SELF DEFENCE REVIEW
EXAMEN DE LA LÉGITIME DÉFENSE

FIRST INTERIM REPORT - WOMEN IN CUSTODY

February 6, 1997

Submitted to the

MINISTER OF JUSTICE OF CANADA

and to the

SOLICITOR GENERAL OF CANADA

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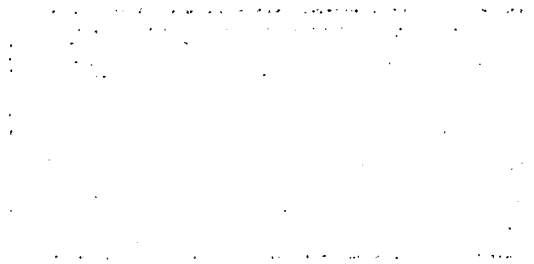

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Cover Letter To First Interim Report

SELF DEFENCE REVIEW
EXAMEN DE LA LÉGITIME DÉFENSE

February 6, 1997

The Honourable Allan Rock, P.C., M.P.
Minister of Justice and
Attorney General of Canada
Department of Justice
239 Wellington Street
Ottawa, Ontario
K1A OH8

The Honourable Herb Gray, P.C., M.P.
Solicitor General of Canada
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Ottawa, Ontario
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Dear Ministers:

I am pleased to submit to you my *First Interim Report - Women In Custody*, reporting on my review of the cases of women in custody for homicide who have applied to me to have their cases reviewed because they claim they were acting in self defence when the victim was killed. While my recommendations in appropriate cases are summarized in this Report (Chapter 5), they are submitted to you in much greater detail as a separate Addendum to it, in order to respect the confidential nature of the information conveyed to me.

This Report is the first of three reports to be submitted to you pursuant to my terms of reference. The applications from women in custody have been reviewed first, recognizing their more urgent need. The applications from women not in custody will be the subject of my second interim report and my final report will deal with the other parts of my mandate, including law reform recommendations.

Yours sincerely,

Judge Lynn Ratushny

Self Defence Review Staff

Chair:	Judge Lynn Ratushny
Legal Counsel:	James W. O'Reilly
Assistant Legal Counsel:	Jacqueline Palumbo
	Lisa Clifford
	Sally Keilty
	Paula MacPherson
Applicants' Legal Counsel:	Anne Derrick
	Michelle Fuerst
	Elise Groulx
	Bonnie Missens
Administrator:	Céline Carrier
Support Staff:	Brigitte Bérubé
	Anne Légère

Self Defence Review Terms Of Reference

In recent years, there have been developments in our understanding of the law of self-defence as it relates to battered women who have been involved in abusive relationships. There are concerns that women convicted of homicide in these circumstances may not have received the benefit of the defence of self-defence when it may have been available to them.

We also now have an increased understanding of abusive relationships and their impact upon those who have been battered, and how this might support the use of the defence. Questions have also been raised about the circumstances under which these types of offences occurred and about whether our criminal law, sentencing processes and sentencing tools are adequate to deal with these circumstances.

Accordingly, the Honourable Lynn Ratushny, a judge of the Ontario Court of Justice (Provincial Division) is appointed:

- to review the cases of women under sentence in federal and provincial institutions who apply for a remedy and who are serving a sentence for homicide in circumstances in which the killing allegedly took place to prevent the deceased from inflicting serious bodily harm or death;

- to make recommendations in appropriate cases to the Government of Canada for individual women whose circumstances merit consideration for the granting of royal prerogative of mercy;

- to clarify the availability and the scope of the defences available to women accused of homicide in the circumstances set out above; and

- to make recommendations as considered appropriate with respect to possible law reform initiatives stemming from the review.

Judge Ratushny will be authorized:

- to adopt such procedures and methods as she may from time to time deem expedient for the proper conduct of her inquiries;

- to engage the services of such staff and technical advisors as she deems necessary or advisable and the services of counsel to aid and assist her in the inquiry, at such rates of remuneration and reimbursement as may be approved by the Treasury Board.

Foreword - To the Applicants

I have approached my task in the Self Defence Review in the same way as I approach my role as a judge. I try to keep in mind the words of G.K. Chesterton, the English novelist, who, after his experience serving on a jury, wrote of the human beings behind the statistics and the system:

> Now it is a terrible business to mark a man out for the vengeance of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things... And the horrible thing about all legal officials, barristers, detectives and policement, is not that they are wicked, some of them are good, not that they are stupid, several of them are quite intelligent, it is simply that they have gotten used to it. Strictly, they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful Court of judgment; they only see their own workshop.

The same is true, obviously, if it is a woman in the dock. It is a reminder to all of us not to forget the human dimension of the law and to try to see things from the point of view of those who find themselves enmeshed in the legal system.

No matter the thousands of words reviewed by the Self Defence Review and the legal principles applied, I have always been conscious of the fact that what I am doing is reviewing people's lives - lives that have been, more often than not, filled with abuse, misery and tragedy, and lives that ultimately led to the loss of others' lives. Each applicant before me, regardless of whether she was considered to be a "good" or "bad" person at the time of the killing, was entitled to defend herself. That has been the focus of the Self Defence Review: a respect for the dignity of the individual and the lives we are dealing with and the issue of self defence. With this focus, there has been no room for pre-judgment about the kinds of lives the

applicants have lived. Most of them had no choice. I am here only to try to understand a part of each person's life and try to "step into her shoes" at the time of the killing.

I thank each applicant for the courage she has shown in revealing, as one applicant put it, the "closets" of her life to me. That is not an easy thing for any of us to do and it is so much harder for those who are vulnerable and disempowered. I recognize that each applicant, by applying to the Review, took a risk - a risk of hope and then of bitter disappointment when I could not help so many of them. For the applicants I could not assist in legal terms, I have tried to assist them in human terms and to treat each of them with respect. Perhaps this was the hardest part of this process - to try to understand each woman's plight and then, ultimately, being able to help so few.

For those who read this report and see only an arid analysis of abstract legal concepts, please know that the Review has been far more than that. It has been, more than anything else, a unique and poignant human experience for all of us involved in it. To all of those applicants who have suffered in your lives, may you have hope for the future.

CHAPTER 1 - INTRODUCTION AND OVERVIEW OF THE REVIEW PROCESS

This first interim report of the Self Defence Review (SDR, or, the Review) covers Phase One of the Review's work, consisting of analyses of claims of self defence made by women convicted of homicide and currently in custody. Phase One has lasted fifteen months. The second phase of the Review will address claims of self defence made primarily by women convicted of homicide who are no longer in custody. The third and final phase of the Review will involve consideration of possible reforms in the law of self defence. The total expenditure for Phase One has been (to January 31, 1997) $592,170.00.

This report consists of two volumes. The first volume contains a description of the Self Defence Review's activities since its creation in the autumn of 1995 (Chapter 1), a discussion of the legal issues that had to be resolved in this first phase (Chapters 2 and 3) and a brief summary of its conclusions and recommendations (Chapter 4). The second volume consists of detailed case summaries and recommendations in relation to the six applicants I concluded merited some form of remedy.

This first phase of the Self Defence Review's mandate is by far the most difficult and time-consuming of the three phases. This is because it included all of the organizational and preparatory work for all three phases, interpretation of the Review's terms of reference, determination of the standard of review that should apply to the assessment of all applications, legal research on the current law of self defence, establishment of a working definition of self defence, legal file-building for all applications to the Review, as well as the complete analysis of a very large group of applications (total of 55). Subsequent phases will require far less time than the 15 months it has taken to complete this first phase. My current projection is that the second and third phases will be completed this spring.

This chapter contains an overview of Phase One, including a description of the methodology I applied to the review of applications before me. Because the Self Defence Review is an unprecedented initiative, I have set out in considerable detail the procedures I followed in carrying out my mandate.

The Review's workplan over Phase One can be broken down into six stages:

Stage 1: Organization
Stage 2: Outreach to Potential Applicants to the Self Defence Review
Stage 3: First Screening and Appointment of Regional Legal Counsel for Applicants
Stage 4: File Building and Analysis
Stage 5: Personal Interviews, Conclusions and Recommendations
Stage 6: Report

Stage 1: Organization

The Self Defence Review began its work in September 1995. My administrator, Céline Carrier, and I began by setting up an office within space leased by the Department of Justice. In addition to making logistical arrangements for supplies and equipment, we began to identify important contacts for the Review and assemble resource materials. We also began to compile a list of women who were eligible for review of their convictions.

Early in this stage (November 1995), I held a roundtable discussion with experts on self defence and abuse. Participants included law professors, psychologists, defence counsel, prosecutors, Justice Department and Solicitor General's Department officials, and representatives from the Elizabeth Fry Society and the native community. The purpose of the meeting was to give the Self Defence Review the benefit of their expertise and advice regarding the Review's mandate.

In this initial stage, I entered into contracts with persons who assisted me in carrying out my mandate. I asked Professor David Paccioco and Professor Elizabeth Sheehy, both of the University of Ottawa Faculty of Law, to prepare papers on the law of self defence and international and comparative perspectives on self defence claims respectively. I asked the Canadian Association of Elizabeth Fry Societies (CAEFS) to assist me by reviewing the materials I had prepared for contacting potential applicants and to assist women in applying to the Review by explaining to them its purpose and helping them complete the application forms. I also engaged Legal Counsel for the Self Defence Review, James W. O'Reilly, to assist me in all of the legal work necessary in discharging my mandate. Finally, it became necessary to engage assistant legal counsel to carry out a variety of tasks including gathering legal files, gleaning from them any information relevant to self defence, speaking to contacts across the country who could provide information or comments on the cases before me and summarizing all information received. I was ably assisted by Jacqueline Palumbo, Lisa Clifford, Sally Keilty and Paula MacPherson.

Stage 2: Outreach to Potential Applicants

An early task of the Review was to devise an Application for Review that would be sent to women who appeared to be eligible for review. The application form is attached as Appendix A. I tried to keep it as uncomplicated and direct as possible. In October 1995, I sent information packages to the women identified as potentially eligible for the Review. The packages contained a covering letter, a copy of the Self Defence Review's Terms of Reference and the application form.

I considered it important to try to reach all of the women who may have been eligible for review under my terms of reference. Accordingly, I sent the initial application package to all women in Canada then serving a sentence for homicide. I used lists compiled by the Correctional Service of Canada (CSC) to identify these women. In addition, to ensure that no one was missed, I sent packages to all federal and provincial penal institutions in Canada, including parole offices, all five regional deputy commissioners of corrections, and to heads of correction for all provinces and territories in Canada. In total, I sent out 236 application packages. I received back 98 application forms. Those applications may be broken down into the following categories:

55 - women currently in custody for homicide

26 - women on parole or probation

5 - women convicted of attempted murder, conspiracy to commit murder or counselling murder (as opposed to a conviction for homicide)

2 - women convicted of homicide but no longer under sentence

10 - others (including 8 women convicted of homicide and in custody but who are appealing their convictions; 1 woman who was convicted of homicide, appealed her conviction and then abandoned her appeal to the Supreme Court of Canada; and 1 woman convicted of homicide who was unlawfully at large and now has been returned to custody)

This interim report deals with the 55 applicants in custody for homicide. The following chart shows the geographic distribution of the in-custody applicants by the province or territory of the offence occurrence:

GEOGRAPHIC DISTRIBUTION OF THE 55 PHASE ONE APPLICANTS	
ALBERTA	6
BRITISH COLUMBIA	3
MANITOBA	5
NOVA SCOTIA	4
ONTARIO	17
QUÉBEC	11
SASKATCHEWAN	8
YUKON	1

The second interim report will deal with women who fall into all of the other categories. However, in relation to those women who are currently pursuing appeals, I will review their convictions only if their appeals are decided (and, obviously, dismissed) before I complete Phase Two. After that point, presumably they may apply directly to the Minister of Justice under s. 690 of the *Criminal Code* for a remedy.

Women who sent me an application form for a review of their convictions were provided with a Preliminary Information Form ("PIF") asking them to name potential sources of information about the issues of self defence and abuse in their cases (see Appendix B). I did not send these forms directly to the applicants because they were very long and I wanted the women to have help in filling them out. Instead, they were given to the Canadian Association of Elizabeth Fry Societies which distributed them to Elizabeth Fry Society representatives

across Canada. Those representatives brought the forms to the applicants and helped them to complete them. The PIF also contained legal releases from the applicant which permitted the Self Defence Review to obtain legal, medical and other confidential materials about the applicant's case.

I asked the Elizabeth Fry Society members to make personal contact with all of the 236 women who received an application package. I asked them to explain to the women the purpose and objective of the Self Defence Review and to make clear to them that the Review was not like a trial - the process would be consensual, not adversarial. Further, if there was any doubt about a woman's eligibility for the Review, the woman should be included, unless she preferred not to be part of the Review. Her personal wishes were to be respected. If a woman wanted to apply, I asked the Elizabeth Fry Society representatives to obtain as much information from the woman as possible and to report that information to me on the Preliminary Information Form.

I originally set a deadline of December 15, 1995 for receipt of all applications and the Preliminary Information Form. I extended that deadline to January 31, 1996.

Stage 3: First Screening and Appointment of Regional Legal Counsel for Applicants

Once the application forms were received, we began to obtain all of the legal files available in relation to each woman's conviction. (This process is described in greater detail in Stage 4). The first step was to obtain Criminal Profile Reports from the Correctional Service of Canada. These reports generally included a summary of the woman's offence, some background information about her (sometimes information about abuse or other relevant history) and information about the woman's current status. These reports were turned to because they were readily available at this early stage of the Review, before legal files had been obtained, and they gave me enough information to make a very preliminary assessment of

the merits of the claims of self defence before me. I recognized that the CSC reports did not have the status of legal files (such as a trial or sentencing transcript) so I did not rely on them greatly. Still, they gave me enough information to make that preliminary assessment. I ranked the applications according to whether: (1) there appeared to be some evidence of self defence in the facts surrounding the woman's offence; (2) self defence seemed to me unlikely according to those facts; or (3) there appeared to be no facts supporting a claim of self defence. I gave priority to cases falling into the first group. This simply meant that I asked for the legal files to be gathered for those women first. I then requested files in relation to applicants in the second group. For women whose cases fell into the third group, I sent out letters advising them that on my preliminary assessment there appeared to be no basis for a claim of self defence. I gave these women an opportunity to respond to that assessment by giving me their own account of what happened in their cases. Based on that response, a woman's case could be (and, for some, were) reclassified into the first or second group or, if there still appeared to be no basis for a claim of self defence, the woman's file was closed. If, as was the case for each stage of analysis of a woman's case, there was any doubt as to whether there was a basis for a claim of self defence, the applicant was given the benefit of that doubt; her file was kept open and the review of her case proceeded to the next stage.

I then wrote to all applicants in the first and second groups and invited them to tell me their "story"; *i.e.* their version of what happened and anything else they wished to say about their case to help me understand how the killing happened. Many applicants sent me long letters setting out their personal histories, feelings and descriptions of what happened when the killing occurred. Some women did not feel comfortable putting this in writing. I gave all applicants my telephone number and invited them to call me collect at any time. Many did so. Others preferred to tell me their story on audio or video tape.

In some cases, I received information from an applicant that suggested that her claim fell outside my terms of reference but, at the same time, disclosed an allegation that a miscarriage of justice had occurred in her case. For example, I received several applications from women

who claimed that they were not, in fact, responsible for the killing for which they were convicted. They claimed that someone else was responsible or that the death was the result of an accident. Where I had no reason to question their claim, I sent these women letters informing them of the availability of the process for reviewing convictions under s. 690 of the *Criminal Code*. I offered to facilitate the s. 690 process for these women by forwarding the relevant files in my possession to the Criminal Conviction Review Group of the Department of Justice. Where I received instructions from them to do so, I transferred their files with the Review on their behalf.

Some women raised issues of self defence that did not appear to fit squarely within my terms of reference. For example, some women applied to me whose sentences had expired (my terms of reference ask me to review the convictions of women "who are *serving* a sentence"). Others made claims of self defence who had been convicted of attempted murder or conspiracy to commit murder - so-called "inchoate offences" of homicide (my terms of reference ask me to review the convictions of women "who are serving a sentence for *homicide*"). For these cases, I requested directions from the Minister of Justice. There appeared to me to be no reason in principle why such cases should not be reviewed but I conceded that they appeared to fall outside the express words of my terms of reference. At the same time, I requested clarification from the Minister about the cases of women on parole and probation. I had assumed that these cases were within my terms of reference. Again, there appeared to be no basis in principle why such cases should not be reviewed. Ultimately, I received instructions to review the cases falling into all of the above categories. However, as is apparent from this interim report, I gave priority to the cases of women in custody.

Based on the very strong recommendation from the participants in the roundtable discussion in November 1995, I decided to appoint counsel for the applicants to the Review. I appointed four regionally-based legal counsel: Ms. Anne Derrick (Halifax), Ms. Élise Groulx (Montréal), Ms. Michelle Fuerst (Toronto), and Ms. Bonnie Missens (Saskatoon) for the applicants who were not screened out in the first screening assessment. I notified each

applicant of her counsel's address and phone number..

The function of counsel was to assist applicants with respect to their applications but not to act in an adversarial capacity. Their first responsibility was to contact each of the applicants to whom they had been assigned, to listen to her story and to provide to the SDR a preliminary opinion in writing as to the applicant's eligibility for the Review. Subsequently, they were asked to respond to any requests from me for information and to any concerns raised by applicants. All SDR communications to applicants were sent directly to the applicants and copied to their legal counsel. Counsel were requested to consult with their clients with respect to any correspondence from me (whether it involved asking the applicant questions or explaining further why I could not review her case), to make any representations she felt appropriate in response to my conclusions and, for those applicants I interviewed, to attend at the interview to assist the applicant in presenting to me information relevant to her case. I found the role of counsel for the applicants of great assistance throughout this first phase of my work. The same group of counsel will be representing applicants in Phase Two of my review.

Stage 4: File Building and Analysis

A major part of the Review's work during this first phase was to obtain and review all of the legal files pertaining to the convictions of women who made applications to me. Every possible source of documentation was contacted and requested to send to me whatever relevant files, reports or transcripts they possessed. I received a high level of cooperation from defence counsel, prosecutors, court officials, police, doctors, forensic experts and shelter workers in this exercise. In most cases, I received court transcripts without charge. Many lawyers sent me their original files on the undertaking that I would return them as soon as I finished reviewing them.

In most cases, I received all or virtually all of the relevant documentation relating to the

applicant's conviction. In some cases, however, files or transcripts had been destroyed. Where this occurred, I had no choice but to base my review on the best information available to me and the memories of the various participants in the legal proceedings.

Once I received these files, my assistant legal counsel reviewed everything in them and highlighted any information relevant to the issues of abuse and self defence. They then prepared case summaries for each applicant. The case summaries became the foundation on which I reviewed the merits of applicants' claims of self defence (see Appendix C). The case summaries captured relevant information under the following headings:

1. Background Information
2. Basis of Conviction from Court Transcript(s) Including Facts
3. Abuse and Self Defence Issues Contained in Pre-Conviction Legal Files Which Were Not Before the Trial/Sentencing Court
4. Abuse and Self Defence Issues From Post-Conviction Sources
5. Issues and Conclusions Re Self Defence (Applying Self Defence Review's Minimum Standards of Review for [Pre/Post] *Lavallée* Cases)
6. Injustices Claimed by the Applicant in the Court Process
7. Other Factors Regarding Release
8. Recommendation

The case summaries followed this standard format to ensure that each applicant's case was reviewed and analyzed on a consistent basis. The case summaries were constantly revised and supplemented after each review of them by me and by my Legal Counsel.

The case summaries also included any information relevant to the woman's claim of self defence that came from a post-conviction source. This included comments on the woman's case from her former defence counsel, her prosecutor, her counsel on the Self Defence Review or any other person contacted by me. It also included information contained in correctional

files, the woman's "story" as provided to the Self Defence Review, her answers to my written questions and, in the case of women I interviewed personally, her oral answers.

Based on the information received on each applicant's case, I then analyzed the claim of self defence against standards of review and a definition of self defence that had been developed while the file building process was underway (See Chapters 2 and 3 for a full discussion of the standards and definition of self defence). The standards of review are, in effect, a definition of the degree to which I had to be satisfied of the merits of a claim of self-defence before I could recommend a remedy. The definition of self defence is a positive statement of the current law of self-defence, reflecting the elements of the defence set out in the *Criminal Code* of Canada as well as the interpretations of those elements in the case law. The standards of review and definition of self defence were sent to the four legal counsel for the applicants and to legal consultants to the Self Defence Review for comments. Counsel for the applicants were also invited, where appropriate, to make submissions to the Self Defence Review on behalf of the applicants with reference to the particular elements of the standards of review and definition of self defence.

Based on the information I had received, I formulated preliminary conclusions about the merits of each case. I then sent applicants letters containing questions that had to answered by them before my analysis could be completed. In effect, these letters gave an indication to applicants and their counsel of problem areas in their claims of self defence. Applicants were provided with their case summary and they were also asked to comment on it (including the initial legal analysis of her claim of self defence). Once I received responses, the case summaries were revised and the legal analysis was refined in accordance with the new information. All information that I received and recorded was kept private and confidential.

At that point, if I concluded that the applicant's claim of self defence could not satisfy the standards of review, I sent her and her counsel a letter of rejection asking for comments or any final submissions. Where appropriate, I responded to such submissions or comments with a

further explanation of my conclusion. Appendix D contains a chart describing the basis on which I rejected the 49 unsuccessful applications to me in Phase One. Before sending a rejection letter, the applicant's institution was notified that the applicant would be receiving disapponting news from the Review and the institution was requested to provide the applicant with additional support. Each applicant's counsel was requested to do the same.

Applicants whose claims appeared to meet the standards of review were scheduled for a personal interview. For the applicants I interviewed, I sent copies of the "Basis of Conviction" section of the case summaries to defence and Crown counsel from the applicant's trial or sentencing hearing. I asked them to comment on whether my understanding of the facts appeared to be accurate.

Stage 5: Personal Interviews - Conclusions and Recommendations

I had originally hoped to meet all of the applicants personally. However, when the number of applicants grew to 98, this was obviously impossible. Still, because there is such a large subjective element to self defence, I decided I could not make a positive recommendation for any woman unless I had met her and heard her version of events directly.

I held personal interviews with twelve applicants in various locations across the country. In attendance with me were a court reporter, the applicant's legal counsel, SDR Legal Counsel and one support person for the applicant, if she so desired. The purpose of the interview was to explore any remaining issues in the applicant's case. I attempted to create an informal atmosphere in which the woman could feel comfortable telling me about things that were understandably very painful for her to describe. At the same time, care was taken in questioning the applicant not to lead her in her answers. Naturally enough, some of the women were very nervous and had difficulty expressing themselves. This was not an impediment to their application since at the point when the interviews occurred I already knew

a great deal about her case and could explore the very particular areas where I needed to hear more from her. Again, counsel for the applicant performed an invaluable role in ensuring that my understanding of her case was complete.

After the interview, applicants were provided with a transcript and invited to make any further clarification of their statements in the interview or to provide me with any further information. Relevant information from the interview was included in the case summaries and a final analysis of the legal issues was then carried out. Applicants were notified of my conclusions and of any recommendation I proposed to make. Again, applicants were asked for any comments or submissions they wished to make. For those applicants for whom I intended to make a positive recommendation, I asked for her consent before forwarding that recommendation to the Minister of Justice and the Solicitor General. This step ensured that the applicants' wishes were respected to the greatest extent possible. For example, some women told me that they would prefer to withdraw their applications rather than go through a new trial.

As will be seen in Chapter 4, I made recommendations on behalf of a total of six women.

Stage 6: Report

The preparation of this report has been an ongoing process from the very beginning of the Self Defence Review. In particular, the chapters on standards of review and the definition of self defence began as memoranda to assist me in reviewing the merits of the claims of self defence before me. Over time, those memoranda were supplemented and revised to take account of fact situations and corresponding legal issues disclosed by the applications.

As explained above, this report is in two volumes. The second volume contains the case summaries and recommendations for the six successful applicants. In keeping with my terms

of reference, I am making recommendations only in those cases where the applicant's circumstances merit consideration for the granting of the royal prerogative of mercy. These recommendations are set out in a separate volume so that the identities of the applicants and other confidential information can be easily protected. This volume, on the other hand, contains no confidential information and may, if the Minister of Justice and the Solicitor General so desire, be released publicly.

CHAPTER 2 - STANDARD OF REVIEW

1. Introduction

One of the first substantive issues that faced the Self Defence Review in this first phase of its work was deciding the standard of review that should apply to applications before me. Another way of expressing this issue is as follows: to what degree must I be satisfied of the merits of an application before recommending a remedy?

In the interest of consistency, I attempted to articulate a working standard of review early in my mandate. I refined it over the course of several months as I applied it to actual cases under consideration. At the end of the day, through a process of constant checking and re-checking, I applied the same standard to all applicants. This standard reflects and respects my terms of reference, the interests of fairness and, as will be discussed further below, the principles underlying use of the royal prerogative of mercy.

It is perhaps preferable for me to refer to standards (plural) of review rather than a single standard. In fact, I employed several different standards that fell into three groups. The first group consisted of "threshold standards" that had to be met before I could assess the real merits of a claim of self defence. The purpose of this first group of standards was to ensure that the applicant's claim fell within my mandate and that the substance of her claim merited serious scrutiny. To put it another way, I needed a way of screening out those applications for which a full analysis of the merits of the claim of self defence did not seem appropriate. At the same time, of course, I was very wary of screening out applications that had potential merit. As such, when I applied these threshold standards, the applicants received the benefit of any doubt.

The second group of standards contains "substantive standards" applicable to the actual

merits of the claims of self defence. Their purpose was to assist me in determining whether it would be appropriate to recommend a remedy for a particular applicant and, if so, the form of that remedy.

The third group of standards are the "sentencing standards." These are the standards I applied in considering whether an applicant was entitled to a remedy affecting the duration of her sentence.

Before discussing the nature and purposes of these various standards, I should describe the various remedies available to applicants.

2. The Royal Prerogative of Mercy

My mandate expressly requires me to determine, on the basis of my review of the claims of self defence presented to me, appropriate cases for the granting of the royal prerogative of mercy. I am not confined to a consideration of the remedies referred to in s. 690 of the *Criminal Code*. As I discuss below, the royal prerogative of mercy includes, for example, pardons or remission of sentences, as well as new trials or referrals to courts of appeal. Accordingly, this mandate permits me to consider remedies that relate both to the substantive merits of a conviction (*e.g.* a full pardon) and remedies relating solely to the sentence imposed on the applicant (*e.g.* remission of sentence).

My terms of reference ask me to review the cases of women under sentence for homicide in which there is an allegation that the killing was carried out to prevent the deceased from causing death or serious bodily harm. In other words, I am to review the cases of women who allege that they acted in self defence. Based on that review, I may make a recommendation for the granting of the royal prerogative of mercy in any of its forms. I have interpreted this mandate as permitting me to make a recommendation for the granting of the royal prerogative

of mercy to any woman whose case presents grounds for the awarding of one of the remedies falling thereunder, so long as the basis for that remedy is revealed in the course of my review of the applicant's claim of self defence. In other words, while my review of an applicant's case is limited to the claim of self defence, I may consider recommending her a remedy even if her claim of self defence fails, if her application reveals other grounds for granting a remedy under the royal prerogative of mercy. To take an example, in a case where I conclude that a woman's claim of self defence is not well founded but it comes to my attention in reviewing that claim that the woman is currently undergoing severe hardship because of poor health or other extreme circumstances, I have considered it within my mandate to recommend a remedy for the woman.[1] I have not encountered such a case in this first phase of my Review. Another example would be where the evidence I have reviewed while examining an applicant's self defence claim suggests the existence of another defence. In fact, in some applicants' cases I considered the defence of provocation. The justification for doing so is set out below. A final example is where my review of the applicant's self defence claim reveals evidence that ought to have been considered on sentencing and I conclude that the applicant merits a remedy under the royal prerogative that responds to that situation (*e.g.* remission of sentence). I have not encountered such a case in this first phase of my Review.

The term "royal prerogative of mercy" is sometimes used to refer only to powers not specifically set out in statute. In other words, it may be used to refer to the powers vested in the Governor General as compared to those given to the Minister of Justice or the Governor in Council under the *Criminal Code*. In this report, I will use the term more generally, as I believe was the intention in my terms of reference, to refer to all of the powers vested in federal authorities, whether the Minister of Justice, the Governor in Council or the Governor General, to respond to petitions of convicted persons. I will refer to these powers in more detail below.

In considering the remedies available under the royal prerogative of mercy, I have been

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[1] The appropriate remedy in such a case would be a conditional pardon.

mindful of the principles underlying the royal prerogative that have been articulated by and are currently respected by the National Parole Board (NPB). These principles have been developed as a matter of policy by the NPB. As such, I have not considered myself bound by them. However, I have consulted and considered them in developing the standards of review and remedies discussed below. The following is an excerpt from a booklet published by the NPB entitled "The Royal Prerogative of Mercy":[2]

> **Principles**
>
> Given its exceptional nature, the royal prerogative of mercy is not exercised according to rigid criteria, but general guidelines have been developed. In conducting investigations and making recommendations, the National Parole Board shall be guided by the following general principles:
>
> 1. *There must be evidence of injustice or undue hardship.* There must be substantial injustice, as the Governor in Council does not intervene on technical grounds. Similarly, any undue hardship, which includes suffering or economic, mental, or physical deprivation, must be out of proportion to the nature of the offence.
>
> 2. *The exercise of the royal prerogative of mercy is concerned solely with the applicant.* The Board should examine the merits of the individual case, not hardship to anyone else affected, not the justice system generally.
>
> 3. *The independence of the judiciary shall be respected.* The exercise of the royal prerogative of mercy will not be considered when it would simply substitute the discretion of the Governor in Council for that of the court. There must be stronger and more specific grounds to recommend action that would interfere with a court's decision.

[2] National Parole Board (January 1994).

4. *The royal prerogative of mercy should be applied in exceptional circumstances only.* It is specifically intended only for rare cases in which considerations of justice and humanity override the normal administration of justice. It should be applied only when there are no other remedies, remedies are not lawfully available in a particular case, or recourse to them would result in greater hardship.

5. *The exercise of the royal prerogative of mercy, by its very nature, should not result in an increased penalty.*

The NPB booklet goes on to describe factors considered in relation to the various remedies falling under the royal prerogative:

Specific Remedies and criteria

1. *Free pardon.* A free pardon is granted only when the innocence of a convicted person is clearly established. Any consequences of the conviction, such as fines, prohibitions, or forfeitures, will be cancelled when a free pardon is granted.

2. *Conditional pardon.* A conditional pardon may be considered for a person who is not eligible for conditional release under the Corrections and Conditional Release Act or for a pardon under the Criminal Records Act. Anyone released on a conditional pardon will be supervised in the same way as a parolee.
   a. *Release subject to lawful conditions.* An inmate may be released through the power of the royal prerogative of mercy in unusual circumstances when consideration for parole is not legally possible. A conditional pardon, which allows an offender to be released subject to certain conditions during a term of imprisonment, may be recommended when there is substantial evidence of inequity or undue

hardship, and the community would not be placed at risk of the offender's reoffending.

b. *Criminal Records Act.* When a person is not eligible for a pardon under the Criminal Records Act, or will become eligible later, a conditional pardon may be recommended when there is evidence:
   - of good conduct, taking into account the Board's policies under the Criminal Records Act; and
   - the applicant is suffering undue hardship.

3. *Remission of sentence.* The remission of sentence amounts to erasing all or part of the sentence imposed by the court because of:
   a. an error of law;
   b. undue hardship; or
   c. an inequity, such as a change in legislation which had unintended and unanticipated consequences for a person previously convicted and sentenced.

4. *Remission of fine, forfeiture, and pecuniary penalty.* The Board may recommend the remission of fines, estreated bail, forfeitures, and other pecuniary penalties when there is substantial evidence of undue hardship due to circumstances or factors unknown to the court that imposed the sanction. The Board shall also consider whether any remission would cause hardship to another person.

5. *Respite.* Respite is an interruption in the execution of a sentence. Respite may be considered when there is significant evidence that failure to grant respite would cause undue hardship or create an inequity.

6. *Prohibition.* The Board may recommend that a prohibition be removed or

> altered when there is evidence that continuing the prohibition would cause undue hardship and altering or removing it would not constitute an undue risk to the community.

The following is a complete list of remedies available under the royal prerogative of mercy:

- free pardon[3]
- conditional pardon[4]
- pardon under the *Criminal Records Act*[5]
- remission of sentence[6]
- respite of sentence[7]
- commutation of sentence[8]
- new trial[9]

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[3] *Criminal Code*, s. 749.

[4] *Criminal Code*, s. 750.

[5] R.S.C. 1985, c. C-47.

[6] Article XII of the Letters Patent constituting the office of the Governor General (R.S.C. 1985, App. No. 31) states that the Governor General has the power to order a conditional or free pardon and, in addition, may "grant to any offender convicted of any such crime or offence ... any respite of the execution of the sentence of any such offender ..." The Governor General may act on the advice of a Cabinet Minister. There is provision in the *Criminal Code* (s. 750) for remission of fines, monetary penalties or forfeiture orders, but this is probably not relevant to our applicants. The power to order a remission of sentence derives from the general powers of the Governor General under Article II of the Letters Patent.

[7] See above, note 6.

[8] See discussion below at 30-1.

[9] *Criminal Code*, s. 690(*a*).

- referral of a case to a court of appeal[10]
- reference to court of appeal on a legal issue[11]
- reference to the Supreme Court of Canada[12]

I have taken the approach that some of these remedies, while open to me to recommend, are for the most part inappropriate in the context of the Self Defence Review. I have not considered granting a pardon under the *Criminal Records Act*. This form of pardon is the subject of a comprehensive statutory regime administered by the National Parole Board. The basis for the remedy under the Act is the applicant's conduct after the offence rather than the merits of the conviction. For these reasons, I have not considered making any recommendations relating to the relief available under that Act.

Generally speaking, I have not considered recommending a referral or reference of an applicant's case to a court of appeal or to the Supreme Court of Canada. These remedies are suitable in cases where there is a substantive legal issue to be resolved or the Minister requires the assistance of a court in deciding the merits of an application under s. 690 of the *Criminal Code*. In the context of the Self Defence Review, I believe it is for the Review itself to determine substantive legal issues and it is the Review that is providing assistance to the Minister. As such, there is no point in my recommending that a court be asked, in effect, to perform the same role as I have been asked to perform under the Self Defence Review. However, there is one situation where I have considered recommending that a case be referred to a court of appeal. This possibility is discussed below under sentencing standards.

I should make note of the inclusion of the remedy of commutation of sentence in the list of remedies falling under the royal prerogative of mercy. This measure consists of an actual

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[10] *Criminal Code*, s. 690(*b*).

[11] *Criminal Code*, s. 690(*c*).

[12] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 53.

reduction of the sentence being served by the applicant, as compared to a remission of sentence which amounts to a forgiveness of all or part of a sentence. Commutation is not referred to in any statutory expression of the royal prerogative, nor is it referred to expressly in the Letters Patent constituting the office of the Governor General. It appears, however, that it does fall under the residual powers of the Governor General as expressed in Article II of the Letters Patent, which states:

> And we do hereby authorize and empower Our Governor General, with the advice of our Privy Council for Canada or any members thereof or individually, as the case requires, to exercise all powers and authorities lawfully belonging to Us in respect of Canada . . . [13]

Given that the power of the monarch to commute sentences has been recognized at common law, it remains vested in the Governor General of Canada under the Letters Patent. I realize that this power has not been used in many decades. The Fauteux Committee said this about it in 1956:

> Under the royal prerogative of mercy the Crown may also commute a sentence of imprisonment to a term shorter in duration than the term imposed by the court. Thus, under this prerogative, the Crown may substitute its judgment for that of the court. Apparently in the early days of the Remission Service it was customary for the Service to make recommendations for the commutation of sentences of imprisonment. However, the practice was abandoned in 1925 and has not been resorted to since that time.
>
> We think this is wise. The question of the amount of punishment to be imposed upon a convicted offender is one exclusively for the courts. If the offender considers that the sentence imposed upon him is excessive, he has his remedy by

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[13] See above, note 6.

> way of appeal. We consider that very serious results would ensue if the Executive branch of government adopted a practice of substituting its order for the judicial order of the court. The question whether a person is serving such a sentence should be released on parole and, if so, at what stage of his imprisonment, is an altogether different matter . . . [14]

I agree with this reasoning. However, there are occasions where, based on the substantive merits of an applicant's case, a commutation of sentence would be the appropriate remedy. This is a different situation from the one described in the Fauteux Committee Report and in relation to which the Committee expressed justifiable concern. The concern there was about the executive substituting its opinion on the appropriate sanction for that of the judiciary. It would be a different case if a review of the applicant's case revealed that a shorter sentence would redress a wrongful conviction. It is in the latter context that I have considered recommending a commutation of sentence for some applicants.

Accordingly, the remedies I have considered recommending are:

- full pardon
- conditional pardon
- remission of sentence
- respite of sentence
- commutation of sentence
- new trial
- referral to court of appeal

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[14] *Report of a Committee Appointed to Inquire into the Principles and Procedures followed in the Remission Service of the Department of Justice of Canada* (Chair: Gérald Fauteux), (Ottawa: Queen's Printer, 1956), at 36.

3. Minimum Standards of Review

The tables set out below summarize the standards of review and corresponding remedies employed by the Self Defence Review for both pre- and post-*Lavallée* cases. I explain these standards and remedies in the text immediately following the tables.

Table I - Summary of the Standards of Review and Corresponding Remedies Relating to Self Defence Employed by the Self Defence Review for Pre-*Lavallée* Cases

	1. Standard of Review and → *Remedy*	**2. Standard of Review and → *Remedy***	**3. Standard of Review and → *Remedy***	**4. Standard of Review and → *Remedy***
Pre-*Lavallée* Cases	Does the applicant advance a claim of self defence that (a) has an air of reality; (b) is supported by evidence that is reasonably capable of belief; (c) includes some evidence in respect of each of the applicable essential legal elements of self defence; and (d) ***could*** **create a reasonable doubt in the mind of a reasonable trier of fact properly instructed on the law?** → *New Trial*	Does the applicant advance a claim of self defence that (a) has an air of reality; (b) is supported by evidence that is reasonably capable of belief; (c) includes some evidence in respect of each of the applicable essential legal elements of self defence; and (d) ***would*** **create a reasonable doubt in the mind of a reasonable trier of fact properly instructed on the law?** → *Pardon*	Does the applicant advance a claim of self defence that (a) has an air of reality; (b) is supported by evidence that is reasonably capable of belief; (c) includes some evidence in respect of each of the applicable essential legal elements of self defence; and (d) **proves self defence on a balance of probabilities?** → *Pardon*	Does the applicant advance a claim of self defence that (a) has an air of reality; (b) is supported by evidence that is reasonably capable of belief; (c) includes some evidence in respect of each of the applicable essential legal elements of self defence; and (d) **proves self defence beyond a reasonable doubt?** → *Pardon*

Table II - Summary of the Standards of Review and Corresponding Remedies Relating to Self Defence Employed by the Self Defence Review for Post-*Lavallée* Cases

	1. Standard of Review and → *Remedy*	**2. Standard of Review and → *Remedy***	**3. Standard of Review and → *Remedy***	**4. Standard of Review and → *Remedy***
Post-*Lavallée* Cases	Does the applicant advance a claim of self defence that (a) has an air of reality; (b) is supported by evidence that is reasonably capable of belief; (c) is supported by evidence that is new or whose significance was not adequately appreciated; (d) includes some evidence in respect of each of the applicable essential legal elements of self defence; and (e) ***could*** **create a reasonable doubt in the mind of a reasonable trier of fact properly instructed on the law?** → *New Trial*	Does the applicant advance a claim of self defence that (a) has an air of reality; (b) is supported by evidence that is reasonably capable of belief; (c) is supported by evidence that is new or whose significance was not adequately appreciated; (d) includes some evidence in respect of each of the applicable essential legal elements of self defence; and (d) ***would*** **create a reasonable doubt in the mind of a reasonable trier of fact properly instructed on the law?** → *Pardon*	Does the applicant advance a claim of self defence that (a) has an air of reality; (b) is supported by evidence that is reasonably capable of belief; (c) is supported by evidence that is new or whose significance was not adequately appreciated; (d) includes some evidence in respect of each of the applicable essential legal elements of self defence; and (e) **proves self defence on a balance of probabilities?** → *Pardon*	Does the applicant advance a claim of self defence that (a) has an air of reality; (b) is supported by evidence that is reasonably capable of belief; (c) is supported by evidence that is new or whose significance was not adequately appreciated; (d) includes some evidence in respect of each of the applicable essential legal elements of self defence; and (e) **proves self defence beyond a reasonable doubt?** → *Pardon*

Table III - Summary of the Standards of Review and Corresponding Remedies Relating to Sentencing Employed by the Self Defence Review

	1. Standard of Review and → *Remedy*	**2. Standard of Review and → *Remedy***	**3. Standard of Review and → *Remedy***
Pre- and Post-*Lavallée* Cases	Does the applicant advance a claim of self defence that (a) is supported by new evidence*; (b) is supported by evidence reasonably capable of belief; and (c) *could* affect the offence for which the applicant was convicted or her sentence? → *Referral to a court of appeal*	Does the applicant advance a claim of self defence that (a) is supported by new evidence*; (b) is supported by evidence reasonably capable of belief; and (c) *would* affect the offence for which the applicant was convicted or her sentence? → *Commutation or Remission of Sentence*	Does the applicant advance a claim of self defence that is supported by evidence justifying sympathetic treatment of the applicant? → *Conditional pardon*

* Or evidence whose significance was not adequately appreciated.

(a) *Threshold Standards*

I applied two distinct threshold standards. As will be discussed below, there is actually a third threshold standard that I applied only to post-*Lavallée* cases. This third standard amounted to a requirement of new evidence or evidence whose significance had not been adequately appreciated. The need for this further threshold for post-*Lavallée* cases became apparent in the course of analyzing the substantive standard appropriate to those cases. As such, it is discussed below under substantive standards for post-*Lavallée* cases.

The following represent the threshold standards common to both pre- and post-*Lavallée* cases. They correspond to clauses (a) and (b) in both Tables I and II set out above. Each standard is set out below, along with commentary explaining its purpose and the manner in which I applied it:

(a) Is there an air of reality to the claim of self defence (*i.e.* if the evidence offered in support of the claim of self defence were raised at trial, would the issue of self defence be left with the jury)?

Commentary:

This standard was intended to create a very low preliminary threshold for the consideration of an applicant's case. It is based on terminology commonly used in criminal trials in determining whether there is evidence on a particular issue that would justify consideration of that issue by the trier of fact. I used this test as a preliminary screening mechanism in cases where it did not appear to me that self defence could possibly arise from the facts presented to me. In other words, a claim of self defence lacked an air of reality if there appeared to me to be no evidence to support it. For example, in some cases the

applicant said that she was not at all responsible for the killing. Obviously, in such a case there can be no claim of self defence. However, since these women may have had a valid claim that a miscarriage of justice had occurred, I helped some of them make applications to the Minister of Justice under s. 690 of the *Criminal Code*. Similarly, some women applied to the Self Defence Review but did not actually claim that they had acted in self defence. Sometimes this was the product of a misunderstanding. For example, some women thought, naturally enough, that the mandate of the Self Defence Review included reviewing the convictions of all women who had suffered past abuse, even if their cases did not raise issues of self defence. Again, where there was no issue of self defence in the applicant's case, I screened out her application at this initial stage.

I always gave the benefit of any doubt on this standard to the applicant. In addition, before deciding that a claim of self defence lacked an air of reality, I provided an opportunity to the applicant to supplement her application if the initial information I received did not support her claim of self defence.

(b) Is the claim of self defence supported by evidence that is reasonably capable of belief?

Commentary:

The Self Defence Review is not a trier of fact. As such, it is not for me to decide matters of credibility. However, at the same time, in order for me to consider the merits of a claim of self defence, I had to consider both the quality and quantity of evidence presented to me on that issue. It is within this threshold standard requiring evidence "reasonably capable of belief" that I considered the qualitative aspects of the evidence in a general sense. As I

explain below, the quality of evidence also affected my consideration of the substantive standards although the ultimate issue under the substantive standards is the quantity of evidence.

It was only where the version of events relating to self defence presented to me, from whatever source, was not reasonably capable of belief that an application would not meet this standard. Again, it was not for me to decide whether the applicant or any other person is actually to be believed. For purposes of this threshold standard, I only considered whether there was evidence of self defence that was reasonably capable of belief - that is, on an objective standard. The question was whether a trier of fact *could* find that the claim of self defence was plausible.

Admittedly, the principal source of evidence of self defence was often the applicant herself. If the applicant's version of events struck me as untruthful, in whole or in part, I was careful not to reject an application on such a subjective basis. Instead, I considered the applicant's claim in the light of the other evidence and determined, on an objective basis, whether the evidence relevant to self defence was reasonably capable of belief.

In a situation where the applicant pleaded guilty, this standard (and others) was difficult to apply. On its face, a guilty plea amounts to an acknowledgement of responsibility for the killing and, at the same time, of the absence of an exculpatory defence. However, I was sensitive to the fact that there are forces that impel some women to plead guilty - the trauma of events, the impact of a lengthy trial on the woman and her family, a genuine feeling of responsibility and remorse and, especially, fear of conviction on a more serious charge (*e.g.* second degree murder instead of manslaughter) - even where she may have had a viable defence. I looked at such cases based on the facts known at the time of the offence (*e.g.* in an agreed statement of facts) and the applicant's story now. I then considered whether the version of events presented to me was reasonably capable of belief, even if it departed from

the facts agreed to by the applicant at the time of her conviction.

The question whether the claim of self defence presented to me was reasonably capable of belief actually arose in two ways. First, it was a general threshold issue relating to the claim of self defence. This meant that if the claim of self defence was clearly contradicted by the vast weight of evidence, it may not meet this standard. For example, if an applicant claimed that the killing took place during a struggle with her adversary over physical possession of a gun and the forensic evidence clearly showed that the firearm was actually discharged at a distance of at least 10 feet, the claim of self defence would not be supported by evidence reasonably capable of belief and the applicant would be asked for her comments. Applications were screened out at this stage only if they did not meet this standard as it applied in this general way.

The second way this standard was applied in the review of a claim of self defence was in relation to the various legal elements of that defence (see Chapter 4 for a description of those legal elements). There had to be evidence which was reasonably capable of belief supporting each of the legal elements of self defence. To take an example, where there was no evidence reasonably capable of belief that the applicant actually feared death or serious bodily harm at the hands of the deceased, then one of the essential elements of self defence could not be satisfied and, therefore, my standard of review could not be me and I could not recommend that the applicant receive a remedy. As applied in this more particular way, the reliable evidence standard actually formed a subsidiary part of the substantive standards that are discussed below.

(b) *Substantive Standards*

(i) Factors Influencing the Choice of Substantive Legal Standards

There are various legal standards that, in theory, I could have applied here - proof beyond a reasonable doubt, proof on the balance of probabilities, evidence creating a reasonable doubt, and so on. The Criminal Convictions Review Group of the Department of Justice, which reviews applications to the Minister under s. 690 of the *Criminal Code*, currently applies the following standard: An applicant is entitled to a remedy (in the form of a new trial or appeal) if the Minister is "satisfied by the application that there is reason to conclude that a miscarriage of justice likely occurred".[15] This is not a legislated standard. It has been developed as a matter of policy within the Department of Justice for the exercise of the powers of the Minister of Justice under s. 690. Similarly, I had to choose, as a matter of policy, the standard (or standards) most appropriate to the task of the Self Defence Review.

Additional guidance on the appropriate standard of review is provided by the approach taken by the Supreme Court of Canada in the *Milgaard*[16] case. The Court was asked two questions in that case:

1. Does the continued conviction of David Milgaard in Saskatoon, Saskatchewan for the murder of Gail Miller, in the opinion of the Court, constitute a miscarriage of justice?

2. Depending on the answer to the first question, what remedial action under

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[15] See Department of Justice "Applications to the Minister of Justice for a Conviction Review". See also, Reasons for Decision of the Minister of Justice (in relation to the application for review by Colin Thatcher), (April 14, 1994).

[16] *Reference re Milgaard* (1992), 12 C.R. (4th) 289 (S.C.C.).

the *Criminal Code*, if any, is advisable?

In addressing these questions, the Court set out guidelines on the standards of review applicable to, and the corresponding remedies available under, the Court's review of the applicant's conviction. Those guidelines are as follows:

(a) The continued conviction of David Milgaard would constitute a miscarriage of justice if, on the basis of the judicial record, the reference case and such further evidence as this court in its discretion may receive and consider, the court is satisfied beyond a reasonable doubt that David Milgaard is innocent of the murder of Gail Miller. If we were to answer the first question put to this court by the Governor General in the affirmative on this ground, we would consider advising that the Governor in Council exercise his power under s. 749(2) of the *Criminal Code* to grant a free pardon to David Milgaard.

(b) The continued conviction of David Milgaard would constitute a miscarriage of justice if, on the basis of the judicial record, the reference case and such further evidence as this court in its discretion may receive and consider, the court is satisfied on a preponderance of the evidence that David Milgaard is innocent of the murder of Gail Miller. If we were to answer the first question put to this court by the Governor General in the affirmative on this ground, it would be open to David Milgaard to apply to reopen his application for leave to appeal to the Supreme Court of Canada with a view to determining whether the conviction should be quashed and a verdict of acquittal entered, and we would advise the Minister of Justice to take no steps pending final determination of those proceedings.

(c) The continued conviction of David Milgaard would constitute a miscarriage of justice if there is new evidence put before this court which is relevant to the issue of David Milgaard's guilt, which is reasonably capable of belief, and which taken together with the evidence adduced at trial, could reasonably be expected to have affected the verdict. If we were to answer the first question put to this court by the Governor General in the affirmative on this ground we would consider advising the Minister of Justice to quash the conviction and to direct a new trial under s. 690(*a*) of the *Criminal Code*. In this event it would be open to the Attorney General of Saskatchewan to enter a stay if a stay were deemed appropriate in view of all the circumstances including the time served by David Milgaard.

(d) If the judicial record, the reference case and such further evidence as this court in its discretion may receive and consider, fails to establish a miscarriage of justice as set out in paras. (a), (b) or (c) above, we might nonetheless consider advising the Minister of Justice that granting of a conditional pardon under s. 749(2) of the *Criminal Code* may be warranted where having regard to all the circumstances, it is felt some sympathetic consideration of David Milgaard's current situation is in order.[17]

In summary, the Court's pairing of its standards of review and potential remedies was as follows:

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[17] Above note 16, at 291-2.

Standard of Review	→ Remedy
(a) proof of innocence beyond a reasonable doubt	→ full pardon by Governor in Council
(b) proof of innocence on a balance of probabilities	→ reopening of appeal to SCC (possibly leading to quashing of conviction and entering of an acquittal)
(c) existence of new evidence which is reasonably capable of belief and which could reasonably be expected to have affected the verdict	→ quashing of the conviction and ordering new trial
(d) existence of circumstances justifying sympathetic consideration	→ conditional pardon

According to this approach, it would be possible to have a series of escalating standards of review. Each standard would, in turn, be indicative of a corresponding remedy available under the umbrella of the royal prerogative of mercy.

While the standards applied by the Criminal Convictions Review Group and the Supreme Court of Canada are valuable precedents for us, at the same time, it is important to bear in mind the differences between the Self Defence Review and the regular s. 690 process, including the *Milgaard* case. First, the Self Defence Review is not confined to the question whether there has been a "miscarriage of justice", as the Supreme Court was requested to inquire into in the *Milgaard* case. As discussed above, the terms of reference of the Self Defence Review require it to "review the cases of women ... who are serving a sentence for homicide in circumstances in which the killing allegedly took place to prevent the deceased from inflicting serious bodily harm or death". Based on that process, the Review must make recommendations "in appropriate cases ... for individual women whose circumstances merit consideration for the granting of the royal prerogative of mercy".

Accordingly, the Review is not specifically directed to determine whether "miscarriages of justice" have occurred. True, the conviction of a woman for homicide in circumstances where the defence of self-defence, as currently understood, was not available, not raised when it could have been or not adequately appreciated, may be characterized as a "miscarriage of justice" in a general sense. However, it is certainly different from a case where the accused alleges to have been wrongly convicted because he or she was not responsible for the crime (*i.e.* did not commit the *actus reus* of the offence) which is the basis for most of the applications under s. 690 of the *Criminal Code*. It is certainly a different situation from that faced by the Supreme Court of Canada in *Milgaard*, where the applicant alleged that he was not involved in the killing of Gail Miller.

Under the Review, the main issue is not whether an applicant was the victim of a miscarriage of justice in the sense that she was wrongfully convicted. In fact, many of the applicants were probably convicted quite properly under the law that governed at the time of their trials or guilty pleas. Rather, for me, the primary question is whether the applicants' convictions and sentences should be sustained in the light of the evidence presented to me and the *current* law. Under s. 690, the question is whether there is a factual basis for believing that the verdict was incorrect under the law that applied at the time. This is an important difference between the basis for the Self Defence Review and the s. 690 process. The Self Defence Review has been asked to carry out a unique mandate - to apply innovations in substantive Canadian law retrospectively. The nature of this unprecedented mandate has implications for the standard of review that should be applied to applicants' cases and the nature of the remedies that should be considered.

In most cases where a person makes an application under s. 690, there is a heavy burden on that person to make a case for upsetting the conclusions of a trial or appeal court. There is a presumption that the person was properly convicted and, therefore, no longer entitled to the presumption of innocence. This presumption (which, for convenience, I will refer to as the "presumption of regularity") that surrounds a conviction for a crime must be rebutted by the applicant before a remedy can be awarded under s. 690. In addition, the mere creation of a

reasonable doubt about the correctness of a conviction would be an insufficient basis upon which to grant the applicant a remedy under s. 690. The passage of time and the corresponding frailty in witnesses' memories could be enough in those cases to create a reasonable doubt about the correctness of the conviction. As such, the standard of review for s. 690 applications is relatively strict.

As mentioned, the current standard applicable to s. 690 applications is whether "there is reason to conclude that a miscarriage of justice likely occurred". Given the nature of most s. 690 applications (*i.e.* that applicants claim not to have committed the offence), this standard appears to require the applicant to demonstrate that there is a reasonable basis for concluding that he or she is *probably* innocent of the offence. In the situation of applicants before the Self Defence Review, I considered this standard to be inappropriate to the task I have been asked to carry out. It would require applicants to demonstrate a reasonable basis for concluding that they probably acted in self defence. This standard may be appropriate where the "presumption of regularity" exists, but not where a substantive issue (*i.e.* self defence) remains, in effect, untried.

There is another basis for distinguishing the Self Defence Review from the s. 690 process. The remedies under s. 690 may be described as judicial in nature. The Minister may direct a new trial or refer a case to a court of appeal. The Minister does not grant any direct remedy to an applicant such as a pardon or remission of sentence. Accordingly, it is perhaps appropriate that there exists a single standard applied by the Minister under s. 690. However, my mandate is broader in the sense that I must consider the full range of remedies falling under the rubric of the royal prerogative of mercy. As such, I have had to formulate standards appropriate to the various remedies I must consider rather than a single standard.

In developing suitable standards of review for the Self Defence Review, I began at the level of first principles - the basic rules and values that underlie our system of criminal justice. In a trial situation, an accused who tenders evidence of self defence would be entitled to an acquittal if that evidence raised in the mind of the trier of fact a reasonable doubt about the accused's

liability on the charge. To put this into the vocabulary of my review process, the "standard of review" on the issue of self defence that applies in a trial situation, then, is the standard of a reasonable doubt. Where that standard of review is met, the "remedy" is an acquittal. The question is how to respect that reality, that legal premise, which is based on the principle of the presumption of innocence and reinforced by substantive and procedural law, in my review of the cases before me after the courts had already convicted the applicants. I considered this issue separately for pre- and post-*Lavallée*[18] applications.

(ii) Substantive Standards of Review for Pre-*Lavallée* Cases

Factors Influencing the Choice of Standards

In pre-*Lavallée* cases (*i.e.* those in which applicants were convicted prior to May 3, 1990), applicants did not have an opportunity to argue self defence within the terms recognized by the Supreme Court of Canada in that case. As such, one must accept that there exists a real possibility that these cases may disclose a substantive legal issue that was not nor, realistically, could have been tried. Even if self defence was actually raised in their cases, it could not have been (or, at least, is unlikely to have been) addressed on the same terms as in *Lavallée*.

In principle, then, looking solely at the issue of self defence, there is no difference between applicants convicted prior to *Lavallée* and accused persons at trial. For any accused person at trial, the Crown has to prove its case beyond a reasonable doubt before there can be a conviction. There is always the possibility that the existence of certain facts will create a reasonable doubt and not allow the Crown to discharge its burden of proof. For the pre-*Lavallée* applicant who now claims she acted in self defence on the basis recognized in *Lavallée*, there is an untried or

[18] [1990] 1 S.C.R. 852. This case is a landmark in the law of self defence, particularly as it applies to women in abusive relationships. It is discussed below in Chapter 3.

new factual issue which needs to be considered along with the matters that formed the basis of her conviction. In relation to the convictions of these women, there is no "presumption of regularity" to be rebutted, at least not in relation to the issue of self defence. The analysis of the issue of self defence on the terms currently applicable to it has simply not occurred. Therefore, in my view, in principle at least, it is appropriate to apply to pre-*Lavallée* cases the same "standard of review" that would apply to the issue of self defence at trial - namely, where sufficient evidence exists on the issue of self defence that it raises a reasonable doubt about the applicant's liability.

The problem, of course, is that the Self Defence Review is not in the same position as the original trial court. It is not, in fact, a court at all. How then can it apply a reasonable doubt standard years after the original conviction? How can I evaluate the evidence of self defence that is brought to my attention in the light of all the other trial evidence? I cannot place myself in the position of the original trier of fact. Clearly, I can only proceed from an *objective* assessment of the evidence on self defence. Therefore, the question is not whether I may have a reasonable doubt about the applicant's liability on the basis of the evidence tendered on her application (and the other evidence available). The only way I can approach this question is in terms of my determination of the effect the evidence of self defence would have on a reasonable trier of fact, properly instructed on the current law and considering the totality of the evidence before me. In my view, an applicant should be entitled to some form of remedy (within the remedies falling under the royal prerogative of mercy) if I am satisfied that a reasonable trier of fact *could* have a reasonable doubt about the applicant's liability. By this standard, the correctness of the outcome of the applicant's case would clearly be in doubt and, as such, it would be an "appropriate case" (to use the terminology of my terms of reference) to recommend granting the applicant some form of remedy. The nature of the appropriate remedy in such circumstances will be discussed further below.

It is important to point out that this substantive standard is additional to the threshold standards discussed above. While those threshold standards would otherwise be implicit in the

substantive standard I have devised, I have tried to make all of the elements of my standard express so that: the standard could be applied as consistently as possible; applicants and their counsel understood the standard I was applying and could direct me to evidence relevant to each element of that standard and make submissions about the application of the standard to the evidence; and my conclusions about each case could be as clear as possible, both in relation to successful and unsuccessful applicants.

Those threshold standards applicable to pre-*Lavallée* cases are the "air of reality" standard and the requirement that the evidence in support of the applicant's claim of self defence be "reasonably capable of belief." It would not be necessary, however, for an application in relation to a pre-*Lavallée* conviction, that there be new evidence before me that was not before the convicting court. The evidence supporting the issue of self defence may have existed and may have been introduced into evidence at the time of the original trial or plea. In effect, my mandate requires me to look at the original conviction through modern eyes. As such, evidence that has already been tendered or considered may be vested, by virtue of subsequent level developments, with a significance or "newness" that it was not originally accorded. It is for me to decide what difference the intervening developments would have made in an applicant's case.

To repeat, then, the evidence tendered in support of an application to the Self Defence Review must be sufficient to justify leaving the issue of self defence with the trier of fact and must be reasonably capable of belief. Further, the evidence tendered in support of the claim of self defence must be of sufficient weight to satisfy me that it could create in the mind of a reasonable trier of fact, properly instructed on the current law, a reasonable doubt about the applicant's liability because of self defence.

There is another important implicit aspect of the above standard. It lies in the meaning of "self defence." A reasonable trier of fact could only have a reasonable doubt about an applicant's liability on the issue of self defence if there existed some evidence in resepect of each of the legal elements of that defence. Again, I have attempted to be as clear as possible about the definition

of self defence I was applying in my review of each case. This issue is the subject of Chapter 3 below.

Also, it is important to emphasize again that the Self Defence Review cannot put itself in the place of the original trier of fact. I am not in a position to evaluate the credibility of witnesses at the trial or to weigh the entirety of the evidence. As such, it would be inappropriate for me to review the evidence in light of the applicable law and, simply, substitute my conclusion on liability for that of the original trier of fact. In other words, the issue is not whether *I* have a reasonable doubt about the applicant's liability. Nor should I speculate about the reasoning of the original trier of fact. Rather, the role of the Self Defence Review is more akin to the function of an appeal court which must look at the record of the evidence and any new facts in a more detached light than is the case at trial. Accordingly, it should operate on an objective standard similar to that which an appeal court would apply. I should recommend a remedy that would constitute an interference with a conviction only where, at a minimum, I am satisfied that a reasonable trier of fact could come to a different result had the evidence before us been considered in the light of *Lavallée*.

I am reinforced in the correctness of this standard by the grounds that have historically been applied to the granting of pardons under the royal prerogative of mercy. The Fauteux Committee stated:

> To justify a free pardon, the existence of material facts which were not before the court that convicted the offender must be found and must afford convincing reasons leading to the positive conclusion that, had the court been aware of them, the accused would have been acquitted.[19]

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[19] Above, note 14, at 33.

As I have explained, at least for pre-*Lavallée* applicants, there is always something new in the sense that the evidence is being considered in a new light. The only difference between the standard described by the Fauteux Committee and my own is that I have not tried to assess what the original trier of fact would have done with the evidence before me and in the light of *Lavallée*. I preferred to consider what a hypothetical reasonable trier of fact would do.

I should point out that the Fauteux Committee was discussing the appropriate standard for the granting of a full pardon. I have preferred to set a general minimum standard for success on my review separately from the issue of remedies. The issue of remedies is discussed below.

Summary of Minimum Standard of Review for Pre-Lavallée Cases

The minimum standard of review I have set for pre-*Lavallée* convictions, then, is as follows: There must be an air of reality to the claim of self defence and the claim must be supported by evidence that is reasonably capable of belief. Further, there must exist some evidence in respect of each of the essential legal elements of self defence. Finally, at a minimum, the self defence evidence must be of sufficient weight that it satisfies me that it could create a reasonable doubt about the applicant's liability in the mind of a reasonable trier of fact.

The analysis applied to each pre-*Lavallée* case, to determine if the *minimum* standard of review is met, is as follows:

(a) Is there an air of reality to the claim of self defence?

(b) Is the claim of self defence supported by evidence that is reasonably capable of belief?

(c) Is there some evidence (reasonably capable of belief) in respect of each of the applicable essential legal elements of self defence? and

(d) Could that evidence create a reasonable doubt about the applicant's liability in

the mind of a reasonable trier of fact, properly instructed on the law?

These standards are contained in Table I (column 1) above. They are progressive standards. I have considered them in order and if an applicant, after notification to her and receipt of her comments, failed on any one standard, I ceased to consider her application.

Remedies for Pre-Lavallée Cases

The next question is what the appropriate remedy would be if this *minimum* standard were met. Evidence merely suggesting that the outcome of the case *could* be different will usually not be persuasive enough to suggest what that outcome would be. As such, unless I am to act as a trier of fact on that issue (which, as I have already stated, I am ill-placed to do), I cannot make that determination on my own. At the same time, however, there would exist reasonable grounds for doubting the correctness of the verdict. The appropriate remedy in such a situation would, in my view, be a new trial so that the weight of the evidence could be assessed by a trier of fact. Of course, in a situation where I recommend that the applicant receive a new trial, it would be open to the relevant Attorney General to decide whether or not to proceed in light of all of the circumstances, including the time the applicant has already spent in custody. This possibility was adverted to by the Supreme Court of Canada in *Milgaard*.

I should mention that the applicants have been informed that their consent will be sought before a recommendation is submitted on their behalf to the Minister of Justice and the Solicitor General if I determine that one can be made. I have told applicants of the recommendation, if any, I intended to make on their behalf and I have given them the opportunity to tell me their reaction to those recommendations. Some applicants informed me, early in the process, that if all I was able to do for them was to recommend that they receive a new trial, they would prefer no remedy at all. They said they were simply unwilling to go through a new trial because of the emotional and psychological trauma that would be imposed on them and their families. I have

respected their wishes. This reluctance on the part of some applicants to face a new trial did not, however, affect the articulation of my standard of review or influence the remedies I considered making on behalf of applicants whom I felt were deserving a new trial.

It was important that the applicants be informed of the recommendation I intended to make on their behalf on a number of grounds. First, for many applicants, making an application to the Self Defence Review was a leap of faith. Many applicants, rightly or wrongly, have bitter attitudes toward the legal system. They mistrust lawyers and judges. To proceed with an application to me, they had to set aside or, at least, temper that mistrust temporarily. They had to put faith in a representative of a legal system they feel has let them down. Many of have also told me facts or feelings they have not related to anyone else. I felt an obligation to respond to this leap of faith by informing applicants of my assessment of what they had told me. In a sense, there was a kind of quid pro quo in this relationship - I could not expect applicants to be forthcoming with me and then fail to respond to them directly. Further, informing the applicants of my recommendations is a logical extension of my independent role on the Self Defence Review. Women's applications for review have come to me and it is for me, pursuant to my terms of reference, to recommend relief if I feel it is appropriate to do so. It is not my mandate to submit my decision on *all* applications before me to the Ministers; *i.e.* including those where I can make no recommendation with respect to an applicant's case. In other words, it is not part of my mandate to submit cases to the Ministers with my recommendation that nothing be done in repect of those applicants. In effect, although my powers are limited, I am standing in the place of the Ministers for purposes of reviewing the applications before me and, as such, I have a responsibility to inform women of the outcome of my review, whether positive or negative. Further, if I did not inform them of my recommendation, the applicants, whether they had failed or succeeded in their claim of self defence to me, would not know whether their cases were under consideration by the Ministers. This situation would leave applicants in a state of high anxiety for whatever period of time the Ministers feel they need in order to consider my recommendations. It would be unfair to impose on these applicants, who have already been put through a great deal of stress through the process of the Self Defence Review, an additional and

unnecessary psychological strain.

As mentioned, the foregoing represents a *minimum* standard of review. In a situation where the evidence was of greater weight, such that I was satisfied that the self defence evidence *would* (as opposed to *could*) create a reasonable doubt in the mind of a reasonable trier of fact, the appropriate remedy would be a full pardon. In that situation, the applicant would be entitled to a remedy that recognizes that her conviction can no longer stand. This is not an easy standard to meet. I must be satisfied, in effect, that a reasonable trier of fact, instructed on the current law of self defence and considering the totality of the evidence, would not convict the applicant.

In summary, the minimum standard of review for pre-*Lavallée* cases will be reached where the applicant's claim of self defence has an air of reality, is supported by reliable evidence, includes evidence in respect of each of the essential legal elements of self defence and, further, satisfies me that the outcome of the case could have been different in the sense that a reasonable trier of fact could have a reasonable doubt about the applicant's liability on the totality of the evidence. If so, on that standard, the appropriate remedy would be a new trial. If, however, the evidence is stronger such that I am satisfied that the evidence *would* have created a reasonable doubt about the applicant's liability in the mind of a reasonable trier of fact, then the appropriate remedy would be a full pardon.

It is possible to imagine cases where the evidence before me is even more convincing - where it actually proves to me that the applicant acted in self defence. In situations where the evidence proves self defence on the balance of probabilities or beyond a reasonable doubt, the result should also be a complete pardon of the applicant as the applicant's conviction can no longer stand.

The full array of standards and remedies applicable to pre-*Lavallée* cases is set out in Table I above.

(iii) Substantive Standards of Review for Post-*Lavallée* Cases

Factors Influencing the Choice of Standards: "New Evidence"

I have proceeded on the assumption that it is not the role of the Self Defence Review to retry an issue that has already been dealt with in court. This assumption is borne out by the principles underlying resort to the royal prerogative of mercy, particularly respect for the independence of the judiciary. In the case of pre-*Lavallée* applications, evidence presented to me in relation to self defence is always either new (in that it was not presented at trial because it was believed not to be relevant to self defence) or has significance that was not adequately appreciated at the time (in that it could not have been considered in the light of the Supreme Court of Canada's treatment of the issue of self defence in *Lavallée*).

However, for post-*Lavallée* cases, the issue of self defence may have been fully explored in the light of today's governing jurisprudence at trial. The purpose of reviewing post-*Lavallée* cases is to determine whether the Supreme Court of Canada's decision in that case has been implemented. Given that purpose, I should only make recommendations in relation to those cases where there is some evidence relevant to and supportive of the claim of self defence that was not considered by the trial or sentencing court or whose significance was not adequately appreciated. An example of the latter situation would be where there was evidence at trial of abusive or violent behaviour by the victim toward the applicant but that evidence was not expressly considered in relation to self defence (*e.g.* it was not referred to by the trial judge in instructing the jury on self defence). In such a situation, I may conclude that the significance of that evidence was not adequately appreciated at the time and, accordingly, review the substance of the applicant's claim.

It should be emphasized that any new evidence must support the claim of self defence. The presentation of new evidence that is not relevant to self defence or does not advance the claim of self defence beyond the evidence tendered at trial will not satisfy the requirement of new

evidence. It is not simply the existence of some new evidence that permits me to review the issue of self defence - it must be evidence that specifically relates to that issue and supports the applicant's claim.

Accordingly, the post-*Lavallée* cases must be looked at differently because the defence of self-defence in the terms outlined in *Lavallée* was obviously available to these applicants. As such, unlike the pre-*Lavallée* cases, there *is* a "presumption of regularity" in relation to the convictions of these applicants. In other words, the basis of these applications is entirely different from the pre-*Lavallée* cases. These women are applying to us, not because they did not have the opportunity to benefit from *Lavallée*, but for one or more other possible reasons: self-defence was raised, but was not successful; a decision was made to plead guilty because of the risk of conviction on a more serious charge or to avoid the ordeal of a trial; or the issue of self-defence was not raised.

There are various circumstances that may have given rise to these possibilities. The evidence of self-defence may not have been strong. The judge may not have given sufficient attention to the current law or explained it fully to the jury. The law may not have been sufficiently clear. The accused, if she testified, may not have been believed by the jury. The defence counsel may have may have made a tactical decision not to introduce defence evidence generally or self defence evidence in particular. However, whatever the reason for a woman's conviction after *Lavallée*, the important point is that the circumstances of that conviction are entirely different from the pre-*Lavallée* cases where applicants did not have access to the defence of self defence as it is currently understood.

In terms of the minimum standard of review that must be met in order for me to consider granting a remedy to a post-*Lavallée* applicant, this difference between pre- and post-*Lavallée* cases requires that these categories of cases be looked at differently. If post-*Lavallée* applicants had only to show an air of reality to their claim of self defence and reliable evidence in support of it before the Self Defence Review assessed their claim for a remedy, in many cases, I would be

engaged merely in a exercise of second-guessing either the merits of a defence that had already been raised and rejected or, in the case of a guilty plea, the defence counsel's and the accused's best estimate of the likely success of that defence. For these cases, the same minimum standard of review that I set for pre-*Lavallée* cases is not suitable because that standard was, in effect, already made available to the post-*Lavallée* applicant (*i.e.* at trial or on a guilty plea) and, for whatever reason, was not met. At this point, therefore, the applicant must show something new.

I believe the appropriate approach to post-*Lavallée* cases is the one set out in the Supreme Court's third guideline in *Milgaard*. The Court stated:

> The continued conviction of David Milgaard would constitute a miscarriage of justice if there is new evidence put before this court which is relevant to the issue of David Milgaard's guilt, which is reasonably capable of belief, and which taken together with the evidence adduced at trial, could reasonably be expected to have affected the verdict.[20]

This is a similar approach to that which applies to the introduction of fresh evidence before a court of appeal:[21] Is there *new* evidence which is reliable and, when taken together with the evidence at trial, could reasonably be expected to have affected the outcome? In other words, the applicant must show that there is new information which is reliable (*i.e.* reasonably capable of belief) and of sufficient strength that it could reasonably have affected the outcome of her case.

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[20] Above note 16.

[21] One element of the fresh evidence standard is unnecessary in the context of the Self Defence Review, *i.e.* the requirement that the evidence must not have been available at trial. This is properly part of the fresh evidence test as applied by appeal courts because they do not want to encourage accused persons to withhold evidence at trial and then raise the evidence for the first time before an appeal court. This is not a concern here because there is no reasonable basis for believing that an accused person would have withheld evidence at trial in the hopes of raising it for the first time before a body such as the Self Defence Review.

Summary of Minimum Standard of Review for Post-Lavallée Cases

Again, to start from first principles, my starting point is whether there is an air of reality to the claim of self defence (in other words, if the issue were raised at trial would it be left with the jury or considered by the judge?). Then, the question is whether the applicant is tendering before the Self Defence Review evidence of self defence that is both new and reliable (*i.e.* reasonably capable of belief). If this evidentiary threshold is met, then the evidence supporting the applicant's claim of self defence is examined to determine whether it includes evidence in respect of each of the requisite legal elements of the defence of self defence. If so, the final step is to weigh that evidence. At this point, there is no longer any difference between the pre- and post-*Lavallée* applications - the standard of review and corresponding remedies are exactly the same.

In effect, then, for purposes of establishing the minimum standard of review for post-*Lavallée* cases, the difference between these and pre-*Lavallée* cases requires that an additional threshold be met - that there be evidence offered in support of the claim of self defence which is either new or whose significance was not adequately appreciated at the time of the applicant's conviction.

The analysis applied to each post-*Lavallée* case, to determine if the *minimum* standard of review is met, is as follows:

(a) Is there an air of reality to the claim of self defence?
(b) Is the claim of self defence supported by evidence that is new or whose significance was not adequately appreciated?
(c) Is the claim of self defence supported by evidence that is reasonably capable of belief?
(d) Is there some evidence (reasonably capable of belief) in respect of each of the applicable essential legal elements of self defence? and
(e) Could that evidence create a reasonable doubt about the applicant's liability in the mind of a reasonable trier of fact, properly instructed on the law?

These standards are contained in Table II (column 1) above. They are progressive standards. I have considered them in order and if an applicant, after notification to her and receipt of her comments, failed on any one standard, I ceased to consider her application. The requirement of new evidence (in paragraph (c)) is the only criterion that distinguishes post-*Lavallée* from pre-*Lavallée* cases.

Remedies for Post-Lavallée Cases

The appropriate remedy in post-*Lavallée* cases, just as for pre-*Lavallée* cases, is a function of the weight of the evidence. To repeat, evidence merely suggesting that the outcome of the case *could* have been different will usually not be persuasive enough to suggest what that outcome would be. As such, unless I am to act as a trier of fact on that issue (which I should not do), I am ill-placed to make that determination and a new trial would be needed in order to assess the effect of the evidence. However, if the new evidence were of sufficient weight, it would be possible for me to conclude that it *would* have (not *could* have) affected the verdict in that it would create a reasonable doubt in the mind of a reasonable trier of fact. In that case, the appropriate remedy would be a full pardon.

As with the pre-*Lavallée* cases, it is possible to imagine cases where the evidence before me is even more convincing - where it actually proves to me that the applicant acted in self defence. In situations where the evidence proves self defence on the balance of probabilities or beyond a reasonable doubt, the result should also be a complete pardon of the applicant as the applicant's conviction can no longer stand.

The full array of standards and remedies applicable to post-*Lavallée* cases is set out in Table II above.

Comparison to the Standard under s. 690 of the Criminal Code

This approach to post-*Lavallée* applications with respect to the requirement of new evidence is very similar to the standard applied in s. 690 cases where, as discussed above, there exists a presumption of regularity about the applicant's conviction. As I point out above, there are still important differences between the s. 690 process and the Self Defence Review. However, I have been mindful of (although not bound by) the guidelines that the Minister of Justice has promulgated on s. 690. These guidelines were set out in the Reasons for Decision of the Minster of Justice in the application under s. 690 of Colin Thatcher (April 14, 1994):

1. The remedy contemplated by section 690 is extraordinary. It is intended to ensure that no miscarriage of justice occurs when all conventional avenues of appeal have been exhausted.

2. The section does not exist simply to permit the Minister to substitute a ministerial opinion for a jury's verdict or result on appeal. Merely because I might take a different view of the same evidence that was before the court does not empower me, under section 690, to grant a remedy.

3. Similarly, the procedure created by section 690 is not intended to create a fourth level of appeal. Something more will ordinarily be required than simply a repetition of the same evidence and arguments that were before the trial and the appellate courts. Applicants under section 690 who rely solely on alleged weaknesses in the evidence, or on arguments of law that were put before the court and considered, can expect to find that their applications will be refused.

4. Applications under section 690 should ordinarily be based on new matters of significance that either were not considered by the courts or that occurred or arose after the conventional avenues of appeal had been exhausted.

5. Where the applicant is able to identify such "new matters", the Minister will assess them to determine their reliability. For example, where fresh evidence is proffered, it will be examined to see whether it is reasonably capable of belief, having regard to all of the circumstances. Such "new matters" will also be relevant to the issue of guilt. The Minister will also have to determine the overall effect of the "new matters" when they are taken together with the evidence adduced at trial. In this regard, one of the important questions will be "is there new evidence relevant to the issue of guilt which is reasonably capable of belief and which, taken together with the evidence adduced at trial, could reasonably be expected to have affected the verdict?"

6. Finally, an applicant under section 690, in order to succeed, need not convince the Minister of innocence or prove conclusively that a miscarriage of justice has actually occurred. Rather, the applicant will be expected to demonstrate, based on the analysis set forth above, that there is a basis to conclude that a miscarriage of justice likely occurred.

Paragraph 5 of the Minister's guidelines sets out the fresh evidence standard applied by appeal courts.[22] In that context, where the standard is met, the result before the appeal court is usually the ordering of a new trial. The exception is where the fresh evidence is conclusive on the issue of liability[23] and the appeal court will make its own determination. However, appeal courts in Canada are generally reluctant to usurp the role of the trier of fact by making findings on new evidence. Similarly, under the s. 690 process, the result is usually a new trial or referral to a court of appeal.

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[22] See, *e.g.*, *Stolar* v. *The Queen* (1988), 62 C.R. (3d) 313 (S.C.C.)

[23] See, *e.g.*, *R.* v. *Morin* (1995), 37 C.R. (4th) 395 (Ont. C.A.).

Under the s. 690 process, accordingly to the Minister's guidelines, the standard of review is separate from the question whether there is new, reliable evidence that could have affected the outcome of the case (compare paragraphs 5 and 6 of the Minister's guidelines). Accordingly, it would appear that the Minister could acknowledge that the applicant has presented new evidence that casts doubt on the correctness of the verdict but, at the same time, conclude that it is not likely that a miscarriage of justice has occurred. This separation of issues does not appear to be appropriate in the context of the Self Defence Review in that my terms of reference do not require me to make a specific conclusion as to whether "miscarriages of justice" have taken place. My focus is solely on the appropriate course of action where I am satisfied that an applicant's claim of self defence has merit.

In any event, the Supreme Court of Canada in *Milgaard* includes in the definition of a "miscarriage of justice" a situation where "there is new evidence ... which is relevant to the issue of ... guilt, which is reasonably capable of belief, and which taken together with the evidence adduced at trial, could reasonably be expected to have affected the verdict." This is the standard I have adopted for post-*Lavallée* cases.[24]

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[24] There may be situations where an applicant alleges that her case was not properly dealt with (*e.g.* the issue of self defence was not fully explored) because of the incompetence of defence counsel. In respect of such allegations, the usual rule in appeal situations is that the appellant must prove that counsel failed to act reasonably and that the failure puts in doubt the reliability of the verdict or the fairness of the proceedings (see *R.* v. *Joanisse* (1995), 44 C.R. (4th) 364 (Ont. C.A.)). Once this burden has been met, the appellant is entitled to a new trial. By my approach on the standards of review, the issue of incompetence of counsel is irrelevant. For example, an applicant cannot allege that her counsel was incompetent if the evidence presented to us does not suggest an "air of reality", is not reliable, is not new (in the case of a post-*Lavallée* applicant), does not address the legal elements of self defence or, at the end of the day, is not sufficiently persuasive to merit a remedy. In other words, the issue of competence of counsel can only arise in substance if the applicant succeeds in her application. Even then, however, her success does not mean that her counsel must have been incompetent. In pre-*Lavallée* cases, I am considering a legal issue that counsel could not reasonably have been expected to raise. In post-*Lavallée* cases, there can be any number of reasons why the issue of self defence was not addressed at trial, none of which would necessarily support an inference that the applicant's counsel was incompetent. For example, the evidence may not have been available, or the applicant may have simply wished to plead guilty. In short, an exploration of the issue of the competence of the applicant's counsel would add nothing to my assessment of the merits of an

(c) *Sentencing Standards*

(i) General Parameters

In addition to the situations involving the substantive defence of self defence (and the corresponding standards and remedies discussed above), I have also been alert to cases where the evidence disclosed by an application may not meet the substantive standard of review but there is evidence relevant to self defence that was not taken into account on sentencing and could have mitigated the sentence imposed, or affects the particular offence for which the woman was convicted.

In such cases, I have considered recommending granting the royal prerogative of mercy so as to reduce the applicant's sentence (or parole ineligibility period) or to release the applicant by way of a conditional pardon. I see these possibilities as falling within my terms of reference to recommend granting the royal prerogative of mercy "in appropriate cases" based on my review of the applicant's claim of self defence. My interpretation of my terms of reference and my reasons for considering the area of sentencing standards are discussed more fully below in relation to the special situation I encountered in relation to the defence of provocation.

If the evidence that was presented to the Self Defence Review does not meet the standard for review in relation to the defence of self-defence and was already considered in sentencing the applicant, I should obviously not interfere with the sentence that was imposed. However, if that evidence is new (in the sense that it was not previously taken into account or its significance was not adequately appreciated at sentencing) and reliable (*i.e.* reasonably capable of belief), then it may justify a recommendation for sentence remission, sentence commutation or a conditional pardon. Obviously, a recommendation for a full pardon would be inappropriate in these

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application. As such, it is simply not a matter that has concerned me.

circumstances because the applicant would still be liable for homicide.

The possibility of self defence evidence raising issues relating to applicants' sentences exists both for pre- and post-*Lavallée* cases. On this issue, because the "new" element has to be present before sentencing can be considered, both classes of case should be treated the same. For example, if I conclude that there is evidence relevant to self defence but that evidence could not sustain an acquittal (*e.g.* if evidence relating to one of the legal elements of that defence were missing), it could still have an effect on sentencing. If that evidence was not taken into account in sentencing the applicant, I would consider what, if any, effect it might have had on the sentence imposed. Again, as with the substantive standard for post-*Lavallée* cases, I would also consider the effect on sentence of evidence relating to self defence even if it were not new if I was satisfied that the significance of the evidence was not adequately appreciated at the time of sentencing.

Another possibility is that the self defence evidence put forward by the applicant may indicate that the woman should have been convicted of second degree rather than first degree murder, or manslaughter rather than murder. Again, the self defence evidence presented to me may not satisfy me that a reasonable trier of fact would, or even could, have had a reasonable doubt about the applicant's liability yet, at the same time, that evidence may indicate that the outcome of the case could or would have been different, notwithstanding that the applicant would still have been convicted of a homicide. This would be so, for example, if the evidence could or would create a reasonable doubt in the mind of a reasonable trier of fact in relation to one of the essential elements of the offence for which the applicant was convicted or some defence other than self defence. Again, the evidence would have to be either new or have a significance that was not adequately appreciated at the time of the applicant's conviction.

This latter possibility is clearly a substantive issue not a sentencing matter. However, I am addressing it under the heading of sentencing standards because the remedy that would be appropriate in the scenarios I have described would be directed at the applicant's sentence rather

than her conviction.

In these cases, the appropriate minimum standard to apply is whether the self defence evidence, taken together with the other evidence introduced at the trial or tendered on sentencing, *could* affect the offence for which the applicant was convicted (in the sense that it could affect the verdict that a reasonable trier of fact, properly instructed on the law, would render) or on the sentence imposed. Where that minimum standard was met, however, I would not be in a position to determine what the effect of the evidence would be. As such, the remedy should be a referral of the case to the appropriate court of appeal. However, if I were satisfied that the evidence *would* affect the sentence or the offence for which the applicant was convicted, I would then have to decide what the measure of that effect would be and, exercising my discretion under my terms of reference, recommend granting the appropriate remedy.

I do not believe that the ordering of a new trial would be an appropriate remedy in either of these two situations (*i.e.* where the evidence *could* or *would* affect the offence or the sentence). Certainly there would be no need for a new trial if the new evidence could only affect the sentence. The proper remedy would be a sentencing appeal or sentence reduction. However, even where the new evidence could affect the offence for which the applicant was convicted, a new trial would not be the proper remedy because there may be no need to hear *all* of the evidence. In this situation, the new evidence would merely relate to one of the elements of the offence for which the applicant was convicted, not the entire issue of liability. Accordingly, the proper course would be to put the matter before an appeal court which could hear the new evidence and determine its potential effect on the whole of the case against the applicant. This differs from the situation under the substantive standards where I would consider recommending a new trial for a woman if her claim of self defence could create a reasonable doubt in the mind of a reasonable trier of fact. The difference lies in the fact that in that situation, I would have been satisfied that all of the essential legal elements of self defence was present and, as such, the liability of the applicant for *any* offence would be in doubt. There would, therefore, be a need for a new trial so that the issue of the woman's liability could be reconsidered. Of course, the

ultimate result of the referral of a case to an appeal court could be a new trial if that court were of the view that the matter should be heard by a trier of fact according to the standard applied in fresh evidence cases.[25]

There are two kinds of remedies that would be appropriate in cases where I was satisfied that the evidence *would* have affected the offence for which the applicant was convicted or her sentence. The first would only apply in cases of murder since it would affect the period of parole ineligibility imposed on persons convicted of murder. For example, in a case where the self defence evidence indicated to me, because of the deceased's abuse of the applicant and her resulting mental state, that a reasonable trier of fact would have a reasonable doubt about the presence of planning and deliberation (one of the essential elements of first degree murder) on the applicant's part, I could recommend that the applicant receive some relief corresponding to a reduction of her parole ineligibility period from a duration of twenty-five years to ten years (*e.g.* by way of a commutation of sentence or a conditional pardon).[26] The remedy would reflect the fact that the applicant should be serving a sentence for second-degree, rather than first-degree, murder. To take another example under this first option, if the applicant was convicted of second degree murder and received a life sentence with a parole ineligibility period of 13 years, it would be open to me to recommend that the parole ineligibility period be reduced in the light of new self defence evidence I received which indicated severe abuse inflicted by the deceased against the applicant during their relationship (again, this could be achieved by way of a commutation of sentence or conditional pardon). In both of these situations, the applicant would still be subject to a life sentence since such a sentence is mandatory for both first and second

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[25] See above, note 22.

[26] I realize that while a period of ten years of parole ineligibility is normally imposed on persons convicted of second degree murder, a longer period can, in fact, be imposed. The case law on this issue clearly suggests that a ten-year ineligibility period should be imposed absent aggravating factors that suggest a longer period. If there were a question in a particular application before me whether a longer period of parole ineligibility should be imposed on an applicant, the proper result would be to remit the matter to the relevant court of appeal for purposes of making the determination on parole ineligibility.

degree murder.

The second kind of remedy would only apply to applicant's convicted of manslaughter. The remedy would involve an actual reduction of the applicant's sentence. For example, if I were presented with self defence evidence that indicated, according to my standard of review, that the applicant was wrongly convicted of murder and should have been convicted of manslaughter, I would consider making a recommendation that the applicant receive some relief corresponding to a reduction of her sentence from the mandatory life sentence for murder to a sentence in keeping with a conviction for manslaughter. Another example that would involve a sentencing remedy in a manslaughter case would be where I was presented with self defence evidence, such as abuse in the applicant's background and in her relationship with the deceased, that was not taken into account in sentencing. In such a situation, I may recommend a remedy that could result in a reduction of the applicant's sentence (*e.g.* by way of a remission or commutation of sentence).

It bears repeating that the Self Defence Review is not a court and that it is not for me to sentence an applicant. In any of the circumstances described above where the appropriate outcome was not clear, the proper course of action, in my view, would be for the matter to be referred to the relevant court for disposition.

A third kind of sentencing remedy may be appropriate in some cases. This possibility, which could arise in either murder or manslaughter cases, would involve making a recommendation that the applicant receive a conditional pardon. In effect, this would amount to a recommendation that the woman be placed on parole immediately. This would be an appropriate remedy in cases where it appears to me, based on my review of the applicant's claim of self defence, that the applicant deserves particularly sympathetic treatment because of the hardship that custody imposes on her.

(ii) The Defence of Provocation

The Self Defence Review was appointed because of developments in the law of self defence. It was not appointed to deal with defences other than self defence or other grounds on which miscarriages of justice might arise. Accordingly, the Review made no independent inquiry into other grounds of exculpation. In those cases where there was no basis for a review of an applicant's case on grounds of self defence but a separate claim of wrongful conviction was nevertheless put forward by the applicant, the Review forwarded the applicant's file to the Minister of Justice for review under s. 690 of the Criminal Code.

However, in a small number of cases, my review of the evidence revealed circumstances consistent with the defence of provocation. I decided to consider the availability of that defence to these applicants. Because consideration of the defence of provocation was probably unforeseen by the Minister when he appointed me (it was certainly unforeseen by me), an explanation of my decision is warranted.

I decided to consider the availability of the defence of provocation for some applicants for the following reasons:

1. In these cases, the evidence relevant to provocation arose from the same body of evidence which was presented to the Review in support of a claim of self defence. In other words, no separate review of the evidence was required in order to consider the availability of the defence of provocation. This evidence was before me in any case on the issue of self defence.

2. In each case where I considered the issue of provocation, I had concluded that the applicant had failed to meet the Self Defence Review's minimum standard of review because of the absence of evidence on a single element of the definition of self defence. In each case, the missing element was the final clause in our definition of

self defence; that is, whether an ordinary person with the applicant's background and placed in the circumstances of the killing would have believed it was necessary to use the degree of force employed by the applicant in order to preserve herself. In each of these cases, the applicant failed on this element of self defence because the applicant used excessive force. That ordinary person would have employed less force or resorted to other options in the circumstances. At the same time, the applicant's reaction to the deceased's wrongful conduct appeared to stem from a loss of self control on her part. As such, the possibility of a defence of provocation was patent on the evidence before me on the issue of self defence.

3. My terms of reference do not rule out the possibility of consideration of the defence of provocation under the circumstances I have described. Again, I would concede that this interpretation of my terms of reference was probably unforseen. Nevertheless, my approach does not strain the words of the terms of reference beyond their plain meaning and, on that basis, I did not regard them as preventing an inquiry into the issue of provocation.

The terms of reference oblige me to review the cases of women under sentence for homicide "in circumstances in which the killing allegedly took place to prevent the deceased from inflicting serious bodily harm or death". In all cases, I reviewed the circumstances of the killing only where there was an allegation that force was used by the applicant to prevent serious bodily harm or death. In fact, in all cases in which I ultimately considered the defence of provocation I was satisfied that there was evidence reasonably capable of belief that the applicant actually believed that she was at risk of death or serious bodily harm at the hands of the deceased. As such, in considering the availability of the defence of provocation, I did not depart from my instructions to review only those cases where there was an allegation from the applicant that she was at risk of death or serious bodily harm from the deceased.

The terms of reference request me to make recommendations "in appropriate cases" for the granting of the royal prerogative of mercy. They do not state that I should make recommendations only where a claim a self defence is made out. As such, I have always considered it within my mandate to consider recommending a remedy for a woman who otherwise falls within my terms of reference (*i.e.* who claims that her offence arose from a fear of death or serious bodily harm from her victim) who is deserving of consideration for the granting of the royal prerogative mercy on purely merciful grounds, such as poor health or extreme hardship. Similarly, I do not interpret my mandate as preventing me from recommending a remedy for a woman who otherwise falls within my terms of reference and is deserving of consideration for the granting of the royal prerogative of mercy because of the presence of evidence supporting the defence of provocation.

As discussed elsewhere in this report, the royal prerogative takes many forms. It is extremely flexible and can be applied on many different grounds and in varied circumstances. If my duty to recommend remedies were confined to cases where a defence of self defence was made out, there would be no need for me to consider the full array of remedies falling under the royal prerogative. At most, the appropriate remedies would include the granting of a pardon (where the woman should have been acquitted) or the power to order a new trial (where the claim of self defence was less clear). My obligation to consider the full range of royal prerogative remedies (such as commutations of sentence, remissions of sentence, respites of sentence, conditional pardons or referrals to appeal courts) permits me to consider remedies which may be appropriate in circumstances where the woman, whose case otherwise falls within my mandate, is deserving of consideration on grounds other than self defence, including the defence of provocation.

My terms of reference also oblige me to "clarify the availability and the scope of the defences available to women accused of homicide in the circumstances set out above"

(*i.e.* where the woman acted to prevent the deceased from inflicting serious bodily harm or death). This aspect of my mandate proceeds from a recognition that there may be defences other than self defence available in circumstances where the woman was responding to a threat of serious bodily harm or death. Most obvious is the defence of provocation. I believe it is consistent with my obligation to "clarify the availability and scope" of these defences to consider the availability of the defence of provocation to women whose cases otherwise fall within my terms of reference.

4. There have been developments in the law of provocation which are analogous to the developments in the law of self defence that inspired the creation of the Self Defence Review. Under the law of provocation there is now a far more sensitive consideration of the attributes of the ordinary person that are relevant to the inquiry into provocation than was the case a decade or two ago. The recent Supreme Court of Canada case of *R.* v. *Thibert* is a prime example. The Court held that the ordinary person, for purposes of the defence of provocation, shares with the accused all of the attributes that make the wrongful act or insult of the deceased specially significant. The Court specifically rejected the prior "narrow approach" to the consideration of the characteristics of the ordinary person in favour of one which would vest the ordinary person with many of the accused's characteristics and circumstances. The Court stated:

> [I]f the test is to be applied sensibly and with sensitivity, then the ordinary person must be taken to be of the same age, and sex, and must share with the accused such other factors as would give the act or insult in question a special significance. In other words, all the relevant background circumstances should be considered. It is how such an "ordinary" person with those characteristics would react to the situation which confronted the accused that should be used as the basis for considering the objective element.

> ... Thus, although characteristics such as a propensity to drunken rages or short tempered violence cannot be taken into account, other characteristics may properly be considered without in any way demeaning or subverting the aim of the objective test to encourage responsible behaviour. So too, it is proper for the jury to consider the background of the relationship between the deceased and the accused, including earlier insults which culminated in the final provocative actions or words. For a jury to take this into account would not adversely affect the objective aspect of the test.[27]

This approach is consistent with the analysis of the objective branch of the defence of self defence in *Lavallée*. There, the Supreme Court of Canada held that one must vest the reasonable person with many of the characteristics of the accused woman and take into account the history of abuse in the relationship in determining whether the woman's beliefs and actions were reasonable in the circumstances. In effect, then, the Court's approach in *Thibert* builds on the analysis in *Lavallée* and permits consideration of a background of abuse or violence in determining the objective branch of the issue of provocation. Both cases reflect an expansion of the concept of the reasonable person in Canadian law. As such, in addressing the issue of provocation for those women whose cases otherwise fall within my terms of reference, I am applying an analysis similar to that which was approved in *Lavallée* and which animated the creation of the Self Defence Review. In particular, the significance of past abuse or violence in the woman's life, which is central to the Self Defence Review's mandate, must be evaluated in determining the availability of the defence of provocation.

5. The alternative to examining the issue of provocation in these cases myself would have been to refer the cases to the Minister for consideration under s. 690 of the

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[27] (1996), 104 C.C.C. (3d) 1 (S.C.C.), at 8-9.

Criminal Code or to the Solicitor General for consideration in relation to the royal prerogative. This alternative struck me as unsatisfactory in the cases I have described given that I had already conducted a complete review of the applicants' cases on the issue of self defence, gained an appreciation of the probity of that evidence, met personally with the applicant and, ultimately, concluded that her claim of self defence was not made out. A referral to one of the appropriate Ministers would have required a review of the applicants' cases from scratch. This struck me as unnecessarily duplicative and, to say the least, excessively inconvenient to the applicants involved. Given that my reading of the terms of reference did not preclude consideration of the defence of provocation in cases that otherwise fell within my mandate, I undertook to consider that defence myself rather than pass these applications to one of the appropriate Ministers.

6. In all of the cases involving provocation, I reviewed the merits of that defence on the basis of evidence that was not before the trial court. As such, in keeping with the principles for the exercise of the royal prerogative, I respected the independence of the judiciary by not merely substituting my view of the evidence for that of the trial court.

7. The cases in which it appeared to me appropriate to consider the issue of provocation were few in number. Having already considered the evidence relevant to provocation in reviewing these cases on grounds of self defence, very little extra time or legal analysis was required to reach a conclusion on provocation. Had this issue arisen in a more cases such that it involved a significant allocation of time or resources, I may have approached it differently.

Therefore, on the basis of these reasons, I considered, in a very small number of cases and in very particular circumstances, the issue of provocation. While my terms of reference may not

have foreseen this possibility, they did not, in my view, foreclose it.

(iii) Summary

In summary, then, the following represents the appropriate ***minimum*** standard to apply to cases that raise issues of sentence:

(a) Is there new self defence evidence or self defence evidence whose significance was not adequately appreciated?
(b) Is the evidence reasonably capable of belief?
(c) Could the evidence have affected the offence for which the applicant was convicted or her sentence?

This standard is contained in Table III (column 1) above.

The appropriate remedy where this minimum standard was met would be a referral of the case to the relevant court of appeal to determine the appropriate sentence or to review the conviction. However, if the evidence were more cogent, such that I was satisfied that it *would* have had an affect on the applicant's sentence or conviction (*i.e.* by creating a reasonable doubt in the mind of a reasonable trier of fact about an essential element of the offence or a defence other than self defence), then I would recommend that the applicant receive a remedy in the form of a remission or commutation of sentence. Finally, if I were satisfied that the applicant deserved sympathetic treatment, I may recommend that she be conditionally pardoned (and, thereby, released).

These sentencing standards and the corresponding remedies are contained in Table III above.

CHAPTER 3 - DEFINING SELF DEFENCE

1. *R.* v. *Lavallée*

The Self Defence Review was created in response to the Supreme Court of Canada decision in *R.* v. *Lavallée*,[28] a case involving a claim of self defence on the part of a woman who killed her abusive spouse. That case represented a significant advance in the law of self defence and attracted national attention to the issue of spousal abuse. The concern that sparked creation of the Self Defence Review was that there were women who had been convicted of homicide in circumstances where they may have had a basis for a defence of self defence on the terms recognized in *Lavallée* but they did not have an opportunity to raise it. One of the main objectives of the Self Defence Review, then, was to analyze applicants' cases on the basis of *Lavallée* to ensure that these women were given access to the defence of self defence as it is currently understood. Therefore, it is important that I explain the approach I took to the issue of self defence based on my understanding of *Lavallée*.

In *Lavallée*, the accused was a woman who had endured severe physical abuse from her common law spouse over a period of three or four years. She had often sought medical attention but lied to physicians about the cause of her injuries. According to the accused's statement to police, during the course of a party on the night of the killing, the accused feared that the deceased was going to beat her again and she hid from him in her closet. The deceased sought out the applicant, pulled her from the closet, and struck her on the head. He then threatened the accused, saying that she would "get it" when their guests had left and, after handing her a gun, told her either to kill him or he would "get" her. He turned to leave the room and the accused shot him in the back of the head.

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[28] Above, note 18.

At trial, a defence expert, Dr. Fred Shane, testified that the accused's actions were "a relection of her catastrophic fear that she had to defend herself". The accused did not testify. The jury acquitted her.

The Crown appealed successfully to the Manitoba Court of Appeal on the question of the admissibility of the expert's testimony on the basis that Dr. Shane's opinion was based in part on information not in evidence. The accused appealed to the Supreme Court of Canada.

In a majority decision written by Madame Justice Wilson, the Court held that the introduction of evidence on the pyschological effect of having been a victim of physical abuse was necessary in order for the jury to understand the mental state of the accused at the time of the killing. In particular, it would assist the average juror to understand why a woman would remain in such an abusive relationship. It would also be relevant to the legal elements of self defence, particularly the reasonableness of the accused's apprehension of death or serious bodily harm and the reasonableness of the accused's belief that she could not otherwise preserve herself than by using the force she did. As Wilson J. stated, "[t]he 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'".[29]

The Court specifically disapproved of the stipulation, which in earlier cases[30] had been read into the law of self defence, that the accused must have responded to imminent danger. This requirement, in effect, meant that a person could not raise self defence in a situation where he or she anticipated future harm. The victim's assault had to be in progress at the time of the accused's acts. As Dr. Shane testified, there are often cycles in abusive relationships in which a period of tension would be followed by violence which, in turn, would be followed by a period of contrition. The cycle would then start over. Women in such relationships become sensitive to the

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[29] Above, note 18, at 874.

[30] See, *e.g.*, *R.* v. *Whynot* (1983), 9 C.C.C. 449 (N.S.C.A.)

revolution of this cycle and, accordingly, can anticipate when they are likely to be victims of violent acts on the part of their mates. The perspective of the women in such relationships has been referred to as the "battered woman syndrome." Requiring women who could accurately anticipate when they were likely to be assaulted to wait until the assault was underway before they could defend themselves would, according to Wilson J., be "tantamount to sentencing her to 'murder by installment.'"[31]

In the context of self defence, the Court held, the mental state of a woman in an abusive relationship can only be understood by the jury if it appreciates the impact that her victimization may have had on her fear and her response to that fear. Wilson J. stated:

> Given the relational context in which the violence occurs, the mental state of an accused at the critical moment she pulls the trigger cannot be understood except in terms of the cumulative effect of months or years of brutality. As Dr. Shane explained in his testimony, the deterioration of the relationship between the appellant and [the deceased] in the period immediately preceding the killing led to feelings of escalating terror on the part of the appellant.[32]

In addition, the Court held that the evidence of abuse and the expert testimony about the impact that abuse can have on the perceptions of a woman in an abusive relationship was relevant to the other main issue in self defence cases - the reasonableness of her belief that use of force was necessary in order to preserve herself:

> I think the question the jury must ask itself is whether, given the history circumstances and perceptions of the appellant, her belief that she could not

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[31] Above, note 18, at 883, citing *State* v. *Gallegos*, 719 P.2d 1268 (N.M. 1986), at 1271.

[32] Above, note 18, at 880.

> preserve herself from being killed by [the deceased] that night except by killing him first was reasonable. To the extent that expert evidence can assist the jury in making that determination, I would find such testimony to be both relevant and necessary.[33]

The significance of *Lavallée* for the law of self defence, in my view, is not in the recognition of the phenomenon referred to as the "battered woman syndrome", although it is this aspect of the case that has probably received the most attention. Rather, its real significance lies in the fact that the Court took a broad view of the evidence that is relevant to the legal elements of the law of self defence. In particular, it recognized that the experiences, background and circumstances of the accused should be taken into account in determining whether she actually believed she was at risk of serious bodily harm or death and had to use force to preserve herself, and the reasonableness of her beliefs. In effect, *Lavallée* tells us that we must consider a broad range of factors that may influence a person's beliefs. Similarly, many of these factors will be relevant in assessing the reasonableness of the accused's beliefs.

I should point out that my terms of reference do not confine me to a review only of cases involving "battered woman's syndrome". My task involves reviewing cases where there is an allegation on the part of the applicant that the killing was committed in response to a threat of harm from the deceased. This would obviously include situations like *Lavallée* but is not confined to such cases. As such, I have reviewed the issue of self defence in a wide variety of circumstances. In doing so, I have applied what I understand to be the approach the Supreme Court of Canada took in *Lavallée* and have considered the impact that the woman's background, including her experiences of abuse, if any, may have had on her beliefs (*i.e.* her belief that she was at risk of serious bodily harm or death and her belief that she needed to use force to preserve herself). I have also considered, in assessing the reasonableness of her beliefs, what an ordinary person would have believed who shared the applicant's background and was placed in like

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[33] Above, note 18, at 889.

circumstances. This approach is reflected in the definitions of self defence set out below.

Therefore, in summary, I have not gone looking for evidence that applicants were suffering from "battered woman's syndrome" or any other pyschological condition. I have simply assessed the claims of self defence before me on the basis of the evidence that is relevant to the actual legal elements of self defence, as recognized in the current law.

2. The Significance of Evidence of Abuse

The Self Defence Review's mandate gives a good deal of attention to the issue of spousal abuse. The preamble to my terms of reference states:

> In recent years, there have been developments in our understanding of the law of self-defence as it relates to battered women who have been involved in abusive relationships. There are concerns that women convicted of homicide in these circumstances may not have received the benefit of the defence of self-defence when it may have been available to them.
>
> We also now have an increased understanding of abusive relationships and their impact upon those who have been battered, and how this might support the use of the defence. Questions have also been raised about the circumstances under which these types of offences occurred and about whether our criminal law, sentencing processes and sentencing tools are adequate to deal with these circumstances.

The question of the significance of abuse in the context of self defence was obviously one of the motivating considerations in the creation of the Self Defence Review. In reviewing the

applications before me, I gave special attention to evidence of abuse suffered by the applicant whether at the hands of her adversary or on the part of others. However, there was no criterion that the applicant must have suffered abuse in her life. I looked at all applications before me on the issue of self defence whether or not there was evidence that the applicant was abused.

Where there was evidence of abuse in an applicant's case, I always considered what affect that abuse may have had on her perceptions, beliefs and actions. For example, abuse in a woman's past may affect the circumstances in which she perceives danger. It may augment or it may diminish her fear and, accordingly, affect the way she responds to it. All of these possibilities are relevant in a self defence setting because the legal elements of self defence require an assessment of the person's actual beliefs that she was at risk of harm and that she needed to respond to that risk with physical force.

In addition to affecting the assessment of a woman's actual beliefs, evidence of abuse may be relevant to the assessment of the reasonableness of those beliefs as required by the current law of self defence. As pointed out by the Supreme Court of Canada in *Lavallée*, reasonableness must be determined within the circumstances actually experienced by the accused person. Accordingly, when one assesses whether a woman's belief that she was at risk of serious bodily harm or death or her belief that she had to use force to protect herself was reasonable, one should take account of the fact that she had been in like situations before.

As discussed below in more detail, reasonableness is determined by considering what an ordinary person would have believed in circumstances similar to those in which the accused finds herself. In order for this determination to be a realistic one, the ordinary person must share with the accused some of the characteristics that are relevant to her beliefs. Among those characteristics must be included any past abuse or victimization.

As such, in keeping with my terms of reference, I gave particular attention to any evidence of abuse in the applicant's past or on the occasion of the killing. I considered such evidence both

under the subjective and objective elements of the law of self defence.

3. Self Defence Review Definitions

(a) *Development of the Definitions*[34]

The following definitions are intended to be a positive statement of the current law of self defence. They reflect the elements of the defence set out in the *Criminal Code* as well as interpretations of those elements in the case law. Where there are gaps in the existing law, I have attempted to fill them in a manner I believe is consistent with current law. The following definitions are also a product of their application to each of the self defence claims before me.

The purpose of these definitions was to assist me in determining whether the evidence presented to me responds to the legal elements of self defence. In devising these definitions, I have attempted to achieve the following objectives:

1. Identify the circumstances under which each of the existing definitions of self defence applies.

2. Make clear the distinct legal elements of self defence.

3. Isolate the subjective and objective legal elements.

4. Identify the circumstances relevant to the inquiry into the subjective and objective legal elements.

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[34] I was greatly assisted in this exercise by a paper commissioned by the Self Defence Review and prepared by Professor David Paccioco, "The Law of Self Defence" (1996).

5. Identify the methodology employed to determine reasonableness.

The first definition, which is intended to reflect the contents of s. 34(2) of the Code, is by far the most complicated of the three and, for my purposes, the most relevant. The first three subsections of the definition state the main substantive elements of s. 34(2), separating out the subjective from the objective branches. The most important parts of the definition are actually contained in subsections (2), (3) and (4). Subsections (2) and (3) set out the rules for determining the accused's subjective belief and the reasonableness of that belief, respectively. As such, subsection (2) is relevant to the question whether the accused believed that she was being, or was going to be, assaulted (paragraph (1)(a)). whether she believed that she was at risk of death or serious bodily harm (paragraph (1)(b)), and whether she believed that it was necessary to kill her assailant in order to protect herself (paragraph (1)(c)). Subsection (2) makes clear that the defender's subjective beliefs should be determined by looking at all of the factors that may have influenced her perception of the circumstances in which she found herself.

By far the most difficult part of the definition is contained in subsection (3). This provision is intended to guide the determination whether the defender's beliefs were reasonably held. In order to make that determination, one must consider what an ordinary person placed in the defender's circumstances would have believed. The challenge is to identify the relevant characteristics of the "ordinary person" and the relevant circumstances.[35] I have cast this provision in the negative in order to make use of the form of words employed by the Supreme Court of Canada in penal negligence cases[36] - that is, a person's conduct is *unreasonable* if it constitutes a marked departure from what an ordinary person would have done in like circumstances. Here, a defender's beliefs

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[35] This part of the definition has been under constant revision in light of the facts I encounter in the applications before me. In each case, I must determine whether a particular factor forms part of the objective inquiry.

[36] *E.g.*, *R.* v. *Creighton*, [1993] 3 S.C.R. 3; *R.* v. *Naglik*, [1993] 3 S.C.R. 122; *R.* v. *Gosset*, [1993] 3 S.C.R. 76.

will be unreasonable if they constitute a marked departure from what an ordinary person would have believed. In effect, then, I have used the standard of penal negligence to set the outside limit of reasonableness. In order to satisfy the objective elements of the definition of self defence, then, there must be evidence from which a reasonable trier of fact could conclude that the applicant's beliefs were reasonable (*i.e.* not unreasonable).

If the objective inquiry is to be a meaningful one, it must be more limited than the subjective inquiry. In other words, if all of the defender's characteristics were part of the objective branch of the defence, it would cease to be objective. It would no longer serve as a standard against which to measure the defender's actions but would amount simply to a mirror of the defender herself. On the other hand, the objective inquiry must not be artificial or sterile. Clearly, there is a good deal about the defender and her circumstances that is relevant to the reasonableness of her beliefs and conduct. This is the lesson of *Lavallée*. I must consider the reasonableness of a person's beliefs in the light of her particular situation. In particular, I must consider the effect that past abuse or victimization may have had on the woman's actual beliefs and consider their reasonableness against that background. In keeping with current case law, I did not consider intoxication under the reasonableness assessment - the ordinary person is not intoxicated.

The objective branch of self defence must, therefore, take account of the factors that define the defender's situation while preserving the objectivity of the inquiry. This may be achieved through the legal device of the "ordinary person", so long as one invests that person with some of the defender's actual characteristics and place the person in the defender's actual situation. I have attempted to make clear that the "ordinary person" is a person with the defender's background who is placed in the circumstances as the defender understood them to be. Included among these circumstances, set out in subsection (4), are certain personal attributes of the defender which, if relevant, should be ascribed to the "ordinary person" - history of abuse, age, sex, race, physical characteristics, *etc.* I have also left this category open-ended to allow for the inclusion of other relevant factors as they arise.

My definition of self defence makes clear both the methodology I employed in determining the issue of reasonableness and the reasonableness standard itself. These are contained in subsections (3) and (4) respectively of Definition 1 below. Subsection (3) says that the reasonableness of the defender's actual beliefs should be determined by the standard of the ordinary sober person placed in the defender's circumstances as she understood them to be. Then, the question is whether the defender's actual beliefs constitute a marked departure from what that ordinary sober person would have believed.

According to subsection (4), the defender's actual beliefs are reasonable if they do not constitute a marked departure from what an ordinary sober person would have believed in like circumstances. There is a further consideration under the reasonableness standard which I have referred to as an "exception for unreasonable mistakes" (paragraph (4)(a)). I have said that a woman's beliefs will not be reasonable if they derive from an unreasonable mistake about the circumstances under which the killing occurred. The reason why it is necessary to include this further limit is because the general reasonableness standard is based on the circumstances of the killing as the woman believes them to be. For example, the reasonableness of the woman's fear of death or serious bodily harm would be determined in the context of her belief that her adversary had threatened her and possessed a weapon. However, I must consider the possibility that the woman may have been mistaken about the circumstances. For example, the woman may have been mistaken about her adversary's possession of a weapon. If she was, it would raise a question whether her belief that she was at risk of death or serious bodily harm was reasonable. In my view, her belief would be reasonable if her mistake was reasonable. In other words, if her mistake about her adversary's possession of a weapon was an unreasonable one (*i.e.* one that represented a marked departure from what an ordinary person in like circumstances would have made), then so too would her belief that she was at risk of death or serious bodily harm be unreasonable.

The other definitions of self defence build on the approach we have taken to s. 34(2). They differ, of course, as required by s. 34(1) and s. 37 of the *Criminal Code*, not only in terms of the circumstances in which they apply, but also in terms of their substantive elements. In particular,

the standard applicable to the use of force under them is purely objective. Still, in light of *Lavallée*, the objective inquiry should be based on an appreciation of the circumstances in which the defender found herself. Accordingly, our definitions make clear that all the circumstances should be taken into account in determining whether it was necessary to use the amount of force actually employed by the defender.

(b) *Analysis of Self Defence Evidence According to Essential Legal Elements*

As discussed above, each applicant's claim of self defence was assessed on the basis of the minimum standards of review I established (See Tables I and II above). Accordingly, the first question was whether the applicant's claim of self defence had an air of reality. Next, I would consider whether the claim was supported by evidence reasonably capable of belief. For a post-*Lavallée* applicant, I would then consider whether there was some new evidence supporting the applicant's claim. Once I had satisfied myself that these thresholds standards had been met, I went on to consider whether there was some evidence in the applicant's case in respect of each of the essential legal elements of self defence.

To take an example, for an application governed by self defence Definition 1 (deriving from s. 34(2) of the *Criminal Code*), I analyzed the self defence evidence under the following main headings:

(a) Assault:

(i) *Actual Assault:*

(ii) *Actual Belief re Assault*

(iii) *Reasonableness of Her Belief*

(b) Fear of Death or Serious Bodily Harm:

(i) *Actual Belief:*

(ii) *Reasonableness of Her Belief:*

(c) Need to Use Force:

(i) *Actual Belief:*

(ii) *Reasonableness of Her Belief:*

In analyzing these legal issues, I considered all of the evidence available to me in any form, whether in legal files, correspondence, notes of telephone calls or transcripts of interviews. I itemized the evidence that was relevant to each of these issues and then arrived at a conclusion whether there was some evidence reasonably capable of belief in respect of each issue. I approached these issues in a progressive fashion. For example, if there was no evidence before me that the applicant actually feared death or serious bodily harm from her adversary, then I would end my review of her application at that point. At that point, I provided my preliminary conclusion to the applicant and her counsel and invited representations on it. Subject to receiving new evidence on that issue, I would close the applicant's file at that point, unless there was a basis for considering her applicant on another ground (*e.g.* provocation).

If I was satisfied that there was some evidence in respect of all of the essential legal elements of self defence, I proceeded to consider the weight of that evidence. It was at this point that I considered the substantive standards discussed above - *i.e.* whether the evidence *could* or *would* create a reasonable doubt in the mind of a reasonable trier of fact properly instructed on the law, or whether self defence was proved on the balance of probabilities or beyond a reasonable doubt.

As mentioned, in some cases where applicants failed on my analysis of the essential legal elements of self defence, I nevertheless went on to consider standards relating to sentencing - *i.e.* whether the self defence *could* or *would* affect the offence for which the applicant was convicted or the sentence that was imposed. Where the issue was whether the self defence evidence might

affect the offence for which the applicant was convicted, I had to consider the substantive area of the law where that affect would be felt. I enountered two such areas in this first phase of the Review - the partial defence of provocation and the issue of planning and deliberation in a conviction for first degree murder. Where appropriate, then, I proceeded to analyze the self defence evidence as it related to these other substantive issues.

SELF DEFENCE

General Rule

1. A person is not guilty of homicide if the person (the "defender") uses force against another person (the "adversary") in self defence or in defence of a person under the defender's protection.

Definition 1. Applicable where the defender intentionally causes death or serious bodily harm (s. 34(2)).

Elements of Self Defence

2. (1) A defender acts in self defence where

Assault

(*a*) the defender

(i) is unlawfully assaulted by the adversary;
(ii) is under an actual belief that the adversary is unlawfully assaulting her and her belief is reasonable; or
(iii) is under an actual belief that the adversary will unlawfully assault her and her belief is reasonable; and

Actual Belief: Death or Serious Bodily Harm

(*b*) the defender is under an actual belief that she is at risk of death or serious bodily harm from the adversary and her belief is reasonable; and

Actual Belief: Need to Use Force

(*c*) the defender is under an actual belief that it is necessary to cause the adversary death or serious bodily harm in order to protect herself and her belief is reasonable.

Actual Belief: Factors

(2) The defender's actual beliefs shall be determined by considering her background and state of mind, as well as all of the circumstances under which the killing occurred as the defender understood them to be.

Reasonableness: Methodology

(3) The reasonableness of the defender's actual beliefs shall be determined

(*a*) by first considering what an ordinary sober person, who shared the defender's background and was placed in all of the circumstances under which the killing occurred as the defender understood them to be, would have believed; and

(*b*) by then considering whether the defender's actual beliefs constitute a marked departure from what that ordinary sober person would have believed.

Reasonableness

(4) The defender's actual beliefs are reasonable if

General Limits

(*a*) they do not constitute a marked departure from what an ordinary sober person, who shared the defender's background and was placed in all of the circumstances under which the killing occurred as the defender understood them to be, would have believed, and

Exception for Unreasonable Mistakes

(*b*) they do not derive from an understanding of the circumstances under which the killing occurred which constitutes a marked departure from what an ordinary sober person, who shared the defender's background, would have understood those circumstances to be.

Relevant Circumstances

(5) The circumstances that shall be considered under subsections (2),(3) and (4) are:

(*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.

Definition 2. Applicable where the defender does not intend to cause death or serious bodily harm and does not provoke the adversary's assault (s. 34(1)).

Elements of Self Defence

3. (1) A defender acts in self defence where

Assault

(*a*) the defender

(i) is unlawfully assaulted by the adversary;
(ii) is under an actual belief that the adversary is unlawfully assaulting her and her belief is reasonable; or
(iii) is under an actual belief that the adversary will unlawfully assault her and her belief is reasonable; and

Degree of Force

(*b*) the defender uses no more force than is reasonably necessary in the circumstances to protect herself.

Actual Belief

(2) In determining what the defender actually believed, her background and state of mind, as well as all of the circumstances under which the killing took place as the defender understood them to be, shall be considered.

Reasonableness: Methodology

(3) The reasonableness of the defender's actual beliefs shall be determined

(*a*) by first considering what an ordinary sober person, who shared the defender's background and was placed in all of the circumstances under which the killing occurred as the defender understood them to be, would have believed; and

(*b*) by then considering whether the defender's actual beliefs constitute a marked departure from what that ordinary sober person would have believed.

Reasonableness:

(4) The defender's actual beliefs are reasonable if

General Limits

(*a*) they do not constitute a marked departure from what an ordinary sober person, who shared the defender's background and was placed in all of the circumstances under which the killing occurred as the defender understood them to be, would have believed, and

Exception for Unreasonable Mistakes

(*b*) they do not derive from an understanding of the circumstances under which the killing occurred which constitutes a marked departure from what an ordinary sober person, who shared the defender's background, would have understood those circumstances to be.

Relevant Circumstances

(5) The circumstances that shall be considered under paragraph (1)(*b*) and subsections (2), (3) and (4) are:

(*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.

Definition 3. Applicable in situations not covered by Definitions 1 and 2, or where the defender acts to protect another person (s. 37)).

Elements of Self Defence

4. (1) A defender acts in self defence or in defence of another where *Assault*

(*a*) the defender

(i) or a person under the defender's protection is unlawfully assaulted by the adversary;

(ii) is under an actual belief that the adversary is unlawfully assaulting her or a person under her protection and her belief is reasonable; or

(iii) is under an actual belief that the adversary will unlawfully assault her or a person under her protection and her belief is reasonable; and

Degree of Force

(*b*) the defender uses no more force than is reasonably necessary in the circumstances to protect herself or the other person.

Actual Belief

(2) In determining what the defender actually believed, her background and state of mind, as well as all of the circumstances under which the killing took place as the defender understood them to be, shall be considered.

Reasonableness: Methodology

(3) The reasonableness of the defender's actual beliefs shall be determined

(*a*) by first considering what an ordinary sober person, who shared the defender's background and was placed in all of the circumstances under which the killing occurred as the defender understood them to be, would have believed; and

(*b*) by then considering whether the defender's actual beliefs constitute a marked departure from what that ordinary sober person would have believed.

Reasonableness:

(4) The defender's actual beliefs are reasonable if

General Limits

(*a*) they do not constitute a marked departure from what an ordinary sober person, who shared the defender's background and was placed in all of the circumstances under which the killing occurred as the defender understood them to be, would have believed, and

Exception for Unreasonable Mistakes

(*b*) they do not derive from an understanding of the circumstances under which the killing occurred which constitutes a marked departure from what an ordinary sober person, who shared the defender's background, would have understood those circumstances to be.

Relevant Circumstances

(5) The circumstances that shall be considered under paragraph (1)(*b*) and subsections (2), (3) and (4) are:

(*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.

CHAPTER 4 - SUMMARY OF 55 CASES AND RECOMMENDATIONS

The following is a summary of the two broad categories of cases I have dealt with in Phase One. The first group is made up of those applicants who could not succeed on my minimum standards of review. Appendix D contains a table of all 49 of these cases, with a summary of the basis on which the applicant's case failed. The chart below simply identifies the number of applicants falling under each of the potential grounds for failure.

The second group of applicants consists of those for whom I have made a recommendation in relation to the granting of the royal prerogative of mercy.

1. Summary of the Cases of the 49 Applicants in Custody Who Did Not Succeed in their Claim of Self Defence and for whom No Other Recommendation Could Be Made

- the number of applicants who withdrew or abandoned their applications: **4**

- the number of applicants who did not meet the SDR's minimum standards of review:

  (a) because there was no "air of reality" to the applicant's claim of self defence:

  - applicants who claim they did not kill or participate in any way in the killing: **15****

  - applicants whose claim of self defence otherwise lacked an air of reality: **5**

  (b) for post-*Lavallee* convictions only, because the applicant's claim of self defence was not supported by "new" evidence or evidence whose significance was not adequately appreciated: **5**

  (c) because the applicant's claim of self defence was not supported by evidence reasonably capable of belief: **4**

(d) because not all of the applicable legal elements of self defence were supported by some evidence reasonably capable of belief:

- there was no evidence the applicant was under an actual belief that she was or would be assaulted by the adversary: **1**

- there was no evidence the applicant was under an actual belief that she was at risk of death or serious bodily harm from her adversary: **8**

- there was no evidence the applicant was under an actual belief that it was necessary to cause the adversary death or serious bodily harm in order to protect herself: **4**

- there was no evidence that the applicant's actual belief that it was necessary to cause the adversary death or serious bodily harm in order to protect herself was reasonable: **3**

(e) the number of applicants who met each of the above standards of review but whose claim of self defence could not create a reasonable doubt in the mind of a reasonable trier of fact properly instructed on the law: **0**

TOTAL: 49

***NOTE: Of the 15 applicants who claimed that they did not kill or participate in any way in the killing, 12 applicants were advised of the existence of s.690 of the Criminal Code, given an information booklet and an offer of assistance to facilitate their application under that section and to transfer their files with the SDR to the Department of Justice officials responsible for s.690 applications, if they wished; 3 of these applicants' files were transferred to the s.690 process, at the applicant's request.*

2. Summary of Each of the Cases of the 6 Applicants in Custody for whom Recommendations Are Submitted to the Minister of Justice of Canada and the Solicitor General of Canada, as a Private and Confidential Addendum to this First Interim Report :

(1) FILE SDR-02

The applicant was convicted in 1991 of manslaughter and sentenced to 8 years' incarceration.

I am satisfied that the applicant's claim of self defence would create a reasonable doubt as to her liability for the death of the victim in the mind of a reasonable trier of fact properly instructed on the law and, accordingly, that she would be acquitted.

I therefore recommend that the power vested in the Governor in Council under s.748(2) of the *Criminal Code* to grant a free pardon be invoked on behalf of the applicant in respect of her manslaughter conviction.

(2) FILE SDR-45

The applicant was convicted in 1991 of manslaughter and sentenced to 6 years' incarceration.

I am satisfied that the applicant's claim of self defence is supported by evidence which proves on a balance of probabilities that she was acting in self defence when the victim was killed and, accordingly, that if that evidence were presented to a reasonable trier of fact properly instructed on the law, she would be acquitted.

I therefore recommend that the power vested in the Governor in Council under s.748(2) of the *Criminal Code* to grant a free pardon be invoked on behalf of the applicant in respect of her manslaughter conviction.

(3) FILE SDR-20

The applicant was convicted in 1978 of second degree murder and sentenced to life imprisonment with a parole ineligibility period of 10 years.

I have concluded that her claim of self defence could not create a reasonable doubt as to her liability for the death of the victim in the mind of a reasonable trier of fact. However, I have also concluded that the evidence relevant to self defence is consistent with the partial defence of provocation.

I am satisfied that if that evidence were presented to a reasonable trier of fact properly instructed on the law, the applicant would be convicted, not of second degree murder, but of manslaughter and would receive a substantial determinate sentence. Due also to a breach of her parole conditions, she has been incarcerated for 16 1/2 years in respect of her murder conviction.

I therefore recommend that Her Majesty's royal prerogative of mercy be extended to the applicant and the power vested in the Governor General of Canada under the Letters Patent constituting that office be invoked to grant the applicant, effective March 1, 1997, a commutation of her life sentence to time served plus 3 years or, in the alternative, to grant the applicant under that same authority, effective March 1, 2000, a remission of the remainder of her life sentence.

(4) FILE SDR-22

The applicant was convicted in 1987 of first degree murder and sentenced to life imprisonment with a parole ineligibility period of 25 years.

I have concluded that the applicant's claim of self defence could not create a reasonable doubt as to her liability for the death of the victim in the mind of a reasonable trier of fact. However, I

have also concluded that the evidence relevant to self defence is relevant to the "planned and deliberate" elements of first degree murder.

I am satisfied that if that evidence were presented to a reasonable trier of fact properly instructed on the law, it could affect the applicant's first degree murder conviction.

I therefore recommend to the Minister of Justice that he exercise his power under s. 690(b) of the *Criminal Code* and refer to the Court of Appeal the matter of whether the killing of the victim was planned and deliberate on the part of the applicant as required by s. 231(2) of the *Criminal Code*, for hearing and determination as if it were an appeal by her.

(5) FILE SDR-24

The applicant was convicted in 1978 of second degree murder and sentenced to life imprisonment with a parole ineligibility period of 10 years.

I have concluded that the applicant's claim of self defence could not create a reasonable doubt as to her liability for the death of the victim in the mind of a reasonable trier of fact. However, I have also concluded that the evidence relevant to self defence is consistent with the partial defence of provocation.

I am satisfied that if that evidence were presented to a reasonable trier of fact properly instructed on the law, the applicant would be convicted, not of second degree murder, but of manslaughter and would receive a determinate sentence. Due also to a breach of her parole conditions, the applicant has been incarcerated for the last almost 20 years. I am also satisfied that the applicant requires intensive support and counselling on a broad range of issues upon her release.

I therefore recommend the following:

(a) that Her Majesty's royal prerogative of mercy be extended to the applicant and the power vested in the Governor General of Canada under the Letters Patent constituting that office be invoked to grant the applicant a commutation of her life sentence to time served or, in the alternative, to grant the applicant under that same authority a remission of the remainder of her life sentence;

(b) that, accordingly, the applicant be released immediately;

(c) that the Government provide the applicant with aftercare for a period of two years following her release to give her support and counselling with respect to her place of residence and psychiatric, psychological, social welfare and drug abuse issues.

(6) FILE SDR-37

The applicant was convicted in 1985 of second degree murder and sentenced to life imprisonment with a parole ineligibility period of 10 years.

I have concluded that the applicant's claim of self defence could not create a reasonable doubt as to her liability for the death of the victim in the mind of a reasonable trier of fact. However, I have also concluded that the evidence relevant to self defence is consistent with the partial defence of provocation.

I am satisfied that if that evidence were presented to a reasonable trier of fact properly instructed on the law, the applicant would be convicted, not of second degree murder, but of manslaughter and would receive a determinate sentence. The applicant was incarcerated for the

10 years of her parole ineligibility period and also for an extra 1/2 year because of a breach of her parole conditions. She is presently on parole and participating in alcohol addiction counselling.

I therefore recommend the following:

(a) that Her Majesty's royal prerogative of mercy be extended to the applicant and the power vested in the Governor General of Canada under the Letters Patent constituting that office be invoked to grant the applicant a commutation of her life sentence to time served or, in the alternative, to grant the applicant under that same authority a remission of the remainder of her life sentence;

(b) that, accordingly, the applicant be released from sentence immediately;

(c) that the Government provide the applicant with aftercare for a period of one year following her release from sentence, to give her support and counselling with respect to her place of residence and alcohol abuse issues.

Appendix A - Application for Review

TO: SELF DEFENCE REVIEW

FROM: _____

(print name)

_____

(print mailing address)

I wish to apply to have my case reviewed. I understand that this application is a first step only, that more information will be required before any decision is made regarding the suitability of my case for review, and that my completion of this application does not guarantee that my case will be reviewed.

Name First Middle Last	**For Official Use Only** File Number
Mailing Address P.O. Box/Street # _____ Institution _____ City Province Postal Code	
Date of Birth Year Month Day	**Finger Print and Photograph Service No. (F.P.S.)**
Date of Trial or Guilty Plea Year Month Day	**Date of Conviction** Year Month Day
Date of Sentence Year Month Day	
Place of Trial or Guilty Plea Court _____ Address	**Date Appeal Heard (if any)** Year Month Day
Court where appeal heard/denied Court _____ Address	
My Lawyer at Trial was	**My Lawyer on Appeal was**
I had a full trial Yes No	**I entered a guilty plea** Yes No
I was convicted of: First Degree Murder ____ Second Degree Murder ____ Manslaughter ____	
The sentence imposed was _____	
The person who was killed was abusive or threatening towards me or someone related to me. Yes ___ No ___	
My relationship to the person who was killed: _____	
Signature of Applicant _____ **Date** _____	

Return Completed Form to: Self Defence Review
c/o Judge Lynn Ratushny
Varette Building, 8th Floor
130 Albert Street
Ottawa, Ontario K1A 0H8

Appendix B - Personal Information Form

SELF DEFENCE REVIEW

Review of cases of women convicted of homicide
which occurred in the context of an abusive relationship

EXAMEN DE LA LÉGITIME DÉFENSE

Revue des dossiers des femmes condamnées pour homicide
commis dans le contexte d'une relation empreinte de violence

TO: The Applicant

FROM: Judge Lynn Ratushny

RE: Self Defence Review

If you have applied or will be applying for a review, I have asked your nearest Elizabeth Fry Society representative to help me gather as much early information as possible for future use in your review. This early information is to be listed on this form and the attached two releases are to be signed. **I will not be contacting any person or place named by you on this list until I have received a written Application for Review from you and you have signed the two attached release forms. If you decide not to apply for a review, this form and the attached releases will be returned to you.**

Name of Applicant: _____

Address: _____

_____

_____

FPS No: _____

1. Names of people and places you had contact with <u>before and around</u> the time of the killing who might have been aware of your relationship with the deceased:

	NAME	PRESENT PHONE #	PRESENT ADDRESS
FAMILY MEMBERS			
FRIENDS			

	NAME	PRESENT PHONE #	PRESENT ADDRESS
NEIGHBORS			
EMPLOYERS			
CO-WORKERS			
CLERGY			
POLICE			

	NAME	PRESENT PHONE #	PRESENT ADDRESS
SHELTER WORKERS			
SOCIAL WORKERS			
LAWYERS			
DOCTORS			
NURSES			

	NAME	PRESENT PHONE #	PRESENT ADDRESS
TEACHERS			
HOSPITALS			
SCHOOLS			
DECEASED'S FAMILY			

	NAME	PRESENT PHONE #	PRESENT ADDRESS
DECEASED'S FRIENDS			
OTHER			

2. Names of people and places you have had contact with since the killing, if known to you:

	NAME	PRESENT PHONE #	PRESENT ADDRESS
LAWYERS			
CROWN PROSECUTORS			
JUDGES ON YOUR CASE			
CLERGY			

	NAME	PRESENT PHONE #	PRESENT ADDRESS
DOCTORS			
PSYCHOLOGISTS OR COUNSELLORS			
OTHER			

3. **Was the issue of abuse by the deceased raised:**

(a) with your lawyer, before your conviction?

- Yes _____ No _____
- If No, why not: _____

_____

_____

_____

(b) at your trial or sentencing?

- Yes _____ No _____
- If Yes, indicate whether it was raised at trial or sentencing or both:

_____

_____

_____

(c) at any appeals?

- Yes _____ No _____

4. **Status of any appeals of your conviction:**

_____

_____

_____

5. **Dates of your Parole Board hearings:**

_____

_____

_____

_____
Signature of Elizabeth
Fry Society representative
assisting the Applicant

_____
Signature of Applicant

_____
Date

_____
Name (print) of Elizabeth
Fry Society representative

Attachments to be completed: **Waiver**
Consent to Release of Personal Information

CONSENT TO THE RELEASE OF PERSONAL INFORMATION TO THE SELF DEFENCE REVIEW

I, _____ ***[print name]***,

of _____ ***[print full mailing address]***,

was convicted of _____ ***[print name of offence]***

in relation to the death of _____ ***[print name of deceased]***

on _____ ***[print date of conviction]***.

I have submitted an Application for Review to Judge Lynn Ratushny of the Self Defence Review, asking her to review my case in respect of the above conviction.

I consent to the release to Judge Ratushny, as may be requested by her or her designate, of all personal information and documentation relating to me as may be in the possession of or under the control of:

(1) any federal, provincial or territorial correctional institution, facility or authority in Canada including without limitation the Correctional Service of Canada and the National Parole Board;
(2) any medical facility or medical practitioner including a medical doctor, psychiatrist, psychologist, nurse, nursing assistant, therapist or counsellor;
(3) any law enforcement agency or authority, wherever located;
(4) any educational facility or authority;
(5) any social service facility or authority including without limitation child welfare agencies, shelters, social workers;
(6) any lawyer who has represented me at any time; and
(7) any other person or institution, facility or authority who may have information relevant to Judge Ratushny's review of my case.

I hereby authorize Judge Lynn Ratushny to make, on my behalf, any request for access to personal information, including as that term is defined in the Privacy Act, R.S.C. 1985,c. p-21 as amended, and I hereby consent to the disclosure to Judge Ratushny of all personal information relating to me.

_____ _____
Applicant's signature Date

_____ _____
Witness' signature Date

Full name and address of witness:

_____

_____

_____

(Please Type or Print)

WAIVER OF SOLICITOR-CLIENT PRIVILEGE

I, _____ *[print name]*,

of _____ *[print full mailing address]*,

was convicted of _____ *[print name of offence*

in relation to the death of _____ *[print name of deceased]*,

on _____ *[print date of conviction]*.

I have submitted an Application for Review to Judge Lynn Ratushny of the Self Defence Review, asking her to review my case in respect of the above conviction.

The names and addresses of all counsel who represented me in court proceedings in relation to the above charge and the conviction are:

NAME	ADDRESS

By signing this document, I waive any solicitor-client privilege to which the above-named counsel are subject and I hereby authorize each of them to:

(1) discuss any aspect of my case with Judge Ratushny or any of her designated representatives, so long as my case is being reviewed by her; and

(2) disclose all forms of communication between myself and them and to provide originals or copies of correspondence, documents or anything else relating to my case to Judge Ratushny or any of her designated representatives.

I sign this waiver voluntarily.

_____ _____

Applicant's signature Date

_____ _____

Witness' signature Date

Full name and address of witness: _____

_____

_____

_____

(Please Type or Print)

Appendix C - Case Summary

Self Defence Review
Examen de la légitime défense

PERSONAL AND CONFIDENTIAL

Files Tabbed By:
Case Summary Prepared By:
Case Summary Reviewed By:
Date:

CASE SUMMARY: SDR-	
1. BACKGROUND INFORMATION	
(a) Applicant	Name Date of Birth: F.P.S. No. Current Address: (name of any co-accused)
(b) Victim	
(c) Date and Place of Offence	
(d) Particulars of Conviction	
(e) Sentence	
(f) Appeal(s)	
(g) Prior Criminal Record	
2. BASIS OF CONVICTION FROM COURT TRANSCRIPT(S) INCLUDING FACTS	

CASE SUMMARY: SDR-	
3. ABUSE AND SELF-DEFENCE ISSUES CONTAINED IN PRE-CONVICTION LEGAL FILES WHICH WERE NOT BEFORE THE TRIAL/ SENTENCING COURT Received to date: To be received:	
4. ABUSE AND SELF-DEFENCE ISSUES FROM POST-CONVICTION SOURCES	1. From Applicant: 2. From Other Sources:
5. ISSUES AND CONCLUSIONS RE SELF-DEFENCE *(Applying Self Defence Review's Minimum Standards of Review for [pre/post] -Lavallée Cases*	
6. INJUSTICES CLAIMED BY THE APPLICANT IN THE COURT PROCESS	1. Applicant's Claim(s): 2. SDR Comments
7. OTHER FACTORS REGARDING RELEASE	
8. RECOMMENDA-TION	

Appendix D - List of Closed Files for Applicants in Custody

TOTAL: 49 **February 6, 1997**

File #	Pre or Post Lavallée Conviction	Date File Closed	Reason
SDR-03	PRE	Jan 28/97	There is no evidence that the Applicant's actual belief it was necessary to have the victim killed was reasonable in all of her circumstances.
SDR-04	POST	Feb 3/97	There is no "new" evidence of self defence allowing the SDR to reconsider the issue for this post-Lavallée conviction.
SDR-06	POST	Jan 30/97	There is no evidence that the Applicant's actual belief it was necessary to have the victim killed was reasonable in all of her circumstances.
SDR-07	PRE	Aug 7/96	The Applicant says she did not participate in the killing; advised of s. 690 *C.C.*; there is no air of reality to her claim of self defence.
SDR-10	PRE	Jan 21/97	The Applicant says she did not kill; it was an accident; advised of s. 690 *C.C.*; there is no air of reality to her claim of self defence.
SDR-12	POST	Dec 4/96	There is no "new" evidence of self defence allowing the SDR to reconsider the issue for this post-Lavallée conviction.
SDR-14	POST	Feb 28/96	The Applicant says she did not kill; advised of s. 690 *C.C.*; there is no air of reality to her claim of self defence.
SDR-16	PRE	Jun 26/96	The Applicant says she did not participate in the killing; advised of s. 690 *C.C.*; there is no air of reality to her claim of self defence.
SDR-17	POST	Nov 12/96	The Applicant says she was not involved in the killing; advised of s. 690 *C.C.*; there is no air of reality to her claim of self defence.
SDR-18	POST	Jan 30/97	There is no evidence that the Applicant was under an actual belief that it was necessary to use the force she did to protect herself.

File #	Pre or Post Lavallée Conviction	Date File Closed	Reason
SDR-19	POST	Jan 31/97	There is no "new" evidence of self defence allowing the SDR to reconsider the issue for this post-Lavallée conviction.
SDR-21	POST	Oct 7/96	The Applicant does not know why she killed and cannot remember the actual killing. There is no evidence that the Applicant actually believed she was at risk of death or serious bodily harm from the victim.
SDR-23	POST	Jun 24/96	There is no evidence that the Applicant actually believed it was necessary to kill to protect herself and her children.
SDR-25	POST	Feb 3/97	For a s. 34(2) *C.C.* situation, there is no evidence that the Applicant was under an actual belief that it was necessary to cause the victim death or serious bodily harm. For a s. 37 *C.C.* situation, there is no evidence that the Applicant used no more force than was reasonably necessary in all of her circumstances to protect her child, because she doesn't remember stabbing the victim or why she stabbed him.
SDR-26B	POST	Jan 31/97	The Applicant has no memory of anything of what happened so that there is no evidence of her state of mind including whether she was under the actual belief that she was at risk of death or serious bodily harm from the victim.
SDR-28	POST	Jan 15/97	The Applicant's claim of self defence is not reasonably capable of belief.
SDR-29	POST	Jan 15/97	There is no evidence that the Applicant actually believed she was at risk of death or serious bodily harm or that she believed it was necessary to kill or seriously harm the victim.
SDR-33	PRE	Apr 23/96	The Applicant says she did not kill; advised of s. 690 *C.C.*; there is no air of reality to her claim of self defence.
SDR-35	PRE	Dec 27/96	The Applicant says she does not know if she was the person who killed and her claim of self defence is not supported by evidence which is reasonably capable of belief.

File #	Pre or Post Lavallée Conviction	Date File Closed	Reason
SDR-36	PRE	Dec 5/96	There is no evidence that the Applicant actually believed she was at risk of serious bodily harm or death from the deceased.
SDR-38	POST	Dec 17/96	There is no "new" evidence of self defence allowing the SDR to reconsider the issue for this post-Lavallée conviction.
SDR-39	POST	Sep 25/96	The Applicant says she did not kill; advised of s. 690 *C.C.*; there is no air of reality to her claim of self defence.
SDR-42	POST	Nov 25/96	The Applicant does not know why she killed; there is no evidence that she actually believed that shooting the victim was necessary to protect herself.
SDR-49	PRE	Sep 18/96	There is no evidence that the Applicant actually believed she was at risk of death or serious bodily harm.
SDR-50	POST	Jul 8/96	When the Applicant killed, she did not believe she was at risk of death or serious bodily harm.
SDR-51	PRE	Apr 23/96	The Applicant says she did not kill; advised of s. 690 *C.C.*; there is no air of reality to her claim of self defence.
SDR-57	PRE	Oct 29/96	The Applicant says she was not involved in any part of the killing; there is no air of reality to her claim of self defence.
SDR-58	POST	Jan 16/97	There is no air of reality to the Applicant's claim of self defence.
SDR-59	POST	Feb 22/96	The Applicant says she did not kill. There is no air of reality to her claim of self defence. Her file with the SDR was transferred to s. 690 *C.C.* with the SDR's legal materials, on the Applicant's instructions.
SDR-60	PRE	Apr 18/96	The victim was the Applicant's young daughter. There was no self defence involved. There is no "air of reality" to the Applicant's claim of self defence.

File #	Pre or Post Lavallée Conviction	Date File Closed	Reason
SDR-64	POST	Oct 31/96	The Applicant's claim of self defence is not supported by evidence reasonably capable of belief and there is no "new" evidence allowing the SDR to reconsider her sentence, as she requested.
SDR-65	POST	Sep 17/96	There is no air of reality to the Applicant's claim of self defence.
SDR-66	PRE	Jan 24/97	There is no evidence that the Applicant's belief it was necessary to have the deceased killed in order to protect herself and her children, was reasonable.
SDR-67	PRE	Mar 22/96	The Applicant says she was not involved in any way in the killing. There is no air of reality to her claim of self defence. Her file with the SDR was transferred to s. 690 *C.C.* with the SDR's legal materials, on the Applicant's instructions.
SDR-68	POST	Mar 19/96	There is no air of reality to the Applicant's claim of self defence.
SDR-71	POST	Aug 13/96	The Applicant cannot remember anything of what happened, so there is no evidence of any of the essential legal elements of self defence.
SDR-72	POST	Apr 29/96	The Applicant requested that her application be withdrawn.
SDR-74	POST	Jan 20/97	The Applicant's claim of self defence is not supported by evidence that is reasonably capable of belief.
SDR-75	PRE	Apr 9/96	The Applicant says she did not participate in any way in the killing. There is no air of reality to her claim of self defence.
SDR-76	POST	Mar 19/96	The Applicant says she did not kill. There is no air of reality to her claim of self defence. Her file with the SDR was transferred to s. 690 *C.C.* with the SDR's legal materials, on the Applicant's instructions.
SDR-83	POST	Nov 4/96	The Applicant withdrew her application because she was soon to be released.
SDR-84	POST	Oct 29/96	There is no evidence reasonably capable of belief that the Applicant actually believed she was at risk of any harm from the deceased.

File #	Pre or Post Lavallée Conviction	Date File Closed	Reason
SDR-85	POST	Jan 31/97	The Applicant says she did not kill; there is no air of reality of her claim of self defence.
SDR-86	POST	Jul 17/96	There is no air of reality to the Applicant's claim of self defence and her claim is not supported by evidence which is reasonably capable of belief.
SDR-87	POST	Sep 12/96	The Applicant did not respond to the SDR's inquiries. Her file was closed as abandoned.
SDR-89	POST	Jan 7/97	Self defence was raised at trial and there is no "new" evidence of self defence allowing the SDR to reconsider the issue for this post-Lavallée conviction.
SDR-93	POST	Oct 29/96	The Applicant did not respond to the SDR's inquiries. Her file was closed as abandoned.
SDR-94	PRE	Jan 24/96	The Applicant says she did not kill; advised of s. 690 *C.C.*; there is no air of reality to her claim of self defence.
SDR-96	POST	Oct 29/96	There is no evidence that the Applicant actually believed she was at risk of death or serious bodily harm from the victim.