at para. 34.

sentencing, where a judge decides “some type of community-based treatment program” is the most appropriate sanction as an alternative to incarceration, “if such a program is not available in the province the judge might then have little option but to impose a term of custody.”¹⁰⁷⁹

In other decisions, the corollary of the reasoning that an offender needs therapy and that prison will best offer that source of healing has a more pronounced outcome, such as where the community resources are considered inadequate and prison is the only remaining option for rehabilitation. This is evident in *D.L.W.* where the judge delivers a four-year imprisonment term against the submission of defence counsel for a conditional sentence. The judge rejected this submission after finding that the community (and provincial institutions) lacks proper rehabilitation-oriented resources and that D.L.W. requires specialized treatment in a prison setting. Similarly, in *R. v. Smith*,¹⁰⁸⁰ Lilles J. finds the treatment resources in the community insufficient and sentences Helen Smith to 31 months imprisonment to be followed by a further three years of probation for assault causing bodily harm.

Helen Smith had been “partying into the early morning hours” with her husband and punched and kicked his head after he made derogatory comments to her.¹⁰⁸¹ Smith is a survivor of the residential school system, and her psychological assessment reports that in her childhood she experienced “emotional, spiritual, physical, sexual abuse and neglect at home.”¹⁰⁸² She began her involvement with alcohol as a child, which developed into an addiction. Smith’s substance abuse extended to heroin and cocaine several years before this sentencing (at which she was 51 years old), and her addictions have compromised her memory from when she was a sex worker

¹⁰⁷⁹ Timothy F. Hartnagel, “The Rhetoric of Youth Justice in Canada” (2004) 4(4) *Criminal Justice: The International Journal of Policy & Practice* 355 at 369-70.

¹⁰⁸⁰ *R. v. Smith*, 2004 YKTC 14. [*Smith*]

¹⁰⁸¹ *Ibid.* at para. 1.

¹⁰⁸² *Ibid.* at para. 15.

“living in skid row in Vancouver.”¹⁰⁸³ In terms of the pattern of Smith’s offending, the RCMP report filed suggests that her past assaultive behaviour has generally escalated in tandem with her drinking, and mostly involves aggression against men. The judge notes that despite recognizing the nexus between her drinking and these assaults, “it has not resulted in a change in her behaviour.”¹⁰⁸⁴ Her psychological assessment notes “violence has been part of all her relationships.”¹⁰⁸⁵ It seems that she was the victim of much partner violence, and was also abusive to her partners – but presumably due to a strength and power imbalance she “often wait[ed] until they were drunk before assaulting them, since she could not successfully assault them when the men were sober.”¹⁰⁸⁶

The depiction of her violence within the psychological assessment is troubling, as her assessor finds vis-à-vis her abusive relationships that

[h]er expectations of her partners were often not met in that she believed the men should work and not stay at home and drink and abuse her (generally they were chronic alcoholics as well). As a result of her partners not meeting her idealistic expectations, she would build up resentment and eventually attack them when they were drunk.¹⁰⁸⁷

It is problematic for the author of the report to suggest Smith’s expectation that her partners work, remain sober, and refrain from abusing her is “idealistic.” It is inconceivable that a similar report for an urban middle class woman offender would suggest these expectations are unreasonable or idealistic. Or, taking criminalization out of it entirely: it is even more inconceivable that anyone would make such a comment about an urban middle class woman’s relationships. I mention above that Kim Pate has found that women offenders’ PSRs offer gendered perspectives of women’s struggles; this example from Smith’s psychological report is a

¹⁰⁸³ *Ibid.* at para. 17.

¹⁰⁸⁴ *Ibid.* at para. 16.

¹⁰⁸⁵ *Ibid.* at para. 18.

¹⁰⁸⁶ *Ibid.* at para. 15.

¹⁰⁸⁷ *Ibid.* at para. 18.

similarly gendered, raced, and classed representation of her pathway to criminalization. Further, much as I discuss above that most judges rely heavily on recommendations from PSRs, Smith's psychological assessment is a primary source of information for the sentencing judge. It is clear that Lilles J. too is reliant on Smith's psychological assessment: the doctor's "report and oral evidence were extremely helpful in understanding Mrs. Smith's issues and the nature of treatment or programming that may be of assistance to her."¹⁰⁸⁸ Nonetheless, despite reliance on a report that contains the above problematic comments, Lilles J. does find in mitigation that Smith was exposed to violence in her childhood, and "[a]s an offender, she has also been a victim."¹⁰⁸⁹

There are several aggravating factors, including Smith's past assault(s) upon her husband, offence seriousness, and her extensive, lengthy criminal record of other serious assaults. While Lilles J. does refer to Smith being an Aboriginal woman with "a most unfortunate childhood where she was exposed to violence"¹⁰⁹⁰ within mitigating factors, the judgment does not once directly mention *Gladue*, nor does it cite s. 718.2(e). This is insufficient to discharge the judicial duty in *Gladue*,¹⁰⁹¹ as affirmed by *Ipeelee*.¹⁰⁹²

Against the backdrop of the violence in Smith's life, the author of her psychological assessment determines that she presents a "substantial level of risk to the public that cannot be moderated without significant treatment interventions that should be delivered in a secure setting in my opinion."¹⁰⁹³ The doctor evaluates her as presenting a high risk to reoffend (and violently), with a low projected level of manageability in the community, and extensive treatment needs for

¹⁰⁸⁸ *Ibid.* at para. 14.

¹⁰⁸⁹ *Ibid.* at para. 25.

¹⁰⁹⁰ *Ibid.*

¹⁰⁹¹ *Gladue*, *supra* note 15 at para. 82.

¹⁰⁹² *Ipeelee*, *supra* note 16 at para. 85.

¹⁰⁹³ *Smith*, *supra* note 1080 at para. 23.

addictions and the abuse she has experienced. The author of this report also “concludes that the mix of counseling and treatment programs available in the Yukon are insufficient to reduce her risk to her current husband or future partners to a level manageable in the community.”¹⁰⁹⁴ Lilles J. affirms this conclusion, stating “I agree. On the other hand, there are a variety of programs available in the federal system, including several which accommodate traditional aboriginal values and customs.”¹⁰⁹⁵ As Smith has been “[d]iagnosed with Anti-social and Borderline Personality Disorders,” the judge finds “she requires a lengthy period of intensive and structured treatment, which is not available in the Yukon or in the community, in order that her risk factors can be managed in the community.”¹⁰⁹⁶ Lilles J. reiterates that “[p]rotection of the public can best be achieved by ‘rehabilitation’, meaning intensive treatment in a structured setting. Such programs are only available in or through the Federal system.”¹⁰⁹⁷ After examining the options canvassed by the author of the psychological assessment, Lilles J. concurs with the recommendation for the program for violent women at Fraser Valley Institute,¹⁰⁹⁸ adding that while there may be additional suitable programs, they appear to be “very few in number.”¹⁰⁹⁹

This judgment is complex in terms of how it deals with treatment issues, as there is tension in the decision regarding rehabilitation. The author of her psychological assessment describes Smith’s “unresponsiveness to treatment,”¹¹⁰⁰ and in response to being “specifically asked” whether the programming Smith completed while awaiting sentencing was sufficient to reduce her assessed risk, the doctor “advised that they have not.”¹¹⁰¹ Similarly, Lilles J. comments that Smith’s prior sentences from previous offences (including long prison sentences,

¹⁰⁹⁴ *Ibid.* at para. 20.

¹⁰⁹⁵ *Ibid.* at para. 24.

¹⁰⁹⁶ *Ibid.* at para. 26.

¹⁰⁹⁷ *Ibid.* at para. 27.

¹⁰⁹⁸ *Ibid.* at para. 28.

¹⁰⁹⁹ *Ibid.* at para. 29.

¹¹⁰⁰ *Ibid.* at para. 19.

¹¹⁰¹ *Ibid.* at para. 21.

and community sanctions) “have not been effective in deterring her offending.”¹¹⁰² The judge considers this an aggravating factor. However, among mitigating factors, Lilles J. includes that Smith “has taken and successfully completed all the programming that was available to her during her detention”¹¹⁰³ (which included both remand at the Whitehorse Correctional Centre and time in the community at the Yukon Adult Residential Centre, where “she was essentially under house arrest”¹¹⁰⁴). The judge adds that Smith “is clearly motivated to deal with her issues,” although qualifies that with an underlined “at this time.”¹¹⁰⁵ Lilles J. lists the “numerous” counseling options that Smith “has taken advantage of” during both her imprisonment and community detention while awaiting sentencing:

[s]he has made contact with and received counseling from Alcohol and Drug Services, the Family Violence Prevention Unit, CAIRS, (a programme for residential school survivors) and a variety of support people in her home community of Carcross. She has been seeing Dr. Hutsul on a regular basis. Dr. Hutsul is a psychologist funded by the Carcross/Tagish First Nation. Mrs. Smith completed a three-week substance abuse program, the SAM program, while in detention. She completed a 15-hour Suicide Intervention Skills Program in October 2003. During the latter part of 2003, she was released on bail to complete a four-week Women’s Residential Treatment Program for alcohol and drug addictions. She has also contacted Hospice Yukon. Throughout this period, she has maintained contact with various religious organizations, from which she receives support.¹¹⁰⁶

Further, Lilles J. states that Smith’s “attendance and participation in all the programs were reported as excellent,”¹¹⁰⁷ and the doctor who performed her psychological assessment communicates that Smith’s level of engagement in these programs “indicate a high level of motivation which is a positive sign.”¹¹⁰⁸

¹¹⁰² *Ibid.* at para. 26.

¹¹⁰³ *Ibid.* at para. 25.

¹¹⁰⁴ *Ibid.* at para. 11.

¹¹⁰⁵ *Ibid.* at para. 25.

¹¹⁰⁶ *Ibid.* at para. 12.

¹¹⁰⁷ *Ibid.* at para. 13.

¹¹⁰⁸ *Ibid.* at para. 21.

Ultimately, Lilles J. decides that the need to protect the public, “and in particular, those individuals who may in the future enter into a relationship with her,”¹¹⁰⁹ supersedes other considerations. This concern is reasonably based in her history of assaultive behaviour against men, however it (like the doctor’s comments that Smith’s expectations of her abusive, unproductive, and addicted partners) also fails to recognize the context of those relationships. I again note that there is no *Gladue* analysis, apart from one offhand reference within mitigating factors recognizing that Smith is an Aboriginal woman, so it appears that the judge decided protection of the public is the “paramount principle in this sentencing”¹¹¹⁰ without properly balancing that against s. 718.2(e).

Nonetheless, it appears that Lilles J. largely decides Smith’s sentence should be a term of federal imprisonment so that Smith could receive treatment services. It is slightly unclear from the above list of programming that Smith completed during her presentence detention which programs she underwent during the period she spent in the correctional institution, and which she participated in while on release in the community. It does appear that while there was some programming that she made use of in the institution, there were other programs within the community too. For example, Lilles J. notes in the above list that Smith “was released on bail to complete a four-week Women’s Residential Treatment Program for alcohol and drug addictions.”¹¹¹¹ While there may have been other reasons motivating her judicial interim release, from this it does appear that Smith had to leave the correctional institution and return to the community to receive that specialized treatment programming. This, in tandem with the diligence, willingness, and success that Smith demonstrated in her presentence treatment, renders

¹¹⁰⁹ *Ibid.* at para. 27.

¹¹¹⁰ *Ibid.*

¹¹¹¹ *Ibid.* at para. 12.

it unclear why Lilles J. determines that only federal prison programs are intensive enough to suit her needs.

It would be instructive to know whether this reasoning would have been altered had the judge engaged in a proper, robust *Gladue* analysis, including its shift in focus to restorative alternatives to incarceration. Additionally, it is interesting that Lilles J. comments, as above, “[p]rotection of the public can best be achieved by “rehabilitation”, meaning intensive treatment in a structured setting,”¹¹¹² and locates that in the federal penitentiary. Here, the judge defines that “rehabilitation” means “intensive treatment” in prison, instead of defining rehabilitation in a more restorative-oriented way consistent with the duty and need to look to alternatives for Aboriginal offenders. While the issues are entangled within offence seriousness and Smith’s lengthy history of criminalization, these complications should not preclude a *Gladue* analysis (as I have referenced throughout, *Ipeelee* has clarified that the judicial duty remains in such cases). In sum, *Smith* represents a clear instance in which a judge orders federal incarceration specifically for treatment reasons, and holds out programming in prison as being necessary for the offender’s specialized needs.

Sometimes judges prioritize rehabilitation and find there are sufficient resources in the community to provide treatment services, such as in *R. v. Isaac*¹¹¹³ where the judge orders Michelle Isaac to a conditional sentence of sixteen months for defrauding the Ministry of Social Services over \$5000. In *Isaac*, Green J. makes efforts to fashion a sentence that responds to Isaac’s history of victimization. Green J. notes that she has “ties to Ochapowace First Nation.”¹¹¹⁴ The PSR outlines Isaac’s childhood, which Green J. describes as “shocking by any

¹¹¹² *Ibid.* at para. 27.

¹¹¹³ *R. v. Isaac*, 2009 SKPC 111. [*Isaac*]

¹¹¹⁴ *Ibid.* at para. XIII.

measure”¹¹¹⁵ and includes sexual abuse by her grandfather, abuse by her father, and foster care. Isaac became involved with “excessive substance abuse” and multiple relationships that produced seven children, all removed into foster care.¹¹¹⁶ While addicted to cocaine, Isaac has both sold drugs and attempted suicide by overdose. Ultimately, the judge finds that “[g]iven these unique circumstances, and the resources available for her supervision and treatment in the community”¹¹¹⁷ a conditional sentence is appropriate. Green J. is clear about how *Gladue* factors and Isaac’s history of victimization cumulatively bolster the need to prioritize the principle of rehabilitation:

I find the reality of her mental illness and her addiction to cocaine during the commission of this offence, the fact she was sexually abused for six years in foster care as a child, and the other *Gladue* factors listed above, to be compelling factors in her sentencing. While not in any way negating the principles of denunciation and deterrence, in my view these factors make clear the importance in this sentencing of the principles of rehabilitation and of seeking an alternative to incarceration that is reasonable in the circumstances, especially considering her circumstances as an Aboriginal offender. Taken together with her recent stability, addictions treatment and her ability to access mental health and other services in the community, I find a conditional sentence to be a reasonable alternative to sending her to the Pinegrove Correctional Centre.¹¹¹⁸

Thus, the judge uses the *Gladue* lens to discern that Isaac’s vulnerabilities and past victimization require a more restorative-oriented sentence. Perhaps it should be noted that Isaac’s offence was non-violent, as this may also have more readily allowed the judge to prioritize the principle of rehabilitation. I return to this case in the final section of this chapter where I discuss tension in the relationship between punishment and healing.

¹¹¹⁵ *Ibid.* at para. III.

¹¹¹⁶ *Ibid.* at para. IV.

¹¹¹⁷ *Ibid.* at para. XV.

¹¹¹⁸ *Ibid.* at para. XVII.

In *R. v. C.G.O.*,¹¹¹⁹ the judge uses the goal of healing to orient and structure a sentence that relies on community resources. In a judgment from First Nations Court, Bennett J. sentences C.O. to a conditional sentence order of two years less a day followed by a three-year probation order for the aggravated assault of a child and failure to provide the necessities of life that permanently affected the health of the child. C.O. bathed her sister's 3½ year old daughter in hot water that badly burned her skin. While her partner administered traditional first aid, he refused to take her to the hospital because he “did not trust doctors” and feared that their own children would be removed from their care.¹¹²⁰ After a few days, C.O. insisted they go to the hospital, where examining doctors also found marks on the child's body consistent with “inflicted trauma and severe neglect.”¹¹²¹ The child is now quadriplegic, with brain damage among other permanent afflictions, and is entirely dependent on a caretaker.

Bennett J. provides extensive details about C.O.'s personal history. C.O. is Cree, and grew up on a reserve afflicted with poverty, addictions, and abuse, among other “inter-generational impacts of the residential school system.”¹¹²² She experienced unrelenting abuse in her life, including long-term sexual abuse by her father and almost continual abuse by her partner, with whom she has several children. Their children have been in and out of state care “voluntarily and by removal” due to social workers' concerns about “parental neglect, insufficient health care and unhealthy living conditions as well as Ms. C.O.'s mental health.”¹¹²³ Her uncle, an elder, reported to the sentencing court that C.O. is isolated, having “been away from her family support and traditional life skills.”¹¹²⁴

¹¹¹⁹ *R. v. C.G.O.*, 2011 BCPC 145. [*C.G.O.*]

¹¹²⁰ *Ibid.* at para. 38.

¹¹²¹ *Ibid.* at para. 42.

¹¹²² *Ibid.* at para. 4.

¹¹²³ *Ibid.* at para. 23.

¹¹²⁴ *Ibid.* at para. 56.

The judge contemplates her *Gladue* factors, finding from the constellation of systemic factors that victimization has constrained her options, as C.O. “has had few realistic opportunities to change. In my view, the poverty, isolation and violence are precisely what brought Ms. C.O. to court.”¹¹²⁵ Bennett J. extends this understanding of the factors that contributed to her criminalization by contextualizing that while the offences are serious, “in my view, Ms. C.O.’s unique circumstances are inextricably interwoven with the offences.”¹¹²⁶ This demonstrates a clear judicial recognition of how the victimization-criminalization continuum has operated in C.O.’s life.

Rooting the understanding of her criminalization in this interplay of systemic factors allows for a solutions-based approach to sentencing wherein the judge states that restitution can only be approached through rehabilitation: “[i]n my view, ‘making it right’ in this case means two things: providing Ms. C.O. with aboriginal-based services and resources so that she can address her mental health issues: and, ensuring that she addresses her mental health issues in a meaningful way.”¹¹²⁷ The judge fashions a conditional sentence specifically to support C.O., with conditions “aimed at providing the necessary resources for her”¹¹²⁸ and a probationary term “aimed at providing resources for healing.”¹¹²⁹ As such, these sanctions are structured and represented as healing instruments. This orientation is consistent with the opinion C.O.’s uncle (who works in prisons in his capacity as an elder) expressed at the sentencing hearing: rehabilitation must occur at home because “rehabilitation does not and cannot happen in jail.”¹¹³⁰

Broadly, I support this formulation of imprisonment and its limits.

¹¹²⁵ *Ibid.* at para. 62.

¹¹²⁶ *Ibid.* at para. 65.

¹¹²⁷ *Ibid.* at para. 69.

¹¹²⁸ *Ibid.* at para. 74.

¹¹²⁹ *Ibid.* at para. 75.

¹¹³⁰ *Ibid.* at para. 56.

It must be remembered that this sentencing judgment issues from First Nations Court, as it seems that the sentencing paradigm is different in its explicit and sustained focus on rehabilitation from the outset: a “fit sentence” is referred to as “the healing plan.”¹¹³¹ Chris Andersen writes that “for Aboriginal communities interested in taking control of their own justice processes, ‘healing is justice,’ and ‘justice is healing.’”¹¹³² The significance of the sentencing paradigm has been elucidated by studies demonstrating that a determinative factor in sentencing practices is “penal philosophy,” or “the decision-making rules or strategies” judges use in sentencing (such as whether the primary orientation is guided by rehabilitation or deterrence).¹¹³³

The representation of imprisonment that emerges from *C.O.* is complicated. It seems that the judge shares the view of her uncle the elder that rehabilitation will not happen in prison, because the judge references his opinion and ultimately administers a rehabilitative-oriented community-based sentence, against the Crown’s submission that incarceration is required. At the same time, Bennett J. suggests that imprisonment would not deter C.O. because she “has been imprisoned for most of her life by these very same [systemic] factors” and imprisonment “in some respects, means an improvement in her quality of life.”¹¹³⁴ By portraying C.O. as imprisoned by *Gladue* factors, Bennett J. characterizes imprisonment as a potential respite – not expressly presented as a place of active healing, but at least “healing” in the sense of providing a reprieve from the abuse, poverty, and other challenges in her life. Nonetheless, by ordering a conditional sentence to promote healing, Bennett J. recognizes that straight incarceration would not be conducive to C.O.’s healing needs.

¹¹³¹ *Ibid.* at para. 66.

¹¹³² Andersen, *supra* note 5 at 309.

¹¹³³ Robert M. McFatter, “Sentencing Strategies and Justice: Effects of Punishment Philosophy on Sentencing Decisions” (1978) 36(12) *Journal of Personality and Social Psychology* 1490 at 1490.

¹¹³⁴ *C.G.O.*, *supra* note 1119 at para. 62.

4.4.2 The fraught relationship between punishment and healing

In the final section of this chapter, I turn more fully to the relationship between punishment and healing, suggesting that it is inherently fraught. First I consider some issues that arise in the conditional sentence ordered in *Isaac*, not to challenge it in a fundamental way but instead using it to raise some aspects of conditional sentences that may be difficult for criminalized Aboriginal women. This speaks to the issue of the tension between punishment and healing because conditional sentence orders are designed to be more restorative than prison sanctions, but if women receive conditional sentences that they are susceptible to breaching, this may still land them in prison. Then I move to incarceration, offering statistics about the recidivism of Aboriginal women to suggest that imprisonment is not a healing force in these women's lives. I discuss the lack of consistency between provincial and federal rehabilitative services, and point to where judges articulate this disparity in the cases I examined. I conclude by mentioning some features of imprisonment that render it immediately antithetical to healing for women, and briefly comment on reintegration post-release – or, as I explain, “reintegration” by returning criminalized Aboriginal women to the margins.

4.5 Tension between punishment and healing

4.5.1 Punitive aspects of the restorative-oriented conditional sentence order

I discuss *Isaac* above, and I return to this judgment here to introduce the issue of the tension between punishment and rehabilitation by identifying some of the less visible ways that this tension may play out in conditional sentence orders. I want to emphasize that ultimately the decision in *Isaac* is appropriately restorative-oriented, and I do not intend to obscure this message with my discussion in this section. I aim to merely highlight some of these problems, without undercutting the sensitivity of the overall judgment in *Isaac*. I only use this decision as a

vehicle, because the issues it introduces (duration and specific conditions) are representative of those in many other judgments ordering conditional sentences. As I explain above, I believe conditional sentence orders are an important sentencing tool, but I also want to offer some nuance because they still present challenges for criminalized Aboriginal women.

In *Isaac*, in addition to various “strict and restrictive conditions,” Green J. explains that the sentence quantum “will be longer than the term of imprisonment she would have otherwise received if she had been sentenced to the Correctional Centre.”¹¹³⁵ Implementing a longer conditional sentence than the imprisonment alternative seems misaligned with the assertion by Stuart J. in *Elias* that “[t]o be successful, conditional sentences must focus on healing, not punishment.”¹¹³⁶ It could be argued that longer sentences are consistent with greater involvement in whatever rehabilitative features are attached (and sometimes this is the case, particularly where the alternative is straight incarceration). Further, it is consistent with the direction in *Proulx* that sentencing judges may decide to order longer conditional sentences than the prison term may otherwise have been, to ensure proportionality to the gravity of the offence and to reflect the responsibility of the offender “since a conditional sentence will generally be more lenient than a jail term of equivalent duration.”¹¹³⁷ Equally, however, often even a “healing” approach to a longer, more restorative-oriented conditional sentence can slide into greater punitiveness.

I mention above when discussing *Kendi* that research has shown Aboriginal women breach their conditions almost three times the rate that non-Aboriginal women do.¹¹³⁸ In conjunction with this higher breach rate, because longer conditional sentences mean more time

¹¹³⁵ *Isaac*, *supra* note 1113 at para. XVII.

¹¹³⁶ *R. v. Elias*, 2001 YKTC 501 at para. 101. [*Elias*, 2001]

¹¹³⁷ *Proulx*, *supra* note 84 at para. 54.

¹¹³⁸ Juristat: Johnson, *Outcomes of Probation and Conditional Sentence Supervision*, *supra* note 933 at 9.

during which breaches are possible, longer conditional sentences may be particularly difficult for Aboriginal women. This is significant in terms of the goals of *Gladue* because the presumptive penalty (barring reasonable excuse) for breaching a conditional sentence is for the offender to serve the remainder of her sentence in prison.¹¹³⁹ Kent Roach writes “[h]ealing conditions when administered through the coercive apparatus of the state may start out with the best of intentions but result in imprisonment.”¹¹⁴⁰ Some judges demonstrate a great deal of sensitivity to these issues. In *Elias*, Stuart J. agrees with the defence submission that the probation order

should be as minimally intrusive as possible and should be designed to make it as clear as possible so that Ms. Elias, who does not have a good track record of following any kind of court order, can do the best she can to follow this one. I do not wish to set her up for further failures or breaches, recognizing the limitations that are clearly indicated in the pre-sentence report. This is designed for one primary purpose, which is the rehabilitation of Ms. Elias, which will, ultimately, best protect society and anyone close to Ms. Elias.¹¹⁴¹

Returning to *Isaac*, Green J. attaches special conditions that relate to treatment needs, including that Isaac must participate in a substance abuse program and attend counseling for “personal, psychological and psychiatric” issues as arranged by her supervisor.¹¹⁴² Such conditions are common, as “[c]onditional sentences have also been widely used to help offenders begin to tackle issues, like addictions, underlying many crimes.”¹¹⁴³ Green J. also imposes a condition prohibiting Isaac from consuming any alcohol or other substances. Abstinence conditions are frequently imposed for offenders with substance abuse problems.¹¹⁴⁴ Nonetheless, Sarah Turnbull and Kelly Hannah-Moffat have observed, “[d]espite the widespread use of conditions in various phases of the criminal justice system, their purposes and the implications

¹¹³⁹ *Proulx*, *supra* note 84 at para. 39.

¹¹⁴⁰ Roach, *supra* note 129 at 266.

¹¹⁴¹ *Elias*, 2009, *supra* note 855 at para. 35.

¹¹⁴² *Isaac*, *supra* note 1113 at para. XX.

¹¹⁴³ Shawn Bayes, “Harper’s Crime Laws” *Canadian Dimension* 41:2 (March 2007) 22 at 23. [Bayes]

¹¹⁴⁴ Juristat: Johnson, *Outcomes of Probation and Conditional Sentence Supervision*, *supra* note 933 at 1, 8.

associated with their use remain under-theorized.”¹¹⁴⁵ Kent Roach describes that abstinence conditions in a conditional sentence order may be implemented for the offender’s “own good,” but render addicted offenders immediately vulnerable to breaching, and “the catch is that any breach may well result in imprisonment for the duration of a sentence that may have been extended for rehabilitative reasons.”¹¹⁴⁶ Some judges have recognized this vulnerability in addicted offenders. For example, in the probation variation judgment *R. v. Coombs*,¹¹⁴⁷ Veit J. explains

Ms. Coombs’ re-integration into society will be facilitated if she remains in the community while acquiring the means of coping with her drug addiction through counselling and treatment and also the means of understanding her self-destructive behaviour through psychological and psychiatric counselling and treatment. Such provisions are already contained in her probation order and Ms. Coombs consents to take such counselling and treatment. Imposing an absolute prohibition on some addicts, including alcoholics, may only set them up for failure and ensure that they will be jailed. Ms. Coombs became an addict during her formative years; her medical and emotional rehabilitation is likely to include slips. Her re-integration into society will not be assisted by being jailed for every slip along the difficult road ahead.¹¹⁴⁸

I alluded to these problems in my discussion of *Kendi* earlier in this chapter. Here, Veit J. demonstrates one way for judges to administer conditions that promote treatment in the community, but without amplifying the punitive features of the sentence in a way that could result in incarceration.

The problem of offenders, and particularly those struggling with substance abuse, becoming vulnerable to breaching conditions of their community sentences is a challenging issue for judges to contend with. In the face of these complexities, Green J. strives to impose a restorative-oriented sentence that is consistent with *Gladue*, recognizing and responding to

¹¹⁴⁵ Turnbull & Hannah-Moffat, “Under these Conditions”, *supra* note 906 at 532.

¹¹⁴⁶ Roach, *supra* note 129 at 266.

¹¹⁴⁷ *R. v. Coombs*, 2004 ABQB 621. [*Coombs*]

¹¹⁴⁸ *Ibid.* at para. 8.

Isaac's experiences of victimization. The conditional sentence the judge orders for Isaac remains much better aligned with the goals of *Gladue* than the sentence of incarceration that would have otherwise been imposed. I use this case as an opportunity to discuss how conditional sentences can be challenging for some criminalized Aboriginal women to comply with, because the stakes are high given that the presumptive result of a breach is for offenders to serve the remainder of their sentences in prison (the precise penalty conditional sentences are designed to avoid). For this reason, even elements of conditional sentence orders may engage the tension between punishment and rehabilitation. For more pronounced iterations of this tension, I turn to sentences of incarceration.

4.5.2 The revolving door of prison

I begin with statistics about recidivism to provide some information about the (in)effectiveness of imprisonment, in terms of its revolving door. Reporting the results of a five-year study (1999-2004) of the reinvolvement of Aboriginal and non-Aboriginal individuals in the Saskatchewan provincial correctional system, Sara Johnson reports significantly different statistics for Aboriginal and non-Aboriginal people's rates of reinvolvement. For this study, reinvolvement means returning to correctional services after sentence completion, and relates exclusively to Saskatchewan provincial correctional services (including incarceration, conditional sentences, and probation). The disparities between the reinvolvement of Aboriginal and non-Aboriginal individuals are stark: after release, 57% of Aboriginal peoples became reinvolvement in the system, compared with 28% of non-Aboriginal people.¹¹⁴⁹

¹¹⁴⁹ Juristat: Statistics Canada, *Returning to Correctional Services after Release: A Profile of Aboriginal and Non-Aboriginal Adults Involved in Saskatchewan Corrections from 1999/00 to 2003/04* by S. Johnson (Ottawa: Minister of Industry, 2005), online: Statistics Canada <http://www5.statcan.gc.ca/subject-sujet/result-resultat.action?pid=2693&id=2149&lang=eng&type=STUDIES&pageNum=1&more=0> at 11. [Juristat: S. Johnson, *Returning to Correctional Services after Release*]

Aboriginal individuals were particularly vulnerable within the first year following their release, with 29% returning to the correctional system within that period, compared with 13% for non-Aboriginal individuals during that period.¹¹⁵⁰ Johnson attributes this vulnerability to the complex and higher needs of Aboriginal individuals post-release.¹¹⁵¹ Johnson reports that people sentenced to the community (such as serving conditional sentences or probationary orders) demonstrated the lowest likelihood for reinvolvement in correctional services.¹¹⁵² For Aboriginal individuals, of those who were sentenced to the community, 43% returned to correctional services post-release, which is substantially less than the 65% figure for Aboriginal individuals who became reinvolved after serving custodial terms.¹¹⁵³ For non-Aboriginal individuals, 20% became reinvolved in correctional services after release from community sentences versus the 33% who returned to corrections after completing a sentence of incarceration.¹¹⁵⁴ Johnson suggests “[i]t is possible that community supervision contributes to more successful treatment and thus reintegration, and that those offenders released following a period of community supervision are less likely to become re-involved in the system,”¹¹⁵⁵ and calls for further research to substantiate this theory.

This report does not disaggregate its results into statistics about Aboriginal women specifically.¹¹⁵⁶ However, Johnson does denote that the study comprises data for the over 2700 Aboriginal women and 900 non-Aboriginal women who were involved in Saskatchewan

¹¹⁵⁰ *Ibid.*

¹¹⁵¹ *Ibid.*

¹¹⁵² *Ibid.* at 12.

¹¹⁵³ *Ibid.*

¹¹⁵⁴ *Ibid.*

¹¹⁵⁵ *Ibid.* at 13.

¹¹⁵⁶ René Gobeil and Meredith Robeson Barrett explain that “[a]s women represent a small proportion of incarcerated offenders, they tend to receive less research attention relative to male offenders. This general trend applies to recidivism research as well. Indeed, several investigators have reported mainly aggregated recidivism rates (i.e., across genders) and have presented gender-specific data only in small, relatively superficial sections or in appendices.” [Renée Gobeil & Meredith Robeson Barrett, “Research Report: Rates of Recidivism for Women Offenders” (September 2007), online: Research Branch, Correctional Service of Canada <http://www.csc-scc.gc.ca/text/rsrch/reports/r192/r192-eng.shtml>. at 1]. [Gobeil & Robeson Barrett]

provincial corrections for that period, which amounts to almost double the proportion of Aboriginal women represented in the results than non-Aboriginal women (19% of the total results signifies information about Aboriginal women, versus 10% for non-Aboriginal women).¹¹⁵⁷ For a broader sense of the overrepresentation of Aboriginal women in Saskatchewan provincial corrections, Tina Hotton Mahony reports for Statistics Canada that in 2008/2009 “Aboriginal women comprised more than 85% of admissions of women to adult provincial sentenced custody in Saskatchewan and Manitoba and just over half in Alberta.”¹¹⁵⁸

As these statistics only apply to Saskatchewan correctional services, results from other provinces and territories may differ, to varying degrees. But using the above data in an illustrative manner, it is apparent that Aboriginal women are overrepresented, significantly more likely to return to the correctional system post-release, and while they become reinvolved at lower rates following community sentences than after periods of incarceration, their rates of reinvolverment still far exceed those of non-Aboriginal people. I have provided information for these provincial statistics because I have tried to focus on provincial level sentences where possible in this thesis, to foreground conditional sentences. As I discuss in the introduction, I have made this choice because of the importance of conditional sentences to respond to the goals of *Gladue* to reduce overincarceration. Johnson’s findings that Aboriginal peoples demonstrated lesser rates of reinvolverment following community sentences than after periods of incarceration supports my decision to attempt to foreground provincial sentences.

Despite my intended focus on provincial level sentences, federal statistics remain relevant because some cases identified through my methodological approach do involve federal sentences.

¹¹⁵⁷ Juristat: S. Johnson, *Returning to Correctional Services after Release*, *supra* note 1149 at 8.

¹¹⁵⁸ Statistics Canada, *Women in Canada: A Gender-Based Statistical Report: Women and the Criminal Justice System* by T. Hotton Mahony (Ottawa: Minister of Industry, 2011), online: Statistics Canada <http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11416-eng.htm> at 36.

In their report about the recidivism of federally sentenced women, Renée Gobeil and Meredith Robeson Barrett have found that Aboriginal women are significantly more likely to have their conditional release revoked and to be reconvicted than non-Aboriginal women.¹¹⁵⁹ Gobeil and Robeson Barrett studied the recidivism rates (where recidivism means any revocation of conditional release or any new conviction within two years) of “all federally sentenced adult women released on day parole, full parole, statutory release, or sentence expiration/warrant expiry during the study period,”¹¹⁶⁰ 2002-2004. Gobeil and Robeson Barrett calculated these rates for each year within the two-year period separately. For the 2002-2003 period, Gobeil and Robeson Barrett report that 50% of Aboriginal women returned to the system after a revocation of their conditional release, compared with 33.1% of non-Aboriginal women.¹¹⁶¹ This is similar to the 2003-2004 data, which shows that 47.3% of Aboriginal women had a revocation of their conditional release, and 34.5% of non-Aboriginal women.¹¹⁶² For 2002-2003, 43.9% of Aboriginal women received a reconviction during that period, compared with 23.1% of non-Aboriginal women.¹¹⁶³ The 2003-2004 results show that 38.5% of Aboriginal women received a reconviction, compared with 25.1% of non-Aboriginal women.¹¹⁶⁴ Taken as a whole and echoing the provincial data from Saskatchewan, the federal figures demonstrate that relative to non-Aboriginal women, Aboriginal women are more likely to return to the correctional system post-release.

Mandy Wesley writes in a recent report about the marginalization of Aboriginal women in the federal correctional system that to reduce recidivism and to help Aboriginal women

¹¹⁵⁹ Gobeil & Robeson Barrett, *supra* note 1156 at 11.

¹¹⁶⁰ *Ibid.* at 6-7.

¹¹⁶¹ *Ibid.* at 11.

¹¹⁶² *Ibid.*

¹¹⁶³ *Ibid.*

¹¹⁶⁴ *Ibid.*

reintegrate more successfully into the community after their release, they require greater resources and support.¹¹⁶⁵ Laura Shantz, Jennifer M. Kilty, and Sylvie Frigon note that “[b]ecause women leaving prison lack basic resources, they are often forced to rebuild their lives on the margins of society.”¹¹⁶⁶ As the above statistics about correctional reinvolvement suggest, Aboriginal women pass through the revolving door of prisons too often. The reasons for this phenomenon are complex (and rooted in colonization), but gesture to the inherent tension in the conception of prison as a place of both punishment and healing.

4.5.3 Prison treatment services

Prison existence is defined by control and exclusion, which permeates the structure and delivery of programming. Women in prison have reported finding the inherently punitive prison environment antithetical to the implementation and effectiveness of rehabilitative and therapeutic programming.¹¹⁶⁷ This discordance may be particularly felt where the role of prison psychologists is predominantly to assess prisoners’ risk level (both regarding recidivism and institutional security) and to make recommendations for security classification, but also to provide counseling services.¹¹⁶⁸ Some writers and advocates have flagged this dual securitization/therapeutic role for its inappropriateness.¹¹⁶⁹ These two roles establish a conflict of interest for the psychologist, because “[w]hen a psychologist is performing risk assessment, or is

¹¹⁶⁵ Aboriginal Corrections Policy Unit, Public Safety Canada, *Marginalized: The Aboriginal Women’s Experience in Federal Corrections* by M. Wesley (Ottawa: Public Safety Canada, 2012), online: Public Safety Canada <http://www.publicsafety.gc.ca/res/cor/apc/apc-33-eng.aspx> at 20-1. [Wesley, *Marginalized Report*]

¹¹⁶⁶ Laura Shantz, Jennifer M. Kilty & Sylvie Frigon, “Echoes of Imprisonment: Women’s Experiences of ‘Successful (Re)integration’” (2009) 24(1) *Canadian Journal of Law & Society* 85 at 97. [Shantz, Kilty & Frigon]

¹¹⁶⁷ Pollack, Pollack, “‘You Can’t Have it Both Ways’”, *supra* note 958 at 121.

¹¹⁶⁸ Jennifer M. Kilty, “Under the Barred Umbrella: Is there Room for a Women-Centered Self-Injury Policy in Canadian Corrections?” (2006) 5(1) *Criminology & Public Policy* 161 at 176. [Kilty, “Under the Barred Umbrella”] See also Bouchard, *supra* note 948 at S41.

¹¹⁶⁹ See e.g. Kilty, “‘Under the Barred Umbrella’”, *supra* note 1168 at 172; see also Interview of Kim Pate by Hana Gartner (26 November 2010) on CBC’s *The Fifth Estate*, “Interview: Kim Pate”, online: http://www.cbc.ca/video/#/Shows/the_fifth_estate/1278707885/ID=1668371268.

involved in rehabilitative programming addressing risk, the government is typically the client.”¹¹⁷⁰ This form of conflict is not just embodied in institutional psychologists, but also applies to correctional officers. Arbour J. notes in her report that “[t]he inherent conflict between the role of correctional officers as security guards and their roles as supporters and counselors is sharpened”¹¹⁷¹ for women prisoners who have histories of victimization, quoting a prisoner who told the Commission of Inquiry into Certain Events at the Prison for Women in Kingston:

“[t]he CX staff, in particular, you hear that term: Well, he’s a nice guy. Well, you’ve got the nice guy/bad guy syndrome because he’s a nice guy when everything is going okay, but all of a sudden, if something happens in the institution, and there’s a male that’s needed, he becomes the bad guy, he becomes the aggressor, he becomes the intimidator, he becomes the force, he becomes the muscle.”¹¹⁷²

In addition, Wesley notes “the lack of gender appropriate programming in an Aboriginal cultural context”¹¹⁷³ at the federal level, which complicates correctional rehabilitative efforts for Aboriginal women and contributes to their already-challenging prison experience. Wesley also highlights that the general type of correctional programming offered at the federal level may not be effective because of its traditional concentration on substance abuse and violence prevention strategies instead of other aspects such as employment skills.¹¹⁷⁴ All of these barriers to effective programming are compounded by the “diversity [across] the health care challenges experienced by the correctional population and the marginalized status of offenders in general.”¹¹⁷⁵

There may be greater provision for programming options at the federal level in part because “[r]esearch has suggested that federal inmates have substantially higher levels of needs

¹¹⁷⁰ Andrew M. Haag, “Ethical Dilemmas Faced by Correctional Psychologists in Canada” (2006) 33(1) *Criminal Justice & Behavior* 93 at 96.

¹¹⁷¹ Arbour Inquiry Report, *supra* note 70 at 212.

¹¹⁷² *Ibid.*

¹¹⁷³ Wesley, Marginalized Report, *supra* note 1165 at 41.

¹¹⁷⁴ *Ibid.* at 18.

¹¹⁷⁵ Peternelj-Taylor, *supra* note 313 at 350.

and therefore, may require greater attention and programming,¹¹⁷⁶ and also because it is simply easier to offer consistency across “policies, procedures, practices, and programming” given “a single governing body.”¹¹⁷⁷ Provincially, there is some provision for correctional programming. For example, British Columbia Corrections cites on its website that its programming “help[s] offenders understand how they can change their behaviour,” with programs “designed to promote long-term changes in thinking, skills and lifestyles that are known to contribute to criminal behaviour.”¹¹⁷⁸ However, Betty Krawczyk and Phyllis Iverson (respectively a former prisoner and a member active in a prisoner-support group) have commented that there is a paucity of programming to which provincially-sentenced women in British Columbia have access.¹¹⁷⁹ Krawczyk comments that “[a]ny kind of rehabilitation is not taken seriously by this government for the women in the provincial prisons.”¹¹⁸⁰ This problem can be extended across Canadian provinces, where “provincial jails are infamous for their lack of programming and support, they tend to function primarily as warehouses”¹¹⁸¹ and federal prisons “appear to be better options”¹¹⁸² by contrast. As provincial sentences are necessarily for less than two years, rehabilitative prison services are often unavailable at the provincial level; where services are available their effectivity may be hampered as professionals have less time to administer their services.¹¹⁸³

¹¹⁷⁶ Statistics Canada, Gannon *et al*, *Criminal Justice Indicators: 2005*, *supra* note 310 at 33.

¹¹⁷⁷ Bernier, *supra* note 232.

¹¹⁷⁸ BC Corrections, “Correctional Facilities in British Columbia: Core Programs Overview”, online: Corrections, Government of British Columbia, Ministry of Justice www.pssg.gov.bc.ca/corrections/in-bc/details/overview.htm.

¹¹⁷⁹ Marni Norwich, “Women Behind Bars” *The Straight* (2 November 2006), online: Straight <http://www.straight.com/article-46501/women-behind-bars>.

¹¹⁸⁰ *Ibid.*

¹¹⁸¹ Pollack, ““You Can’t Have it Both Ways””, *supra* note 958 at 118.

¹¹⁸² *Ibid.*

¹¹⁸³ Elaine Player, “The Reduction of Women’s Imprisonment in England and Wales: Will the Reform of Short Prison Sentences Help?” (2005) 7(4) *Punishment & Society* 419 at 428.

In *R. v. Good*,¹¹⁸⁴ Faulkner J. draws a distinction between provincial and federal imprisonment, ultimately representing federal prison as a place of treatment (in contradistinction to provincial) and highlighting its programming options. The judge sentences Helen Good to three years imprisonment followed by supervision per a long-term offender designation for assault causing bodily harm and uttering death threats to her husband. I discuss this decision in Chapter 3, with reference to the judicial recognition that victimization has constrained her choices, but without contextualizing this victimization within a *Gladue* analysis. One of her several psychological and psychiatric assessments reports that Helen Good had already “undergone extensive and repeated counselling and therapy to no obvious effect.”¹¹⁸⁵ The judge agrees that these sessions have “been ineffective at best and, more likely, counterproductive. It has allowed Helen to see herself only as a victim and to blame her violence on her own abuse.”¹¹⁸⁶ I mention in Chapter 3 that Faulkner J. comments that Good “continues to seek refuge in her own victimization as a justification”¹¹⁸⁷ for her offending.

When considering whether to designate Good a long-term offender and with regard to constraining Good’s violence, Faulkner J. lauds a “particularly intensive form” of Dialectic Behaviour Therapy (DBT) Program, which is only available to women serving federal terms.¹¹⁸⁸ The judge dismisses a related DBT program available at the territorial level at the Whitehorse Correctional Centre, explaining “the availability of appropriate treatment is a powerful argument in favour of a federal sentence.”¹¹⁸⁹ While Good has participated in treatment and counseling at the Whitehorse Correctional Centre while in remand, Faulkner J. accedes to the Crown argument

¹¹⁸⁴ *Good*, *supra* note 602.

¹¹⁸⁵ *Ibid.* at para. 17.

¹¹⁸⁶ *Ibid.* at para. 23.

¹¹⁸⁷ *Ibid.* at para. 34.

¹¹⁸⁸ *Ibid.* at para. 38.

¹¹⁸⁹ *Ibid.*

that she “has always participated in treatment while incarcerated but always repeats the pattern of offending once released.”¹¹⁹⁰ Against this backdrop, and also considering public safety, the judge decides “[i]n my view, it is time to try a different approach. That approach requires a penitentiary sentence.”¹¹⁹¹

As Good has undergone significant periods of treatment while incarcerated in the past without a subsequent change in behaviour, a different type of program in a different context of incarceration does not appear to offer much of a “different approach” to her rehabilitation. It does, however, signify a transition in how healing through imprisonment is represented within the judgment. That is, with respect to Good’s former periods of incarceration during which she underwent treatment and then continued to offend upon release, the judge conveys a construction of prison that suggests it is either ineffective or counterproductive (at least for Good) in terms of any healing capacities. However, by stating “it is time to try a different approach”¹¹⁹² and identifying that this different approach will be found in the federal correctional system, Faulkner J. suggests another representation of the experience of imprisonment, wherein healing (perhaps generally, but at least for Good) is possible.

Judicial awareness of the disparity between federal and provincial programming options emerges in a number of other cases I have considered and discussed above, including *R. v. D.L.W.*,¹¹⁹³ *R. v. Pelletier*,¹¹⁹⁴ and *R. v. Smith*.¹¹⁹⁵ Even in the sensitive decision *R. v. Connors*¹¹⁹⁶ where the judge grapples with the 2007 amendments to the conditional sentencing regime and concludes that the changes preclude that otherwise appropriate sentencing option, in the end the

¹¹⁹⁰ *Ibid.* at para. 39.

¹¹⁹¹ *Ibid.* at para. 40.

¹¹⁹² *Ibid.*

¹¹⁹³ *D.L.W.*, *supra* note 991.

¹¹⁹⁴ *Pelletier*, *supra* note 1023.

¹¹⁹⁵ *Smith*, *supra* note 1080.

¹¹⁹⁶ *Connors*, *supra* note 224.

judge decides “a two year sentence in a federal penitentiary, as Crown is seeking, would not only give appropriate recognition to denunciation and deterrence, but also suit the needs of the offender better than a lengthy term in a provincial jail.”¹¹⁹⁷ Ross J. does not elaborate on the substance of these needs, and the reason(s) why the judge considers a federal penitentiary better suited to Shayla Connors’ needs are not specified, but it is likely this refers to the lack of programming in provincial institutions.

While provincial correctional institutions are widely known to lack programming services, there were instances in the cases I examined that provided a slightly different picture. For example, in *Woods*, discussed above and in Chapter 3, an almost inverse representation of imprisonment emerges than does in *Redhead*, in which the experience of incarceration seems to have triggered her institutional violence instead of being rehabilitative. Whelan J. sentences Candace Woods to a conditional sentence of two years less a day, concluding that the circumstances of her offence (robbery) did not necessitate incarceration.¹¹⁹⁸ A community sentence is additionally appropriate because of her family commitments: when she was released on bail under strict conditions, Whelan J. observes that “[b]ecause she has been confined to her residence much of the time, she has developed a close bond with her son and she is the primary caregiver.”¹¹⁹⁹ In terms of her experience of (presentencing) imprisonment, it seems that Woods made some progress while in custody on remand. Woods’ mother conveys to the judge that remand was “an ‘eye opener’”¹²⁰⁰ for Woods, “who is motivated to avoid drugs and criminal activity so as not to jeopardize her being able to care for her infant son.”¹²⁰¹ Whelan J. reports that Woods’ addictions motivated her offending, but that while in remand, Woods completed the

¹¹⁹⁷ *Ibid.* at para. 25.

¹¹⁹⁸ *Woods*, *supra* note 502 at para. 47.

¹¹⁹⁹ *Ibid.* at para. 14.

¹²⁰⁰ *Ibid.* at para. 15.

¹²⁰¹ *Ibid.*

Women's Substance Abuse Program and remained in the Methadone Program, maintaining her sobriety, after her release.¹²⁰²

Despite some apparent positives emergent from Woods' time in presentence custody, first, Woods' experience of remand was relatively brief (two months), so it may not be representative of the damaging effects of the experience of imprisonment for longer periods. Second, this seemingly positive experience of incarceration appears to be an anomaly in the cases I studied. I merely present it as a counterbalance to the idea that imprisonment (and at in provincial institutions in particular) is always and necessarily detrimental. However, it should be underscored that Woods' experience does not appear to be representative – quite the opposite. Additionally, if Aboriginal women like Woods *do* receive some benefit from their time in remand, this benefit has the potential to be eroded during sentence determinations: Whelan J. writes that “[t]he availability of programming is one factor taken into account when determining the credit to be given for remand.”¹²⁰³ Whelan J. nonetheless decides to credit her for her remand time at a ratio of two to one. It should be noted that recently the government passed a bill that constrains judicial discretion regarding sentence reduction by restricting the ratios that judges can use to credit offenders with remand custody.¹²⁰⁴

All of these issues are complex, particularly for Aboriginal women offenders on the borderline of provincial and federal time for whom judges have eliminated conditional sentences – if judges decide incarceration is necessary for an Aboriginal woman, it seems to make intuitive

¹²⁰² *Ibid.* at para. 16. It does seem that Woods was highly motivated, as after her release on an undertaking she reestablished positive relationships with family members and distanced herself from people stuck in substance abuse and criminality [at para. 15].

¹²⁰³ *Ibid.* at para. 50.

¹²⁰⁴ The “Truth in Sentencing Act,” which entered into force on February 22, 2010, stipulates that judges can only credit remand time at a ratio of one to one, except where “the circumstances justify it,” permitting credit for one and one half days for each day spent in remand. See *Canada Bill C-25, An Act to amend the Criminal Code (Limiting Credit for Time Spent in Pre-Sentencing Custody), (The Truth in Sentencing Act)*, 2nd Sess., 40th Parl., 2009, online: Parliament of Canada <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=4172410&File=24#1>.

sense that “while she is there anyway,” she be placed where (federally or provincially) she is most likely to receive rehabilitative services. It becomes more problematic where, as in *Pelletier*, it appears that prison sentences longer in duration are being considered specifically to prolong involvement in prison rehabilitative services. Such instances suggest that prison is being promoted as a rehabilitative sanction, whereas much evidence demonstrates that the experience of imprisonment (including its isolation, coerciveness, oppressiveness, and bleakness) causes people’s mental health to worsen.

4.4 Concluding thoughts: Imprison with great caution

Women’s victimization(s) impact how they experience these features of imprisonment, which emphasizes the importance of thinking about how victimization is understood and incorporated into sentencing. The stresses of incarceration often retrigger post-traumatic stress disorder¹²⁰⁵ or other mental health problems arising from past violence, often because the powerlessness, vulnerability, and fundamentally unequal power dynamics characterizing women’s prison lives replicate patterns of abuse they have experienced.¹²⁰⁶ The reactivation of past experiences of victimization has prompted many incarcerated women to engage in self-injurious behaviour, become (sometimes suicidally) depressed, and to suffer further detrimental mental health effects.¹²⁰⁷ In another iteration of the problem of individualizing structural factors, these reactions may be formulated as pathological by correctional systems instead of being

¹²⁰⁵ Michele J. Eliason, Janette Y. Taylor & Rachel Williams, “Physical Health of Women in Prison; Relationship to Oppression” (2004) 10(2) *Journal of Correctional Health Care* 175 at 183.

¹²⁰⁶ Dirks, *supra* note 294 at 106.

¹²⁰⁷ Pollack, “Taming the Shrew”, *supra* note 909 at 76. See generally for an interesting discussion of how such behaviours should be seen as coping mechanisms learned through past traumatic experiences but are instead formulated as pathological by the correctional system. For a further reflection on how the pathologization of self-harming behaviour is often met with increased punitive measures such as institutional charges, see Kilty, “Under the Barred Umbrella”, *supra* note 1168.

understood as coping mechanisms derived from past traumatic experiences.¹²⁰⁸ This understanding sometimes results in increased punitive measures such as institutional charges or intensified isolation through segregation.¹²⁰⁹ Simply being severed from society, their children, and loved ones/support networks often causes the erosion of women's self-conception and mental health.¹²¹⁰ These painful processes underscore how imprisonment is often incompatible with any kind of healing process for Aboriginal women because it often aggravates preexisting pain and engenders additional pain. As such, judges must take great care and caution before concluding that it is the best sentencing option.

Additional research finds that women have difficulty reintegrating into the community after serving carceral sentences because of the way the experience of imprisonment indelibly marks their lives. Laura Shantz, Jennifer M. Kilty, and Sylvie Frigon are careful to identify that “reintegration” itself is a problematic concept because structural inequalities that contribute to women's imprisonment also signify that “women who are subject to imprisonment are never fully *of* the community.”¹²¹¹ I understand this to mean that criminalized women who land in prison are often already so marginalized that they were never fully integrated into the functioning core of the community to begin with, so that post-release, when they are being “reintegrated,” they are really just being thrust back to those same margins. Women adjusting from living within the (oppressive) structure of imprisonment may feel anxious, stigmatized, and further marginalized, often returning to the isolation of poverty and having to renavigate their lives with inadequate resources in the community.¹²¹²

¹²⁰⁸ Pollack, ““Taming the Shrew””, *supra* note 909 at 76.

¹²⁰⁹ See e.g. Sapers, “A Preventable Death”, *supra* note 859 starting at para. 9.

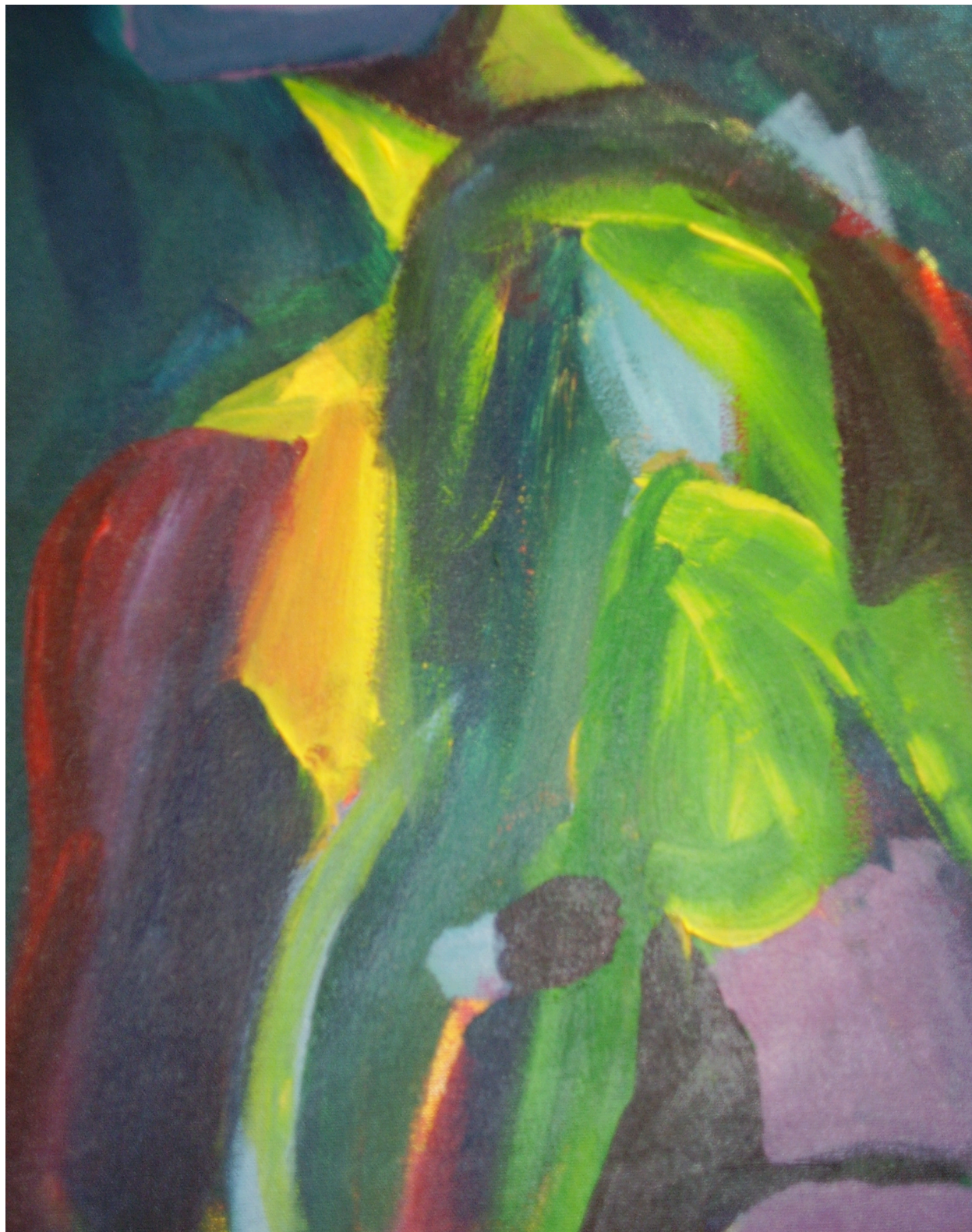
¹²¹⁰ Barbara H. Zaitzow, “Pastel Fascism: Reflections of Social Control Techniques used with Women in Prison” (2004) 32(3/4) *Women's Studies Quarterly* 33 at 40.

¹²¹¹ Shantz, Kilty & Frigon, *supra* note 1166 at 87.

¹²¹² *Ibid.* at 97-8.

In these and related ways, prison should not be regarded as a place of healing – quite the opposite. It has been widely documented that prison amplifies and foments pain and struggles instead of offering a salve. Additionally, Michael Jackson observes that what many “official reports suggest is that the experience of imprisonment, as a response to crime, is itself criminogenic: it actually produces and reproduces the very behaviour it seeks to control.”¹²¹³ By exacerbating criminalized Aboriginal women’s struggles, judges should not understand incarceration as a place of healing, and should exercise great caution when considering appropriate sanctions.

¹²¹³ Jackson, *Justice Behind the Walls*, *supra* note 275 at 18.

Figure 5**“...Not Separate” (acrylic on canvas)**

(5) Conclusion

5.1 Listening to the victimization histories of criminalized Aboriginal women, as heard and told by sentencing judges

In the introduction to this thesis, I related that program coordinator for Kindred House Shawna Hohendorff had told a Parliamentary subcommittee on sex work that her clients (of whom about 80% were Aboriginal women) felt systemically unheard. Hohendorff told the subcommittee that her clients “don’t feel listened to,”¹²¹⁴ feeling that bureaucracies are “not open” to “their particular life stories.”¹²¹⁵ As I describe in Chapter 1, Hohendorff explained to the subcommittee that she “[does not] know all of the answers,” and that she “think[s] it’s a complex set of problems,” but that above all, what “we need to do is to listen, so that it is holistic, and so that they are part of our community, not separate.”¹²¹⁶

I used Hohendorff’s words to title the painting introducing this chapter, “...Not Separate” (Figure 5). Hohendorff’s words frame this thesis both because I want to foreground the criminalized Aboriginal women at the centre of my work, and because I have sought to understand how aspects of their “life stories”¹²¹⁷ are heard by the criminal justice system, with respect to experiences of victimization. My painting “...Not Separate” is an abstract depiction of a woman’s body, zoomed in such that it is difficult to see the woman at the centre. This is a reference to how the sentencing discourses relating to the Aboriginal women in this thesis are sometimes decontextualized, whereas the judicial frame must be refocused and widened to respond to the histories and needs of the women at the centre, and particularly those needs relating to victimization and colonization.

¹²¹⁴ Ottawa, House of Commons, *Subcommittee on Solicitation Laws*, *supra* note 4 at 31.

¹²¹⁵ *Ibid.*

¹²¹⁶ *Ibid.* at 32.

¹²¹⁷ *Ibid.* at 31.

Across all of my paintings in the series that open each chapter of this thesis, the women depicted are faceless. This represents the limited focus of processes within the criminal justice system (sentencing and corrections), and the fact that the victimization narratives I discuss in this thesis are refracted through these institutional lenses. The life narratives presented to and heard by the criminal justice system certainly do not define or encapsulate the lives of criminalized Aboriginal women, but these accounts are significant to how these women are understood and treated in the system. Professor Sayantani DasGupta suggests to her students that they approach a text “by asking themselves – ‘whose story is it?’”¹²¹⁸ For the discourses in this thesis, the judges are (primarily) the storytellers, but situated within a web of narratives. The victimization narratives I explore in Chapter 3 are the stories written by many actors in the criminal justice system (particularly police officers, probation officers, doctors, lawyers, and ultimately judges), and constructed within certain confines defined by the system (such as in the format of presentence reports and counsel submissions), to service the goals of the system. As the narratives I explore in this thesis conform to these parameters, and are then told through judges’ words in sentencing decisions, the “listening” that I perform in this thesis is an act of listening to the life stories legal officials relate about the victimization histories of these criminalized Aboriginal women. These narratives as constructed in the sentencing process are the subject of Chapter 3. As Aboriginal women are vastly overrepresented in Canadian prisons, my focus shifts in Chapter 4 to the intersection between women’s life narratives (as heard by sentencing judges) and judicial discourses about imprisonment. Essentially, in Chapter 3 I examine narratives about

¹²¹⁸ Sayantani DasGupta, “‘Your Women Are Oppressed, But Ours Are Awesome’: How Nicholas Kristof And *Half The Sky* Use Women Against Each Other” (8 October 2012), online: Racialicious <http://www.racialicious.com/2012/10/08/your-women-are-oppressed-but-ours-are-awesome-how-nicholas-kristof-and-half-the-sky-use-women-against-each-other/>.

victimization related by sentencing judges, and in Chapter 4 I explore the institutional response – how sentencing judges, the gatekeepers to prison, respond to those narratives in part through discourses about imprisonment.

Regarding the overrepresentation of Aboriginal women in prisons, I pay particular attention to conditional sentence orders in this thesis because I view this sanction as that which (where appropriate) most readily replaces what would otherwise be a term of incarceration. To fully respond to the directives in *Gladue*, as reinforced by *Ipeelee*, conditional sentences must remain central within available sentencing options. As Ross J. notes in *Stevens*, “*Gladue* arises most often, it seems, when a court is considering whether a custodial sentence ought to be imposed on an aboriginal offender.”¹²¹⁹ This observation is salient to my choice to focus on sentencing judgments where conditional sentences could have been (or were once) available.

The personal histories of criminalized Aboriginal women as related in this thesis often involve extensive experiences of victimization. This prevalence of victimization underscores the importance of my use of the feminist theory of the victimization-criminalization continuum to inform this thesis. NWAC emphasizes that

[i]t is essential that those in the criminal justice field recognize [...] that [t]here is a link between victimization and criminalization which occurs at both an individual and a collective level. Aboriginal women/girls suffer additional gender specific forms of collective discrimination within the victim to criminal cycle, and attention must be paid to this.¹²²⁰

In this thesis, I have sought to make this link between victimization and criminalization visible by drawing out judicial discourses about how it relates to the sentencing process. Aboriginal women’s experiences of victimization impact their lives before, during, and after the sentencing process. This impact is potentially complicated by impediments to access to community

¹²¹⁹ *Stevens*, *supra* note 806 at para. 14.

¹²²⁰ NWAC, “Arrest the Legacy”, *supra* note 394 at 2 (in Insert 1).

resources (including the dearth of such resources, particularly in isolated, impoverished communities), as I discuss in Chapter 4. Kelly Hannah-Moffat writes about the security classification process for federally sentenced women that “victimization becomes an informal measure of risk.”¹²²¹ In my research, this observation extends to judicial understandings of Aboriginal women’s histories of victimization at sentencing, particularly where judges fail to engage in a thorough *Gladue* analysis and instead use decontextualized reasoning.

Often these histories of victimization contribute to or are translated into the idea that Aboriginal women require therapeutic intervention in some form (both through prison programs or treatment conditions in the community) to minimize risk and promote rehabilitation. Some judges consequently portray imprisonment as a specialized mode of treatment. The appropriateness of treatment through imprisonment is complicated. For example, sometimes communities lack the internal support to manage community sentences safely and effectively and incarceration therefore becomes the foremost remaining option. As I discuss in Chapter 4, judicial conceptions of how victimization histories contribute to the need for treatment contribute to sentencing challenges in cases where the judge finds that community resources are insufficient. Judicial perceptions that federal incarceration does offer adequate treatment services are similarly troubling because of the deleterious effects of the experience of imprisonment. As Pollack writes, “[t]hat women are willing to serve longer prison sentences in order to get help that is often unavailable in their communities, and that judges are willing to sentence them in this

¹²²¹ Hannah-Moffat, “Gendering Risk at What Cost”, *supra* note 461 at 247.

way, is quite disturbing.”¹²²² This outcome is disturbing because fundamentally, prisons are not structured to provide treatment but are instead oriented toward security concerns.¹²²³

Many actors in the criminal justice system advance the suggestion that imprisonment provides access to treatment programs that are necessary to rehabilitation – not only judges, but also defence and Crown counsel, and probation officers. The multiple sources of the idea that prison is a place of treatment were evident in my research. In *Diamond*, the author of the PSR suggests that Diamond must address her difficulties with specialized professionals in a confined setting.¹²²⁴ Defence counsel in *Whitford* acknowledges (alongside the related Crown submission) that Whitford “needs a longer period of time in a structured setting to allow her rehabilitation and to permit her access to the programs that are offered.”¹²²⁵ The judge in *Whitford* adopts the same view, finding “I am satisfied that a significant period is needed to allow her to complete that [rehabilitative] process as far as possible and to avail herself of the programs, counseling, and other factors that are available.”¹²²⁶

While I am critical of these views in this thesis, I acknowledge that when effectively administered, prison programming may be helpful for some prisoners.¹²²⁷ However, at the federal level, the Correctional Investigator reports that the Correctional Service “has not done enough to ensure Aboriginal offenders are given sufficient access to culturally sensitive

¹²²² Pollack, “‘You Can’t Have it Both Ways’”, *supra* note 958 at 161.

¹²²³ Stephanie Findlay, “Trouble in the Big House: How Mandatory Minimum Sentencing Could Make it Worse for Women in Prison” *MacLean’s Magazine* (17 January 2011), online: MacLean’s <http://www2.macleans.ca/2011/01/17/trouble-in-the-big-house/>.

¹²²⁴ *Diamond*, *supra* note 878 at para. 25.

¹²²⁵ *Whitford*, *supra* note 693 at para. 28.

¹²²⁶ *Ibid.* at para. 41.

¹²²⁷ The Office of the Correctional Investigator reports that “[f]rom research and experience, we know that when correctional programs are properly targeted and sequenced, well-implemented and delivered to meet earliest parole eligibility dates they can reduce recidivism, save money in the long run and enhance public safety” [OCI, *Annual Report 2010-2011*, *supra* note 29 at 43].

programming and services.”¹²²⁸ The Correctional Investigator adds, “the areas of concern associated with Aboriginal corrections go far beyond the issue of over-representation and require focusing on what happens to this group of offenders while in the care and custody of the Correctional Service.”¹²²⁹ These matters would benefit from further research. For my purposes, it is sufficient to identify and challenge discourses in the criminal justice system suggesting that criminalized Aboriginal women’s victimization experiences precipitate a need for treatment in prison.

Both *Gladue* and *Ipeelee* have held that incarceration is particularly problematic for Aboriginal offenders, so all actors in the system must be very cautious before holding out imprisonment as a source of healing. Additionally, Stuart J.’s more general comments in *Elias* are instructive and should be understood by all actors in the criminal justice system: “I do not suggest that there is no place for punitive responses, but it must now be recognized that jail as the sentencing tool of choice has never lived up to its claims — and has enormously damaging side effects.”¹²³⁰ For Aboriginal women, these side effects appear on both the collective level in the form of overrepresentation, and at the individual level, in terms of the deleterious impacts on their own lives and well-being. However, despite these problems inherent in imprisonment, sentencing judges have a challenging, complicated task.

5.2 The role of the sentencing judge

In *Gladue*, Justices Cory and Iacobucci acknowledge that sentencing judges have a “limited role” “in remedying injustice against aboriginal peoples in Canada.”¹²³¹ The processes of colonization behind that injustice are longstanding and complex, so sentencing initiatives are

¹²²⁸ OCI, *Annual Report 2009-2010*, *supra* note 20 at 43.

¹²²⁹ *Ibid.* at 44.

¹²³⁰ *Elias*, 2001, *supra* note 1136 at para. 105.

¹²³¹ *Gladue*, *supra* note 15 at para. 65.

just one aspect of the many issues that must be addressed and redressed. Cory and Iacobucci JJ. write that “sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system.”¹²³² In *Ipeelee*, LeBel J. echoes that “[i]t would have been naive to suggest that sentencing Aboriginal persons differently, without addressing the root causes of criminality, would eliminate their overrepresentation in the criminal justice system entirely.”¹²³³ There is a spectrum of approaches and reforms needed to respond to the overincarceration of Aboriginal peoples. However, notwithstanding the “admittedly limited”¹²³⁴ role of sentencing judges in this broader task, sentencing remains a necessary and important role. LeBel J. states despite the need for other approaches, “that does not detract from a judge’s fundamental duty” to arrive at an appropriate sentence, and “[n]or does it turn s. 718.2(e) into an empty promise.”¹²³⁵

In *Ipeelee*, LeBel J. describes the responsibility and pivotal role played by sentencing judges:

[s]entencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.¹²³⁶

Gladue identifies sentencing as a “critical juncture” at which the overincarceration of Aboriginal peoples can be meaningfully addressed because judges set in motion the way in which Aboriginal peoples are processed through the system. This motion is often cyclical: I discuss in Chapter 4 that “[r]esearch has found that Aboriginal persons are more likely than their non-

¹²³² *Ibid.*

¹²³³ *Ipeelee*, *supra* note 16 at para. 61.

¹²³⁴ *Ibid.* at para. 69.

¹²³⁵ *Ibid.*

¹²³⁶ *Ibid.* at para. 61.

Aboriginal counterparts to be re-admitted to the correctional system after being released.”¹²³⁷ The revolving door swings with particular force for Aboriginal women. Both *Gladue*¹²³⁸ and *Ipeelee*¹²³⁹ emphasize that Aboriginal peoples experience imprisonment differently,¹²⁴⁰ often making it a less appropriate sanction. Specifically, “[t]he experiences of Aboriginal women prisoners are different from those of non-Aboriginal women prisoners.”¹²⁴¹ Additionally, as I address in Chapter 3, criminalized Aboriginal women are especially vulnerable to pleading guilty. In this context, the availability of alternatives to imprisonment, and judicial consideration of those alternatives, becomes vital.

Ipeelee describes that sentencing judges are best positioned “as front-line workers in the criminal justice system” to be critical about how systemic factors can permeate the sentencing framework, and “re-evaluate these [sentencing] criteria to ensure that they are not contributing to ongoing systemic racial discrimination.”¹²⁴² In this critical approach, judges benefit from the information in presentence reports and *Gladue* reports, so both types of reports should be informed by a deep understanding of what is involved in the *Gladue* analysis. In Chapter 4, I am critical of the decontextualized judicial reasoning in *Char*, however Bayliff J.’s comments do reflect the challenges inherent in the sentencing process, and the need for guidance about alternatives to incarceration: “I ask myself, what could be done here to rehabilitate and reintegrate Ms. Char? What could be done? Is there some other option to custody here? Is there something that the court should be doing differently here?”¹²⁴³

¹²³⁷ Juristat: Brzozowski, Taylor-Butts & Johnson, *Victimization and Offending*, *supra* note 22 at 15.

¹²³⁸ *Gladue*, *supra* note 15 at para. 37.

¹²³⁹ *Ipeelee*, *supra* note 16 at para. 74.

¹²⁴⁰ See also Shaw, “Women, Violence and Disorder in Prisons”, *supra* note 1053 at 68.

¹²⁴¹ Kelly Hannah-Moffat, “Feminine Fortresses: Woman-Centered Prisons?” (1995) 75(2) *The Prison Journal* 135 at 161 n 14.

¹²⁴² *Ipeelee*, *supra* note 16 at para. 67.

¹²⁴³ *Ibid.* at para. 34.

In Chapter 3, I discuss Cozen J.'s comments in *Johnson*¹²⁴⁴ about how the information about *Gladue* factors presented to sentencing judges varies in its adequacy, and the resultant challenges for judges engaging in a *Gladue* analysis. Manitoba judges have expressed concern and frustration at the insufficiency (or absence) of *Gladue* reports in their experience, and have identified the need for greater information and guidance to support a proper *Gladue* analysis.¹²⁴⁵ There are at least two available resources designed to assist the preparation of *Gladue* reports with clear instructions about how to structure them in a way that is most helpful to the courts. The Legal Services Society of British Columbia has created one such resource,¹²⁴⁶ and the University of Manitoba Faculty of Law has produced another.¹²⁴⁷ Increased usage of such resources will assist judges to ameliorate the overincarceration of Aboriginal peoples.

5.3 Creative sentencing and judicial discretion

Ipeelee holds that “[a]s the statistics indicate, section 718.2(e) of the *Criminal Code* has not had a discernible impact on the overrepresentation of Aboriginal people in the criminal justice system.”¹²⁴⁸ As I discuss in Chapter 1, the decision indicates that this failure may not be a problem within the provision itself but instead: “the *Gladue* principles were never expected to provide a panacea,” and sentencing decisions demonstrate a “fundamental misunderstanding and misapplication of both s. 718.2(e) and this Court’s decision in *Gladue*.”¹²⁴⁹ Hopefully, the clarifications provided by *Ipeelee* will be meaningfully incorporated into sentencing decisions,

¹²⁴⁴ *Johnson*, *supra* note 695.

¹²⁴⁵ Debra Parkes *et al.*, *Gladue Handbook: A Resource for Justice System Participants in Manitoba* (September 2012), online: University of Manitoba, Faculty of Law http://chrr.info/images/stories/Gladue_Handbook_2012_Final-1.pdf at 13-14. [Parkes *et al.*]

¹²⁴⁶ Jay Istvanffy, *Gladue Primer* (February 2011), online: Legal Services Society, BC <http://www.lss.bc.ca/publications/pub.php?pub=388>.

¹²⁴⁷ Parkes *et al.*, *supra* note 1245. This handbook adopts the same instructions as the LSS handbook [*Ibid.*] for the format and content of *Gladue* reports.

¹²⁴⁸ *Ipeelee*, *supra* note 16 at para. 63.

¹²⁴⁹ *Ibid.*

facilitating the combined ability of s. 718.2(e) and its interpretation in *Gladue* to better realize their mutual goal to reduce the overincarceration of Aboriginal peoples.

In *Ipeelee*, LeBel J. comments on the legislated objectives of sentencing, but adds the direction that “[t]o the extent that current sentencing practices do not further these objectives, those practices must change so as to meet the needs of Aboriginal offenders and their communities.”¹²⁵⁰ There is no explicit directive that judges look to more radical sentencing alternatives, but it does seem that *Ipeelee* at minimum encourages creative sentencing. For example, this implicit support for more creative sentencing outcomes appears where LeBel J. quotes academics Jonathan Rudin and Kent Roach:

[if an innovative] sentence can serve to actually assist a person in taking responsibility for his or her actions and lead to a reduction in the probability of subsequent re-offending, why should such a sentence be precluded just because other people who commit the same offence go to jail?”¹²⁵¹

Additionally, LeBel J. summarizes the purpose of sentencing – as I discuss in Chapter 1, “to promote a just, peaceful and safe society through the imposition of just sanctions that, among other things, deter criminality and rehabilitate offenders, all in accordance with the fundamental principle of proportionality.”¹²⁵² Importantly, LeBel J. continues that “[j]ust sanctions are those that do not operate in a discriminatory manner,”¹²⁵³ and combines this with Parliament’s direction in s. 718.2(e), noting that this legislative direction was “to ensure that judges undertook their duties properly.”¹²⁵⁴ From these comments, it seems that *Ipeelee* stands for the idea that part of the duty of a judge sentencing Aboriginal offenders includes the need to step outside of the

¹²⁵⁰ *Ibid.* at para. 66.

¹²⁵¹ *Ibid.*

¹²⁵² *Ibid.* at para. 68.

¹²⁵³ *Ibid.*

¹²⁵⁴ *Ibid.*

box and develop more innovative, creative sanctions where such outcomes contribute to rehabilitation and minimize the risk of reoffence.

However, judicial creativity is hampered by encroachments on judicial discretion – particularly where those encroachments impinge on the availability of community-based sanctions. In Chapter 1, I introduce the problem of incursions into judicial discretion vis-à-vis conditional sentence orders through the passage of Bill C-9 in 2007 and Bill C-10 in 2012. With the depletion of conditional sentences as a sanction available to judges, it is uncertain how much real scope and impact the clarifications in *Ipeelee* will have on the overrepresentation of Aboriginal peoples in the system, and particularly its prisons. For example, while *Connors* was decided before *Ipeelee* and the further restrictions on conditional sentences after Bill C-10 entered into force, Ross J. signaled that the 2007 amendments to the conditional sentencing regime already problematically trench on judicial discretion. I mention in Chapter 1 that Ross J. found that the amendments “preclude[d]” him from considering a conditional sentence order for that young Aboriginal woman offender, and sentenced her to federal custody.¹²⁵⁵ In reaching that conclusion, Ross J. cites another case that refers to the effect of the amendments on the “reduction of judicial discretion [as] an ‘undesired result.’”¹²⁵⁶ The problem of incursions into judicial discretion may also function to dilute sentences in some cases. In Chapter 1 I also reference *Audy*, in which Slough J. orders probation (with conditional sentence-like conditions including an absolute curfew of 24 hours a day, 7 days a week for the first 9 months of the order), but notes that before the 2007 amendments a conditional sentence would have been the outcome.¹²⁵⁷

¹²⁵⁵ *Connors*, *supra* note 224 at paras. 16-24.

¹²⁵⁶ *Ibid.* at para. 23.

¹²⁵⁷ *Audy*, *supra* note 223 at paras. 5-8.

A fuller examination of the impacts of the 2007 conditional sentencing amendments on judicial discretion goes beyond the parameters of my thesis. Nonetheless, it is important to still highlight that within my research I found decisions in which the judges specifically flag that these amendments have reduced their ability to construct just and appropriate sentences. It is also important to identify that incursions into judicial discretion in this area are hugely problematic for criminalized Aboriginal peoples, and women in particular. The 2012 amendments augment this problem.

To illustrate the scope of this problem, I have identified in the chart at Appendix B which offences in the judgments I reviewed for this thesis would no longer be eligible for conditional sentence orders after the passage of Bill C-10, now the 2012 conditional sentencing amendments. The chart also lists the case name, the most serious offence for which that Aboriginal woman was sentenced, whether a conditional sentence order was sought by counsel or considered by the judge, and the sanction ordered. To determine which of these offenders would no longer be eligible for conditional sentence orders after the 2012 amendments, I first looked up the most serious offence in the *Criminal Code* (or the *Controlled Drugs and Substances Act*,¹²⁵⁸ for possession/trafficking offences) and evaluated it against the current (2012) version of s. 742.1.¹²⁵⁹ Many offences were eliminated exclusively after this step, based entirely on the law and without considering the facts. In some cases, where the offence was hybrid and the judgment was issued by a provincial court-equivalent (as opposed to a superior entry-level court), it required determining whether the Crown proceeded by indictment.

I have included all of the results from my evaluations in the chart at Appendix B, for all 91 judgments I reviewed for this thesis. Primarily, however, I want to highlight how the 2012

¹²⁵⁸ Controlled Drugs and Substances Act, SC 1996, c 19.

¹²⁵⁹ See Appendix A for the current (after November 20, 2012) full text of s. 742.1.

conditional sentencing amendments would have radically changed the sanctions ordered for those cases that actually resulted in a conditional sentence order. Of the 91 decisions I considered for this thesis, 31 of the Aboriginal women sentenced were given conditional sentence orders. As I describe in my methodology in Chapter 2, those sentences were ordered between 1999 and 2011 (and spanned the years following the 2007 amendments). Following the 2012 s. 742.1 amendments, 29 of those 31 conditional sentence orders would no longer be possible. That bears repeating: either immediately on the law, or because on the facts the Crown proceeded by indictment for a hybrid offence now excluded by s. 742.1, 29 of the 31 Aboriginal women that received conditional sentence orders in my research would no longer be eligible for conditional sentences for the same offences/facts today. For one further case,¹²⁶⁰ I was unable to determine whether that offender would remain eligible for a conditional sentence, because the answer hinged on whether the Crown proceeded by indictment or summarily, which is unclear in the judgment. I only found *one* decision of the 31 that actually resulted in a conditional sentence order that would continue to be eligible for a conditional sentence order after the 2012 amendments. To be clear, that means that those 29 (possibly 30, depending on the answer for the judgment I could not conclusively settle) criminalized Aboriginal women would likely have been sent to prison instead under the current 2012 law (although perhaps in limited cases a strict probationary term may have been ordered¹²⁶¹). This regressive turn in sentencing law is deeply troubling, and threatens to further exacerbate the ongoing problem of overrepresentation.

As I discuss in this thesis, maintaining the availability of conditional sentence orders is critical to service the goal of s. 718.2(e) to reduce the overrepresentation of Aboriginal peoples in prisons. In the brief the Assembly of First Nations provided to the Standing Committee on

¹²⁶⁰ *R. v. S.C.M.*, 2008 ABPC 214.

¹²⁶¹ See text to footnote 1257.

Justice and Human Rights during the Bill C-9 debates, the Teslin Tlingit Council explain that in the Yukon, conditional sentences have been “proven to be an effective instrument utilized by the Territorial Courts working with First Nation community processes, such as the Teslin Tlingit Peacemaker Sentencing Panel.”¹²⁶² It is both noteworthy that the Teslin Tlingit nation supports conditional sentences as a sentencing option consistent with their own concept of justice and equally that they are actively involved in the sentencing process through their sentencing panel.

The Teslin Tlingit Council continues, stating

[c]onditional sentences have contributed towards the promotion and exercise of community accountability and support of offenders to achieve the successful completion of their conditions, while also acknowledging and responding to the interest of those who have been victimized by a crime. The result is that families are kept together with a focus on balancing retribution and rehabilitation of the individual, which provides for the benefit of the overall community.¹²⁶³

This example is instructive, because it illustrates both the consonance of conditional sentences with some understandings of Aboriginal justice, and moreover, it demonstrates the need to consult and include Aboriginal groups throughout criminal justice policy and legislative changes. This level of engagement likely requires the need to develop more complex and deeper relationships between the justice system and Aboriginal women – perhaps, as Patricia Monture-Angus and Kim Pate suggest, to the extent of mapping out and navigating the “undeveloped legal terrain” of the federal “government’s fiduciary duties to criminalized Aboriginal women.”¹²⁶⁴ The issue of such fiduciary duties exceeds the scope of this thesis, but would be a productive area for further research.

¹²⁶² *House of Commons Debates*, No. 39-1 (1 November 2006) at 1640 (Jean Crowder).

¹²⁶³ *Ibid.*

¹²⁶⁴ Debra Parkes & Kim Pate, “Time for Accountability: Effective Oversight of Women’s Prisons” (2006) 48(2) *Canadian Journal of Criminology and Criminal Justice* 251 at 258.

5.4 Listening, but alongside voice and action in communities

In *Elias*, Stuart J. holds that “[o]ur inmate populations stand as stark reminders of our failed investments in punishment.”¹²⁶⁵ I would extend that sentiment to the gross overrepresentation of Aboriginal peoples in prison, which further underscores this failure. In this thesis, against this backdrop of overrepresentation, I have focused on criminalized Aboriginal women. CAEFS and NWAC find that

[w]hat is not known is the degree to which the *Criminal Code* and the *Gladue* decision are of assistance to women. This is an area where further research is recommended to determine if women receive access to the *Gladue* provisions and the degree to which the court’s analysis of race that *Gladue* demands is coupled with a gendered analysis.¹²⁶⁶

My thesis offers a contribution that responds to this recommendation, as it explores where judicial discourses about the victimization of criminalized Aboriginal women intersect with the *Gladue* analysis.

Gladue and *Ipeelee* hold that sentencing initiatives to respond to overrepresentation offer an important but limited role in the broader need to ameliorate the overincarceration of Aboriginal peoples. Similarly, I believe that work analyzing sentencing discourses offers an important but limited role. Reading the judgments that form the backbone of this thesis brought into relief that real change must occur at the ground level, in communities. It is troubling that the current government has budgeted \$2.1 billion dollars for prison expansion¹²⁶⁷ when this money could be redirected “to health, education, housing, welfare, employment programs, addictions and sexual-abuse treatment,”¹²⁶⁸ and other healing-oriented reforms.

¹²⁶⁵ *Elias*, 2001, *supra* note 1136 at para. 101.

¹²⁶⁶ CAEFS & NWAC, “Women and the Canadian Legal System” *Canadian Woman Studies*, *supra* note 908 at 97.

¹²⁶⁷ “More prisons to be expanded” *CBC* (10 January 2011) online: [CBC http://www.cbc.ca/news/politics/story/2011/01/10/tories-prison-infrastructure.html](http://www.cbc.ca/news/politics/story/2011/01/10/tories-prison-infrastructure.html). See also “Tories announce \$155.5M prison expansion” *CBC* (6 October 2010) online: [CBC http://www.cbc.ca/news/politics/story/2010/10/06/toews-prison-construction.html](http://www.cbc.ca/news/politics/story/2010/10/06/toews-prison-construction.html).

¹²⁶⁸ Bayes, *supra* note 1143 at 23.

Before criminalization, research has shown that women have “identified obstacles to receiving drug or alcohol treatment in the community, such as long waiting lists, programs that are not culturally relevant for Aboriginal people or responsive to women’s needs, and expensive fees.”¹²⁶⁹ For community sentence orders and post-release after imprisonment but within the sentence remaining (such as during probation orders), criminalized women may also be prevented access to community treatment resources at the outset. These resources may restrict access based on “exclusionary factors”¹²⁷⁰ – ironically, factors such as criminalization and mental health issues. This latter barrier may contribute to problems discussed in this thesis, such as cases in which judges order incarceration because community resources are insufficient to meet treatment needs.

Elizabeth Adjin-Tettey suggests that “[i]f we understand that women’s criminality is inextricably linked to their victimization and traumatization, we also need to then examine the structural changes that must occur to disrupt the current cycles of victimization in the lives of girls and women.”¹²⁷¹ These structural changes extend far beyond sentencing, and beyond the criminal justice system entirely. As Kim Pate stresses,

[i]t seems ludicrous that we continue to pretend that telling women and girls not to take drugs to dull the pain of abuse, hunger or other devastation, or tell them that they must stop the behaviour that allowed them to survive poverty, abuse, disabilities, et cetera, [will be effective] in the face of no current or prospect of any income, housing, medical, educational or other supports.¹²⁷²

In this light, Aboriginal women may be criminalized for coping mechanisms developed in reaction to victimization and other disadvantages stemming from colonization. Instead, the focus should be on expanding the availability of and access to community resources.

¹²⁶⁹ Pollack, “‘You Can’t Have it Both Ways’”, *supra* note 958 at 118.

¹²⁷⁰ Shantz, Kilty & Frigon, *supra* note 1166 at 101.

¹²⁷¹ Dirks, *supra* note 294 at 111.

¹²⁷² Pate, “Advocacy, Activism and Social Change”, *supra* note 341 at 82.

Alongside these reforms at the community level, it is helpful to analyze how sentencing judges respond to issues presented by criminalized Aboriginal women. As part of this practice, I suggest that it is important to listen to and reflect on what the criminal justice system “hears,” through how this is recorded in sentencing judgments. “Listening” to accounts of women’s lives may assist judges in the challenging sentencing task of finding just and appropriate sanctions for criminalized Aboriginal women. Perhaps the greater direction and clarity offered by *Ipeelee* will have meaningful effects on how sentencing judges hear and respond to the narratives of criminalized Aboriginal women. In this thesis, my goal has been to amplify the judgments that “hear” in a way consistent with the *Gladue* analysis and through the lens of the victimization-criminalization continuum, and to offer some thoughts about others that could “hear” more effectively. The ultimate goal should be that the victimization narratives experienced by Aboriginal women will change. Until then, with the sentencing guidance from *Ipeelee*, hopefully criminalized Aboriginal women will begin to feel more heard.

Bibliography

BILLS, LEGISLATION, AND RELATED PROCEEDINGS

Controlled Drugs and Substances Act, SC 1996, c 19.

Corrections and Conditional Release Act, S.C. 1992, c. 20.

Corrections and Conditional Release Regulations, SOR/92-620.

Criminal Code, R.S.C., 1985, c. C.-46 ss. 718; 718.1; 718.2; 718.2(a)(ii); 718.2(a)(ii.1); 718.2(a)(iii); 718.2(b); 718.2(d); 718.2(e); 718.3; 742.1; 752.

Canada, Bill C-9, *An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment)*, 1st Sess., 39th Parl., 2007, online: Parliament of Canada
<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=2172003>. [Bill C-9 Stages]

Canada Bill C-9, *An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment)*, 1st Sess., 39th Parl., 2007, online: Parliament of Canada
<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=3294571>. [Bill C-9 Text]

Canada Bill C-25, *An Act to amend the Criminal Code (Limiting Credit for Time Spent in Pre-Sentencing Custody), (The Truth in Sentencing Act)*, 2nd Sess., 40th Parl., 2009, online: Parliament of Canada
<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=4172410&File=24#1>.

Canada Bill C-10, *An Act to Enact the Justice for Victims of Terrorism Act and to Amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts (Safe Streets and Communities Act)*, 1st Sess., 41st Parl., 2012, online: Parliament of Canada
<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=5120829&View=6>. [Bill C-10 Stages]

Canada Bill C-10, *An Act to Enact the Justice for Victims of Terrorism Act and to Amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts (Safe Streets and Communities Act)*, 1st Sess., 41st Parl., 2012, online: Parliament of Canada
<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5465759&File=62#11>. [Bill C-10 Text]

House of Commons Debates, No. 39-1 (29 May 2006 to 21 June 2007).

Indian Act, R.S.C. 1985, c. I-5.

Ottawa, House of Commons, *Subcommittee on Solicitation Laws of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, 38th Parl. 1st sess., No. 19 (31 March 2005), online: Parliament of Canada
<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=38&Ses=1&DocId=1723237&File=0>.

Parliament of Canada: Law and Government Division, *Legislative Summary: Bill C-9: An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment)* by R. MacKay (12 May 2006; revised 27 September 2007), online:
http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/Bills_ls.asp?lang=E&ls=c9&Parl=39&Ses=1&source=library_prb.

CASES

R. v. A.E.M., 2008 SKQB 61.

R. v. Allan, 2008 CanLII 35699 (ON SC).

R. v. Arcand, 2010 ABCA 363.

R. v. Armstrong, 2006 ABPC 5.

R. v. Asp (R. v. C.M.A.), 2005 YKSC 58.

R. v. Audy, 2010 MBPC 55.

R. v. B.K.W., 2008 BCPC 0418.

R. v. Batisse, 2008 CarswellOnt 8590 (WLeC).

R. v. Batisse, 2009 CarswellOnt 580 (ON CA) (WLeC).

R. v. Beaulieu, Beaulieu, Chief Zebrasky, 2007 MBPC 9.

R. v. Berner, 2010 BCPC 305.

R. v. Bird, 2008 ABQB 327.

R. v. Bisson, Kohl, and Hill, 2004 CanLII 12844 (ON SC).

- R. v. Bluebell*, 2011 SKQB 203.
- R. v. Braun*, 2006 BCPC 590.
- R. v. Brooks*, 2008 NSPC 58.
- R. v. Burke*, 2004 BCSC 1130.
- R. v. C.G.O.*, 2011 BCPC 145.
- R. v. Capistrano*, 2001 MBQB 60.
- R. v. Char*, 2007 CarswellBC 1489 (BC PC) (WLeC).
- R. v. Char*, 2007 CarswellBC 1453 (BC CA) (WLeC).
- R. v. Chouinard*, 2005 CarswellOnt 10610 (ONSC) (WLeC).
- R. v. Cleary*, 2002 NWTSC 30.
- R. v. Collins*, 2009 CarswellOnt 9678 (Ont. Sup. Ct. Jus.) (WLeC).
- R. v. Connors*, 2010 NSPC 63.
- R. v. Coombs*, 2004 ABQB 621.
- R. v. Curran*, 2001 ABPC 34.
- R. v. D.E.W.*, 2003 BCPC 0488.
- R. v. D.L.W.*, 2007 SKPC 151.
- R. v. Dennill*, 2010 NWTSC 98.
- R. v. Diamond*, 2006 QCCQ 2552.
- R. v. Dick*, 2002 BCPC 650.
- R. v. Dillon*, 2004 NWTSC 39.
- R. v. Elias*, 2001 YKTC 501.
- R. v. Elias*, 2009 YKTC 59.
- R. v. Evaloardjuk*, 1999 CanLII 1156 (NU CJ).

- R. v. Fineday*, 2007 SKPC 2.
- R. v. Fisher*, 2004 CanLII 10497 (ON SC).
- R. v. Galloway*, 2004 SKQB 130.
- R. v. Gilpin*, 2002 BCSC 1876.
- R. v. Gladue*, [1999] 1 S.C.R. 688.
- R. v. Good*, 2010 YKTC 96.
- R. v. Good*, 2012 YKCA 2.
- R. v. Gregoire*, 2009 NLTD 21.
- R. v. Guimond*, 2010 MBPC 33.
- R. v. Hachey and Selena Wiley*, 2008 NBQB 52.
- R. v. Happyjack*, 2006 QCCQ 8276.
- R. v. Heavenfire*, 2006 ABPC 228.
- R. v. Icebound*, 2006 QCCQ 2281.
- R. v. Ipeelee*, 2012 SCC 13.
- R. v. Isaac*, 2009 SKPC 111.
- R. v. Jack*, 2001 YKSC 55.
- R. v. Jack, Joyce Smith, and Nenette Smith*, 2008 BCPC 0332.
- R. v. Jankovic*, 2004 ABPC 162.
- R. v. John*, 2004 SKCA 13.
- R. v. Johnson*, 2011 YKTC 11.
- R. v. Kahypeasewat (R. v. V.K.)*, 2006 SKPC 79.
- R. v. Kendi*, 2010 NWTTC 8.
- R. v. Laliberte*, 2000 SKCA 27.

- R. v. Lilley*, 2004 YKTC 38.
- R. v. M(C.A.)*, [1996] 1 S.C.R. 500.
- R. v. Machiskinic*, 2004 SKQB 358.
- R. v. Martin, Evans, and LaViolette*, 2004 NWTSC 15.
- R. v. McDougall*, 2009 MBQB 299.
- R. v. Menard*, 2010 YKTC 11.
- R. v. Monias*, 2003 CarswellMan 575 (MB PC) (WLeC).
- R. v. N.R.R.*, 2011 MBQB 90.
- R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206.
- R. v. Neshinapaise*, 2008 CarswellOnt 3725 (ONCJ) (WLeC).
- R. v. Niganobe*, 2008 CanLII 54322 (ON SC).
- R. v. O.C.G.*, 2011 CarswellBC 1655 (BCPC) (WLeC).
- R. v. O.N.M., S.M. & C.W.S.*, 2011 BCPC 97.
- R. v. Papakyriakou*, 2009 ONCJ 397.
- R. v Pawis (R. v. N.C.P.)*, 2006 ONCJ 386.
- R. v. Pechawis*, 2005 SKPC 25; *R. v. S.A.P.*, 2005 SKPC 25.
- R. v. Pelletier (R. v. J.P.)*, 2011 SKQB 7.
- R. v. Pépabano*, 2005 CanLII 48584 (QC CQ).
- R. v. Petawabano*, 2008 QCCQ 6141.
- R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5.
- R. v. Redhead*, 2009 MBQB 314.
- R. v. Redies*, 2009 YKTC 85.
- R. v. R.K., M.P., and S.W.*, 2001 CanLII 26261 (MB PC).

- R. v. S.C.M.*, 2008 ABPC 214.
- R. v. S(I.M.D.)*, 2000 YTSC 19.
- R. v. S.L.N.*, 2010 BCSC 405.
- R. v. Saganash*, 2006 QCCQ 2282.
- R. v. Sans*, 2004 NBQB 386.
- R. v. Sayers and Elanik*, 2003 NWTSC 69.
- R. c. Shecapio*, 2006 QCCQ 13164.
- R. v. Shenfield*, 2008 ABPC 47.
- R. v. Shoenthal*, 2006 SKQB 177.
- R. v. Shore*, 2002 SKPC 42.
- R. v. Small Eyes and Hunt*, 2008 ABPC 300.
- R. v. Smith*, 2004 YKTC 14.
- R. v. Stabsdown*, 2008 ABPC 250.
- R. v. Stevens*, 2009 NSPC 46.
- R. v. Stimson*, 2010 CarswellAlta 2644 (ABPC) (WLeC).
- R. v. Stimson*, 2011 CarswellAlta 167 (AB CA) (WLeC).
- R. v. Stonechild*, 2009 SKPC 122.
- R. v. Swan*, 2004 CanLII 29564 (MB PC).
- R. v. Wells*, [2000] 1 S.C.R. 207.
- R. v. Tapaquon*, 2009 SKQB 142.
- R. v. Tippeneskum*, 2011 ONCJ 219.
- R. v. Travers*, 2001 CanLII 17782 (MB PC).
- R. v. W.L.Q.*, 2005 SKQB 10.

R. v. Whitford, 2005 BCSC 1110.

R. v. Whitford, 2008 BCSC 1378.

R. v. Woods (R. v. C.I.W.), 2007 SKPC 54.

R. v. Wycotte, 2006 BCPC 657.

REPORTS (GOVERNMENTAL AND NON-GOVERNMENTAL)

Aboriginal Corrections Policy Unit, Public Safety Canada, *Marginalized: The Aboriginal Women's Experience in Federal Corrections* by M. Wesley (Ottawa: Public Safety Canada, 2012), online: Public Safety Canada <http://www.publicsafety.gc.ca/res/cor/apc/apc-33-eng.aspx>.

Blackstock, Cindy *et al.*, *Keeping the Promise: The Convention on the Rights of the Child and the Lived Experiences of First Nations Children and Youth* (Ottawa: First Nations Child & Family Caring Society of Canada, 2004).

Canada, Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2009-2010*, (Ottawa: The Correctional Investigator Canada, 2010), online: Office of the Correctional Investigator <http://www.oci-bec.gc.ca/rpt/index-eng.aspx>.

Canada, Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2010-2011*, (Ottawa: The Correctional Investigator Canada, 2011), online: Office of the Correctional Investigator <http://www.oci-bec.gc.ca/rpt/index-eng.aspx>.

The Canadian Bar Association: National Criminal Justice Section, "Bill C-9 – *Criminal Code* Amendments (Conditional Sentence of Imprisonment)" (September 2006), online: www.cba.org/CBA/submissions/pdf/06-42-eng.pdf.

Commission of Inquiry into Certain Events at the Prison for Women in Kingston, *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Commissioner: Arbour J.) (Ottawa: Public Works and Government Services Canada, 1996), online: Justice Behind the Walls http://www.justicebehindthewalls.net/resources/arbour_report/arbour_rpt.htm.

Corrections Branch, Ministry of the Solicitor General, *The Federal Female Offender: Report on a Preliminary Study* by Margaret Shaw (Ottawa: Solicitor General Canada, 1991).

Dell, Colleen Anne & Roger Boe, "Research Reports: An Examination of Aboriginal and Caucasian Women Offender Risk and Needs Factors" (December 2000), online: Research Branch, Correctional Service of Canada <http://www.csc-scc.gc.ca/text/pblct/forum/e132/e132ind-eng.shtml>.

- Gobeil, Renée & Meredith Robeson Barrett, “Research Report: Rates of Recidivism for Women Offenders” (September 2007), online: Research Branch, Correctional Service of Canada <http://www.csc-scc.gc.ca/text/rsrch/reports/r192/r192-eng.shtml>.
- Istvanffy, Jay, *Gladue Primer* (February 2011), online: Legal Services Society, BC <http://www.lss.bc.ca/publications/pub.php?pub=388>.
- Jackson, Michael & Graham Stewart, “A Flawed Compass: A Human Rights Analysis of the Roadmap to Strengthening Public Safety” (September 2009), online: Justice Behind the Walls <http://www.justicebehindthewalls.net/news.asp?nid=78>.
- NWAC, “Arrest the Legacy: From Residential Schools to Prisons” (2012), online: Native Women’s Association of Canada <http://www.nwac.ca/gendering-reconciliation>.
- NWAC, “What Their Stories Tell Us: Research Findings from the Sisters in Spirit Initiative” (2010), online: Native Women’s Association of Canada <http://www.nwac.ca/media/release/21-04-10>.
- Native Women’s Association of Canada, “Culturally Relevant Gender Based Models of Reconciliation” (March 2010), online: NWAC <http://www.nwac.ca/research/nwac-reports>.
- Parkes, Debra *et al.*, *Gladue Handbook: A Resource for Justice System Participants in Manitoba* (September 2012), online: University of Manitoba, Faculty of Law http://chrr.info/images/stories/Gladue_Handbook_2012_Final-1.pdf.
- Provincial Association of Transitional Houses (PATHS), *Restorative Justice: Is it Justice for Battered Women?: Should the Saskatchewan Government Allow/Institute the Use of Restorative Justice Strategies for Family Violence Cases Throughout the Province/in Only Certain Communities/Only Under Certain Circumstances/with Certain Safeguards? Report on PATHS’ April 2000 Conference. Saskatoon, 2000.* (Saskatoon: PATHS, 2000), online: PATHS <http://www.hotpeachpages.net/canada/air/rjConfdoc.html>.
- Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Canada Communication Group Publishing, 1996).
- Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Vol. I: Looking Forward, Looking Back* (Ottawa: Royal Commission on Aboriginal Peoples, 1996), online: Indian and Northern Affairs Canada http://www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html.
- Sapers, Howard, “A Preventable Death” (20 June 2008), online: The Office of the Correctional Investigator <http://www.oci-bec.gc.ca/rpt/index-eng.aspx>.

The Task Force on Federally Sentenced Women, “Creating Choices: The Report of the Task Force on Federally Sentenced Women” (April 1990), online: Correctional Service of Canada <http://www.csc-scc.gc.ca/text/prgrm/fsw/choices/toce-eng.shtml>.

OTHER GOVERNMENT SOURCES: STATISTICS

Canada, Statistics Canada: Canadian Centre for Justice Statistics, *Adult Correctional Statistics in Canada, 2010/2011* by M. Dauvergne (Ottawa: Minister of Industry, 2012), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11715-eng.htm#a7>.

Canada, Statistics Canada: Canadian Centre for Justice Statistics, *Criminal Justice Indicators: 2005*, (Ottawa: Minister of Industry, 2005), online: Statistics Canada http://www5.statcan.gc.ca/access_acces/archive.action?loc=/pub/85-227-x/85-227-x2002000-eng.pdf. (Authors: Gannon *et al.*, Editor: Rebecca Kong).

Juristat: Statistics Canada, *Outcomes of Probation and Conditional Sentence Supervision: An Analysis of Newfoundland and Labrador, Nova Scotia, New Brunswick, Saskatchewan and Alberta, 2003/2004 to 2004/2005* by S. Johnson (Ottawa: Minister of Industry, 2006), online: Statistics Canada <http://www5.statcan.gc.ca/bsolc/olc-cel/olc-cel?lang=eng&catno=85-002-X20060079521>.

Juristat: Statistics Canada, *Returning to Correctional Services after Release: A Profile of Aboriginal and Non-Aboriginal Adults Involved in Saskatchewan Corrections from 1999/00 to 2003/04* by S. Johnson (Ottawa: Minister of Industry, 2005), online: Statistics Canada <http://www5.statcan.gc.ca/subject-sujet/resultat.action?pid=2693&id=2149&lang=eng&type=STUDIES&pageNum=1&more=0>.

Juristat: Statistics Canada, *Violent Victimization of Aboriginal Women in the Canadian Provinces, 2009* by S. Brennan (Ottawa: Minister of Industry, 2011), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11439-eng.htm>.

Statistics Canada, *2006 Census: Analysis Series: Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations*, online: Statistics Canada <http://www12.statcan.gc.ca/census-recensement/2006/as-sa/97-558/p2-eng.cfm>.

Statistics Canada, *Aboriginal Statistics at a Glance* by A. Bisson *et al.*, online: Statistics Canada <http://www.statcan.gc.ca/pub/89-645-x/2010001/c-g/c-g014-eng.htm>.

Statistics Canada: Canadian Centre for Justice Statistics, *Victimization and Offending in Canada's Territories* by S. de Léséleuc & J-A. Brzozowski (Ottawa: Minister of Industry, 2006), online: Statistics Canada <http://www.statcan.gc.ca/pub/85f0033m/85f0033m2006011-eng.htm>.

- Statistics Canada: Juristat, *Adult Correctional Services in Canada 2008/2009* by Donna Calverley (Fall 2010), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2010003/article/11353-eng.htm#a7>.
- Statistics Canada: Juristat, *Criminal Victimization in the Territories* by S. Perreault & T. Hotton Mahony (26 January 2012), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11614-eng.htm>.
- Statistics Canada: Juristat, *The Incarceration of Aboriginal People in Adult Correctional Services* by S. Perreault (Ottawa: Minister of Industry, 2009), online: Statistics Canada <http://www76.statcan.gc.ca/stcsr/query.html?style=emp&qt=perreault&charset=iso-8859-1&qm=1&oq=&rq=1&la=en>.
- Statistics Canada: Juristat, *Victimization and Offending Among the Aboriginal Population in Canada* by J-A. Brzozowski, A. Taylor-Butts, & S. Johnson (Ottawa: Minister of Industry, 2006), online: Statistics Canada http://www5.statcan.gc.ca/access_acces/alternative_alternatif.action?l=eng&loc=http://www.statcan.gc.ca/pub/85-002-x/85-002-x2006003-eng.pdf&t=Victimization%20and%20offending%20among%20the%20Aboriginal%20population%20in%20Canada.
- Statistics Canada, *Women in Canada: A Gender-Based Statistical Report: Women and the Criminal Justice System* by T. Hotton Mahony (Ottawa: Minister of Industry, 2011), online: Statistics Canada <http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11416-eng.htm>.

JOURNAL ARTICLES

- Adjin-Tettey, Elizabeth, "Sentencing Aboriginal Offenders: Balancing Offenders' Needs, the Interests of Victims and Society, and the Decolonization of Aboriginal Peoples" (2007) 19(1) 179.
- Andersen, Chris, "Governing Aboriginal Justice in Canada: Constructing Responsible Individuals and Communities through 'Tradition'" (1999) 31 *Crime, Law & Social Change* 303.
- Belknap, Joanne, "'Offending Women': A Double Entendre" (2010) 100(3) *The Journal of Criminal Law and Criminology* 1061.
- Bracken, Denis C., Lawrence Deane & Larry Morrissette, "Desistance and Social Marginalization: The Case of Canadian Aboriginal Offenders" (2009) 13(1) *Theoretical Criminology* 61.
- Britton, Dana M., "Feminism in Criminology: Engendering the Outlaw" (2000) 571 *Annals of*

- the American Academy of Political and Social Sciences 57.
- Brown, Marilyn, "Gender, Ethnicity, and Offending over the Life Course: Women's Pathways to Prison in the Aloha State" (2006) 14(2) *Critical Criminology* 137.
- Brownridge, Douglas A., "Understanding the Elevated Risk of Partner Violence against Aboriginal Women: A Comparison of Two Nationally Representative Surveys of Canada" (2008) 23(5) *Journal of Family Violence* 353.
- Burgess-Proctor, Amanda, "Intersections of Race, Class, Gender, and Crime: Future Directions for Feminist Criminology" (2006) 1(1) *Feminist Criminology* 27.
- CAEFS & NWAC, "Women and the Canadian Legal System: Examining Situations of Hyper-Responsibility: Discussion Paper by the Canadian Association of Elizabeth Fry Societies (CAEFS) and the Native Women's Association of Canada (NWAC)" *Canadian Woman Studies* 26:3,4 (Winter/Spring 2008) 94.
- Cameron, Angela, "Stopping the Violence: Canadian Feminist Debates on Restorative Justice and Intimate Violence" (2006) 10(1) *Theoretical Criminology* 49.
- Campbell, Allison, "Federally Sentenced Women and Security Classification" (July 2006), online: Prison Justice
http://www.prisonjustice.ca/starkravenarticles/women_max_security_0706.html.
- Chesney-Lind, Meda, "Patriarchy, Crime, and Justice: Feminist Criminology in an Era of Backlash" (2006) 1(1) *Feminist Criminology* 6.
- Comack, Elizabeth, "New Possibilities for a Feminism 'in' Criminology? From Dualism to Diversity" (1999) 41(2) *Canadian Journal of Criminology* 161.
- Cunliffe, Emma & Angela Cameron, "Writing the Circle: Judicially Convened Sentencing Circles and the Textual Organization of Criminal Justice" (2007) 19(1) *Canadian Journal of Women and the Law* 1.
- Balfour, Gillian, "Falling Between the Cracks of Retributive and Restorative Justice: The Victimization and Punishment of Aboriginal Women" (2008) 3(2) *Feminist Criminology* 101.
- Bouchard, Françoise, "Mental Health (A Health Care Needs Assessment of Federal Inmates in Canada)" 2004 95(Supplement 1) *Canadian Journal of Public Health* S36.
- DeHart, Dana D., "Pathways to Prison: Impact of Victimization in the Lives of Incarcerated Women" (2008) 14(12) *Violence Against Women* 1362.
- Dej, Erin, "What Once was Sick is now Bad: The Shift from Victim to Deviant Identity for those

- Diagnosed with Fetal Alcohol Spectrum Disorder” (2011) 36(2) *Canadian Journal of Sociology* 137.
- Dell, Colleen Anne, Catherine J. Fillmore & Jennifer M. Kilty, “Looking Back 10 Years after the Arbour Inquiry: Ideology, Policy, Practice, and the Federal Female Prisoner” (2009) 89(3) *The Prison Journal* 286.
- Dirks, Danielle, “Sexual Revictimization and Retraumatization of Women in Prison” (2004) 32(3/4) *Women’s Studies Quarterly* 102.
- Doob, Anthony N. & Cheryl Marie Webster, “Countering Punitiveness: Understanding Stability in Canada’s Imprisonment Rate” (2006) 40(2) *Law & Society Review* 325.
- Eliason, Michele J., Janette Y. Taylor & Rachel Williams, “Physical Health of Women in Prison; Relationship to Oppression” (2004) 10(2) *Journal of Correctional Health Care* 175.
- Ferraro, Kathleen J. and Angela M. Moe, “Mothering, Crime, and Incarceration” (2003) 32(1) *Journal of Contemporary Ethnography* 9.
- Graydon, Charalee F., “Habilitation: Sentencing of Female Offenders” (1992) 5(1) *Canadian Journal of Law & Jurisprudence* 121.
- Haag, Andrew M., “Ethical Dilemmas Faced by Correctional Psychologists in Canada” (2006) 33(1) *Criminal Justice & Behavior* 93.
- Hannah-Moffat, Kelly, “Feminine Fortresses: Woman-Centered Prisons?” (1995) 75(2) *The Prison Journal* 135.
- Hannah-Moffat, Kelly, “Gendering Risk at What Cost: Negotiations of Gender and Risk in Canadian Women’s Prisons” (2004) 14(2) *Feminism & Psychology* 243.
- Hannah-Moffat, Kelly, “Moral Agent or Actuarial Subject: Risk and Canadian Women’s Imprisonment” (1999) 3(1) *Theoretical Criminology* 71.
- Hannah-Moffat, Kelly & Paula Maurutto, “Re-contextualizing Pre-sentence Reports: Risk and Race” (2010) 12(3) *Punishment & Society* 262.
- Hartnagel, Timothy F., “The Rhetoric of Youth Justice in Canada” (2004) 4(4) *Criminal Justice: The International Journal of Policy & Practice* 355.
- Hunter, Anna, “The Violence that Indigenous Women Face” *Canadian Dimension* 39:2 (March/April 2005) 34.
- Kilty, Jennifer M., “Under the Barred Umbrella: Is there Room for a Women-Centered Self-Injury Policy in Canadian Corrections?” (2006) 5(1) *Criminology & Public Policy* 161.

- Kirmayer, Laurence J., Gregory M. Brass & Caroline L. Tait, "The Mental Health of Aboriginal Peoples: Transformations of Identity and Community" (2000) 45(7) *The Canadian Journal of Psychiatry* 607.
- Koons-Witt, Barbara A., "The Effect of Gender on the Decision to Incarcerate Before and After the Introduction of Sentencing Guidelines" (2002) 40(2) *Criminology* 297.
- Marchetti, Elena, "The Deep Colonizing Practices of the Australian Royal Commission into Aboriginal Deaths in Custody" (2006) 33(3) *Journal Of Law And Society* 451.
- Marchetti, Elena, "Intersectional Race and Gender Analyses: Why Legal Processes Just Don't Get It" (2008) 17(2) *Social & Legal Studies* 155.
- Martel, Joane & Renée Brassard, "Painting the Prison 'Red': Constructing and Experiencing Aboriginal Identities in Prison," (2008) 38(2) *British Journal of Social Work* 340.
- Maurutto, Paula & Kelly Hannah-Moffat, "Assembling Risk and the Restructuring of Penal Control" (2006) 46 *British Journal of Criminology*. 438.
- McFatter, Robert M., "Sentencing Strategies and Justice: Effects of Punishment Philosophy on Sentencing Decisions" (1978) 36(12) *Journal of Personality and Social Psychology* 1490.
- McGill, Jena, "An Institutional Suicide Machine: Discrimination Against Federally Sentenced Aboriginal Women in Canada" (Autumn 2008) 2(1) *Race/Ethnicity: Multidisciplinary Global Contexts* 89.
- Monture, Patricia A., "Confronting Power: Aboriginal Women and Justice Reform" *Canadian Woman Studies* 25:3,4 (Summer 2006) 25.
- Monture-Angus, Patricia, "Women and Risk: Aboriginal Women, Colonialism, and Correctional Practice" *Canadian Woman Studies* 19:1,2 (Spring/Summer 1999) 24.
- Muftic, Lisa R., Jeffrey A. Bouffard and Leana Allen Bouffard, "An Exploratory Study of Women Arrested for Intimate Partner Violence: Violent Women or Violent Resistance?" (2007) 22(6) *Journal of Interpersonal Violence* 753.
- O'Neil, John, "Editorial: Aboriginal Health Governance" (2004) 1(1) *Journal of Aboriginal Health* 4.
- Paradies, Yin C., "Beyond Black and White: Essentialism, Hybridity and Indigeneity" (2006) 42(4) *Journal of Sociology* 355.
- Parkes, Debra & Kim Pate, "Time for Accountability: Effective Oversight of Women's Prisons" (2006) 48(2) *Canadian Journal of Criminology and Criminal Justice* 251.
- Pate, Kim, "Advocacy, Activism and Social Change for Women in Prison" *Canadian Woman*

- Studies* 25: 3,4 (Summer 2006) 81.
- Peternelj-Taylor, Cindy A., "Conceptualizing Nursing Research with Offenders: Another Look at Vulnerability" (2004) 28(4) *International Journal of Law and Psychiatry* 348.
- Player, Elaine, "The Reduction of Women's Imprisonment in England and Wales: Will the Reform of Short Prison Sentences Help?" (2005) 7(4) *Punishment & Society* 419.
- Poister Tusher, Chantal & Sarah L. Cook, "Comparing Revictimization of Two Groups of Marginalized Women" (2010) 25(10) *Journal of Interpersonal Violence* 1893.
- Pollack, Shoshana, "'I'm Just Not Good in Relationships': Victimization Discourses and the Gendered Regulation of Criminalized Women" (2007) 2(2) *Feminist Criminology* 158.
- Pollack, Shoshana, "Taming the Shrew: Regulating Prisoners through Women-Centered Mental Health Programming" (2005) 13(1) *Critical Criminology* 71.
- Pollack, Shoshana, "'You Can't Have it Both Ways': Punishment and Treatment of Imprisoned Women" (2009) 20(2) *Journal of Progressive Human Services* 112.
- Pollock, Joycelyn M. & Sareta M. Davis, "The Continuing Myth of the Violent Female Offender" (2005) 30(1) *Criminal Justice Review* 5.
- Presser, Lois, "The Narratives of Offenders" (2009) 13(2) *Theoretical Criminology* 177.
- Raeder, Myrna S., "Domestic Violence in Federal Court: Abused Women as Victims, Survivors, and Offenders" (2006) 19(2) *Federal Sentencing Reporter* 91.
- Roach, Kent, "Changing Punishment at the Turn of the Century: Restorative Justice on the Rise" (2000) 42(3) *Canadian Journal of Criminology* 249.
- Roberts, Julian V. & Thomas Gabor, "Living in the Shadow of Prison: Lessons from the Canadian Experience in Decarceration" (2004) 44(1) *British Journal of Criminology* 92.
- Rumgay, Judith, "Scripts for Safer Survival: Pathways Out of Female Crime" (2004) 43(4) *The Howard Journal of Criminal Justice* 405.
- Shantz, Laura, Jennifer M. Kilty & Sylvie Frigon, "Echoes of Imprisonment: Women's Experiences of 'Successful (Re)integration'" (2009) 24(1) *Canadian Journal of Law & Society* 85.
- Sheehy, Elizabeth, "Misogyny is Deadly: Inequality makes Women more Vulnerable to Being Killed" (08/2010) 17(3) *Canadian Centre for Policy Alternatives Monitor* 18.
- Turnbull, Sarah & Kelly Hannah-Moffat, "Under these Conditions: Gender, Parole and the Governance of Reintegration" (2009) 49(4) *British Journal of Criminology* 532.

- Tyagi, Smita Vir, "Victimization, Adversity and Survival in the Lives of Women Offenders: Implications for Social Policy and Correctional Practice" *Canadian Woman Studies* 25:1,2 (Winter 2006) 133.
- Welsh, Andrew & James R.P. Ogloff, "Progressive Reforms or Maintaining the Status Quo?: An Empirical Evaluation of the Judicial Consideration of Aboriginal Status in Sentencing Decisions" (2008) 50(4) *Canadian Journal of Criminology and Criminal Justice* 491.
- Williams, Toni, "Punishing Women: The Promise and Perils of Contextualized Sentencing for Aboriginal Women in Canada" (2007) 55(3) *Cleveland State Law Review* 269.
- Zaitzow, Barbara H., "Pastel Fascism: Reflections of Social Control Techniques used with Women in Prison" (2004) 32(3/4) *Women's Studies Quarterly* 33.

BOOKS (AND ESSAYS WITHIN)

- CAEFS & NWAC, "Women and the Canadian Legal System: Examining Situations of Hyper-Responsibility" in Patricia A. Monture & Patricia D. McGuire, eds., *First Voices: An Aboriginal Women's Reader* (Toronto: Inanna, 2009) 382.
- Campbell, Larry, Neil Boyd, & Lori Culbert, *A Thousand Dreams: Vancouver's Downtown Eastside and the Fight for its Future* (Vancouver: Greystone Books, 2009).
- Chewter, Cynthia, Book Review of *In Conflict with the Law: Women & the Canadian Justice System* by Ellen Adelberg & Claudia Currie, eds., *Canadian Woman Studies* 19:1,2 (Spring/Summer 1999) 215.
- Chrisjohn, Roland, Sherri Young, & Michael Maraun, *The Circle Game: Shadows and Substance in the Indian Residential School Experience in Canada* (Syilx territory on the Penticton Indian Reserve, BC: Theytus Books, 2006).
- Comack, Elizabeth, "The Prisoning of Women: Meeting Women's Needs" in Kelly Hannah-Moffat & Margaret Shaw, eds., *An Ideal Prison? Critical Essays on Women's Imprisonment in Canada* (Halifax: Fernwood Publishing, 2000) 117.
- Conaghan, Joanne, "Intersectionality and the Feminist Project in Law" in Emily Grabham *et al*, eds., *Intersectionality and Beyond: Law, Power and the Politics of Location* (New York: Routledge-Cavendish, 2009) 21.
- Darnell, Regna, "Nomadic Legacies and Contemporary Decision-Making Strategies between Reserve and City" in Heather A. Howard & Craig Proulx, eds., *Aboriginal Peoples in Canadian Cities: Transformations and Continuities* (Waterloo: Wilfred Laurier University Press, 2011) 39.

- Donovan, Sadie, "Challenges to and Successes in Urban Aboriginal Education in Canada: A Case Study of Wiingashk Secondary School" in Heather A. Howard & Craig Proulx, eds., *Aboriginal Peoples in Canadian Cities: Transformations and Continuities* (Waterloo: Wilfred Laurier University Press, 2011) 123.
- Duff, R. A. & D. Garland, "Introduction: Thinking about Punishment" in Antony Duff & David Garland, eds., *A Reader on Punishment* (Oxford: Oxford University Press, 1994) 1.
- Faith, Karlene, *Unruly Women: The Politics of Confinement and Resistance* (Vancouver: Press Gang Publishers, 1993).
- Faith, Karlene & Anne Near, eds., *13 Women: Parables from Prison* (Vancouver: Douglas & McIntyre, 2006).
- Flynn, Lindy-Lou, "Plains Indian Ways to Inter-tribal Cultural Healing in Vancouver" in Heather A. Howard & Craig Proulx, eds., *Aboriginal Peoples in Canadian Cities: Transformations and Continuities* (Waterloo: Wilfred Laurier University Press, 2011) 227.
- Green, Joyce, "Balancing Strategies: Aboriginal Women and Constitutional Rights in Canada" in Joyce Audry Green ed., *Making Space for Indigenous Feminism* (Black Point, N.S.: Fernwood Pub., 2007) 140.
- Green, Joyce, "Taking Account of Aboriginal Feminism" in Joyce Audry Green ed., *Making Space for Indigenous Feminism* (Black Point, N.S.: Fernwood Pub., 2007) 20.
- Hannah-Moffat, Kelly, "Re-Forming the Prison – Rethinking our Ideals" in Kelly Hannah-Moffat & Margaret Shaw, eds., *An Ideal Prison? Critical Essays on Women's Imprisonment in Canada* (Halifax: Fernwood Publishing, 2000) 30.
- Howard, Heather A., "The Friendship Centre: Native People and the Organization of Community in Cities" in Heather A. Howard & Craig Proulx, eds., *Aboriginal Peoples in Canadian Cities: Transformations and Continuities* (Waterloo: Wilfred Laurier University Press, 2011) 87.
- Howard, Heather A. & Craig Proulx, eds., *Aboriginal Peoples in Canadian Cities: Transformations and Continuities* (Waterloo: Wilfred Laurier University Press, 2011).
- Howard, Heather A. & Craig Proulx, "Transformations and Continuities" in Heather A. Howard & Craig Proulx, eds., *Aboriginal Peoples in Canadian Cities: Transformations and Continuities* (Waterloo: Wilfred Laurier University Press, 2011) 1.
- Ignass, Marianne, "'Why Is My People Sleeping?' First Nations Hip Hop between the Rez and the City" in Heather A. Howard & Craig Proulx, eds., *Aboriginal Peoples in Canadian Cities: Transformations and Continuities* (Waterloo: Wilfred Laurier University Press, 2011) 203.

- Jackson, Michael, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & McIntyre, 2002).
- Kuokkanen, Rauna, "Myths and Realities of Sami Women: A Post-Colonial Feminist Analysis for the Decolonization and Transformation of Sami Society" in Joyce Audry Green ed., *Making Space for Indigenous Feminism* (Black Point, N.S.: Fernwood Pub., 2007) 72.
- LaRocque, Emma, "Métis and Feminist: Ethical Reflections on Feminism, Human Rights and Decolonization" in Joyce Audry Green ed., *Making Space for Indigenous Feminism* (Black Point, N.S.: Fernwood Pub., 2007) 53.
- Manson, Allan *et al.*, *Sentencing and Penal Policy in Canada: Cases, Materials, and Commentary* 2d ed. (Toronto: Emond Montgomery Publications, 2008).
- Monture-Angus, Patricia, "Aboriginal Women and Correctional Practice: Reflections on the Task Force on Federally Sentenced Women" in Kelly Hannah-Moffat & Margaret Shaw, eds., *An Ideal Prison? Critical Essays on Women's Imprisonment in Canada* (Halifax: Fernwood Publishing, 2000) 53.
- Monture-Angus, Patricia, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1996).
- Newhouse, David R., "Urban Life: Reflections of a Middle-Class Indian" in Heather A. Howard & Craig Proulx, eds., *Aboriginal Peoples in Canadian Cities: Transformations and Continuities* (Waterloo: Wilfred Laurier University Press, 2011) 23.
- Shaw, Margaret, "Women, Violence and Disorder in Prisons" in Kelly Hannah-Moffat & Margaret Shaw, eds., *An Ideal Prison? Critical Essays on Women's Imprisonment in Canada* (Halifax: Fernwood Publishing, 2000) 61.
- St. Denis, Verna, "Feminism is for Everybody: Aboriginal Women, Feminism and Diversity" in Joyce Audry Green ed., *Making Space for Indigenous Feminism* (Black Point, N.S.: Fernwood Pub., 2007) 33.
- Tuhiwai Smith, Linda, *Decolonizing Methodologies: Research and Indigenous Peoples* (London: Zed Books Ltd, 2008).
- Williams, Toni, "Intersectionality Analysis in the Sentencing of Aboriginal Women in Canada: What Difference Does it Make?" in Emily Grabham *et al.*, eds., *Intersectionality and Beyond: Law, Power and the Politics of Location* (New York: Routledge-Cavendish, 2009) 79.
- Zehr, Howard, *The Little Book of Restorative Justice* (Intercourse, PA: Good Books, 2002).

NEWSPAPER AND MAGAZINE ARTICLES

Bayes, Shawn, "Harper's Crime Laws" *Canadian Dimension* 41:2 (March 2007) 22.

Bernier, Jennifer, "Breaking Down the Walls: Building a Case for Community-Based Alternatives to Incarceration that Better Meet the Needs of Criminalized Women" *Network Magazine* 13:1 (Fall/Winter 2010/11), online: Canadian Women's Health Network <http://www.cwhn.ca/en/node/42825>.

Botsford Fraser, Marian, "Life on the Instalment Plan: Is Canada's Penal System for Women Making or Breaking Renee Acoby?" *The Walrus* (March 2010), online: <http://www.walrusmagazine.ca/articles/2010.03-justice-life-on-the-instalment-plan/>.

Findlay, Stephanie, "Trouble in the Big House: How Mandatory Minimum Sentencing Could Make it Worse for Women in Prison" *MacLean's Magazine* (17 January 2011), online: MacLean's <http://www2.macleans.ca/2011/01/17/trouble-in-the-big-house/>.

Maynard, Robyn, "Criminal (in)justice: State Violence and the Criminalization of Indigenous Women in Canada, An Interview with Gillian Balfour" *Briar Patch* 40:2 (1 March 2011) 32, online: Briar Patch Magazine <http://briarpatchmagazine.com/articles/view/criminal-injustice>.

Norwich, Marni, "Women Behind Bars" *The Straight* (2 November 2006), online: Straight <http://www.straight.com/article-46501/women-behind-bars>.

Stastna, Kazi, "Shacks and slop pails: Infrastructure crisis on Native reserves" *CBC* (26 November 2011), online: CBC <http://www.cbc.ca/news/canada/story/2011/11/24/f-first-nations-infrastructure.html>.

"More prisons to be expanded" *CBC* (10 January 2011) online: CBC <http://www.cbc.ca/news/politics/story/2011/01/10/tories-prison-infrastructure.html>.

"Tories announce \$155.5M prison expansion" *CBC* (6 October 2010) online: CBC <http://www.cbc.ca/news/politics/story/2010/10/06/toews-prison-construction.html>.

INTERVIEWS, LECTURES, CORRESPONDENCE, AND VIDEOS

CBC Doc Zone: 8th Fire, "8th Fire: Indigenous in the City" *CBC*, online: CBC <http://www.cbc.ca/player/Shows/Shows/Doc+Zone/8th+Fire/Full+Episodes/ID/2186429161/>.

Crenshaw, Kimberlé, "A Tale of Two Movements: Intersectionality, Gender, and the Prison Industrial Complex" (Lecture delivered at the UCSB Multicultural Centre Theatre, 18

May 2006), Regents of the University of California, online: youtube <http://www.youtube.com/watch?v=d1v9E83yTNA>.

Interview of Kim Pate by Hana Gartner (26 November 2010) on CBC's The Fifth Estate, "Interview: Kim Pate", online: http://www.cbc.ca/video/#/Shows/the_fifth_estate/1278707885/ID=1668371268.

Kilbourne, Jean, "Killing Us Softly 4: Advertising's Image of Women" (2010), online: youtube http://www.youtube.com/watch?v=PTImho_RovY&feature=related.

Pate, Kim, Lecture on Mental Health and Sentencing (Lecture delivered to the Canadian Chapter of the International Association of Women Judges at the "Judging Women: Aging, Mental Health and Culture" conference held by the National Judicial Institute and the Faculty of Law, University of British Columbia at the Fairmont Pacific Rim in Vancouver, 11 May 2011).

Personal correspondence from Michael Jackson (24 November 2012), email.

Sapers, Howard, Correctional Investigator, "Mental Health Challenges in Federal Corrections" (Lecture delivered to the North Shore Schizophrenia Society at West Vancouver Memorial Library, 7 November 2011), online: youtube <http://www.youtube.com/user/nsschizophrenia/videos>.

Sheehy, Elizabeth, "Defending Battered Women on Trial: 'Not a Battered Woman': Jamie Gladue" (Lecture delivered at the Faculty of Law, University of British Columbia, 1 April 2011).

INTERNET SOURCES

Ahni, "Anishinabek Outlaw Term 'Aboriginal'", online: (2008) Intercontinental Cry <http://intercontinentalcry.org/anishinabek-outlaw-term-aboriginal/>.

BC Corrections, "Correctional Facilities in British Columbia: Core Programs Overview", online: Corrections, Government of British Columbia, Ministry of Justice www.pssg.gov.bc.ca/corrections/in-bc/details/overview.htm.

Boyle McCauley Health Centre, "Services and Programs: Kindred House", online: BMHC <http://www.bmhc.net/services/kindred.html>.

Canadian Legal Information Institute, CanLII, online: CanLII <http://www.canlii.org/en/>.

CAEFS, "Justice for Battered Women – Denied, Delayed...Diminished: Jails are Not the Shelters Battered Women Need", online: CAEFS <http://www.elizabethfry.ca/diminish.htm>.

DasGupta, Sayantani, “‘Your Women Are Oppressed, But Ours Are Awesome’: How Nicholas Kristof And *Half The Sky* Use Women Against Each Other” (8 October 2012), online: Racialicious <http://www.racialicious.com/2012/10/08/your-women-are-oppressed-but-ours-are-awesome-how-nicholas-kristof-and-half-the-sky-use-women-against-each-other/>.

Dictionary.com, online: Dictionary.com <http://dictionary.reference.com/>, s.v. “strategy”.

E4C, “Crossroads”, online: E4C <http://www.e4calberta.org/crossroads.html>.

Ministry of Justice, “Correctional Facilities in British Columbia: Sentence Management Process” (9 May 2007), online: Government of British Columbia, Corrections <http://www.pssg.gov.bc.ca/corrections/in-bc/details/management.htm>.

The PAR Foundation, online: PAR <http://www.parfoundation.ca/>.

Truth and Reconciliation Commission of Canada, “Residential School Locations” *Truth and Reconciliation Commission of Canada*, online: Truth and Reconciliation Commission of Canada <http://www.trc.ca/websites/trcinstitution/index.php?p=12>.

University of Alberta, Faculty of Law, “Legal Education and Reform Project”, online: Student Legal Services <http://www.slsedmonton.com/education-reform/community-outreach/>.

University of Alberta, Faculty of Law, “Student Legal Services of Edmonton”, online: Student Legal Services <http://www.slsedmonton.com/>.

Westlaw Canada, online: Westlaw Canada <http://www.westlawcanada.com/>.

Appendix A

Conditional sentencing law following the passage of Bill C-10 (which entered into force on November 20, 2012):

s. 742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if

- (a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;
 - (b) the offence is not an offence punishable by a minimum term of imprisonment;
 - (c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;
 - (d) the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more;
 - (e) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that
 - (i) resulted in bodily harm,
 - (ii) involved the import, export, trafficking or production of drugs, or
 - (iii) involved the use of a weapon; and
 - (f) the offence is not an offence, prosecuted by way of indictment, under any of the following provisions:
 - (i) section 144 (prison breach),
 - (ii) section 264 (criminal harassment),
 - (iii) section 271 (sexual assault),
 - (iv) section 279 (kidnapping),
 - (v) section 279.02 (trafficking in persons — material benefit),
 - (vi) section 281 (abduction of person under fourteen),
 - (vii) section 333.1 (motor vehicle theft),
 - (viii) paragraph 334(a) (theft over \$5000),
 - (ix) paragraph 348(1)(e) (breaking and entering a place other than a dwelling-house),
 - (x) section 349 (being unlawfully in a dwelling-house), and
 - (xi) section 435 (arson for fraudulent purpose).
- 1992, c. 11, s. 16;
 - 1995, c. 19, s. 38, c. 22, s. 6;
 - 1997, c. 18, s. 107.1;
 - 2007, c. 12, s. 1;
 - 2012, c. 1, s. 34.

[Source: Canadian Legal Information Institute, CanLII, online: CanLII <http://www.canlii.org/en/>.]

Appendix B

Case Name	Most Serious Offence	CSO Sought by Counsel/ Considered by Judge?	Sanction Ordered	Still Eligible for CSO after Bill C-10 Passage (2012 CSO Amendments)?
<i>R. v. Evaloardjuk</i> , 1999 CanLII 1156 (NU CJ). [Nunavut]	Aggravated assault	Yes	CSO 9 mos	No
<i>R. v. S(I.M.D.)</i> , 2000 YTSC 19. [Whitehorse]	Driving impaired, caused bodily harm	Yes	CSO 15 mos	No
<i>R. v. R.K., M.P., and S.W.</i> , 2001 CanLII 26261 (MB PC). [Winnipeg]	Manslaughter	No	(MP) 9 yrs prison; but after credit for remand, 6 yrs prison	No
<i>R. v. Capistrano</i> , 2001 MBQB 60. [Winnipeg Centre]	Manslaughter	Yes	CSO 2 yrs less a day; probation 3 yrs	No
<i>R. v. Curran</i> , 2001 ABPC 34. [Edmonton]	Trafficking	Yes	CSO 18 mos	No
<i>R. v. Jack</i> , 2001 YKSC 55. [Whitehorse]	Sexual assault	Yes	CSO 12 mos; probation 3 yrs	No
<i>R. v. Travers</i> , 2001 CanLII 17782 (MBPC).	Driving impaired, causing death	Yes	CSO 2 yrs less a day; probation 3 yrs	No
<i>R. v. Cleary</i> , 2002 NWTSC 30. [Yellowknife]	Theft over \$5000; fraud over \$5000	Yes	CSO 2 yrs less a day	No
<i>R. v. Dick</i> , 2002 BCPC 650. [New Westminster]	Robbery of bank	No	Prison 2 yrs; probation 1 yr after release (residual from former, breached CSO)	No
<i>R. v. Gilpin</i> , 2002 BCSC 1876. [Williams Lake]	Manslaughter	Yes	CSO 2 yrs less a day	No

Case Name	Most Serious Offence	CSO Sought by Counsel/ Considered by Judge?	Sanction Ordered	Still Eligible for CSO after Bill C-10 Passage (2012 CSO Amendments)?
<i>R. v. Shore</i> , 2002 SKPC 42. [Regina]	Driving impaired, causing death	Yes	CSO 2 yrs less a day	No
<i>R. v. D.E.W.</i> , 2003 BCPC 0488. [Kelowna]	Aggravated assault	Yes	CSO 30 mos; but after credit for remand, 22 mos; probation 2 yrs	No
<i>R. v. Monias</i> , 2003 CarswellMan 575 (MB PC) (WLeC).	Possession for purposes of trafficking	Yes	Prison 18 mos; 12 mos probation	No
<i>R. v. Sayers and Elanik</i> , 2003 NWTSC 69. [Inuvik]	(Elanik) manslaughter	Yes	Prison 5 yrs	No
<i>R. v. Sans</i> , 2004 NBQB 386. [Miramichi]	Causing damage by fire to house and vehicle when knew/reckless was occupied (arson)	No? (Unclear)	Prison 2 yrs less a day; probation 2 yrs	No
<i>R. v. Fisher</i> , 2004 CanLII 10497 (ON SC). [Thunder Bay]	Manslaughter	No? (Unclear)	Prison 8 yrs	No
<i>R. v. Smith</i> , 2004 YKTC 14. [Whitehorse]	Assault causing bodily harm	Yes? (Unclear)	Prison 14 mos (already reduced remand credit of 17 mos); probation 3 yrs	No
<i>R. v. Dillon</i> , 2004 NWTSC 39. [Fort McPherson]	Aggravated assault	Yes	CSO 12 mos; probation 12 mos	No
<i>R. v. Lilley</i> , 2004 YKTC 38. [Whitehorse]	Assault with weapon	Yes	CSO 5 mos; probation 3 yrs	No
<i>R. v. Machiskinic</i> , 2004 SKQB 358. [Wynyard]	Manslaughter (plea; original charge 2 nd degree murder)	Yes	Prison 2½ yrs	No

Case Name	Most Serious Offence	CSO Sought by Counsel/ Considered by Judge?	Sanction Ordered	Still Eligible for CSO after Bill C-10 Passage (2012 CSO Amendments)?
<i>R. v. Bisson, Kohl, and Hill</i> , 2004 CanLII 12844 (ON SC).	(Bisson) Manslaughter	No	Prison 10 yrs, reduced by credit for remand to 5 ½ yrs	No
<i>R. v. Galloway</i> , 2004 SKQB 130. [Prince Albert]	Dangerous driving causing bodily harm and death, impaired and causing bodily harm and death	Yes	Prison 2 yrs; 6 mos concurrent	No
<i>R. v. Jankovic</i> , 2004 ABPC 162. [Edson]	Robbery; trafficking; breach of probation order	Yes	Prison 2 ½ yrs; 4 mos consecutive; 1 day (breach)	No
<i>R. v. Burke</i> , 2004 BCSC 1130. [Fort St. John]	Possession for purposes of trafficking	Yes	CSO 2 yrs less a day; probation 2 yrs	No
<i>R. v. Martin, Evans, and LaViolette</i> , 2004 NWTSC 15. [Hay River]	Simple possession	Unclear	(Martin) suspended sentence for 1 yr; released on conditions of probation order	Yes
<i>R. v. Swan</i> , 2004 CanLII 29564 (MB PC).[Winnipeg]	Stole \$35 000 from Band	No? (Unclear)	Suspended sentence for 1 yr; released on conditions of probation order; restitution	No
<i>R. v. Pechawis</i> , 2005 SKPC 25.	Trafficking	Yes	CSO 18 mos	No
<i>R. v. Asp</i> , 2005 YKSC 58. [Whitehorse]	Manslaughter	No? (Unclear)	Prison 5 yrs; after reduced for remand credit, 3 yrs	No
<i>R. v. Pepabano</i> , 2005 CarswellQue 11839.	Driving impaired causing death of three	Yes	Prison 42 mos	No

Case Name	Most Serious Offence	CSO Sought by Counsel/ Considered by Judge?	Sanction Ordered	Still Eligible for CSO after Bill C-10 Passage (2012 CSO Amendments)?
<i>R. v. Whitford</i> , 2005 BCSC 1110. [Prince Rupert]	Breaking and entering; assault	Yes	Prison 3 yrs 6 mos; after reduced for remand credit, 3 yrs 5 mos	No
<i>R. v. W.L.Q.</i> , 2005 SKQB 10. [Yorkton]	Manslaughter	Yes (barely)	Prison 4 yrs; after reduced for remand credit of 6 mos, leaves prison 3 yrs, 30 days concurrent	No
<i>R. v. Chouinard</i> , 2005 CarswellOnt 10610 (ONSC) (WLeC). [Ottawa]	Accessory to manslaughter	Yes	CSO 22 mos; probation 2 yrs	No
<i>R. v. Shecapio</i> , 2006 QCCQ 13164. [Montreal]	Manslaughter	No	Prison 8 yrs; after remand time credit of 2 yrs in custody, leaves 4 yrs	No
<i>R. v. Wycotte</i> , 2006 BCPC 657. [Williams Lake]	Driving while prohibited	N/A	Not guilty	Yes
<i>R. v. Pawis</i> , 2006 ONCJ 386. [Toronto]	Aggravated assault	Yes	CSO 2 yrs less a day; probation 3 yrs	No
<i>R. v. Kahypeasewat</i> , 2006 SKPC 79.	Manslaughter	Yes	CSO 2 yrs less a day; probation 2 yrs	No
<i>R. v. Heavenfire, Bigcrow, Pasquayak, and Pasquayak</i> , 2006 ABPC 228. [Calgary]	(Heavenfire) Uttering threats and forcible entry [charged attempted murder; break and enter with intent murder]	Unclear	After 8 mos of pretrial custody credited at 2:1 ratio, prison 1 day, concurrent; probation 12 mos	No

Case Name	Most Serious Offence	CSO Sought by Counsel/ Considered by Judge?	Sanction Ordered	Still Eligible for CSO after Bill C-10 Passage (2012 CSO Amendments)?
<i>R. v. Diamond</i> , 2006 QCCQ 2252. [Waskaganish]	Aggravated assault	Yes	CSO 24 mos less a day; after reduced by remand credit, 18 mos; probation 24 mos	No
<i>R. v. Shoenthal</i> , 2006 SKQB 177. [Wynyard]	Criminal negligence causing death	Yes	Prison 2½ yrs or 30 mos	No
<i>R. v. Braun</i> , 2006 BCPC 590. [Surrey]	Mischief over \$5000	Unclear	Conditional discharge for 1 yr; released on probation conditions	Yes
<i>R. v. Happyjack</i> , 2006 QCCQ 8276. [Waswanipi]	Defrauding; false documents; theft over \$5000	Yes	Prison 8 mos; probation 18 mos	No
<i>R. v. Saganash</i> , 2006 QCCQ 2282.	Defrauding; false documents; theft over \$5000	Yes	CSO 14 mos; probation 18 mos	No
<i>R. v. Icebound</i> , 2006 QCCQ 2281. [Waswanipi]	Defrauding; false documents; theft over \$5000	Yes	CSO 14 mos; probation 18 mos	No
<i>R. v. Armstrong</i> , 2006 ABPC 5. [Calgary]	Operating motor vehicle dangerous to public; evaded police; possession of stolen property over \$5000	Yes	Prison 1 yr; after reduced for remand credit, 6 mos; probation 2 yrs	Yes
<i>R. v. Char</i> , 2007 CarswellBC 1489 (BC PC) (WLeC). [Williams Lake]	Shoplifting and breaches of court orders	Unclear	Prison 1 yr (after reduced by remand credit); (more but all concurrent)	Yes
<i>R. v. Woods</i> , 2007 SKPC 54.	Robbery	Yes	CSO 2 yrs less a day	No
<i>R. v. Beaulieu, Beaulieu, Chief Zebrasky</i> , 2007 MBPC 9. [Winnipeg]	(Stacey Beaulieu) Manslaughter	No	Prison 5 yrs	No

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<i>R. v. Fineday</i> , 2007 SKPC 2.	Driving impaired causing death; driving impaired causing bodily harm	Yes	Prison 90 days intermittent; probation 3 yrs; CSO 2 yrs less a day; probation 3 yrs (all concurrent)	No
<i>R. v. D.L.W.</i> , 2007 SKPC 151. [Saskatoon]	Manslaughter (plea; was charged with 2 nd degree murder)	Yes	Prison 4 yrs; after reduced by (16 mos) remand credit (4 mos for time served), and for when on release under strict conditions (12 mos for time on release), leaves prison 2 yrs 8 mos	No
<i>R. v. Jack, Joyce Smith, and Nenette Smith</i> , 2008 BCPC 0332. [Duncan]	Manslaughter (plea; originally charged w/ 2 nd deg murder)	Yes	(Joyce and Nenette) Prison 2 yrs; no credit for remand	No
<i>R. v. Stabsdown</i> , 2008 ABPC 250. [Lethbridge]	Trafficking (cocaine); failing to comply with probation order	Yes	CSO 22 mos	No
<i>R. v. Bird</i> , 2008 ABQB 327. [Edmonton]	Manslaughter; aggravated sexual assault, kidnapping	No	Prison 12 yrs; after reduced by remand credit, prison 9 yrs	No
<i>R. v. S.C.M.</i> , 2008 ABPC 214. [Calgary]	Assault with weapon; threatening death or bodily harm; willfully damaging property under \$5000; mischief	Yes	CSO 12 mos; probation 12 mos	Unclear (would depend on whether Crown proceeded by indictment, – if by indictment, ineligible for CSO; if summarily, eligible)

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<i>R. v. Batisse</i> , 2008 CarswellOnt 8590 (WLeC). [Sudbury]	Child abduction	Yes	Prison 5 yrs (in addition to time served)	No
<i>R. v. A.E.M.</i> , 2008 SKQB 61. [Prince Albert]	Manslaughter (plea; originally charged with unlawfully causing death, 2 nd deg murder)	No	Prison 4 yrs; after reduced for remand credit, prison 3 yrs	No
<i>R. v. Neshinapaise</i> , 2008 CarswellOnt 3725 (ONCJ) (WLeC). [Thunder Bay]	Assault with weapon	Yes	Conditional discharge; released on probation for 6 mos	Probably yes (provided Crown proceeded summarily)
<i>R. v. Shenfield</i> , 2008 ABPC 47. [Edmonton]	Trafficking (cocaine)	Yes	Suspended sentence for 18 mos; released on probation order	No
<i>R. v. Hachey and Selena Wiley</i> , 2008 NBQB 52. [Bathurst]	Possession for purpose of trafficking	Yes	(Wiley) Prison 1 yr	No
<i>R. v. Whitford</i> , 2008 BCSC 1378. [Prince George]	Manslaughter (plea; orig charged with 2 nd degree murder)	No	Prison 6 yrs; after reduced for remand credit, prison 4 yrs	No
<i>R. v. Niganobe</i> , 2008 CanLII 54322 (ON SC).	Driving impaired causing death; driving impaired causing bodily harm	Yes	Prison 5 yrs (causing death), 2 ½ yrs concurrent (bodily harm); after reduced for remand credit, 3 yrs 3 mos	No
<i>R. v. Petawabano</i> , 2008 QCCQ 6141. [Mississini]	Manslaughter	No	Prison 5 yrs; after reduced for remand credit, prison 4 yrs 6 mos	No

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<i>R. v. Allan</i> , 2008 CanLII 35699 (ON SC).	Defrauding social assistance program over \$5000; falsifying records; possessing property re fraud	Yes	Fine of \$500 or in default prison 7 days; probation 18 mos	No
<i>R. v. Brooks</i> , 2008 NSPC 58. [Shubenacadie]	Causing bodily harm (plea; original charge aggravated assault)	Yes	CSO 12 mos; probation 8 mos	No
<i>R. v. B.K.W.</i> , 2008 BCPC 0418. [Prince George]	Assault causing bodily harm	Yes	Suspended sentence; released on probation 3 yrs	No
<i>R. v. Tapaquon</i> , 2009 SKQB 142. [Regina]	Willfully attempted to obstruct, pervert or defeat justice by harbouring (criminals); trafficking cocaine	No	Prison 18 mos, concurrent	No
<i>R. v. Redhead</i> , 2009 MBQB 314. [Winnipeg Centre]	Attempted murder of police officer	No	Prison 10 yrs; after reduced for remand credit, prison 6 yrs	No
<i>R. v. Stonechild</i> , 2009 SKPC 122. [Saskatoon]	Robbery with firearm; failure to comply with probation order (three failures); carrying weapon for purpose dangerous to public peace;	No	Prison 10 yrs (net, including all and after remand credit reduced)	No
<i>R. v. Elias</i> , 2009 YKTC 59. [Whitehorse]	Assault with weapon	No	Prison 15 mos; after reduced for remand credit, prison 4 mos; probation 2 yrs	No
<i>R. v. Isaac</i> , 2009 SKPC 111. [Melville]	Defrauding ministry of social services over \$5000	Yes	CSO 16 mos	No
<i>R. v. McDougall</i> , 2009 MBQB 299. [Winnipeg Centre]	Manslaughter	Yes	Prison 3 yrs	No

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<i>R. v. Gregoire</i> , 2009 NLTD 21. [Happy Valley-Goose Bay]	Driving impaired causing death; driving impaired causing bodily harm	Yes	CSO 2 yrs less a day; probation 2 yrs; 15 yr driving prohibition	No
<i>R. v. Papakyriakou</i> , 2009 ONCJ 397.	Theft more than \$7.4 million over 11 yr period	Yes	Prison 5 yrs	No
<i>R. v. Collins</i> , 2009 CarswellOnt 9678 (Ont. Sup. Ct. Jus.) (WLeC).	Defrauded Ont. Works Assistance Program over \$5000; false info, falsifying records, forged docs	Yes	Prison 16 mos; probation 2 yrs	No
<i>R. v. Stevens</i> , 2009 NSPC 46. [Sydney]	Assault with weapon (motor vehicle)	Yes	Conditional discharge; released on probation conditions 18 mos	Probably yes (provided Crown proceeded summarily)
<i>R. v. Redies</i> , 2009 YKTC 85. [Ross River]	Driving impaired causing bodily harm; driving while disqualified; over .08	Yes	Prison 6 mos (impaired b/h); prison 1 mos concurrent (driving disqualified); etc etc: prison 12 mos total; probation 6 mos	No
<i>R. v. S.L.N.</i> , 2010 BCSC 405. [Chilliwack]	Extortion; assault causing bodily harm; possession of weapon (all while in prison)	N/A	Prison 30 days (extortion); prison 24 mos (assault b/h); prison 18 mos (weapon); all concurrent; total: prison 30 mos	No
<i>R. v. Guimond</i> , 2010 MBPC 33. [Winnipeg Centre]	Failing to provide the necessaries of life	Yes	CSO 18 mos (after reducing for remand credit); probation 3 yrs	Yes

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<i>R. v. Good</i> , 2010 YKTC 96. [Whitehorse]	Assault causing bodily harm; uttering death threats; Crown application to designate as long-term offender	No	Prison 3 yrs concurrent; after reduced for remand credit, prison 31 mos; long-term offender designation ordered for 10 yrs following release	No
<i>R. v. Audy</i> , 2010 MBPC 55. [Swan River Centre]	Driving impaired causing bodily harm	Yes	Fine of \$1000; probation 18 mos	No
<i>R. v. Berner</i> , 2010 BCPC 305. [Surrey]	Driving impaired; dangerous operation of vehicle causing death; also causing bodily harm	No	Prison 2 yrs 6 mos concurrent; driving prohibition 5 yrs	No
<i>R. v. Kendi</i> , 2010 NWTTC 8. [Fort McPherson]	Mischief by damaging property; breach of probation (two); break and enter into house	Yes	CSO 1 yr (b and e); 3 mos consecutive (mischief); 1 mos (breach probation); 1 mos (breach probation); concurrent; total: CSO 15 mos; probation 1 yr	No
<i>R. v. Connors</i> , 2010 NSPC 63. [Sydney]	Robbery with violence; shoplifting	Yes	Prison 2 yrs (robbery); prison 1 mos concurrent (shoplifting)	No
<i>R. v. Dennill</i> , 2010 NWTSC 98. [Yellowknife]	Possession of cocaine for purpose of trafficking	Yes	Prison 9 mos; prison 10 mos consecutive; total: prison 19 mos	No

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<i>R. v. Stimson</i> , 2010 CarswellAlta 2644 (ABPC) (WLeC). [Red Deer]	Driving impaired causing death; operating motor vehicle without license	Yes	Prison 90 days served intermittently; probation 2 yrs; prison 30 days intermittently, concurrent (driving w/out license); prison 1 day (breaches)	No
<i>R. v. Tippeneskum</i> , 2011 ONCJ 219.	Aggravated assault; breach of probation; theft of property; fail to attend court; theft of property; obstruct police by giving false name	No	Prison 3 ½ yrs (aggravated assault); after reduced for remand credit, prison 37 mos; the other convictions net prison 6 mos concurrent	No
<i>R. v. Johnson</i> , 2011 YKTC 11. [Whitehorse]	Trafficking (cocaine)	Yes	CSO 10 mos	No
<i>R. v. N.R.R.</i> , 2011 MBQB 90. [Winnipeg Centre]	Manslaughter	No	Prison 12 yrs; after reduced by remand credit, prison 8 yrs 8 mos	No
<i>R. v. Bluebell</i> , 2011 SKQB 203. [Saskatoon]	Attempted murder; breach of undertaking; possession of stolen property; possession of prohibited weapon; fail to attend court	No	Prison 6 ½ yrs; after reduced for remand credit, prison 5 yrs 5 mos (attempt murder); prison 30 days concurrent (breach undertaking); time served for other offences	No

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<i>R. v. O.C.G.</i> , 2011 CarswellBC 1655 (BCPC) (WLeC). [New Westminster]	Aggravated assault; failure to provide necessities of life to person under her charge	Yes	CSO 2 yrs less a day; probation 3 yrs	No
<i>R. v. O.N.M., S.M. & C.W.S.</i> , 2011 BCPC 97. [Prince George]	Kidnapping, unlawful confinement, assault causing bodily harm	No	(Ms. M) Prison 10 yrs (kidnapping); prison 6 yrs concurrent (unlawful confinement); prison 3 yrs concurrent (assault b/h); after reduced for remand credit, prison 7 yrs 3 mos	No
<i>R. v. Pelletier</i> , 2011 SKQB 7. [Regina]	Robbery; arson; assault; Crown application for long-term offender designation	No	(after reducing for remand credit) Prison 9 mos (each robbery with violence, concurrent); prison 18 mos consecutive (arson); prison 1 yr (assault); total: prison 3 yrs and 3 mos; long-term offender designation ordered for 7 yrs after release	No