Centre for Women's Justice

Self-defence: Canadian law 1985-2022

Elizabeth Sheehy

About the Centre for Women's Justice
Centre for Women's Justice (CWJ) is a lawyer-led charity focused on challenging failings and discrimination against women in the criminal justice system. We carry out strategic litigation and work with frontline women's sector organisations to challenge police and prosecution failings around violence against women and girls (VAWG). Our evidence base is built on the experience of frontline women's sector support workers discussed during our training sessions with them, the requests for legal advice they send to us, and our research. In 2021 we responded to a total of 1,081 legal enquiries, including 559 in which we gave legal advice.

About this paper
This paper was commissioned as part of CWJ's work to address the unjust criminalisation of victims of VAWG who are accused of offending. It is specifically intended to help inform debate about potential reforms in law and practice in England and Wales to make self-defence more accessible for victims of domestic abuse who use force against their abuser.

Credits and acknowledgements
This paper was written by Elizabeth Sheehy, Professor Emerita of Law, University of Ottawa, Canada. With thanks to the Olwyn Foundation.

www.centreforwomensjustice.org.uk

Self-defence: Canadian law 1985-2022

By Elizabeth Sheehy

Canadian criminal law includes several forms of homicide offences, including first degree murder, second degree murder, infanticide and manslaughter. First degree murder requires the Crown to prove not only intent to kill another person or to cause bodily harm that they know is likely to result in death (s 229(a)), but also the further elements of planning and deliberation (s 231(2), the main basis upon which abused women are charged with first degree murder, especially when they have killed an incapacitated man); contract killing (s 231(3)); or some other act that makes the murder more heinous, such as intentionally killing someone in the course of committing another violent crime of illegal domination like kidnapping or sexual assault (s 231(5)). First degree murder carries a mandatory life sentence (s 235(1)) and a period of parole ineligibility of 25 years (s 745(a)).

Second degree requires proof of intent to kill, and also carries a mandatory life sentence (s 235(1)). Parole ineligibility is set for a period between 10 and 25 years (s 245(c)), determined by the presiding judge on advice from the jury. Manslaughter is the unlawful killing of another, either by some unlawful act (like assault) or by criminal negligence. There is no mandatory minimum for manslaughter unless it is committed with a firearm, in which case it is four years (s 236(a)). The maximum sentence is life imprisonment (s 236(b)).

As with other jurisdictions, in Canada self-defence is the primary defence available to women who have committed violent offences (including homicide) against their abusers in the context of domestic abuse. Self-defence is a full defence and legal justification, resulting in an acquittal when successfully pleaded. Other defences to murder include provocation (*Code* s 232, a statutory defence recently reformed to limit its availability[1]) and intoxication (common law defence), both of which reduce murder to manslaughter if successful; mental disorder (*Code* s 16, also a statutory defence, to be proven by the accused); and possibly duress (a mix of statutory (*Code* s 17) and common law), but only if the woman was forced to kill a person other

[1] The new defence is available only if the deceased was committing or attempting to commit an indictable offence carrying the potential for imprisonment for at least five years (s 232(2)). For discussion of the reformed defence see Kate Fitz-Gibbon & Elizabeth Sheehy, "The Merits of Restricting Provocation to Indictable Offences: A Critical Analysis of Provocation Law Reform in Canada and New South Wales, Australia" (2019) 31:2 *Canadian Journal of Women and the Law* 197-231. Although the reform was intended to benefit abused women, the constitutionality of the new limitation was successfully challenged by a British Columbia (BC) man ultimately convicted of executing his former partner and her boyfriend, on the basis that abused women who kill could be disadvantaged: *R v Simard*, 2019 BCSC 531. A Crown appeal to the Supreme Court of Canada on this issue was dismissed without reasons 16 January 2020, leaving the new restrictions unenforceable in BC: Kim Bolan, "Supreme Court of Canada rejects Crown appeal over provocation defence in B.C. case" *Vancouver Sun* (12 January 2020) online: https://vancouversun.com/news/crime/supreme-court-of-canada-rejects-crown-appeal-over-provocation-defence/.

than her threatener.[2] Defences to manslaughter include extreme intoxication[3] and automatism, both of which are common law defences that must be proven by the accused on a balance of probabilities and are complete defences if successful.

The requirements of self-defence were provided for in subsection 34(2) of the *Criminal Code of Canada* in 1985 as follows:

> S 34. ...
>
> (2) Everyone who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
>
> (*a*) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes, and
>
> (*b*) he believes on reasonable and probable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

In 1990, Justice Bertha Wilson, writing for the majority in the Supreme Court of Canada, ruled in *R v Lavallee*[4] that expert evidence on Battered Woman Syndrome ("BWS") was admissible to support self-defence in cases involving women who experienced violence at the hands of an abusive partner. BWS evidence was ruled to be both relevant and necessary in order to disabuse jurors of discriminatory myths about women who experience battering, to educate jurors about the consequences of battering, and to provide a fair interpretation of the "reasonableness" requirements of self-defence. Justice Wilson explained: "*If it strains credulity to imagine what the 'ordinary man' would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man'*".[5]

---

[2] *R v Ryan*, 2013 SCC 3. Nicole Ryan had been acquitted of counselling murder on the basis of duress for attempting to hire an undercover police officer to kill her former husband, whom she alleged was threatening her and her child. Her acquittal by a trial judge of the Nova Scotia Supreme Court (2010 NSSC 114) was upheld by the Nova Scotia Court of Appeal, (2011 NSCA 30) but overturned by the Supreme Court of Canada (2013 SCC 3) on the basis that duress is not legally available where the accused kills her threatener as opposed to an innocent third party. However, the Court stayed the criminal proceedings against Ms Ryan because the law of duress had been unclear; the Crown had changed its legal position in its appeal; Ryan had suffered both from prior abuse and lengthy legal proceedings; and because of the role of the state in her case, at para 35: "There is also the disquieting fact that, on the record before us, it seems that the authorities were much quicker to intervene to protect Mr. Ryan than they had been to respond to her request for help in dealing with his reign of terror over her." See Nadia Verrelli & Lori Chambers, *No Legal Way Out: R v Ryan, Domestic Abuse and the Defence of Duress* (Vancouver: UBC Press, 2021).

[3] The *Criminal Code* limitation on the extreme intoxication defence, s 33.1 was declared unconstitutional, opening the defence for use for crimes like sexual assault and manslaughter, in *R v Brown*, 2022 SCC 18; *R v Sullivan*, *R v Chan*, 2022 SCC 19. For discussion of the implications of these decision for crimes of male violence against women see Kerri Froc & Elizabeth Sheehy, "Last Among Equals: Women's Equality, *R v Brown*, and the Extreme Intoxication defence" forthcoming (2022) *University of New Brunswick Law Review*. Available in SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4222393.

[4] *R v Lavallee* [1990] 1 SCR 852.

[5] *Ibid* at 874.

Justice Wilson further ruled that BWS evidence was relevant to the issues of whether the woman actually and reasonably perceived herself subject to an unlawful assault; whether she reasonably feared death or grievous bodily harm; and whether her belief that nothing less than lethal force was needed to stave off serious bodily harm or death was honest and reasonable, in light of the lack of alternatives. Lavallee had shot her boyfriend in the back as he was leaving the room, telling her he would "*deal*" with her later. Yet Justice Wilson rejected the common law gloss that imminent violence, in the sense of an immediate physical attack, is a requirement of self-defence, for otherwise we are condemning abused women to "*murder by instalment*".[6] She also jettisoned the common law principle of the "*duty to retreat*" because it does not apply to a man confronting an intruder in his home: "*A man's home may be his castle but it is also the woman's home, even if it seems to her more like a prison in the circumstances*".[7]

In 1998, two justices of the Supreme Court in *R v Malott*,[8] another case involving a woman who killed her abuser, emphasised systemic issues in restating the law from *Lavallee*: "*To fully accord with the spirit of Lavallee…a judge and jury should be made to appreciate that a battered woman's experiences are both individualized, based on her own history and relationships, as well as shared with other women, within the context of a society and a legal system which has historically undervalued women's experiences. …[A]ll this should be presented in such a way as to focus on the reasonableness of the woman's actions, without relying on old or new stereotypes about battered women*".[9]

They also identified additional factors that the jury should consider in determining whether she reasonably believed she could otherwise preserve herself than by killing: "*a woman's need to protect her children from abuse, a fear of losing custody of her children, pressures to keep the family together, weaknesses of social and financial support for battered women, and no guarantee that the violence would cease simply because she left*". [10]

On the whole, Canada's law of self-defence, as re-interpreted by the Supreme Court in *Lavallee* and *Malott*, seems to have produced many acquittals, although there are too few reported cases prior to the *Lavallee* decision to definitively attribute the acquittal rate to the re-interpretation. For example, Professor Sheehy reviewed trial transcripts from 1990 to 2005 for 91 women charged with murder where self-defence was at issue. Of these, seven women were released by charges being dropped or stayed; 49 entered guilty pleas to manslaughter; one pled guilty to second-degree murder; and 34 went on to trial. Of those who went to trial, three were convicted of murder; nine were convicted of manslaughter; and 22 were acquitted of all charges (26%). Altogether 32/91 women were either spared a trial or acquitted based on self-defence (32%) and 62 were convicted of homicide (mostly due to guilty pleas), 56 of which were manslaughter convictions.[11]

---

6 *Ibid* at 883.

7 *Ibid* at 888–89.

8 *R v Malott* [1998] 1 SCR 123.

9 *Ibid* at para 43.

10 *Ibid* at para 42.

11 E. Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (Vancouver: UBC Press, 2014) 10.

A more recent study yielded similar results. In the time period 2000–2010, 36 women were charged with homicide: 19 pled guilty to manslaughter and one to murder, and one charge was stayed. Of the 15 cases that went to trial, 11 were acquitted, usually on the basis of self-defence.[12]

Commenting on these figures, Professor Sheehy suggests that a significant barrier to a woman's access to a fair trial on the merits is the fact that a murder conviction carries with it a mandatory life sentence, with the minimum period of parole ineligibility set at 10 years and 25 years for second- and first-degree murder, respectively. These crushing mandatory sentences lead to pressure on the accused to plead guilty to manslaughter rather than to present a case on self-defence. Her data also suggest that if a woman can get to trial on self-defence, she has good odds of securing acquittal.

Reform proposals centered on abused women who kill: 1985-1997

Although *Lavallee* represented a breakthrough for abused women in Canada, feminist researchers and advocates had been arguing for reform of self-defence for three decades, starting with publications as early as 1985 that criticized reform proposals emanating from law commissions and government that failed to address the impact of the law on abused women. Feminist analyses demonstrated the sex bias in self-defence law and proposed specific changes to the law.

In 1985, the authors of *A Feminist Review of Criminal Law* examined self-defence and proposed two alternative reforms. The first proposal would have entirely subjectivized the inquiry, such that a woman who honestly believed she was in danger and that the force she used was necessary to protect herself, would be acquitted if believed. The authors pointed out "A man ought not to be acquitted of sexual assault when he honestly, but unreasonably—believed the victim was consenting, while a woman is convicted of murder where she honestly, but unreasonably, believed the force she used was necessary."[13]

The second proposal would have retained the objective/subjective inquiry for the requirement that the accused reasonably believed she needed to use the degree of force used to protect herself, but added a list of factors for the trier of fact to consider in the inquiry, including:

> (1) Were there realistic alternative means which the accused could have used to protect herself or other persons?
>
> (2) (If relevant) With respect to (1), had the accused attempted alternatives in the past?
>
> (3) Was she afraid of retaliation if she attempted any alternative?
>
> (4) What was the accused's economic and psychological state?
>
> (5) How did the accused and the person she killed or assaulted compare in size and strength?

---

12 *Ibid* at 8. See, also, E. Sheehy et al, "Battered Women Charged with Homicide in Australia, Canada and New Zealand: How do they fare?" (2012) 45 Aust & NZ J Crim 383, 391.

13 Christine Boyle et al, *A Feminist Review of Criminal Law* (Ottawa: Status of Women Canada, 1985) at 41.

(6) Was the accused's action reasonable, given her socialization? [14]

In 1995, as part of a co-ordinated response by Status of Women Canada to respond to the 1993 release by the federal government of proposals to amend the *Criminal Code*,[15] Elizabeth Sheehy commented specifically on the proposed self-defence reforms by focusing on the role of sexism and racism in access to the defence by abused women who kill, particularly Indigenous and racialized women, and by police officers who kill unarmed racialized citizens.[16]

First, she rejected the proposal to create a compromise verdict of manslaughter for abused women who fail to meet the strict elements of self-defence because of concerns that juries would choose this option rather than struggle with the more difficult question of acquittal versus conviction.

Second, she expressed three reservations about moving to a strictly subjective test for self-defence: 1. The objective branch of the test is what allows for expert evidence to be introduced to provide evidence regarding the accused's perception of danger and the impacts of battering, and to counteract discriminatory stereotypes; 2. a purely subjective test would overly benefit accused batterers and police officers who kill; and 3. A subjective test would allow the accused batterer to rely on intoxication evidence to bolster their claim that he honestly believed he had to kill to preserve himself.

Third, she opposed the Department of Justice's proposal to add new objective riders of "necessity" and "proportionality" to the law of self-defence, given that the Supreme Court in *Lavallee* had broadened the defence to benefit abused women and further, such additional requirements might lead the courts to re-introduce the "imminence" requirement rejected by *Lavallee*. Fourth, she recommended that any new law of self-defence must be available to women who are parties to homicide or who have contracted the killing.

And finally, she endorsed the list of considerations recommended by *A Feminist Review*, adding that the trier of fact should also consider: whether the deceased made threats to the woman's immigration status or regarding child custody; the role that systemic racism and gender bias played in narrowing the woman's options; the woman's own experience of legal systems, both foreign and domestic; her access to the legal system in light of barriers posed by poverty, language, culture, or failure to accommodate disabilities; the woman's need for economic support; and her responsibility to care for others.

Self-defence reform suggestions were also released in 1997 by Her Honour Judge Lynn Ratushny for the *Self-Defence Review*, whose task it was to review the cases of 98 women convicted of homicide both before and after *Lavallee*, to assess whether women were receiving the benefit of the decision and whether further changes were needed. Judge Ratushny's report, released in 1997,[17] documented ongoing challenges regarding accessibility of self-defence for

---

14 *Ibid*.

15 *Proposals to amend the Criminal Code (general principles)* (Ottawa: Minister of Justice, 1993).

16 E. Sheehy, *What Would a Women's Law of Self-Defence Look Like?* (Ottawa: Status of Women Canada, 1995) at 3.

17 L. Ratushny, *Self Defence Review, Final Report*, July 11, 1997, submitted to the Minister of Justice of Canada and to the Solicitor General of Canada. After reviewing the convictions of 98 women, Judge Ratushny recommended that seven of the women convicted be pardoned, have their sentences commuted or be granted a new appeal. Ultimately, five of the women convicted received some relief, but none were released from prison as a result of this review.

women who kill, and, drawing on the proposals of feminist researchers, urged the government to revise the law.

She recommended that the law of self-defence retain its objective/subjective stance on whether the accused faced an unlawful assault, whether the force was needed to protect the accused or another, and whether the force used was reasonable, in light of the following factors:

> (a) the nature, duration and history of the relationship between the defender and the adversary, including prior acts of violence or threats on the part of the adversary, whether directed to the defender or to others;
> (b) any past abuse suffered by the defender;
> (c) the age, race, sex and physical characteristics of the defender and the adversary;
> (d) the nature and imminence of the force used or threatened by the adversary;
> (e) the means available to the defender to respond to the assault, including the defender's mental and physical abilities and the existence of options other than the use of force; and
> (f) any other relevant factors.

Judge Ratushny also made four policy recommendations regarding the criminal justice response to abused women who kill.[18] In response to the overwhelming pressure on abused women to plead guilty to manslaughter and to give up apparently valid self-defence claims to avoid the risks associated with a murder trial and a life sentence, Judge Ratushny made policy recommendations to police, prosecutors and legislators:

#	Details
Recommendation 1	• In all homicide cases, police should be required to consult with a prosecutor to ensure that the charge to be laid against the accused (i.e., first-degree murder, second degree murder or manslaughter) is appropriate in the circumstances.
Recommendation 2	• Prosecutorial guidelines should require prosecutors to consider all of the evidence available to them, including evidence that may support a defence such as self-defence, in determining whether there is sufficient evidence to justify continuing a prosecution for homicide.
Recommendation 3	• Prosecutorial guidelines should instruct prosecutors to exercise extreme caution in plea discussions concerning homicides where there is some evidence to support a defence such as self-defence. Specifically, they should be directed to consider whether the person's apparent willingness to plead guilty to manslaughter is a true expression of their acceptance of legal responsibility for the killing or is an equivocal plea. If the latter, the prosecutor should consider proceeding on manslaughter rather than

[18] *Ibid* at 197–199.

	murder so that the defence evidence can be heard at trial.
Recommendation 4	• The sentence for second degree murder set out in the Criminal Code should be amended to: (1) allow a jury to recommend, in exceptional circumstances, that a person convicted of second degree murder be considered for leniency; and (2) where a jury so recommends, or where a judge sitting without a jury so finds, the judge may determine the appropriate sentence in the circumstances, with a life sentence being the maximum available. Parole eligibility should then be determined in according to the usual rules under the Corrections and Conditional Releases Act or any period specified by the judge under s. 743.6 of the Criminal Code.

Although none of Judge Ratushny's recommendations received a federal response at the time she released her report, 16 years later in 2013 the government reformed self-defence in a manner largely consistent with Judge Ratushny's proposals. No policy changes have been made to policing or prosecutorial manuals, and Canada still maintains the mandatory life sentence for murder, although Senator Kim Pate has introduced a bill that would enable judges to give the life sentence at their discretion.[19] In another development, a Private Member's Bill (C-247) to criminalise coercive control received first reading in October 2020, but has since died on the Order Table.

Canada's new law of self-defence: 2013-2022

In 2013, the government reformed the law of self-defence in a manner largely consistent with the recommendations of the Self-Defence Review and feminist advocates.[20] The law now reads:

> S. 34(1) A person is not guilty of an offence if:
>
> (a) the accused believes on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
>
> (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and

[19] She introduced Bill S-251 in 2018 and when it died on the Order Table, she re-introduced it as Bill S- 208 in February 2020. Senator Pate continues to bring this issue forward in the Senate.

[20] For a detailed discussion of the origins of the new law see Vanessa A MacDonnell, "The New Self-Defence Law: Progressive Development or Status Quo?" (2013) 92 *Canadian Bar Review* 301.

(c) the act committed is reasonable in the circumstances.

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

(a) the nature of the force or threat;

(b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;

(c) the person's role in the incident;

(d) whether any party to the incident used or threatened to use a weapon;

(e) the size, age, gender and physical capabilities of the parties to the incident;

(f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;

(g) any history of interaction or communication between the parties to the incident;

(h) the nature and proportionality of the person's response to the use or threat of force; and

(i) whether the act committed was in response to a use or threat of force that the person knew was lawful.

The new defence is available for any crime, including for example possession of a weapon or attempting to hire a third party to kill an abuser, as long as the accused acted with a subjective purpose of defending herself or another. If the accused can provide an air of reality (i.e., sufficient evidence to put the matter at issue) to the criteria in subsection (1), i.e., that the accused reasonably believed herself or another to be under threat of violence, that she acted with a defensive purpose, and that her acts were reasonable in the circumstances, the burden shifts to the prosecution to disprove at least one of those elements beyond a reasonable doubt. The new law directs the court to assess the reasonableness of the accused's acts in light of multiple "factors" to be weighed, some of which (like imminence and proportionality) had sometimes been treated as absolute requirements for valid self-defence claims.

This reform has, for the most part, adopted the approaches urged by feminist law reform campaigners. It has widened the defence to apply, at least theoretically, to any crimes committed in self-defence (such as acting to defend another or taking other steps to defend one's self such as hiring a killer), it has maintained a mix of subjective/objective tests, it has made clear that imminence and proportionality are not strict criteria but rather considerations in the overall "reasonableness" inquiry; and it lists prior violence or threat as relevant to reasonableness.

However, it is worth noting that most of the issues identified as relevant to the "reasonableness requirement" are individual ones that look at the specific characteristics of the individuals involved, their past interactions, and the threat and response at issue.

It is less clear whether the law provides a hook for counsel to introduce the systemic evidence that goes to the question of whether a woman's actions were reasonable in the real world of women's lives. For example, s 34 does not direct attention to the issue of what other options were available to the accused (e.g., evidence as to the lack of women's shelters in a rural area; the waiting lists for shelter access; the rate of police response/failure when women seek intervention; the lack of social welfare and housing for women; the likelihood that she will be able to keep her children safe from the abuser if she leaves, etc), or the external evidence that suggests the degree of the woman's endangerment (evidence regarding femicide rates; the risks factors for intimate femicide, including coercive control).

It is possible that astute defence counsel can still get this background, systemic evidence in, particularly if linked to specific facts in the case, but that outcome is not assured: it requires a competent feminist lawyer to identify the connection and seek the relevant external systemic evidence via expert testimony. It also requires a judge who understands why the evidence goes to "reasonableness", even if it is information that the accused herself did not have at the time of the homicide.

Finally, the new s 34 fails to respond to the other kinds of threats men levy at women beyond physical threats, such as threats to interfere with the woman's immigrant status or her access and custody of her children. It also fails to consider the reasonableness of her actions in light of her socialization or her experiences of systemic forces like racism. Again, a competent counsel may be able to gather the experts and evidence to demonstrate how reasonableness of her response—say, not calling police--must be informed by, for example, the experience of other racialized persons. On the other hand, not all women can retain lawyers who have expertise in intimate partner violence, and so the lack of clear statutory language may negatively affect some women's defence.

Canada's new law of self-defence was declared in force in 2013. In the period 2013-2022, using the LexisNexis database,[21] 12 cases emerged where abused women either killed or stabbed a current or former male partner. The woman was acquitted in seven cases;[22] pled guilty in two cases;[23] and found guilty in two cases.[24] In one case, the accused was convicted at trial, but

---

21 The data base was searched using the terms "self-defence" & "battered woman" (113 results) and "self-defence" & abuse (804 results). Only the first 500 cases were reviewed, making this study incomplete. Furthermore, reported cases can represent only a small fraction of criminal law decisions, again making this research sample incomplete. For example, convictions and acquittals rendered by juries are unlikely to be reported unless some aspect is appealed.

22 See, for example, *R v Knott*, 2014 MBQB 72 (second-degree murder); *R v Mason*, 2020 MBQB 851 (manslaughter); *R v Martin*, 2020 ONSC 4779 (attempt murder, aggravated assault, assault with a weapon and possession of a weapon); *R v Banfield*, [2017] OJ No 4454 (Ct Just) (assault with a weapon and assault causing bodily harm); *R v Sanderson*, 2019 SKQB 130 (aggravated assault); *R v Rabut* [2015] ABPC 114 (aggravated assault); and *R v Ameralik*, 2021 NUCJ 3 (second degree murder).

23 *R v Naslund*, 2022 ABCA 6 (charged with first degree murder and offering an indignity to human remains, guilty plea to manslaughter and sentenced to 18 years, sentence reduced to nine years); *R v Doonanco*, (convicted at trial of second degree murder, appeal from conviction dismissed 2019 ABCA 118, new trial ordered by Supreme Court of Canada, 2020 SCC 2 on the basis of miscarriage of justice, guilty plea entered to manslaughter prior to second trial: Janice Johnston, "Alberta woman sentenced to prison in partner's shooting death" (31 August 2020) online: https://www.cbc.ca/news/canada/edmonton/deborah-doonanco-manslaughter-sentence-alberta-1.5706284.

24 *R v Poucette*, 2019 ABQB 423 (charged with second degree murder, convicted of manslaughter; sentenced at 2019 ABQB 725; appeal against conviction dismissed at 2021 ABCA 157); *R v Kahnapace*, 2014 BCSC 2410 (charged with second degree murder, convicted of manslaughter).

granted a new trial on appeal.[25] This brief study suggests that after the 2013 reform women who experience abuse continue to succeed with their self-defence claims.

Another two cases emerged from this study where women succeeded with self-defence claims for assaulting men who were relative strangers, and a third where a new trial was ordered so that self-defence could be properly considered. One case involved a woman who resisted illegal arrest and assaulted police on two separate occasions, the first of which included efforts by police to remove her clothing.[26] In another, a woman in the sex trade stabbed a john, known to her to have been violent to other women and of whom she was afraid, when he commenced a sexual assault.[27] The judge had rejected self-defence on the basis that the complainant had consented to everything prior to the stabbing, but without rejecting her evidence that she had said no to the sexual advance. This accused was granted a new trial based on the judge's error regarding consent and the consequent failure to consider self-defence. In a third, a woman had stabbed a male passenger when she felt threatened by him and two other men who she had agreed to drive from one place to another.[28]

This last case was the only one in the study where the judge's reasoning on the elements of self-defence drew on the systemic background factors that indicated the accused's level of endangerment. Having noted that the accused was a young Indigenous woman who had experienced abuse and neglect in her past, the judge quoted from Canadian data regarding Indigenous women's experiences of male violence and from the *National Inquiry into Missing and Murdered Indigenous Women and Girls* (2015). The judge concluded:

> *I do not suggest that the Defendant knew any of these statistics or had read the Inquiry's final report when she got in her car with the Complainant and his friends. I make these points, however, to show that a person in the Defendant's situation would be entirely justified in her fear. Her lived experience, acknowledged statistically and in a four-year government inquiry, cannot be ignored when determining if her actions that night were reasonable.*[29]

Ongoing Systemic Issues for Abused Women Who Kill

Despite the broad and flexible terms of Canada's new self-defence law and the seemingly high rates of acquittal for those abused women who go to trial, systemic barriers remain with respect to women's access to fair trials on the merits and fair sentences if they are convicted. A recent decision from a provincial court of appeal in the case of Helen Naslund evidences both problems.

Naslund killed her abusive husband when he passed out after a drunken rage during which she was threatened. She had been abused by the deceased for 27 years. She hid his body, with the assistance of at least one of her sons. When his body was discovered almost seven years later, she was charged with first degree murder and offering an indignity to human remains. Rather than go to trial, she agreed to plead guilty to manslaughter; the other charges were withdrawn;

---

25 *R v Dupuis*, 2020 ONCA 807 (charged with second degree murder, convicted by jury of manslaughter, new trial on the issue of self-defence).

26 *R v Gibbons*, 2021 NUCA 17 (resisting arrest, assault of police officer, assault).

27 *R v Francis*, 2018 NSCA 7 (assault causing bodily harm).

28 *R v Fournier*, 2021 ONCJ 598 (assault causing bodily harm and assault with a weapon).

29 *Ibid* at para 56.

and she was sentenced to 18 years in prison, as agreed to by both counsel. This sentence was extremely harsh compared to typical sentences for abused women who plead guilty to manslaughter.[30]

On appeal, in a landmark decision, the Alberta Court of Appeal determined that the sentence agreed to by the Crown and Naslund's counsel was "so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down".[31]

The trial judge was faulted for failing to independently assess whether 18 years was a fit sentence, in light of available precedents; for failing to mitigate the sentence on the basis that Naslund's lengthy experience of the deceased's violence and threat mitigated her moral blameworthiness and thus her culpability; and for seemingly relying on discriminatory beliefs about abused women in the sentencing process, including suggesting that Naslund "had other options", which implied she remained in the home by "choice"—either because the violence was not as bad as she claimed or because she enjoyed the violence. The court commented: "It is impermissible and outdated thinking to suggest that women who are unable to leave situations of domestic violence remain by choice, and such thinking could not but have helped influence the lens through which the joint submission was viewed in this case."[32]

Further, the sentencing judge was criticized for his description of the offence as "a callous, cowardly act on a vulnerable victim in his own home". The appeal court called the remark "ironic and jarring" in the face of Naslund having survived 27 years of abuse in what was also her own home. The Court of Appeal quoted with approval the Supreme Court's statement in *Lavallee* to the effect that a man's home may be his castle but is also the woman's home. These errors--the judge's emphasis on deterrence as a sentencing objective, the focus on the fact that the offence took place in the home of the deceased, and the failure to mitigate the sentence by virtue of the accused's experience of "Battered Woman's Syndrome"—led the appeal court to reduce Naslund's sentence to nine years.

Although this is still an excessive sentence when compared to the average sentence women who kill their abusers receive, it is extraordinary that the court intervened to overturn a sentence agreed to by Naslund's counsel in the absence of an "ineffective assistance of counsel" claim. In response to the Crown's argument that the accused had received a benefit from the plea deal that could not be ignored in the calculation of a fit sentence, because she would most certainly have been convicted of murder and sentenced to the mandatory life sentence, the appeal court took issue with the notion that a manslaughter plea deal was necessarily a benefit. The court referred to Judge Ratushny's analysis of the pressures battered women face to plead guilty, often giving up a viable defence. It stated that nothing in the law would have necessarily prevented Naslund from succeeding with a self-defence claim, because, as the Supreme Court ruled in *Lavallee*, a woman need not face "imminent" threat before responding with violence. While refraining from commenting on what the likely outcome would have been, the court

---

30 Tyler Dawson, "Why battered woman syndrome is not a straight forward defence for women who kill", *National Post*, 12 August 2021, 2022; Elizabeth Sheehy & Lynn Ratushny, "Opinion: Another abused woman failed by the justice system", *Edmonton Journal*, 10 December 2020, https://edmontonjournal.com/opinion/columnists/opinion-trial-of-woman-who-killed-abusive-husband-raises-tough-questions, accessed 29 August 2021.

31 *Naslund*, *supra* note 23 at para 173.

32 *Ibid* at para 141.

displayed considerable understanding of the argument for self-defence, even though Naslund's abuser was sleeping:

> *In this case, and many similar ones, an otherwise law-abiding woman kills her partner after enduring years of abuse, shooting or stabbing him while he slept. Why is this so? It is not a question of sadistically taking his life when her husband is at his most vulnerable, asleep in the marital bed, such that she should be judged the more cruel for it. Rather, it is apparent from these cases that it is because while he is sleeping, he does not pose a threat to her. As the cases show, the fear of reprisal or violence never goes away, the fear that he will awaken and carry on as before or the last time, or the time before that. This fear of violence in their own homes is a prevailing dark cloud and recurrent feature of the lived experience of battered women.*[33]

In conclusion, although Canada has reformed its self-defence law, it has not jettisoned the mandatory life sentence for murder, ensuring that some abused women, like Helen Naslund, will give up their self-defence claims to avoid the risk of a murder conviction, even if the law can potentially accommodate their defence. Furthermore, Naslund's case reveals that judges and Crown attorneys may continue to hold discriminatory attitudes towards abused women who kill, and that women's defence lawyers may not themselves be prepared to advocate strongly for either their innocence or their reduced moral culpability.

[33] *Ibid* at para 144.

www.centreforwomensjustice.org.uk

info@centreforwomensjustice.org.uk