SELF DEFENCE REVIEW
EXAMEN DE LA LÉGITIME DÉFENSE

FINAL REPORT

July 11, 1997

Submitted to the

MINISTER OF JUSTICE OF CANADA

and to the

SOLICITOR GENERAL OF CANADA

SELF DEFENCE REVIEW
EXAMEN DE LA LÉGITIME DÉFENSE

FINAL REPORT

July 11, 1997

Submitted to the

MINISTER OF JUSTICE OF CANADA

and to the

SOLICITOR GENERAL OF CANADA

TABLE OF CONTENTS

Cover Letter To Final Report

SELF DEFENCE REVIEW
EXAMEN DE LA LÉGITIME DÉFENSE

July 11, 1997

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

The Honourable Andy Scott, P.C., M.P.
Solicitor General of Canada
Sir Wilfrid Laurier Building
340 Laurier Avenue West
Ottawa, Ontario
K1A OP8

Dear Ministers:

I am pleased to submit to you my third and Final Report. This completes my mandate under the terms of reference of the Self Defence Review.

Yours sincerely,

Judge Lynn Ratushny

Acknowledgements

The assistance provided by the following individuals and organizations as well as by the many others across Canada who responded generously with their time, is gratefully acknowledged:

Christine Boyle
Mary Campbell
Canadian Association of Elizabeth Fry Societies
Susan Chapman
Jo-Ann Connolly
Correctional Service Canada officials
Andrée Côté
Liza Daniel
Defence Counsel across Canada
Department of Justice Canada
Elizabeth Fry Societies Across Canada
Sylvie Frigon
Patrick Healy
Susan Hendricks
Natalie Isaacs
Michael Jackson
Sharon Kennedy
Lee Lakeman
Sharon MacIver
Allan Manson
Ministry of the Solicitor General of Canada
Ministère de la sécurité publique
Patricia Monture-Okanee
Sheila Noonan
David Paciocco
Dr. Nathan Pollock
Provincial and Territorial Departments of Justice
Dr. Fred Shane
Elizabeth Sheehy
Mary Ellen Turpel-Lafond

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
	Élise Groulx
	Bonnie Missens
Administrator:	Céline Carrier

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 policemen, 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 was 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 their lives, may you have hope for the future.

Summary of Final Report

This Final Report is the third that I have submitted. My *First Interim Report - Women in Custody* was submitted on February 6, 1997. It consisted of two volumes - one describing my process, standard of review and general recommendations, and the second containing six confidential case summaries and detailed recommendations. My *Second Interim Report - Women Not in Custody* was submitted on June 9, 1997 and consisted simply of a case summary and recommendation relating to one successful applicant. To date, there has been no response on the part of the Minister of Justice or the Solicitor General to my *First Interim Report* or my *Second Interim Report.* This Final Report addresses many of the same issues that were contained in the first volume of my First Interim Report and, in keeping with my mandate, also contains law reform proposals.

Chapter 1 - Introduction and Overview of the Review Process

The Review was carried out in six stages:

Stage 1: Organization

Stage 2: Outreach to Potential Applicants of 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: Reports

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. In total, I sent out 236 application packages. I received back 98 application forms. I have now completed my review of all 98 cases.

Chapter 2 - The Ambit and Significance of Lavallée

The significance of the Supreme Court of Canada's landmark 1990 decision in *Lavallée* for the law of self defence, in my view, lies in the fact that the Court took a broad view of the evidence that is relevant to the legal elements of that defence. The Court 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.

Obviously, *Lavallée* is particularly significant in relation to claims of self defence on the part of women. Madam Justice Wilson recognizes that women's "size, strength, socialization and lack of training" are relevant in assessing whether they were justified in using force. Even so, the approach she takes to the analysis of self defence is applicable to any claim of self defence by an accused person. In fact it has been applied to men, albeit in a different context.

My terms of reference did not confine me to a review only of cases involving "battered woman's syndrome". My task involved reviewing cases where there was an allegation on the part of the applicant that the killing was committed in response to a threat of harm from the deceased. This obviously included situations like *Lavallée* but was 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 I have considered the impact that the woman's background, including her experiences of abuse, if any, may have had on her beliefs.

Chapter 3 - Standard of Review

One of the first substantive issues that faced the Self Defence Review 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 did I have to be satisfied of the merits of an application before recommending a remedy?

The primary purpose of a standard of review in the circumstances before me was to ensure that the recommendations I made had a solid legal and evidentiary foundation. A low standard would not have provided the Ministers with the assurance that the self defence claims of the women for whom I made recommendations would withstand scrutiny by third parties. Having created the Self Defence Review to ascertain whether there were women who had been convicted of homicide who may have acted in self defence, the Ministers had to be assured that the cases for which I made recommendations had a solid foundation. The Ministers would have that assurance only if the standard of review was strict.

The strictness of the standard I applied is a product of three separate aspects of it. First, I applied a series of progressive standards (referred to below as "threshold standards") to screen out cases that lacked sufficient substance. Second, the definition of self defence I applied was rigorous in that it required that there be reliable evidence before me on each of the several distinct legal elements of the definition of self defence. Third, I applied a final threshold in those cases in which all of the prior standards had been met. This final standard was a measurement of the overall weight of the evidence tendered in support of the claim of self defence. If the weight of the evidence was sufficient that I was persuaded that the applicant *would be* acquitted if tried by a reasonable jury properly applying the law, then I recommended that the applicant be pardoned. I only recommended a pardon for an applicant where it was clear to me that no reasonable jury would convict her in the face of the evidence before me.

I actually employed a series of standards that may be summarized as follows:

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 that is reasonably capable of belief and relevant to the applicable essential legal elements of self defence under (d) that is either new or whose significance had not been adequately appreciated at the time of the applicant's conviction (for post-*Lavallée* convictions only);

(d) includes some evidence that is reasonably capable of belief in respect of each of the applicable (applying, for the purposes of this summary, the Self Defence Review Definition 1 of self defence) essential legal elements of self defence, namely, some evidence that
   (i) the applicant was unlawfully assaulted by the deceased or under an actual belief that the deceased was unlawfully assaulting her or was going to unlawfully assault her;
   (ii) the applicant was under an actual belief that she was at risk of death or serious bodily harm from the deceased;
   (iii) the applicant was under an actual belief that it was necessary to cause death or serious bodily harm in order to protect herself;
   (iv) each of the applicant's beliefs under (i), (ii) and (iii) was reasonable in the sense that it would not constitute a marked departure from what an ordinary sober person would have believed if that person were placed in the circumstances under which the killing occurred, as the applicant believed them to be, and the circumstances that shall be considered in making that determination are those that may have influenced the applicant's beliefs including
      A. the applicant's background, including any past abuse suffered by the applicant;
      B. the nature, duration and history of the relationship between the applicant and the deceased, including prior acts of violence or threats on the part of the deceased, whether directed to the applicant or to others;

C. the age, race, sex and physical characteristics of the deceased and the applicant;
D. the nature and imminence of the force used or threatened by the deceased;
E. the means available to the applicant 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; and

(e) when considered together with all of the other evidence in the case, could/would create a reasonable doubt in the mind of a reasonable trier of fact properly instructed on the law?

In addition to the foregoing standards, I considered cases where the self defence evidence before me could have an effect on the woman's sentence rather than her conviction. In those cases, I applied the following standard:

(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/would the evidence affect the offence for which the applicant was convicted or her sentence?

Chapter 4 - Summary of 98 Cases and Recommendations

In the end, I made recommendations in relation to 7 of the 98 applicants. Those recommendations may be summarized as follows:

Remedies Recommended by Self Defence Review:

APPLICANT'S PRESENT RELEASE STATUS	PARDONS (where the applicant's claim of self defence has succeeded)	REMISSIONS OF SENTENCE (where the applicant's claim of self defence has failed but the evidence relevant to self defence supports a defence of provocation)	NEW APPEALS (where the applicant's claim of self defence has failed but the evidence relevant to self defence relates to a legal issue that should be heard by an appeal court)
Released - Sentence is Complete	2		
Released - On Parole	1	1	
In Custody - Parole Eligible		2	
In Custody - Parole Ineligible			1
Total	3	3	1

Chapter 5 - Reform Possibilities

1. Problems in the Law Disclosed by the Self Defence Review

In keeping with my mandate, I considered areas where the law could be improved. I discovered two main problems with the current law of self defence:

(a) *Complexity of the Law of Self Defence*

In reviewing many transcripts of charges to the jury in homicide trials, it appeared to me that in a large number of cases the jury must certainly have been totally lost. The fact that juries may often be confused about the law of self defence is not necessarily a reflection on the adequacy of trial judges' charges. In fact, I have been impressed by the thoroughness and accuracy of many of the charges I have read. The main reason jury charges sometimes

miss their mark is because of the complexity of the law. In the course of a few hours, judges must explain to juries the intricacies of a range of difficult legal issues and their interrelationship and, also, make reference to the evidence that is relevant to them.

(b) *Lack of Guidance*

There are two areas where I believe greater guidance could be given to judges and juries dealing with self defence claims. The first relates to the meaning of reasonableness. I believe it would be helpful to make this meaning clear by including it expressly in the definition of self defence. The reasonableness standard I propose be included is one that I think jurors will understand and be capable of applying readily, i.e. that reasonable behaviour would be defined as conduct that would not constitute a marked departure from what an ordinary person would do in like circumstances. The second area where guidance is needed, in my view, is in relation to the circumstances that should be taken into account in determining reasonableness by applying this standard. My approach to the application of both the subjective branch of the defence and the reasonableness standard under the current law, in light of *Lavallée*, involved taking account of the applicant's perspective - looking at the circumstances in which the applicant found herself and considering her background and experience. This permitted a fair assessment of whether the applicant was justified in using the force she actually employed, which is the main objective of a self defence provision.

2. A Reformed Law of Self Defence

A reformed law of self defence should exhibit the following attributes:

1. It should be comprehensive - There is no need for the array of self defence provisions currently set out in the *Criminal Code*. They should be combined in a single provision.

2. It should be simple - the various requirements contained in existing provisions (e.g. ss. 34(2) and 35 of the *Criminal Code*) should be simplified or eliminated where possible.

3. It should be clear - The subjective and objective elements should be clear, as well as the meaning of the objective branch (i.e. the reasonableness requirement) and the factors to be taken into account in determining reasonableness.

The following is a model self defence provision which, I believe, achieves these objectives.

Model Self Defence Provision

Defender	(1) In this section, a "defender" is a person who uses force against another person.
General Rule	(2) A defender is not liable for using force against another person if
Subjective Elements	(a) the defender actually believes (i) the other person is committing or is going to commit an assault, and (ii) the use of force is necessary for self-protection or the protection of a third person from the assault;
Objective Elements	(b) those beliefs are reasonable; and (c) the degree of force used is reasonable.
Definition of Reasonableness	(3) The defender's actual beliefs and the degree of force used are reasonable if they do not constitute a marked departure from what an ordinary sober person would have believed or used, as the case may be, if placed in the circumstances as the defender believed them to be.

Determining Reasonableness - Relevant Circumstances

(4) The circumstances that shall be considered in determining reasonableness are those that may have influenced the beliefs and the degree of force used by the defender and may include:

(*a*) the defender's background, including any past abuse suffered by the defender;

(*b*) the nature, duration and history of the relationship between the defender and the other person, including prior acts of violence or threats, whether directed to the defender or to others;

(*c*) the age, race, sex and physical characteristics of the defender and the other person;

(*d*) the nature and imminence of the assault; and

(*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.

3. Sentencing for Homicide

(a) The Problem - The Pressure to Plead Guilty

I have seen, over the course of my Review, cases where the accused person faced irresistible forces to plead guilty even though there was evidence that she acted in self defence. In some cases, this evidence was very strong. These irresistible forces are the product of the *Criminal Code*'s mandatory minimum sentences for murder. A woman facing a murder charge risks imposition of a mandatory sentence of life imprisonment with parole eligibility after between 10 and 25 years. By contrast, a woman who pleads guilty to manslaughter will generally receive a sentence of between three and eight years with eligibility for full parole after serving one-third of her sentence. This would obviously be a difficult choice for *any* person accused of second-degree murder to make. However, there

may be additional factors that exert even more pressure on a woman to plead guilty, including the fact that she may have a young family to care for; she may have been the victim of abuse and is reluctant to testify publicly about that abuse; she may be genuinely remorseful and even though she feels she had to act to defend herself she has difficulty justifying taking another person's life even to herself. For a woman in this situation, the forces impelling her to plead guilty are considerable. This situation causes me serious concern. It means that these guilty pleas are influenced in whole or in part by forces extraneous to the merits of the cases. It also means that women (and men) may be pleading guilty to manslaughter when they are legally innocent because they acted in self defence.

(b) Recommendations

To address this problem, I propose the following:

Recommendation 1:
In all homicide cases, police should be required to consult with a prosecutor to ensure that the charge to be laid against the accused (*i.e.* first-degree murder, second degree murder or manslaughter) is appropriate in the circumstances.

Recommendation 2:
Prosecutorial guidelines should require prosecutors to consider *all* of the evidence available to them, including evidence that may support a defence such as self defence, in determining whether there is sufficient evidence to justify or continue a prosecution for homicide.

Recommendation 3:
Prosecutorial guidelines should instruct prosecutors to exercise extreme caution when involved in plea discussions concerning homicides where there is some evidence supporting a defence such as self defence. Specifically, they should be directed to consider whether the person's apparent willingness to plead guilty to manslaughter is a true expression of their acceptance of legal responsibility for the killing or is an equivocal plea. If the latter, the prosecutor should consider proceeding on manslaughter rather than murder so that the defence evidence can be heard at trial.

Recommendation 4:
The sentence for second degree murder set out in the *Criminal Code* should be amended to:

(1) allow a jury to recommend, in exceptional circumstances, that a person convicted of second degree murder be considered for leniency; and

(2) where a jury so recommends, or where a judge sitting without a jury so finds, the judge may determine the appropriate sentence in the circumstances, with a life sentence being the maximum available. Parole eligibility should then be determined according to the usual rules under the *Corrections and Conditional Release Act* or any period specified by the judge under s. 743.6 of the *Criminal Code*.

CHAPTER 1 - INTRODUCTION AND OVERVIEW OF THE REVIEW PROCESS

1. General Remarks

My General Approach to the Applicants

I began my task with the view that my role was to try to help each of the applicants, where the law and my mandate permitted it. This meant that I tried to give the applicants the benefit of the doubt until it was clear that I could do no more for them. At the same time, as I explain in detail below, I felt it was necessary to erect a strict standard of review in order to ensure that the cases in which I made recommendations for relief had substantial merit.

My overall general impression of the applicants is that none of them were trying to "beat the system" or present a false version of their actions by applying to the Self Defence Review. Generally speaking, the applicants gave me very candid and forthright descriptions of their conduct. I encountered very few cases where the applicant attempted to deceive me. The majority of the applicants had a respectful attitude toward the Self Defence Review.

While all of the women whose cases I reviewed had killed or attempted to kill someone, I believe there is a world of difference between hurting someone from a position of power and acting from a position of subjugation, as most of these women did. Few of them were involved in a criminal lifestyle at the time of their actions. Most of them, whether they were defending themselves or not, found themselves in relationships or situations in which they were not the dominant actor.

Attitudes Toward the Self Defence Review[1]

From the very beginning, I was astonished at the level of support and interest in the work I was about to embark on that was shown by experts in the law and corrections, women's groups, students and the public at large. I received numerous offers of assistance, many of them from people who were willing to volunteer their time and expertise without compensation or at a rate well below their usual fees. Indeed, all of the counsel who were involved in the Review, both those who acted as counsel to the applicants and those in my office, agreed to accept fee reductions in order to keep the costs of the Review down. In general, there was a remarkable spirit of generosity and enthusiasm about being involved in an unprecedented and worthy humanitarian initiative.

I encountered resistance to the work of the Self Defence Review from two groups. The first consisted of certain representatives of the Attorneys General of the provinces involved (directly or indirectly) in the prosecution of the applicants. Some were opposed to the very idea of the Self Defence Review, for one of two reasons: either because the Review's focus was on *women* convicted of homicide rather than all persons convicted under laws that had been struck down as unconstitutional; or, because they were opposed in principle to the idea of an independent body such as the Self Defence Review second-guessing convictions rendered through the due administration of justice. Others were concerned about the possibility of my making a positive recommendation in cases they had prosecuted. This resulted, in a few cases, in prosecutors making inappropriate remarks about the applicants rather than confining themselves to the evidence. These remarks related to such matters as the applicants' sexual orientation, lifestyle or general disposition. Obviously, such remarks were not only unhelpful but indicated an unwillingness to consider the issues and evidence contained in the applications on which I had asked them to comment. Some expressed concern about their potential liability should the Self Defence Review make recommendations

[1] This discussion is based on views expressed directly to me or indirectly to counsel employed on the Self Defence Review.

in relation to cases in which they were involved - a possibility which I believe is extremely remote. In the end, however, I must say that, despite such views and some initial reluctance, I received cooperation from the provincial Attorneys General Departments in allowing me access to their files.

The other source of resistance to the work of the Self Defence Review came from a surprising source - officials of the very Department responsible for the creation of the Review, the federal Department of Justice. Unlike in the case of provincial prosecuting authorities, whose attitudes were, perhaps, understandable because of their involvement in the cases, I was unable to determine the rationale for resistance by federal officials. It did, however, cause me sufficient concern that I felt it necessary to bring it to the attention of the Minister of Justice in writing on more than one occasion.

Ancillary Benefits of the Self Defence Review

Despite being able to make recommendations on behalf of a very limited number of applicants, I believe that the Self Defence Review helped, in a small way, many of the women for whom I could not make a positive recommendation. This belief comes directly from comments that some of them made to me about the positive effect the process of the Review had on them. For example, many of the women appreciated the opportunity to have someone listen to their story. Some of them had never had a chance to tell their full story before or to describe their personal life. One woman told me: "I had just killed someone. I was ashamed. I was a prostitute. How could I open up to 2 male lawyers when I have had problems with men all my life." Some women were under so much medication to deal with stress during their trial and testimony that they could not remember what had happened and looked to me for answers. Some actually felt that they had not really been part of the court process that resulted in their being convicted but they felt part of the Self Defence Review process, perhaps because I expressed such interest in having them tell me their account of what had happened in order to assess the merits of their self defence claims.

Some women found that telling me about the killings in which they had been involved and about their previous lives, as difficult as that was for them, was also therapeutic. They told me that it caused them to face certain realities, deal with their own involvement in the killings and confront painful memories. They felt stronger for it. The following is a sample of some of the comments[2] I received:

> "The difference between this process and my trial is that I feel I have been included. I have been heard. I didn't feel that in the court process. I've learned how difficult it was to acknowledge that I was a victim too. . . .I felt welcome to speak."
>
> "I have no expectations of this review, but I do have hope. Whatever the result, I shall accept gracefully. I just needed to take the opportunity to try, for myself. It's been a very positive thing for me to do. Going through this process, no matter where it takes me, has been a part of my healing. I thank you Judge Ratushny, for taking the time to review my case. I also want to thank you for the way in which you wrote your letter to me. I felt at ease, I felt comfort in the fact that I did not sense you would pass judgment on me for my life. Most importantly, I felt sincerity in you, which is a rare thing in a place like Prison for Women."
>
> "I'd like to thank you for the tone of your letter. To myself and I'm sure for other women also, the letter conveyed options. And if we chose to exercise these options, it also presented opportunities for us. To not only tell our own stories but to also feel that we had input into this process. Quite frankly, with a legal process which feels so intimidating and formal, I wasn't prepared for the amount of sensitivity and dignity your letter conveyed."
>
> "Thank you for your receptiveness to the issues raised in my case. I finally feel that I am being dealt with fairly."
>
> "I feel as though this is a fairy tale, due to the fact that my concerns are being addressed, that people are listening to what I am saying about my conviction and suggesting something concrete that I can do to deal with it."

---

[2] Not all of the comments set out in this section are verbatim quotations. Some of them are paraphrased from notes of telephone conversations with the applicants. Still, I believe they accurately reflect the applicants' views, both those who were successful and unsuccessful in their application for review.

Negative Comments from Applicants

Obviously, not all of the comments I received from applicants were positive. Some women were quite sceptical of the process and distrustful of its objectives. For example, some thought that my mandate could involve making recommendations that applicants receive *longer* sentences, as, apparently, rumours had begun to circulate to this effect in some of the women's institutions. One woman wrote to me that "the women are saying that the Self Defence Review is a cover-up to catch women in order to give them more time (a longer sentence)." After learning that some women held this view, I wrote to all of the applicants to assure them that there was no possibility that their sentences would be lengthened as a result of the Self Defence Review.

Other applicants thought that the Self Defence Review amounted to having to go through another trial. Others were upset that the process seemed to take so long. Further, as I was only able, in the end, to help a small number of the women who applied to me, this meant that many of the women were disappointed by the results of my review of their cases. Some accepted my conclusion and even agreed with my analysis of their crimes. One woman, for example, thanked me for trying to help her and was grateful for the care with which her case had been reviewed. Others, although only a very few, were bitterly disappointed. One woman, who was particularly upset that I could not help her, felt she had been pressured into applying and, in the end, thought the process was a "sham." For the most part, however, the women expressed agreement with my technical legal analysis of their cases and commented that it actually conformed to their own understanding of what had happened.

2. Overview

This final report of the Self Defence Review (SDR, or, the Review) covers all three phases of the Review's work, consisting of analyses of claims of self defence made by women convicted of homicide and currently in custody (Phase I), those on parole or probation or

whose sentences had expired (Phase II) and consideration of law reform possibilities (Phase III). The total expenditure for all three phases has been approximately $900,000.00.

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

The Review's approach to the analysis of cases can be broken down into six stages:

Stage 1: Organization
Stage 2: Outreach to Potential Applicants of 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: Reports

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, under my terms of reference, for a 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 Paciocco 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 the initial contact with potential applicants and to assist these potential applicants with their applications 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 all 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), to 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 98 applications may be broken down into the following categories:

55 - women in custody for homicide

26 - women on parole or probation for homicide

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 were 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, during the Review, became unlawfully at large and was then returned to custody)

The following chart shows the geographic distribution of the 98 applicants by the province or territory of the offence occurrence:

GEOGRAPHIC DISTRIBUTION OF THE 98 APPLICANTS	
ALBERTA	14
BRITISH COLUMBIA	6
MANITOBA	6
N.W.T.	1
NOVA SCOTIA	8
ONTARIO	35
QUÉBEC	18
SASKATCHEWAN	9
YUKON	1

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 women who applied because they were very long and I wanted them 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, pursuant to my instructions, brought the forms to the applicants and helped the applicants 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 also asked the Elizabeth Fry Society representatives to make personal contact with all of the 236 women who received an application package. I asked them to explain to each woman the purpose and objective of the Self Defence Review and to make clear to each of them that the Review was not like a trial, that the process would be consensual, not adversarial. Further, if there was any doubt about a woman's eligibility for the Review, my instructions were that the woman could be included, unless she preferred not to be part of the Review. Then, if a woman wanted to apply, the next step, as mentioned above, was for 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, I 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 helpful 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 had 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 (see Appendix C) to all applicants in the first and second groups and invited them to tell me their "story", that is, their version of what had happened and anything else they wished to say about their case to help me understand how the killing happened. I realized how important it was to have the women describe their situations to me in their own words after reading the facts surrounding the *Kina* case in Australia.[3] In that case, a sociolinguist's report filed with the appeal court explained that Ms. Kina, an aboriginal woman, had been unable to tell her several lawyers and the trial court about the abuse she had suffered because, for a variety of reasons, she had had great difficulty establishing a relationship of trust and communication with her lawyers.

Many applicants to the SDR sent me long letters setting out their personal histories, feelings and descriptions of what had 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 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

[3] 1993 clemency application in respect of Robyn Kina's 1988 murder conviction, heard as an appeal by the Brisbane Appeal Court, Queensland; new trial ordered; referred to in Sheehy, E., "The Legal Treatment of Self-Defensive Violence By Battered Women: Australia, New Zealand, England and the United States" (1996), prepared for the Self Defence Review, at 47-9.

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 Self Defence Review on their behalf to that Group.

Some women raised issues of self defence that did not appear to fit squarely within my terms of reference. For example, a few women applied to me whose sentences had expired (my terms of reference asked me to review the convictions of women "who *are serving* a sentence"). A few 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 asked 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 recognized 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 applications from women on parole and probation. I had assumed that their cases were within my terms of reference and 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, 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 they 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 invaluable assistance throughout my work.

Stage 4: File Building and Analysis

A major part of the Review's work 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. I was surprised

to learn that some provinces destroy court records, sometimes within a very short time after proceedings have terminated. For example, the province of Nova Scotia destroys court records after two years. This made it difficult in some cases to carry out a review of the applicant's case. It seems to me that, at a minimum, court files should be retained for the duration of a convicted person's sentence so that they can be made available for purposes of inquiries into the person's conviction at a later date. I realize that for those convicted of murder, this would amount to a requirement that files be retained for the duration of the convicted person's life, however, given the relatively few persons falling into that category, I do not believe this would impose an undue hardship on provincial authorities.

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 according to a standardized format I developed. The case summaries became the foundation on which I reviewed the merits of applicants' claims of self defence (see Appendix D). 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. Great care was taken in ensuring that the case summaries were accurate. The case summaries were constantly revised and supplemented after each review of them by me and by my Legal Counsel. The facts contained in the summaries were always checked by at least three persons.

These case summaries were very deliberately structured so as to focus, for comparison purposes, on the evidence relevant to self defence existing as part of the "old" information known about the case (the "Basis of Conviction" and the "Pre-Conviction Legal Files Which Were Not Before the Trial/Sentencing Court" sections of the case summary) versus that evidence which was derived from "new" information (the "Post-Conviction Sources" section of the summary). This comparison was critical to my review and analysis of each case for two reasons. First, each applicant's case could only be reviewed if there was something "new" to review that had not been before the convicting court (see the discussion of the significance of "new" evidence in Chapter 3). Second, it was of utmost importance that the applicant's current account to me of what had happened to cause the killing was tested for credibility against all past accounts from whatever source, whether those past accounts were derived from the applicant herself, from Crown and defence counsel, police, forensic evidence, witnesses, police files, correctional officials' files or, of course, the court transcripts.

In addition to the information forming the basis of the woman's conviction and contained in other pre-conviction files, the case summaries also detailed any information relevant to the woman's claim of self defence that came from a post-conviction source, including 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. This section of the case summary 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 all of 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 Chapter 3 for a full discussion of the standards and definition of self defence). The standards of review were, 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 was 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 interpretation 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 be answered by them before my analysis could be completed. Leading questions were carefully avoided. In effect, these letters gave an indication to applicants and their counsel of problem areas in their claims of self defence. In these letters, applicants were also provided with a list of all of my sources of information along with their case summaries and they were asked to comment on their case summaries. 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 conveyed to each applicant and her counsel throughout the Review's process but it was otherwise kept private and confidentiual.

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 explaining my reasons and asking for comments or any final submissions. Where appropriate, I responded to such submissions or comments with a further legal analysis or a further explanation of my

conclusion. Appendix E contains a chart describing the basis on which I rejected the 91 unsuccessful applications for review. Before sending a rejection letter, the applicant's institution was notified that the applicant would be receiving disappointing 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 forming the basis of conviction appeared to be accurate. I did not send them the other sections of the applicant's case summary as some of the information in these sections was privileged and all of it was confidential.

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 a total of fourteen 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, great care was taken in questioning the applicant so as not to lead her in her answers. Naturally enough, some of the women were very nervous and had difficulty expressing themselves. However,

this was not an impediment to their application, since at the point when the interviews occurred, I already knew a great deal about their cases and could explore the very particular areas where I needed to hear more from them. Again, counsel for the applicant performed an invaluable role in ensuring that my understanding of the applicant's case was complete.

After the interview, applicants were provided with a transcript of their interview 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.

I should mention that the applicants were informed that their consent would be sought before a recommendation was submitted on their behalf to the Minister of Justice and the Solicitor General, if I determined that one could be made. I told applicants of the recommendation, if any, I intended to make on their behalf and I gave 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 of a new trial.

It was important that the applicants be informed of the recommendation I intended to make to the Ministers 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, had bitter attitudes toward the legal system. They mistrusted lawyers and

judges. To proceed with an application to me, they had to set aside or, at least, temper that mistrust. They had to put faith in a representative of a legal system they felt had let them down. Many also told me facts or feelings which they had not previously related to anyone else. I believed I had 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 was a logical extension of my independent role on the Self Defence Review. Women's applications for review had come to me and it was for me, pursuant to my terms of reference, to recommend relief if I was of the opinion that it was appropriate to do so. It was not my mandate to submit my decision on *all* applications before me to the Ministers, that is, including those where I could make no recommendation with respect to an applicant's case. In other words, it was not part of my mandate to submit cases to the Ministers with my recommendation that nothing be done in respect of those applicants. In effect, although my powers were limited, I was standing in the place of the Ministers for purposes of reviewing the applications before me and, as such, I had a responsibility to inform women of the outcome of my review, whether positive or negative. Further, if I had not informed them of my recommendation, the applicants, whether they had failed or succeeded in their claim of self defence to me, would not have known whether their cases were under consideration by the Ministers. This situation would have left all applicants in a state of high anxiety for whatever period of time the Ministers felt they needed in order to consider my recommendations. It would have been unfair to impose on these applicants, who had already been put through a great deal of stress by the process of the Self Defence Review, an additional and unnecessary psychological strain.

Stage 6: Reports

The preparation of this Final 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.

This Final Report is the third that I have submitted. My *First Interim Report - Women in Custody* was submitted on February 6, 1997. It consisted of two volumes - one describing my process, standard of review and general recommendations, and the second containing six confidential case summaries and detailed recommendations. To date, there has been no response on the part of the Ministers to my *First Interim Report*. I have been informed indirectly of some general areas of concern about my report, but have had no detailed discussions about my recommendations. I am aware that my recommendations were delivered to the relevant provincial Attorneys General Departments for their comment. I have been told that these comments were very negative but I have not seen them. Nor have I (nor, *a fortiorori*, have the applicants) been given an opportunity to respond to them. I would not expect these prosecutors to agree with my conclusions. After all, they have only had available to them the material in their own files, assembled at the time of the trial or plea. They have not seen the wealth of material that was made available to me from other sources. Further, as I stated above, I encountered resistance from some persons in provincial Attorneys General Departments during the course of the Review. The fact that some of these persons have reacted negatively to my recommendations is, therefore, not surprising.

My *Second Interim Report - Women Not in Custody* was submitted on June 9, 1997 and consisted simply of a case summary and recommendation relating to one successful applicant.

This Final Report addresses many of the same issues that were contained in the first volume of my First Interim Report and, in keeping with my mandate, also contains law reform proposals.

CHAPTER 2 - THE AMBIT AND SIGNIFICANCE OF *LAVALLÉE*

1. *R.* v. *Lavallée*

The Self Defence Review was created in response to the Supreme Court of Canada's decision in *R.* v. *Lavallée*,[4] 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 may have been women convicted of homicide in circumstances where they could have made a claim 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. It is, therefore, important that I explain my understanding of *Lavallée*.[5]

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 for injuries she suffered at the hands of her spouse but lied to physicians about their cause. According to the accused's statement to police, during the course of a party on the

---

[4] [1990] 1 S.C.R. 852.

[5] My understanding of *Lavallée* derives from the Supreme Court judgment itself, as well as the academic commentary that has appeared since the judgment was rendered. See, e.g., Christine Boyle, "The Battered Wife Syndrome and Self Defence: *Lavallée v. R.*" (1990), 9 Can. J. Fam. Law 171; Donna Martinson, *et al.*, "A Forum on *Lavallée v. R.*: Women and Self-Defence" (1991), 25 U.B.C. L. Rev. 23; Lee Steusser, "The Defence of Battered Woman Syndrome in Canada" (1990), 19 Man. L.J. 195; Martha Shaffer, "*R. v. Lavallée*: A Review Essay" (1990), 22 Ottawa L. Rev. 607; Martha Shaffer, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years after *R. v. Lavallée*", (1997), 47 Univ. of Toronto L.J. 1; Louise Viau, "Commentaires d'arrêt: *Lavallée c. R.*" (1990), 69 Can. Bar Rev. 775.

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 accused, pulled her from the closet, and struck her on the head. He then threatened her, 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, fatally, in the back of the head.

At the accused's murder trial, a defence expert, Dr. Fred Shane, testified that the accused's actions were "a reflection 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 and weight of Dr. Shane's testimony given that his opinion was based in part on information not in evidence.[6] 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 expert evidence on the psychological 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, the Court said it would assist the average juror in understanding 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 her 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'".[7]

---

[6] This issue arose in consequence of the Supreme Court's decision in *R.* v. *Abbey*, [1982] 2 S.C.R. 24.

[7] Above, note 4, at 874.

The Court disapproved of the stipulation, which in earlier cases[8] had been read into the law of self defence, that the accused must have responded to *imminent* danger.[9] This requirement, in effect, meant that a person could not raise self defence in a situation where he or she anticipated future harm and the victim's assault had to be in progress at the time of the accused's acts. As Dr. Shane testified in *Lavallée*, 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 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 instalment.'"[10] The real question is whether the accused's beliefs as to the jeopardy she was in and the need to use force were reasonable.

The Court held that 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:

---

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

[9] In the later case of *R.* v. *Pétel* (1994), 87 C.C.C. (3d) 97 (S.C.C.), the Supreme Court of Canada specifically held that imminence is a factor to be considered in determining the reasonableness of the accused's belief that she was at risk of serious bodily harm or death and of her belief that she could not otherwise preserve herself. Reasonableness can be found in circumstances where the accused was not in imminent jeopardy.

[10] Above, note 4, at 883, citing *State* v. *Gallegos*, 719 P.2d 1268 (N.M. 1986), at 1271.

> 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.[11]

As such, the Court said expert evidence could assist the jury in determining whether the accused had a reasonable fear of death or grievous bodily harm.

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 the 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 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.[12]

The significance of *Lavallée* for the law of self defence, in my view, is not in the recognition of the condition referred to as the "battered woman syndrome", although it is this aspect of the case that has probably received the most attention. Nor is the case important just for its treatment of the issue of expert evidence. Rather, its real significance for the law of self defence lies in the fact that the Court took a broad view of the evidence that is relevant to the legal elements of that defence. Having done so, the use of expert evidence and, more particularly, expert evidence on battered woman syndrome was obviously relevant

---

[11] Above, note 4, at 880.

[12] Above, note 4, at 889.

to the issues before the jury. The Court 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 the accused's beliefs. Similarly, many of these factors will be relevant in assessing the reasonableness of those beliefs.

Obviously, *Lavallée* is particularly significant in relation to claims of self defence on the part of women. Madam Justice Wilson recognized that women's "size, strength, socialization and lack of training" are relevant in assessing whether they were justified in using force.[13] Even so, the approach she took to the analysis of self defence is applicable to any claim of self defence by an accused person. In fact it has been applied to men, albeit in a different context.[14]

I should point out that my terms of reference did not confine me to a review only of cases involving "battered woman's syndrome". My task involved reviewing cases where there was an allegation on the part of the applicant that the killing was committed in response to a threat of harm from the deceased. This obviously included situations like *Lavallée* but was 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 I 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

---

[13] Above, note 4, at 883.

[14] See, *e.g.*, *R. v. McConnell*, (1996), 48 C.R. (4th) 199 (S.C.C.), reversing (1995), 32 Alta. L.R. (3d) 1 (C.A.), for the reasons given by Conrad J.A. in dissent. There, *Lavallée* was used as authority for the proposition that prisoners may be entitled to use preemptive force against an anticipated future attack by fellow prisoners. See Boyle, Christine, "Annotation" (1996), 48 C.R. (4th) 200.

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 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 psychological 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. Evidence of Abuse and Battered Woman Syndrome

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, I did not require

applicants to show that they had suffered abuse in their lives before I considered their cases. I looked at all applications before me on the issue of self defence whether or not there was evidence that the applicant was abused. Again, while the plight of women in abusive relationships obviously figured largely in the creation of the Self Defence Review, my mandate clearly directed me to consider the claims of self defence of all women under sentence for homicide who applied for a remedy. My terms of reference asked me to "review the cases of women...who apply for a remedy and who are serving a sentence for homicide in circumstances in which the killing took place to prevent the deceased from inflicting serious bodily harm or death."

Where there was evidence of abuse in an applicant's case, I always considered what effect 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. These possibilities must be considered in analyzing a claim of self defence because the legal elements of that defence require an assessment of the person's actual belief that she was at risk of harm and her belief 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 the reasonableness of 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, 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.

To be relevant to self defence, the source of the abuse need not be the victim. Past abuse in the life of the accused may be relevant to her perception of the danger in which she found herself and her belief in the need to use force. An example is the case of *R.* v. *Eyapaise.*[15] There the accused stabbed a man who had assaulted her at a party. He touched the accused's legs and breasts and grabbed her around the waist without her consent. The accused reacted by stabbing the victim in the neck. She was charged with and convicted of assault with a weapon. Prior to the night of the stabbing, the accused did not know the victim. McMahon J. found that the accused had suffered considerable abuse during her life and concluded that "[i]t may be that Ms. Eyapaise, given her experience, was under a reasonable apprehension of grievous bodily harm from a stranger."[16] At the same time, however, the trial judge found that the accused could not have reasonably believed that she could not have protected herself otherwise. On that basis, her claim of self defence failed. Still, the finding that evidence of past abuse may be relevant to the perceptions of the accused at the time of the offence is important. As one author stated:

> Where, as in *Eyapaise*, a physical assault by a stranger is perpetrated on a battered woman, the battered woman syndrome may be relevant to her mental state at the moment she committed the alleged act of self-defence to preserve herself from the harm she perceived from him.[17]

---

[15] (1993), 20 C.R. (4th) 246 (Alta. Q.B.)

[16] *Ibid.*, at 251.

[17] Laura Burt, "The Battered Woman Syndrome and the Plea of Self-Defence: Can the Victim and the Accused be Strangers? A Note on *R.* v. *Eyapaise*" (1993), 27 U.B.C. Law Rev. 93, at 97.

I would agree with that statement with one qualification - evidence of abuse on the part of persons other than the victim may be relevant whether or not the accused falls within the "battered woman syndrome." In fact, in many of the cases before me, applicants described the lasting impact on them of abuse carried out by past partners or other relatives.

I agree with the following statement of the significance of battered woman syndrome (BWS):

> ...[T]he judicial understanding of BWS evidence in *Lavallée* was not in fact focussed on the question of whether a woman displays the "syndrome", but rather on the need for information and context regarding the violence of the situation confronting an accused and a realistic assessment of her options.[18]

As I have mentioned, I did not analyze applicants' cases with a view to establishing whether or not they were suffering from battered woman's syndrome at the time of the killing. In keeping with my mandate, I considered whether the woman was acting in self defence and the impact of abusive conduct on her appreciation of the danger she felt she was in. Accordingly, I did not request psychiatric assessments of applicants' states of mind. A further reason for not requesting psychiatric assessments of applicants was because I believed that the value of a present analysis of a past state of mind would be limited. I agree with the English Court of Appeal in *Ahluwalia* when it said that it "would view wholly retrospective medical evidence obtained long after trial with considerable scepticism."[19]

---

[18] Sheehy, E., "What Would a Women's Law of Self Defence Look Like?" (1995), prepared for Status of Women Canada, at 5.

[19] *R. v. Ahluwalia*, [1992] 4 All E.R. 889 at 900. Cited in Sheehy, above note 3, at 82.

As such, in keeping with my terms of reference, I gave particular attention to 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. I should emphasize that this evidence was not enough on its own to make out a defence of self defence, even if the source of the abuse was the deceased. It was simply a factor to be considered in determining whether the legal elements of self defence were present.

CHAPTER 3 - STANDARD OF REVIEW

1. Introduction

One of the first substantive issues that faced the Self Defence Review in the 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 did I have to 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.

In defence of a stringent standard of review

In the pages that follow, I set out the standard of review that I applied in analyzing the self defence claims of the 98 women who applied to me for a review of their convictions. The standard I set was a strict one and I applied it rigorously. No doubt some will criticize the standard I set. After all, on completion of my mandate I concluded that only 3 out of the 98 claims of self defence before me were made out. I suspect that many would have thought the number of successful applicants would be higher. On the other hand, others may criticize the standard as being too low.[20] To explain why I set the standard where I did, I should begin by explaining my approach with reference to the mandate I was given.

[20] One official suggested that I should have required proof of innocence beyond a reasonable doubt. For reasons discussed below, this is obviously far too strict a standard.

The primary purpose of a standard of review in the circumstances before me was to ensure that the recommendations I made had a solid legal and evidentiary foundation. This was very important. The Ministers gave me a mandate to review the self defence claims of women convicted of homicide and to make recommendations *in appropriate cases*. In effect, I would have failed to perform the task assigned to me if the standard of review I established had been set too low. A low standard would not have provided the Ministers with the assurance that the self defence claims of the women for whom I made recommendations would withstand scrutiny by third parties. It would not be clear that my recommendations applied only to *appropriate cases*. Having created the Self Defence Review to ascertain whether there were women who had been convicted of homicide who may have acted in self defence, the Ministers had to be assured that the cases for which I made recommendations had a solid foundation. The Ministers would have that assurance only if the standard of review was strict. Otherwise, they may be forced to review the evidence themselves to determine whether my recommendations were justified. With a stringent standard, they can be spared that task.

The strictness of the standard I applied was a product of three separate aspects of it, as will be seen in the remainder of this chapter. First, I applied a series of progressive standards (referred to below as "threshold standards") to screen out cases that lacked sufficient substance. Accordingly, I analyzed the legal merits of a case only where there was a serious claim of self defence before me, one supported by reliable evidence.

Second, the definition of self defence I applied was rigorous in that it required that there be reliable evidence before me on each of the several distinct legal elements of the definition of self defence. Normally, the requirements of the law of self defence are expressed as compendious norms, that is, as expressions of combined subjective and objective elements. However, I took the approach that I had to be assured of the existence of reliable evidence on *each distinct legal element* of self defence if the woman was to succeed in her claim (the full definitions of self defence I employed are set out below in this chapter under "substantive standards"). Again, the reason for such a rigorous application of the elements of self defence

was in order to be able to provide the Ministers with the assurance that, in those cases in which I recommended that the woman receive some relief, all elements of self defence were clearly present and supported by reliable evidence.

Third, I applied a final standard in those cases in which all of the prior standards had been met. This final standard (discussed below under "substantive standards") was a measurement of the overall weight of the evidence tendered in support of the claim of self defence. I took the approach that where the evidence met all of the legal elements of self defence but I could not be certain that the weight of that evidence would cause a reasonable jury to acquit the applicant, the appropriate result would be a recommendation that the woman receive a new trial. In other words, if all of the elements of the law of self defence were present but I could not be sure what the effect of that evidence would be on a jury, then the issue of self defence would have to be determined at trial. On the other hand, if the weight of the evidence was sufficient that I was persuaded that the applicant *would be* acquitted if tried by a reasonable jury properly applying the law, then I recommended that the applicant be pardoned. This aspect of my standard is explained more fully below. For present purposes, it suffices to say that I only recommended a pardon for an applicant where it was clear to me that no reasonable jury would convict her in the face of the evidence before me. Again, while I realize this is a strict standard, I believe that it is only in cases where the weight of the self defence evidence is substantial that I should recommend such a direct remedy. An extraordinary remedy such as a pardon must have a solid legal and evidentiary foundation for it. Obviously, where the weight of the evidence was inconclusive, I could not seriously suggest to the Ministers that they eradicate a woman's conviction. Such a measure would only be appropriate where it was clear that a woman would be acquitted if tried on the evidence before me.

Categories of Standards

It is apparent from the foregoing that I should 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 legal 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 to be able to screen 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 contained "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 were the "sentencing standards." These were the standards I applied in considering whether an applicant was entitled to a remedy affecting the duration of her sentence.

2. The Royal Prerogative of Mercy

Before discussing the nature and purposes of these various standards, it is appropriate to describe the various remedies available in relation to applicants who succeeded in meeting those standards.

My mandate expressly required 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 was 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 permited me to consider remedies that related both to the substantive merits of a conviction (*e.g.* a full pardon) and remedies related solely to the sentence imposed on the applicant (*e.g.* remission of sentence).

The term "royal prerogative of mercy" is sometimes used to refer only to powers not specifically set out in statute. In other words, the term 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.

My terms of reference asked me to review the cases of women under sentence for homicide in which there was an allegation that the killing was carried out to prevent the deceased from causing death or serious bodily harm. In other words, I was to review the cases of women who alleged that they acted in self defence. Based on that review, I was to make a recommendation for the granting of the royal prerogative of mercy in any of its forms. I interpreted this mandate as permitting me to make a recommendation for the granting of the royal prerogative of mercy to any woman whose case presented grounds for the awarding of one of the remedies falling thereunder, so long as the basis for that remedy was revealed in the course of my review of the applicant's claim of self defence. To state this another way, while my review of an applicant's case was limited to her claim of self defence, I could consider recommending a remedy for her even if her claim of self defence

failed, if the evidence relevant to her claim of self defence revealed other grounds for the granting of a remedy under the royal prerogative of mercy. One example of this would be where the evidence I reviewed while examining an applicant's self defence claim suggested the existence of another defence. In fact, in some applicants' cases I did consider the defence of provocation. The full basis for having done so is set out below.

In considering the remedies available under the royal prerogative of mercy, I have been 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 and, 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":[21]

> **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, nor the justice system generally.

[21] National Parole Board (January 1994).

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.

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, therefore, is a complete list of remedies available under the royal prerogative of mercy:

- free pardon;[22]
- conditional pardon;[23]
- pardon under the *Criminal Records Act*;[24]
- remission of sentence;[25]
- respite of sentence;[26]
- commutation of sentence;[27]
- new trial;[28]
- referral of a case to a court of appeal;[29]
- reference to court of appeal on a legal issue;[30]
- reference to the Supreme Court of Canada.[31]

---

[22] *Criminal Code*, s. 748(2).

[23] *Ibid.*

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

[25] 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 a provision in the *Criminal Code* (s. 748.1) 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.

[26] See above, note 25.

[27] See discussion below at 60-2.

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

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

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

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

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. For example, 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 was for the Review itself to determine substantive legal issues and it was the Review that was providing assistance to the Minister. As such, there was no point in my recommending that a court be asked, in effect, to perform the same role as I had been asked to perform under the Self Defence Review. However, there was one situation where I have considered recommending that a case be referred to a court of appeal. This is discussed below under sentencing standards.

With respect to my 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 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 . . . [32]

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 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 . . . [33]

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 and this would be a different situation from the one described in the Fauteux Committee Report

---

[32] See above, note 25.

[33] *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.

and in relation to which the Committee expressed justifiable concern. The concern there was having the executive substitute its opinion on the appropriate sanction in a given case for that of the judiciary. It would be a different situation, however, if a review of the applicant's case revealed that a shorter sentence would redress a wrongful conviction (e.g. conviction for the wrong offence). It is in the latter context that I have considered recommending a commutation of sentence for some applicants.

Accordingly, the remedies I considered available under the royal prerogative of mercy are:

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

3. Minimum Standards of Review

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

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

Standard of Review and → *Remedy*	**Standard of Review and → *Remedy***
Does the applicant advance a claim of self defence that	Does the applicant advance a claim of self defence that
(a) has an air of reality;	(a) has an air of reality;
(b) is supported by evidence that is reasonably capable of belief;	(b) is supported by evidence that is reasonably capable of belief;
(c) includes some evidence that is reasonably capable of belief in respect of each of the applicable essential legal elements of self defence,[34] and	(c) includes some evidence that is reasonably capable of belief in respect of each of the applicable essential legal elements of self defence, and
(d) when considered in light of all the evidence in the case, *could* create a reasonable doubt in the mind of a reasonable trier of fact properly instructed on the law?	(d) when considered in light of all the evidence in the case, *would* create a reasonable doubt in the mind of a reasonable trier of fact properly instructed on the law?
→ *New Trial*	→ *Pardon*

[34] For this element of my standard of review, I required reliable evidence of each of the essential legal elements of self defence applicable to the applicant's case. As is discussed fully below, there are three distinct definitions of self defence that could apply. In most cases, the definition that derives from s. 34(2) of the *Criminal Code* applied (see Definition 1, below). A summary of *all* of the elements of the standard of review, including the legal elements of s. 34(2), is set out below.

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

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

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

Standard of Review and → ***Remedy***	**Standard of Review and** → ***Remedy***
Does the applicant advance a claim of self defence that (a) is supported by new evidence or evidence whose significance was not adequately appreciated; (b) is supported by evidence reasonably capable of belief; and (c) when considered in light of all of the evidence in the case, *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 or evidence whose significance was not adequately appreciated; (b) is supported by evidence reasonably capable of belief; and (c) when considered in light of all of the evidence in the case, *would* affect the offence for which the applicant was convicted or her sentence? → *Commutation or Remission of Sentence*

(a) *Threshold Standards*

I applied at least two distinct threshold standards. As will be discussed below, there is actually a third threshold standard that I applied only to post-*Lavallée* convictions. 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* convictions 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* convictions.

The following represent the threshold standards common to both pre- and post-*Lavallée* convictions. 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 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 that self defence could possibly arise from the facts presented to me. For example, in some cases the applicant said that she was not at all responsible for the killing. Obviously, in such a case there could 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 always 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 was not a trier of fact. As such, it was not for me to decide matters related purely to 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 the evidence presented to me on that issue. It was 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 I applied in the Review.

It was only where the version of events relating to self defence presented to me, from whatever source, was not generally reasonably capable of belief that an applicant would not meet this standard. Again, it was not for me to decide whether the applicant or any other person was 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 the claim of self defence to be 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 solely on such a subjective basis. Instead, I considered the applicant's claim in the light of all of the other evidence both pre and post conviction, and determined, on an objective basis, whether the evidence relevant to self defence was reasonably capable of belief in the sense that a reasonable trier of fact could find it to be credible.

In applying this standard, I had regard to normal indicia of reliability of evidence that are commonplace in criminal trials. As such, I looked for such factors as consistency in the presentation of the version of events given to me. For example, I compared the version of events the applicant provided to me with any other versions she had given at other points in time, including at trial. Where there were inconsistencies, I always asked the applicant to explain them and then assessed the plausibility of her explanation.[35] I also looked to all of the other evidence in the case to see whether the claim of self defence was consistent with or contrary to that evidence (including forensic evidence). A claim of self defence could only be generally reasonably capable of belief if it could fit with the other evidence. Finally, I

[35] Often this was done by way of a written letter to the applicant after I had carried out a preliminary review of an applicant's case. Some women preferred to withdraw their applications rather than answer a very long list of questions I had about their claim of self defence.

looked for evidence that would corroborate the applicant's claim of self defence. I certainly did not require corroboration and the lack of it did not by itself cause the applicant to fail but, obviously, corroborative evidence could assist the applicant in surpassing this threshold standard.

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)[36] - even where she may have had a viable claim of self 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 present story. I then considered whether the applicant's current version of events presented to me was reasonably capable of belief according to the approach described above, even if it departed from the facts agreed to by her at the time of her conviction. Again, if there was such a departure, the applicant's explanation of why a different version of events was being put forward now was assessed very carefully.

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 contradicted by the vast weight of evidence, it would 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 showed that the firearm was actually

[36] This issue is discussed at length in Chapter 5 - *Reform Possibilities.*

discharged at a distance of at least 10 feet, the claim of self defence would not be supported by evidence reasonably capable of belief. Before I would go any further in my review of the applicant's case, she would be asked to comment on this preliminary conclusion and provide an explanation for her version of events. 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 below for a description of those legal elements). I required that there be evidence reasonably capable of belief supporting each of the applicable 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 met and I could not recommend that the applicant receive a remedy. As applied in this more particular way, this reliable evidence standard also formed a subsidiary part of the substantive standards that are discussed in detail below.

(b) *Substantive Standards*

The substantive standards I applied to the claims of self defence before me had two aspects. First, I required a reliable evidentiary foundation for each of the essential legal elements of self defence and definitions of self defence had to be developed in order to analyze this aspect of the self defence claims. Second, if all of the legal elements of self defence were supported by reliable evidence, I weighed that evidence to determine what, if any, impact it might have on the applicant's homicide conviction.

(i) Definitions of Self Defence

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 were gaps in the existing law, I 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 in that I refined them over the course of my review so that I was sure they could apply meaningfully to all of the fact situations before me.

The purpose of these definitions was to assist me in determining whether the evidence presented to me met the legal elements of self defence. In devising these definitions, I 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;
5. Identify the methodology employed to determine reasonableness.

The first definition, set out below, is intended to reflect the contents of s. 34(2) of the Code. It is by far the most complicated of the three and, for my purposes, the most relevant as it is the provision that most commonly applies to homicides. 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 I employed are actually contained in subsections (2), (3) and (4). Subsections (2) and (3) set out the rules for determining the accused's subjective beliefs and the reasonableness of those

beliefs, respectively. As such, subsection (2) is relevant to the question whether the accused actually believed that she was being, or was going to be, assaulted (paragraph (1)(a)), whether she actually believed that she was at risk of death or serious bodily harm (paragraph (1)(b)), and whether she actually believed that it was necessary to kill her assailant in order to protect herself (paragraph (1)(c)). Subsection (2) makes it clear that the defender's subjective beliefs shall be determined by looking at all of the factors that may have influenced her perception of the circumstances in which she found herself.

The most difficult part of the definition is contained in subsections (3) and (4), the objective inquiry. These provisions are intended to guide the determination as to whether the defender's actual 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 was to identify the relevant characteristics of the "ordinary person" and the relevant circumstances.[37] I have cast subsection (4) in the negative in order to make use of the form of words employed by the Supreme Court of Canada in penal negligence cases[38] - 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 will be unreasonable if they constitute a marked departure from what an ordinary person would have believed. In effect, then, I 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 had to be evidence from which a reasonable trier of fact could conclude that the applicant's beliefs were reasonable (*i.e.* not unreasonable).

---

[37] This part of the definition was under constant revision in light of the facts I encountered in the applications before me. For each application, I had to determine whether a particular factor formed part of the objective inquiry.

[38] *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.

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 had to consider the reasonableness of an applicant's beliefs in the light of her particular situation. In particular, I had to consider the effect that past abuse or victimization may have had on the woman's actual beliefs and consider the reasonableness of those beliefs 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 the defender's actual characteristics that are relevant to the use of defensive force 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, are ascribed to the "ordinary person" - history of abuse, age, sex, race, physical characteristics, mental abilities, *etc.* I have also left this category open-ended to allow for the inclusion of other relevant factors as they arise. Factors that would not be relevant would be personal idiosyncrasies, temperament and character.

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 had to 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 applicable to certain of the 98 cases before me derive from s. 34(1) and s. 37 of the *Criminal Code* and they build on the approach I took 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. In light of *Lavallée*, however, the objective inquiry should, still, be based on an appreciation of the circumstances in which the defender found herself. Accordingly, my definitions make it clear that all the circumstances are to be taken into account in determining whether it was necessary to use the amount of force actually employed by the defender.

To return to the minimum standards of review and place these definitions in that context, 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). I began with the threshold standards discussed 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. It was only after I had satisfied myself that these threshold standards had been met that I went on to consider the substance of her claim of self defence by analyzing whether there was some evidence, reasonably capable of belief, in respect of each of the applicable essential legal elements of self defence.

To give 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 as to 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. I would then provide my preliminary conclusion to the applicant and her counsel and invite representations on it. Subject to receiving some new evidence on that issue, I would close the applicant's file, unless there was a basis for considering her application on another ground (*e.g.* provocation - see below).

If I was satisfied that there was some evidence in respect of all of the applicable essential legal elements of self defence, I proceeded to consider the weight of that evidence. It was at this point that I considered the second substantive standard, which I discuss fully in the next section.

SELF DEFENCE DEFINITIONS

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: General Limits

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

(*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.

(ii) The Standard Relating to Weight

Precedents

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 Conviction 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".[39] 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*[40] case. The Court was asked two questions in that case:

---

[39] 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).

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

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 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.[41]

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

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

[41] *Ibid*, at 291-2.

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.

Special Circumstances of the Self Defence Review

While the standards applied by the Criminal Conviction Review Group and the Supreme Court of Canada are valuable precedents for me, 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. To begin with, 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 my view, the s. 690 standard may be appropriate where a "presumption of regularity" exists, but not in the special circumstances of the Self Defence Review where a substantive issue (*i.e.* self defence) remains, in effect, untried according to current law.

It is helpful in this context to recall the ambit and significance of *Lavallée*, as discussed above, and the motivation underlying creation of the Self Defence Review in devising an appropriate standard of review. The lesson of *Lavallée* is that one can only conduct a proper assessment of a claim of self defence if one takes adequate account of the perspective of the accused person. This is important both for purposes of the subjective aspects of self defence and the objective branch of the defence. Such factors as the history of abuse suffered by the accused and the lack of experience in the use of physical force may have caused the accused to perceive the risk of harm differently and may have caused her to

respond differently to it than another person with different perceptions and experiences. The claim of self defence must be analyzed in light of the accused person's actual circumstances and perspective.

The concern that gave rise to creation of the Self Defence Review was that claims of self defence made by women may not have been analyzed with sufficient consideration given to the perspective of those women in the circumstances they faced. The concern related primarily to women since, as *Lavallée* made clear, it is their perspectives that may not have been adequately appreciated. This concern arose primarily in homicide cases since the analysis in *Lavallée* related primarily to the legal elements in s. 34(2) of the Code, namely, the accused's belief that she was at risk of serious bodily harm or death, her belief that she had to use force to preserve herself and the reasonableness of those beliefs. Obviously, even on their face, these elements have relevance primarily in situations where serious, perhaps deadly, force has been applied. Further, the very terms of s. 34(2) state that the subsection applies where the accused caused serious bodily harm or death.

Accordingly, the terms of reference of the Self Defence Review were drafted so as to address the cases that, as a result of *Lavallée*, presented the most serious concerns - the cases of women charged with homicide offences. Again, the principal worry was that the self defence claims of these women had not been analyzed according to the approach in *Lavallée* - i.e. it was possible that their perspective on the need to use force had not been adequately taken into account. If that were the case, then obviously the woman's conviction would be put in doubt as it would be possible, if the woman's claim of self defence were analyzed within the approach suggested in *Lavallée*, that the woman would have been acquitted, rather than convicted. For that reason, my mandate directed me to make recommendations "in appropriate cases" for the granting of the royal prerogative of mercy. It was foreseen that I might encounter cases where women should have been acquitted.

Therefore, my standard of review had to reflect the fact that the legal ground underlying women's convictions for homicide had shifted. I had to embark on an analysis of the issue of self defence by way of an approach that was either not available or not applied at the time of conviction. This put me in a unique situation. I had to assess claims of self defence on the terms that would apply if that issue were tried according to *Lavallée*. At the same time, I was not in a position actually to act as a trial court. My standard of review had to reflect this unique situation.

It is clear from the foregoing that I was put in a situation completely unlike the kind of review that takes place under s. 690 of the *Criminal Code*. There, the review is conducted solely on a factual basis. This means that one can safely proceed from the assumption that the conviction was correct. The object is to determine whether confidence in the correctness of that conviction can be shaken by new facts. Here, by contrast, our confidence in the convictions under review had diminished because there were cracks in the legal foundation underlying them. For the same reasons, the standards applicable to the exercise of appellate jurisdiction were not entirely appropriate to the Self Defence Review. Appeal courts must give considerable deference to the findings of trial courts and must not merely substitute their view of the evidence for that of the courts below.[42] This is especially true where matters of credibility are in issue.[43] However, this degree of deference could not be shown to the trial outcomes in the cases before me as the factual findings had to be looked at in the light of new law. While I established and applied a strict standard of review, it was not based on acceptance of the correctness of the trial court's conclusions. To so do would have amounted to a failure on my part to consider the effect of *Lavallée* on those conclusions.

---

[42] *R. v. Yebes*, [1987] 2 S.C.R. 168.

[43] *R. v. W.(R.)* (1992), 13 C.R. (4th) 257 (S.C.C.); *R. v. B.(R.H.)* (1994), 29 C.R. (4th) 113 (S.C.C.); *R. v. François* (1994), 31 C.R. (4th) 201 (S.C.C.).

Factors Influencing the Choice of Standards

My aim, then, was to erect a standard of review that would reflect the unique task I was asked to undertake. The standard had to acknowledge the impact of *Lavallée*, the concerns that motivated creation of the Self Defence Review, my terms of reference and the means available to me to discharge my mandate. With these factors in mind, I developed the appropriate standards of review by beginning at the level of first principles - those being 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 for me was 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 had to consider the operation of these principles both in relation to women who were convicted prior to *Lavallée* and those convicted after *Lavallée*. Women convicted after *Lavallée* were in a somewhat different situation because they could have had the benefit of the Supreme Court's judgment in that case, whereas, the women convicted prior to *Lavallée* obviously could not. As such, I addressed the subject of the standard of review first in relation to pre-*Lavallée* convictions and then considered whether that standard was appropriate for post-*Lavallée* convictions as well.

Pre-Lavallée Convictions

For the pre-*Lavallée* applicant (i.e. an applicant convicted prior to May 3, 1990) who claimed to me that she had acted in self defence, there was an untried issue which needed to be considered along with the matters that formed the basis of her conviction. In relation to the convictions of these women, there was 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 had simply not occurred. Therefore, in my view, in principle at least, it was appropriate to fashion a standard of review for pre-*Lavallée* cases that built on the reality that evidence of self defence that raised a reasonable doubt about the applicant's liability would result in an acquittal. The situation is somewhat different for applicants convicted after *Lavallée*, as I discuss below.

The problem, of course, was that the Self Defence Review was not in the same position as the original trial court. It was not, in fact, a court at all. How then could it apply a reasonable doubt standard years after the original conviction? How could I evaluate the evidence of self defence that was brought to my attention in the light of all the other trial evidence? I could not place myself in the position of the original trier of fact. Clearly, I could only proceed from an *objective* assessment of the evidence of self defence. Therefore, the question could not be whether *I* had 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 could approach this question was 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.

In my view, at an absolute minimum, an applicant was entitled to some form of remedy (within the remedies falling under the royal prerogative of mercy) if I was satisfied that a reasonable trier of fact, considering the evidence as a whole and properly applying *Lavallée*,

could have a reasonable doubt about the applicant's liability. By this standard, the correctness of the applicant's conviction was clearly in doubt and, as such, it was 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 is discussed below.

It is important to point out that this branch of the substantive standard relating to weight is additional to the threshold standards and the definition of self defence discussed above. While those thresholds would otherwise be implicit in the substantive standard I devised, I 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, 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.

Post-Lavallée Convictions

As mentioned, I proceeded on the assumption that it was not the role of the Self Defence Review to retry an issue that had 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* convictions, evidence presented to me in relation to self defence was always either new (in that it was not presented at trial because it was believed not to be relevant to self defence) or had 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*).

For the post-*Lavallée* applicant (i.e. an applicant convicted after May 3, 1990), the issue of self defence may have been fully explored at trial in the light of today's governing jurisprudence. The purpose of reviewing post-*Lavallée* convictions was to determine whether the Supreme Court of Canada's decision in that case had been implemented. Given that purpose, I only made recommendations in relation to post-*Lavallée* convictions where there was 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 could conclude that the significance of that evidence was not adequately appreciated at the time and, accordingly, proceed to review the substance of the applicant's claim.

It should be emphasized that this new evidence requirement demanded that the *claim* of self defence be supported by new evidence. The presentation of new evidence that was not relevant to self defence or did not advance the claim of self defence beyond the evidence tendered at trial did not satisfy the requirement. It was not simply the existence of some new evidence that permitted me to review the issue of self defence - it had to be evidence that specifically related to that issue and supported the applicant's claim.

Accordingly, the post-*Lavallée* convictions had to 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* convictions, there *was* a "presumption of regularity" in relation to the convictions of these applicants. In other words, the basis of these applications was entirely different from the pre-*Lavallée* convictions. These women applied to me, 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 were 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 made sufficiently clear. The accused, if she testified, may not have been believed by the jury. The defence counsel 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 was that the circumstances of that conviction were entirely different from the pre-*Lavallée* convictions 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 had to be met in order for me to consider granting a remedy to a post-*Lavallée* applicant, this difference between pre- and post-*Lavallée* convictions also required that the post-*Lavallée* convictions be analyzed differently. If post-*Lavallée* applicants only had 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 have been 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* convictions was 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 had to show something new.

I believe the appropriate approach to post-*Lavallée* convictions 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.[44]

This is a similar approach to that which applies to the introduction of fresh evidence before a court of appeal:[45] 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 to the Self Defence Review had to show that there was new information which was reliable (*i.e.* reasonably capable of belief) and of sufficient strength that it could reasonably affect the outcome of her case.

Remedies

The next question was what the appropriate remedy would be if the *minimum* standard of review were met. The appropriate remedy was a function of the weight of the evidence. Evidence merely suggesting that the outcome of the case *could* be different would usually not be persuasive enough to suggest what that outcome would be. As such, unless I was to

---

[44] Above note 40.

[45] One element of the fresh evidence standard was 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 was not a concern for the Review because there was 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.

act as a trier of fact on that issue (which, as I have already stated, I was ill-placed to do), I could not make that determination on my own. At the same time, however, if this minimum standard were met, there would exist reasonable grounds for doubting the correctness of the applicant's conviction. Accordingly, the appropriate remedy in such a situation would, in my view, be a new trial. The weight of the evidence could then be assessed by a new trier of fact. Of course, in a situation where I might 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 had already spent in custody. This possibility was adverted to by the Supreme Court of Canada in *Milgaard*.

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 recognized that her conviction could no longer stand. This was not an easy standard to meet. I had to be satisfied that no reasonable trier of fact, instructed on the current law of self defence and considering the totality of the evidence, would convict the applicant.[46]

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

---

[46] I note that this is the standard applied by the Supreme Court of Canada in entering an acquittal against a convicted person. In *R. v. Hinse* (unreported, January 21, 1997), Gonthier J. stated: "In the circumstances, being of the view that the evidence could not allow a reasonable jury properly instructed to find the appellant guilty beyond a reasonable doubt, we are all of the view that the appropriate remedy is an acquittal."

> 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.[47]

As I have explained, at least for pre-*Lavallée* applicants, there was always something new in the sense that the evidence was 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 have preferred, instead, to consider what a hypothetical reasonable trier of fact would do with the evidence before me and in the light of *Lavallée*.

These standards and the corresponding remedies are contained in Table I (Pre-*Lavallée*) and Table II (Post-*Lavallée*) above.

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

(iii) Summary of Minimum Standards of Review for Pre-*Lavallée* and Post-*Lavallée* Convictions

Based on the foregoing, the following is a complete summary of the standards of review I applied to both pre- and post-*Lavallée* convictions, applying, by way of example, self defence Definition 1:

---

[47] Above, note 33, at 33.

Summary of Standards of Review for Pre-*Lavallée* and Post-*Lavallée* Convictions[48]

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 that is reasonably capable of belief and relevant to the applicable essential legal elements of self defence under (d) that is either new or whose significance had not been adequately appreciated at the time of the applicant's conviction;[49]

(d) includes some evidence that is reasonably capable of belief in respect of each of the applicable essential legal elements of self defence, namely, some evidence that

(i) the applicant was unlawfully assaulted by the deceased or under an actual belief that the deceased was unlawfully assaulting her or was going to unlawfully assault her;

(ii) the applicant was under an actual belief that she was at risk of death or serious bodily harm from the deceased;

(iii) the applicant was under an actual belief that it was necessary to cause death or serious bodily harm in order to protect herself;

(iv) each of the applicant's beliefs under (i), (ii) and (iii) was reasonable in the sense that it would not constitute a marked departure from what an ordinary sober person would have believed if that person were placed in the circumstances under which the killing occurred, as the applicant believed them to be, and the circumstances that shall be considered in making that determination are those that may have influenced the applicant's beliefs including

A. the applicant's background, including any past abuse suffered by the applicant;

B. the nature, duration and history of the relationship between the applicant and the deceased, including prior acts of violence or threats on the part of the deceased,

---

[48] This summary contains the elements relevant to self defence Definition 1, set out above, as that was the applicable definition for the majority of applications before me.

[49] Paragraph (c) is applicable only to post-*Lavallée* convictions.

whether directed to the applicant or to others;

C. the age, race, sex and physical characteristics of the deceased and the applicant;

D. the nature and imminence of the force used or threatened by the deceased;

E. the means available to the applicant 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; and

(e) when considered together with all of the other evidence in the case, could/would create a reasonable doubt in the mind of a reasonable trier of fact properly instructed on the law?

(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 was also alert to cases where the evidence disclosed by an application did not meet the substantive standard of review but there was evidence relevant to self defence that was not taken into account on sentencing and could mitigate the sentence imposed, or could affect the particular offence for which the woman was convicted.

In such cases, I considered recommending the granting of 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 saw 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 did not meet the standard for review in relation to the defence of self defence and had been already considered in sentencing the applicant, obviously I did not interfere with the sentence that was imposed. However, if that evidence was 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 could justify a recommendation for sentence remission, sentence commutation or a conditional pardon. Obviously, a recommendation for a full

pardon would be inappropriate in these circumstances because the applicant would still be liable for homicide.

The possibility of self defence evidence raising issues relating to applicants' sentences existed both for pre- and post-*Lavallée* cases. Because the "new" element had to be present before sentencing could be considered, both categories were treated the same. For example, if I concluded that there was 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 considered what, if any, effect it might have on the sentence imposed. Again, as with the substantive standard for post-*Lavallée* cases, I also considered 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 had not been adequately appreciated at the time of sentencing.

Another possibility was that the self defence evidence put forward by the applicant could 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 might not have satisfied me that a reasonable trier of fact would, or even could, have a reasonable doubt about the applicant's liability yet, at the same time, that evidence might indicate that the outcome of the case could or would be 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 was 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 were 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.[50]

There were two kinds of remedies that were appropriate in cases where I was satisfied that the evidence *would* affect 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).[51] The remedy would reflect the fact that the applicant should be serving a sentence for second-

---

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

[51] 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, 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 degree murder.

The second kind of remedy would only apply to applicants convicted of manslaughter. The remedy would involve an actual reduction of the applicant's sentence. For example, if I were presented with "new" self defence evidence that indicated, according to my standard of review, that the applicant would be convicted of manslaughter (and, accordingly, that she was wrongly convicted of murder), 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 could recommend a remedy that would 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 was not a court and that it was 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 have been to refer the matter to the relevant court for disposition.

(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 some 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 relevant to self defence 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.

Glanville Williams states in his *Textbook of Criminal Law*:

> It is well known that a person in a panic may go far beyond what is necessary for his own safety. Suppose he over-reacts to an attack by killing his adversary when this is not justified by the law of self-defence. On principle he is still entitled to the provocation defence, reducing his guilt to manslaughter. A person who reacts to a blow often does so in mixed fear and anger, and there would be no sense in trying to confine the provocation defence strictly to action in anger. Both fear and anger release hormones that prepare the body for violent action, and both tend to result in violence.

> That excessive action in self-defence can reduce murder to manslaughter has been recognised by overseas courts, and in *McInnes*[52] Edmund Davies LJ conceded, what was obvious, that "the facts upon which the plea of self-defence is unsuccessfully sought to be based may nevertheless . . . go to show that [the defendant] acted under provocation." . . . From this it seems to follow that in every case in which the defendant believes that he has to defend himself against a serious attack, but for some reason oversteps the limits of self-defence (because the attack he fears is not sufficiently serious to justify killing in self-defence, or because it is held that reasonableness is in issue and he is unreasonable in fearing an attack, or in fearing an attack of that degree of seriousness, or in not realising that he has some other escape) the circumstances can still amount to provocation and almost certainly will do so.[53]

Lavallée itself could be analyzed on the basis of provocation. As Professor Steusser states:

> Let us turn to the case of Angelique Lavallée. She is a battered woman. She is terrified of her abuser. He says to her, "either you kill me or I'll get you." In her situation, that is no idle threat. She reacts. Whether her reaction is sparked by fear or anger, it matters not, because under either label it is open to a jury to conclude that when she fired she was "deprived of the power of self control."[54]

The recognition of the availability of provocation on facts tendered in support of self defence also appears to have been recognized by the Manitoba Court of Appeal in *Lavallée* which, after granting the Crown's appeal on grounds relating to the admissibility of expert testimony deriving from hearsay, ordered a new trial on manslaughter rather than second

---

[52] [1971] 1 WLR 1600, 3 All ER 295.

[53] Glanville Williams, states in his *Textbook of Criminal Law, 1st ed.* (London, Stevens & Sons, 1978), at 497-8:

[54] Cited in Steusser, above note 5, at 208.

degree murder stating: ". . . it is unlikely that the jury, properly instructed, would have found the accused guilty of second degree murder."[55]

In these circumstances, the recognition of the middle ground of manslaughter between conviction on murder and acquittal on self defence does not amount to the creation of a new partial defence of excessive force.[56] Canadian law is clear that excessive force *per se* deprives the accused of the defence of self defence and does not give rise to a basis for a conviction on the lesser offence of manslaughter.[57] However, use of excessive force in self defence may be the product of a loss of self control in response to a wrongful act or insult of the victim (*e.g.* an assault or threat). If so, it is possible that the accused's conduct fits under the partial defence of provocation and must be analyzed on that basis.

As pointed out by Glanville Williams, it is the possibility of provocation in such circumstances that originally gave rise to an automatic rule in some jurisdictions (provided in statute in some cases) that excessive force in self defence results in a manslaughter conviction.[58] The reason for such a rule is as follows:

> . . . [W]hen the use of moderate force is completely lawful, it is too extreme to regard the actor as a murderer on account of an excess of force. It may be said that he is less culpable than the killer who acts on provocation in anger, because the defender has the right to use some force and it may be hard for

---

[55] *R.* v. *Lavallée* (1988), 65 C.R. (3d) 387 (Man. C.A.), at 400.

[56] Although it is difficult to know the precise basis on which the Manitoba Court of Appeal concluded that the jury probably would not have convicted Lavallée of second degree murder. It may have had in mind such a middle ground or it may have simply recognized that the jury would have looked sympathetically on her circumstances (See Viau, above note 5, at 779).

[57] See *R.* v. *Faid* (1983), 33 C.R. (3d) 1 (S.C.C.); *R.* v. *Kandola* (1993), 80 C.C.C. (3d) 481 (B.C. C.A.).

[58] Above note 53, at 500.

> him to form a cool judgment as to when to stop. The principle should apply equally to killing in cases of attempts to prevent crime or of necessity or duress, where the fatal force is not totally excused in the circumstances but should nevertheless be mitigated.[59]

In effect, Glanville Williams' argument recognizes that the person who uses excessive force is less culpable than a person who kills a person who was not behaving violently. If the victim had not used force against the accused, the accused may not have used force either.

This reality is mitigated by the availability of provocation in cases of excessive force. Of course, provocation has its own statutory criteria. It is not every person who uses excessive force who will have available a defence of provocation. Accordingly, there will be cases where an accused person uses excessive force, is disentitled therefore to the defence of self defence and is also disentitled to the defence of provocation (*e.g.* where an ordinary person in the accused's position would not have lost her powers of self control) and, accordingly, will be convicted of murder.

The point is that there are fact situations where evidence tendered in support of a claim of self defence may also be relevant to provocation. I did encounter a few cases where the applicant's claim of self defence failed *only* because of the use of excessive force arising from a loss of self control. The obvious question, then, was whether I should consider that self defence evidence further, in relation to the defence of provocation.

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

---

[59] *Ibid.*

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 only one 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 in defending herself. 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 did not rule out the possibility of consideration of the defence of provocation under the circumstances I have described. Again, I recognize that this interpretation of my terms of reference was probably unforseen. Nevertheless, my approach did 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.

My terms of reference obliged 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.

My terms of reference requested me to make recommendations "in appropriate cases" for the granting of the royal prerogative of mercy. They did not state that I should make recommendations only where a claim a self defence is made out. As such, I always considered it within my mandate to consider recommending a remedy for a woman who otherwise fell within my terms of reference (*i.e.* who claimed that her offence arose from a fear of death or serious bodily harm from her victim), who was deserving of consideration for the granting of the royal prerogative mercy on purely merciful grounds such as poor health or extreme hardship. Similarly, I did not interpret my mandate as preventing me from recommending a remedy for a woman who otherwise fell within my terms of reference and was 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) permitted me to consider remedies which may be appropriate in circumstances where the woman, whose case otherwise fell within my mandate, was deserving of consideration on grounds other than self defence, including the defence of provocation.

My terms of reference also obliged 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 proceeded 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 was the defence of provocation. I believe it was 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 fell 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.[60]

[60] (1996), 104 C.C.C. (3d) 1 (S.C.C.), at 8-9.

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* built on the analysis in *Lavallée* and permitted 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 fell within my terms of reference, I was applying an analysis similar to that which was approved in *Lavallée* (and carried forward in *Thibert*) 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 was central to the Self Defence Review's mandate, had to 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 *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 these 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 second and new review of the applicants' cases. 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 governing 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 which became relevant to provocation in first 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 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 of Minimum Standards of Review Relating to Sentencing and Remedies

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

Does the applicant advance a claim of self defence that

(a) is supported by new evidence or evidence whose significance was not adequately appreciated;

(b) is supported by evidence reasonably capable of belief;

(c) when considered in light of all of the evidence in the case, could/would affect the offence for which the applicant was convicted or her sentence?

The appropriate remedy where this minimum standard was met, in that I was satisfied that the evidence *could* have an affect on the applicant's sentence or conviction, 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 was more cogent, such that I was satisfied that it *would* have 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.

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

Finally, if I was satisfied that the applicant deserved sympathetic treatment, I could recommend that she be conditionally pardoned (and, thereby, released).

CHAPTER 4 - SUMMARY OF 98 CASES AND RECOMMENDATIONS

The following is a summary of the two broad categories of cases I dealt with in the Self Defence Review. A more detailed summary is not included in order to respect the confidentiality of the information conveyed to me by the applicants. The first group of cases consists of those 7 applicants on each of whose behalf I made a recommendation to the Ministers in relation to the granting of the royal prerogative of mercy. Six recommendations were submitted to the Ministers on February 6, 1997 as part of my *First Interim Report - Women in Custody* and the seventh recommendation was submitted on June 9, 1997 as part of my *Second Interim Report - Women Not in Custody*. The second group is made up of those 91 applicants who could not succeed on my minimum standards of review so that their files with the Review have been closed. Appendix E contains a table of these 91 cases, summarizing the basis, according to the Review's minimum standards of review, on which each applicant's case failed. The summary contained in this chapter simply identifies the number of these applicants falling under each of the potential grounds for failure.

1. Summary of Each of the Cases of the 7 Applicants for Whom a Recommendation Has Been Submitted to the Minister of Justice of Canada and the Solicitor General of Canada:

(a) Cases Where the Applicant's Claim of Self Defence Succeeded

(i) 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 have therefore recommended 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.

(ii) 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 have therefore recommended 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.

(iii) FILE SDR-56

The applicant was convicted in 1991 of manslaughter and sentenced to 3 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 have therefore recommended 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.

(b) Cases Where The Applicant's Claim of Self Defence Failed But The Evidence Relevant to Self Defence Supports A Defence of Provocation

(i) 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 have therefore recommended 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.

(ii) 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 have therefore recommended 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.

(iii) **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 have therefore recommended 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.

(c) Cases Where the Applicant's Claim of Self Defence Failed but the Evidence Relevant to Self Defence Relates to a Legal Issue That Should be Heard by an Appeal Court

(i) 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 have therefore recommended 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.

(d) Summary of Remedies Contained in the 7 Self Defence Review Recommendations and Each Applicant's Present Release Status:

Remedies Recommended by Self Defence Review:

APPLICANT'S PRESENT RELEASE STATUS	PARDONS (where the applicant's claim of self defence has succeeded)	REMISSIONS OF SENTENCE (where the applicant's claim of self defence has failed but the evidence relevant to self defence supports a defence of provocation)	NEW APPEALS (where the applicant's claim of self defence has failed but the evidence relevant to self defence relates to a legal issue that should be heard by an appeal court)
Released - Sentence is Complete	2		
Released - On Parole	1	1	
In Custody - Parole Eligible		2	
In Custody - Parole Ineligible			1
Total	3	3	1

2. Summary of the Cases of the 91 Applicants Who Did Not Succeed in their Claim of Self Defence and for Whom No Other Recommendation Could be Made

- the number of applicants whose appeals remained outstanding so that their review with the SDR could not proceed: **9**

- the number of applicants who withdrew or abandoned their applications: **9**

- 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 claimed they did not kill or participate in anyway in the killing: **18****

  - applicants whose claim of self defence otherwise lacked an air of reality: **19**

  (b) for post-*Lavallée* convictions only, because the applicant's claim of self defence was not supported by "new" evidence or evidence whose significance was not adequately appreciated: **8**

  (c) because the applicant's claim of self defence was not supported by evidence reasonably capable of belief: **6**

  (d) because not all of the applicable essential 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: **10**

- 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: **6**

- 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: **4**

(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: **1**

TOTAL: 91

**NOTE: Of the 18 applicants who claimed that they did not kill or participate in any way in the killing, 15 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; 4 of these applicants' files were transferred to the s.690 process, at the applicant's request.

CHAPTER 5 - REFORM POSSIBILITIES

The *Criminal Code* provisions on self defence are as follows:

Self Defence Against Unprovoked Assault - Extent of Justification.

34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

Self Defence in Case of Aggression

35. Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault on himself by another, may justify the use of force subsequent to the assault if

(a) he uses the force

(i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and

(ii) in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;

> (b) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and
>
> (c) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.

> *Preventing Assault - Extent of Justification*
>
> 37.(1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.
>
> (2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

1. The Current State of the Law of Self Defence

Complaints about the sorry state of Canadian law on self defence abound. In a recent case of the Ontario Court of Appeal on self defence, Moldaver J.A. began his judgment as follows:

> This is yet another case where the court is faced with difficult issues arising out of the complex and confusing self-defence regime in the *Criminal Code*.[61]

In the same judgment, Moldaver J.A. pointed out the difficulties the current law of self defence presents to juries:

---

[61] *R.* v. *Pintar* (1996), 2 C.R. (5th) 151 (Ont. C.A.), at 155.

> It is no secret that many trial judges consider their instructions on the law of self-defence to be little more than a source of bewilderment and confusion to the jury. Regardless of their efforts to be clear, trial judges often report glazed eyes and blank stares on the faces of the jury in the course of their instructions on self-defence. Disheartening as this may be, most judges tend to believe that juries are extremely adept at assessing legitimate cases of self-defence and are therefore likely to come to the right result in spite of the confusion created by the charge. While this may be true, it provides little comfort to an accused who has been convicted in the face of legal instructions so complex and confusing that it may well have diverted the jury's attention away from the real basis upon which the claim to self-defence rests. More importantly, it cannot serve to excuse a charge of this nature from constituting an error of law.[62]

The Supreme Court of Canada has also passed comment on the problems with the current state of the law of self defence. In *R.* v. *McIntosh*, Lamer C.J.C. stated:

> As a preliminary comment, I would observe that ss. 34 and 35 of the *Criminal Code* are highly technical, excessively detailed provisions deserving of much criticism. These provisions overlap, and are internally inconsistent in certain respects. Moreover, their relationship to s. 37 . . . is unclear. It is to be expected that trial judges may encounter difficulties in explaining the provisions to a jury, and that jurors may find them confusing. The case at bar demonstrates this. During counsel's objections to his charge on ss. 34 and 35, the trial judge commented, "Well, it seems to me these sections of the *Criminal Code* are unbelievably confusing." I agree with this observation.
>
> Despite the best efforts of counsel in the case at bar to reconcile ss. 34 and 35 in a coherent manner, I am of the view that any interpretation which attempts to make sense of the provisions will have some undesirable or illogical results. It is clear that legislative action is required to clarify the *Criminal Code*'s self-defence regime.[63]

---

[62] *Ibid.*, at 161, citing *R.* v. *Hebert* (1996), 107 C.C.C. (3d) 42 (S.C.C.).

[63] *R.* v. *McIntosh* (1995), 95 C.C.C. (3d) 481 (S.C.C.), at 489.

Legislative action has also been urged by scholars, law reform bodies, the Bar, a Parliamentary Sub-Committee and the government itself. The nature of the reforms that have been proposed in this area are discussed below. I will comment on the merits of each of these proposals and I will then propose improvements in the law of self defence that flow from the application of that law to the 98 cases I reviewed.

2. Law Reform Proposals Relating to Self Defence

(a) *The Law Reform Commission of Canada*

As part of its extensive work on the General Part of the Criminal Code, the Law Reform Commission of Canada (LRCC or the Commission) made recommendations dealing with reform of the law of self defence in 1987 in its *Report 31, Recodifying Criminal Law*.[64] The Commission proposed a single provision on self defence to replace the several sections currently in the *Criminal Code*. The Commission's recommendation and explanation of its aim were expressed as follows:

> 3(10) *Defence of the Person*
>
> (a) *General Rule*. No one is liable if he acted as he did to protect himself or another person against unlawful force by using such force as was reasonably necessary to avoid the harm or hurt apprehended.

[64] Law Reform Commission of Canada, *Report 31, Recodifying Criminal Law* (Ottawa: LRCC, 1987)

Comment

The paramount value set on life and bodily integrity underlies both the prohibitions against crimes of violence and many of the defences in this chapter, specially that of defence of the person. The present law is contained in sections 34 to 37 and subsection 215(4) of the *Criminal Code* in somewhat complex fashion. Section 34 rules out force meant to kill or cause bodily harm; section 37 states the general rule allowing unlawful force to be repelled by necessary proportionate force; and subsection 215(4) restricts the right of self-defence against illegal arrest.

Clause 3(10) roughly retains the law but sets it out more simply in one rule with one exception. The exception related to situations where force was used by peace officers. The exception is not relevant to this discussion. Clause 3(10)(a) articulates the right to use reasonably necessary force against unlawful force. It provides an objective test and restricts the defence to resisting unlawful force. It does not cover, therefore, resisting lawful force such as lawful arrest or justifiable measures of self-defence. It also omits details about force intended to cause death and about self-defence by an aggressor since these relate really to the question whether the force used is reasonably necessary. On the other hand it does cover the force used to protect anyone and not just force used to protect the accused himself or those under his protection.[65]

Comparing the Commission's approach with the current law, the following observations may be made:

- the Commission's proposal would remove the requirement that self defensive force be employed only in response to an unlawful *assault* and replace it with a requirement that there be unlawful *force*;

[65] *Ibid.*, at pp. 36-7.

- various additional requirements under the current law would be deleted, such as the requirement of a reasonable belief in the risk of grievous bodily harm or death (s. 34(2)(a)), the requirement of a reasonable belief in the need to preserve oneself and the requirement to decline further conflict and retreat (under s. 35(c) dealing with aggression or provocation by the accused);

- the Commission's rule would require that the accused apprehend hurt or harm. This would be a purely subjective requirement (*i.e.* the apprehension need not be reasonable);[66]

- the degree of force that would be permitted under the Commission's provision would be force that was "reasonably necessary" rather than "no more than is necessary" (as is usually the case under ss. 34(1) and 37).

Dealing with each of these observations in turn, I would preserve the requirement that self defensive force be restricted to circumstances where the person is responding to an unlawful *assault*. Use of the word "assault" brings into play the definition of assault in s.2 of the *Criminal Code* which defines the term so as to include *threatened* force, as well as actual force. There may well be situations where it would be justified for a person to respond to a threat of force with force. Indeed, this is recognized in the current law in cases such as *Lavallée* and *Pétel*.[67] The Commission's use of the term unlawful force could be interpreted as permitting use of self defensive force only where actual, rather than threatened, force is involved.

---

[66] This is made clear in another proposal of the Commission dealing with "Mistaken Belief as to Defence": "3(17) (a) General Rule. No one is liable if on the facts as he believed them he would have had a defence under clauses 3(1) or 3(8) to 3(16)." *Ibid.*, at pp: 41-2.

[67] Above, notes 4 and 9.

I agree with the Commission's effort to simplify the current law (especially ss. 34(2) and 35) by removing the requirement of a reasonable belief in the risk of grievous bodily harm or death, the requirement of a reasonable belief in the need to preserve oneself and (in the case of s. 35) the duty to decline further conflict and retreat from the scene of the altercation. This would, in effect, do away with a special rule of self defence in situations where the accused was the aggressor. It would appear that this is the ultimate effect of the cases of *R. v. McIntosh*[68] and *R. v. Pintar*[69] in any case. These stipulations complicate the law of self defence significantly. In their favour, the first two requirements, when applied properly, force an inquiry into the accused's mental state at the time he or she employed force and into the reasonableness of the accused's beliefs. As such, they demand that proper account be taken of the accused's perspective. The reasonableness requirement, as interpreted in *Lavallée* must also be applied in such a way as to take account of the accused's background and circumstances. In my view, however, the current formulation of self defence in ss. 34(2) and 35 is unduly complex. The various requirements of those provisions should be replaced by a single general standard governing the use of force for self protection. The subjective and objective aspects of that standard can be included without creating the kind of complexity that currently exists in the *Code*.

The Commission recommended that there be a subjective requirement that the accused apprehend hurt or harm. As stated above, in my view there should be a requirement of an assault, either in terms of an actual application of force or a threat. The degree of harm the accused anticipates from that assault is an issue related to the reasonableness of using force in response and the degree of force employed. In effect, the Commission's approach would replace the stipulations in ss. 34(2) and 35 described above with a requirement of apprehended hurt or harm. I believe this would complicate the law unnecessarily. The

---

[68] Above, note 63.

[69] Above, note 61.

requirement of an assault and an overall reasonableness standard governing the use of self defensive force would be sufficient.

The standard that the Commission established to govern resort to self defensive force is one of reasonable necessity. In effect, this is a softening of the proportionality role in ss. 34(1) and 37. However, this standard lacks the combined subjective/objective characteristic of ss. 34(2) and 35. As I explain below, I have found that this combined approach establishes an appropriate and fair standard by which to assess whether resort to force is justified for purposes of self-protection. It also permits, indeed encourages, the kind of analysis set out in *Lavallée*. For those reasons, I favour the current approach in ss. 34(2) and 35 over the Commission's objective standard.

(b) *The Canadian Bar Association*

Following on the work of the Law Reform Commission, a Task Force of the Canadian Bar Association (CBA) produced a report dealing with reform of the General Part of the *Criminal Code*.[70] The Report dealt extensively with the law of self defence and made the following proposals and comments:

> *Defence of the Person*
>
> 12.(1) Every person is justified in using, in self-defence or in the defence of another, such force as, in the circumstances as that person believes them to be, it is reasonable to use.

[70] Report of the Canadian Bar Association Criminal Codification Task Force, "Principles of Criminal Liability - Proposals for a New General Part of the *Criminal Code of Canada*" (1992).

Excessive Force

(2) A person who uses excessive force in self-defence or in the defence of another and thereby causes the death of another human being is not guilty of murder, but is guilty of manslaughter.[71]

Shortcomings of the present law

There are numerous flaws in the present statutory formulation.

First, it is too complex; section 35 in particular is almost incomprehensible. Citizens cannot hope to understand the law, or their rights and duties. A review of court decisions discloses that judges routinely misdirect juries on the effect of these provisions, and even properly instructed juries will find the charge bewildering.

Second, several provisions appear to conflict with each other. For example, under section 37 a person can only use proportionate force to prevent the repetition of an assault, whereas under s. 34(2) a person is justified in causing death if he or she reasonably believes that such force is necessary to preserve that person's life.

Third, sections 26 and 37(2) appear to say much the same thing.

Fourth, it is not necessary to distinguish between assaults on an accused which are provoked and not provoked.

Fifth, it is not necessary to distinguish between intending and not intending to cause death or grievous bodily harm, as the accused's conduct will be measured against whether he or she used reasonable force.

Sixth, section 37(1) is unduly restrictive in authorizing the use of force in the defence of a third person only if that person is under the protection of the accused.[72]

---

[71] *Ibid.*, at 71.

[72] *Ibid.*, at 75.

The noteworthy features of the CBA Task Force proposal on self defence are the following:

- the Task Force would not require either an assault on the part of the victim or the use of unlawful force. A person would be entitled simply to use force when it would be reasonable to do so;

- the approach of the Task Force is clearly subjective. The reasonableness of the force used would be determined only within the circumstances as the accused believed them to be;

- as with the LRCC proposal, the CBA Task Force would remove certain requirements in the existing law, such as the requirement of a reasonable belief in the risk of grievous bodily harm or death (s. 34(2)(a)), the requirement of a reasonable belief in the need to preserve oneself and the requirement to decline further conflict and retreat (under s. 35(c) dealing with provocation by the accused);

- the overall standard for the use of force would be one of reasonableness (rather than necessity as in s. 34(1) or reasonable belief in necessity as in s. 34(2));

- the Task Force would create a new partial defence of excessive force in self defence that would reduce a murder charge to manslaughter.

By and large, I agree with all six of the CBA Task Force's comments on the current law. My sole reservation relates to the sixth comment. I agree that the words "under the protection of" the accused in s.37 appear to be unduly restrictive. It may be, however, that there is a need to restrict somewhat the authority to intervene to protect a third person. The

CBA Task Force would remove entirely the qualifying words in the current *Code*. Having encountered very few cases in my review that brought this aspect of s. 37 into issue, I reserve judgment on whether the CBA Task Force's approach to this issue is appropriate. However, I do have some disagreement with its re-formulation of the law of self defence.

In my view and from my experience on the Self Defence Review, there is a need to preserve the requirement of an assault preceding the use of self defensive force. While the term assault should be interpreted broadly, as it is under the current law, to include threats and reasonable beliefs that an assault is forthcoming, nevertheless, it is useful to preserve this requirement in order that there be a particular and concrete basis for resorting to self defensive force. I have encountered cases in which the accused was fearful of the victim but only in a general way. They feared that their victims might well assault them sometime in the future. To my mind, this kind of general fear should not justify the use of pre-emptive force. It appears that the CBA Task Force would deal with this issue under the general standard of reasonableness. I would prefer, however, that the requirement of an assault be express so that a discussion of the reasonableness of using force in such circumstances may be avoided.

Like the CBA Task Force, I believe that reasonableness should be determined in the context of the circumstances as the accused person believed them to be. The overall reasonableness standard helps ensure that unreasonable mistakes on the accused's part will not sustain a successful claim of self defence. As will be seen below, I have attempted to make this clear in my proposed provision on self defence.

The CBA Task Force would remove certain requirements that one currently finds in ss. 34(2) and 35, taking the same approach as the Law Reform Commission of Canada. As I stated above, I concur with that approach.

The Task Force's overall standard is one of reasonableness. I agree that this is the appropriate standard, so long as adequate account is taken of the accused's subjective perception of the circumstances and the reasonableness standard is informed by factors specific to the accused.

I am sympathetic to the Task Force's recommendation that excessive force in self defence should result in a conviction for manslaughter rather than murder. In such cases, the accused would have been justified in using *some* force but, whether as a result of anger or an unreasonable error of judgment, went too far. In my experience during the Review, I encountered such cases. As it happens, in three cases, there was self defence evidence that supported a defence of provocation and the excessive use of force was the product of a loss of self control. Recognition of the defence of provocation and, accordingly, a conviction for manslaughter rather than murder is an appropriate result in at least some of the cases in which excessive force has been used in self defence. In my view, the remaining cases should be addressed by way of sentence, about which I will have more to say below.

(c) *The Parliamentary Sub-Committee on the General Part*

In order to accelerate reform of the General Part of the *Criminal Code*, a Parliamentary Sub-Committee was asked by the Justice Minister of the time (Hon. Kim Campbell) to study the proposals made by the Law Reform Commission and make recommendations that could form the basis of new legislation. The Sub-Committee focussed on the areas of the General Part that were most controversial at the time. Its report[73] dealt only briefly with self defence:

---

[73] Report of the Sub-Committee on the Recodification of the General Part of the Criminal Code of the Standing Committee on Justice and the Solicitor General, "First Principles: Recodifying the General Part of the Criminal Code of Canada" (Chairperson: Blaine Thacker, M.P., Q.C.) (Ottawa: Queen's Printer, 1993).

> Both the CBA Task Force and the Law Reform Commission have made recommendations that would simplify considerably the present law. The Sub-Committee supports these efforts to simplify the existing law of self-defence so as to permit the use of reasonable force. It prefers the formulation of the CBA Task Force in that it makes express the subjective and objective elements of the defence. The Law Reform Commission's proposal, in conjunction with its recommendation on mistaken belief as to a defence, is similar but more difficult to understand and apply.
>
> The CBA Task Force also proposed creation of a defence of excessive force in self-defence which would reduce murder to manslaughter. The Sub-Committee does not support creation of the defence of excessive force. In its view, there is both sufficient elasticity in the concept of reasonable force in self-defence and strictness in the *mens rea* for murder that such a defence is unnecessary.[74]

I simply note that the Sub-Committee endorsed the CBA Task Force's approach in setting out clearly the subjective and objective elements of self defence. As I stated above, this is the approach I favour as well.

(d) *The Government White Paper and Consultation Paper*

The Government acted quickly on the Report of the Parliamentary Sub-Committee and issued a White Paper on the General Part in the form of a draft bill amending the *Criminal Code*.[75] The White Paper contained the following draft provisions on self defence:

> *Defence of the person*
>
> 37.(1) A person is not guilty of an offence to the extent that the person acts in self-defence or in defence of another person.

---

[74] *Ibid.*, at 71-2.

[75] "Proposals to amend the Criminal Code (general principles)", June 28, 1993.

Scope of the defence

(2) A person acts in self-defence or in defence of another person if, in the circumstances as the person believes them to be,

(a) the person's acts are necessary for the defence of that person or the other person, as the case may be, against force or threatened force;

(b) the force is or would be unlawful; and

(c) the person's acts are reasonable and are proportionate to the harm that the person seeks to avoid.

The proposed formulation of self defence in the White Paper is obviously more complex than those put forward by the Law Reform Commission and the CBA Task Force. The effect of this provision would be as follows:

- it would introduce a requirement of unlawful force or threatened force on the part of the victim (rather than an assault as under the current law);[76]

- the approach would have a clear subjective aspect. The necessity to use force would be determined in the circumstances as the accused believed them to be. However, it is unclear whether the matter of necessity would be determined subjectively or objectively;

- the standard applicable to the degree of force permitted would be one of reasonableness and proportionality (rather than necessity as under s. 34(1)).

[76] The LRCC recommendation on self defence was similar in this respect.

In a subsequent consultation paper, alternative formulations of the subjective aspect of self defence (and other defences) were put forward by the Justice Department.[77] The following excerpt explains the issue on which the Department was seeking public input:

> *The Subjective Element of Defences*
>
> The definition of defences proposed in the White Paper generally takes into account the accused's perception of the circumstances in determining whether the accused's conduct gives rise to a defence. This approach is in keeping with the proposals of the Law Reform Commission, the CBA Task Force and the Parliamentary Sub-Committee. For example, for the defence of self-defence (s. 37), the White Paper states that a person acts in self-defence if, "in the circumstances as the person believes them to be", the person's acts are necessary to repel unlawful force and are reasonable and proportionate to the perceived harm. A similar approach can be seen in relation to the defence of defence of property (s. 38(1)) and the defences of duress of circumstances (s. 36(2)) and duress by threats (s. 36(3)). To counterbalance this purely subjective aspect, limitations of reasonableness and proportionality have been incorporated into the White Paper's definitions of defences.
>
> This approach gives greater emphasis to the accused's point of view than is the case under the existing law. For example, in relation to self-defence under s. 34(2) of the current *Criminal Code*, the issue is whether the accused's apprehension of death or bodily harm was reasonable. As the Supreme Court of Canada decided in *R.* v. *Lavallée*, personal characteristics of the accused are relevant to this question. Still, the accused is entitled to the defence only if his or her perceptions are found to be reasonable.

[77] Department of Justice and James W. O'Reilly, "Toward a New General Part of the Criminal Code of Canada - Details on Reform Options" (1994)

Options in Relation to the Subjective Element of Defences

Option 1: Defences set out in the General Part could be founded on the accused's appreciation of the circumstances, subject to the requirement of reasonableness.

Option 2: In place of the accused's subjective awareness of circumstances, defences could be based on the reasonableness of the accused's assessment of circumstances, and reasonableness could be determined in light of the accused's individual characteristics (i.e. the approach in *Lavallée*).

The White Paper's substitution of the requirement of an assault with a requirement of unlawful force or threatened force would not effect any change in the law. It would perhaps make it clearer that force may be used in response to a threat, but this is already contained within the definition of an assault.

The White Paper's provision contains a clear subjective element relating to the circumstances in which the reasonableness of the accused's conduct should be assessed. As I stated above, I agree with this approach. However, the provision is unclear in terms of the subjectivity or objectivity of other elements. To my mind, as mentioned, a mixed subjective/objective approach is most appropriate and it is important that the definition of self defence make clear which elements are subjective and which are objective. The government consultation paper questioned whether the better approach is to combine subjective and objective elements (Option 1) or to set a single, objective standard (Option 2). It is apparent from my comments above that my preference is for the former.

The White Paper's overall standard governing the use of force is one of reasonableness and proportionality. This formulation would appear to create separate standards for the use of force (reasonableness) and for the degree of force used (proportionality). While it may

be useful to separate these issues as the White Paper does, I believe a reasonableness standard would be appropriate to both. In particular, the requirement of proportionality in the degree of force used would constitute a significant constriction of the latitude currently recognized in the *Code* and the case law, even in regard to the current objective limit of necessary force in ss. 34(1) and 37. Accordingly, I favour a standard of reasonableness in relation to the degree of force used.

(e) *The Feminist Review of Criminal Law*

A scholarly study prepared in 1985 contained an analysis of the substantive criminal law from a feminist perspective. On the subject of self defence, the study urged an approach that would take more account of the women's perception of the danger she may be in. This approach was prescient of and perhaps influenced the analysis contained in *Lavallée* some five years later. It is worth quoting at length:

> The law of self defence should require the court to examine the facts from the perspective of the accused. Canadian statute law, while obscure, gives plenty of scope to arguments that require the recognition of her perspective. In essence, the law is that one can defend oneself if one is reasonably in fear and the response is reasonable. Section 37(1) of the *Code* is particularly broad in that it speaks of the prevention of assault rather than simply the response to it. This is particularly important for women as the law should be broad enough to protect the woman who has been subjected to a series of assaults and who acts to prevent a further assault.
>
> . . .
>
> It is, however, extraordinarily difficult to see things from the perspective of a person of another gender, and the law of self-defence shows some signs of being male-oriented. Thus there is no absolute duty to retreat in the face of an attack and there is evidence of a "man's house is his castle" type of reasoning. In contrast there is no evidence of a mechanistic approach to proportionality in the sense that the response has to precisely match the attack. Thus the courts do not insist that a weapon cannot be used against an unarmed attacker.

The law of self-defence should therefore be structured so that the situation must be assessed from the perspective of the accused, and that judges not be permitted to focus on the facts immediately associated with the death to the exclusion of all the facts which legitimate the fear of the accused person.

Two approaches are possible, although neither are entirely satisfactory, in our view:

On the one hand, an entirely subjective test could be adopted. Did this accused believe that she was in danger and that the force she used was necessary? In our view this ought to be adopted as long as subjective tests are retained for other serious crimes. A man ought not to be acquitted of sexual assault when he honestly, but unreasonably, believed the victim was consenting, while a woman is convicted of murder where she honestly, but unreasonably, believed the force she used was necessary. It would still be necessary, however, to identify certain factors which would aid the court in trying to see the facts from the perspective of the accused. This is discussed under the second possibility since whichever question is posed - what did the accused think or was the accused reasonable - the court will need the same assistance in putting itself in her shoes.

The second approach, the existing law, mixes subjective and objective tests as, *e.g.*, in the requirement that the accused must believe (subjective) that he cannot otherwise preserve himself from death or grievous bodily harm, and this belief must be reasonable (objective). These two approaches could be retained with a list of factors to assist the decision-maker. The proposed questions are as follows:

(1) Were there realistic alternative means which the accused could have used to protect herself or other persons?

(2) (if relevant) With respect to (1), had the accused attempted alternatives in the past?

(3) Was she afraid of retaliation if she attempted any alternative?

(4) What was the accused's economic and psychological state?

(5) How did the accused and the person she killed or assaulted compare in size and strength?

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

The purpose of this list is to require the court to assess the context, including the history of violence and the availability of help. It may be that it is extremely difficult for a male judge to decide what is reasonable fear for a woman, but the substantive law can indicate what evidence will be relevant and require that specific issues be addressed. This is not to argue for separate legal standards, but simply for recognition that a woman may reasonably perceive herself to be in danger when a man might not.[78]

This approach is noteworthy for the following reasons:

- the study suggests that the main issue is not whether the standard is a subjective or a mixed subjective/objective one. What is more significant is whether the court takes into account factors that are relevant to the reason why the woman used force in the circumstances;

- the study makes a link between the fault basis for offences (*e.g.* sexual assault) and the standard contained in defences (*e.g.* self defence) and proposes that they should be the same.

The two alternative approaches set out in the Feminist Review are the same as the options contained in the government White Paper. While I favour a mixed subjective/objective approach, I believe the authors of the Feminist Review make an important point - that it is very important, perhaps more important than the actual standard employed, to articulate the factors that should be taken into account in applying the standard. I have found this to be true in my application of the current law in light of *Lavallée* and the definitions of self defence I applied reflect this approach. Similarly, the

[78] Boyle, Bertrand, Lacerte-Lamontagne, Shamai, *A Feminist Review of Criminal Law* (Ottawa: Supply and Services, 1985), at 39-42.

model self defence law I propose contains specific reference to the circumstances that should be considered in determining the reasonableness of the accused's use of force.

The other important point made in the Feminist Review is that there is a logical link between the definition of criminal fault and the standard that should apply to defences. I took the same approach when defining self defence for purposes of my Review. I applied the interpretation given in the case law of the objective fault standard in penal negligence cases[79] to the reasonableness standard in the self defence context. I was satisfied that this approach was appropriate to the analysis of the 98 self defence claims before me and, accordingly, I recommend below that this standard be expressly articulated in a reformed law of self defence.

3. Problems in the Law Disclosed by the Self Defence Review

(a) *Complexity of the Law of Self Defence*

In reviewing many transcripts of charges to the jury in homicide trials, it appeared to me that in a large number of cases the jury must certainly have been totally lost. I concur with the views of Moldaver J.A. and Lamer C.J.C. in their criticisms of the current state of the law of self defence, set out above. The fact that juries may often be confused about the law of self defence is not necessarily a reflection on the adequacy of trial judges' charges. In fact, I have been impressed by the thoroughness and accuracy of many of the charges I have read. The main reason jury charges sometimes miss their mark is because of the state of the law itself. In many of the cases I have reviewed (and the same is probably true in many other homicide cases), there is a confluence of several difficult legal issues:

---

[79] E.g., *R.* v. *Creighton*; *R.* v. *Naglik*; *R.* v. *Gosset*; above note 38. In those cases, negligence (i.e. unreasonableness) is defined as behaviour constituting a marked departure from the conduct of an ordinary person.

- the law of homicide, particularly the distinctions between first degree murder, second degree murder and manslaughter, both in terms of the physical elements and the mental elements;

- the law of provocation;

- the law of intoxication;

- the law of self defence, including self defence where death or grievous bodily harm was not intended, self defence where death or grievous bodily harm was intended, self defence where the accused provoked an assault by the victim or was the initial aggressor, and self defence where the accused acted to protect another person.

In the course of a few hours, judges must explain to juries the intricacies of these issues and their interrelationship and, also, make reference to the evidence that is relevant to them. In the vast majority of cases, jury trials probably achieve a considerable measure of justice in that the jury is well placed and well qualified to determine who is telling the truth and to evaluate the reasonableness of the accused's conduct. Because of this, there is actually a reasonably good chance of justice being done. At the same time, however, it is very difficult to have confidence about the significance, in strictly legal terms, of the jury's verdict in any given case. Does a verdict of guilty of second degree murder mean that the jury rejected evidence of planning and deliberation but accepted evidence of intent to kill or cause serious bodily harm which would likely cause death? Does it mean that the jury rejected evidence of self defence or intoxication? Was second degree a compromise between those jurors who felt that the accused committed first degree murder and those who would have accepted a defence of provocation? The meaning of a verdict of guilty of manslaughter is even more difficult to divine. Does it mean that the accused was provoked or intoxicated, or both? Or, does it mean that the jury rejected both provocation and intoxication but felt that the accused did not intend death? Does it mean that the jury rejected self defence completely? Or, again, was the verdict a compromise between those jurors who would have convicted for murder and those who would have acquitted on the basis of self defence?

Obviously, if the law in these areas were simplified, judges would have an easier time explaining it to juries and juries would, perhaps, understand it better. In turn, it would be easier to draw conclusions from jury verdicts, conclusions which are often necessary for purposes of sentencing. It does not fall within my mandate to recommend reform of all of these areas of the law. However, reform of the law of self defence is clearly within my terms of reference. I propose below a model self defence law that consolidates the current provision of the Code and clarifies the subjective and objective elements of that defence.

(b) *Lack of Guidance*

There are two areas where I believe greater guidance could be given to judges and juries dealing with self defence claims. The first relates to the meaning of reasonableness. As mentioned, I believe this standard should be applied in the same way as the penal negligence standard is interpreted in Canadian law. In effect, this means that reasonable behaviour would be conduct that would not constitute a marked departure from what an ordinary person would do in like circumstances. I believe it would be helpful to make this standard clear by including it expressly in the definition of self defence. It is a standard that I think jurors will understand and be capable of applying readily.

The second area where guidance is needed, in my view, is in relation to the circumstances that should be taken into account in applying the above standard. As mentioned, my approach to the application of both the subjective branch of the defence and the reasonableness standard under the current law, in light of *Lavallée*, involved taking account of the applicant's perspective - looking at the circumstances in which the applicant found herself and considering her background and experience. This permits a fair assessment of whether the applicant was justified in using the force she actually employed,

which is the main objective of a self defence provision. I believe that an express requirement to consider such circumstances should be set out in a reformed law of self defence.

4. A Reformed Law of Self Defence

(a) *Features of a Reformed Law of Self Defence*

In summary, then, a reformed law of self defence should exhibit the following attributes:

1. It should be comprehensive - There is no need for the array of self defence provisions currently set out in the *Code*. They should be combined in a single provision.

2. It should be simple - the various requirements contained in existing provisions (e.g. ss. 34(2) and 35) should be simplified or eliminated where possible.

3. It should be clear - The subjective and objective elements should be clear, as well as the meaning of the objective branch (i.e. the reasonableness requirement) and the factors to be taken into account in determining reasonableness.

The following is a model self defence provision which, I believe, achieves these objectives.

(b) *A Model Self Defence Law*

Self Defence

Defender

(1) In this section, a "defender" is a person who uses force against another person.

General Rule

(2) A defender is not liable for using force against another person if

Subjective Elements

(a) the defender actually believes

(i) the other person is committing or is going to commit an assault, and

(ii) the use of force is necessary for self-protection or the protection of a third person from the assault;

Objective Elements

(b) those beliefs are reasonable; and

(c) the degree of force used is reasonable.

Definition of Reasonableness

(3) The defender's actual beliefs and the degree of force used are reasonable if they do not constitute a marked departure from what an ordinary sober person would have believed or used, as the case may be, if placed in the circumstances as the defender believed them to be.

Determining Reasonableness - Relevant Circumstances

(4) The circumstances that shall be considered in determining reasonableness are those that may have influenced the beliefs and the degree of force used by the defender and may include:

(*a*) the defender's background, including any past abuse suffered by the defender;

(*b*) the nature, duration and history of relationship between the defender and the other person, including prior acts of violence or threats, whether directed to the defender or to others;

(*c*) the age, race, sex and physical characteristics of the defender and the other person;

(*d*) the nature and imminence of the assault; and

(*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.

The basis for this model provision will be apparent from the foregoing discussion. However, some further comment is warranted.

Clause (1) defines the term "defender". Its purpose is simply to permit a clearer identification of the various persons referred to in the remainder of the provision, including the person using force, the victim and third persons.

Clause (2) contains the general rule of self defence. It sets out both the subjective and objective aspects of the rule. In particular, the defender must actually believe that he or she is being or is going to be unlawfully assaulted. An assault would include both actual and threatened force. The defender would also have to believe that the use of force was necessary for self protection or for the protection of another. I believe that this is an appropriate requirement so as to discourage use of force where it is not, strictly speaking, a necessary response to an assault. For example, force used purely for retribution should not constitute self defence.

I have included defence of a third person within the general rule for self defence. It will be noted that I have omitted the words "under the protection of" the defender that currently exist in s. 37 of the *Code*. It strikes me that the current formulation is unduly narrow. However, I encountered few cases that involved alleged protection of third persons and, therefore, my omission of those qualifying words currently found in s. 37 should not be taken as a definitive recommendation for their removal.

Clause (2) also includes a requirement that the degree of force used be reasonable. I believe this is an appropriate standard, one that permits greater flexibility than the current requirement of necessary force (e.g. in s. 34(1) and 37) and the Government White Paper's requirement of strict proportionality.

Clause (3) contains a definition of reasonableness. As mentioned, it derives from the penal negligence standard articulated by the Supreme Court of Canada. I believe it is necessary to make this standard express in the definition of self defence. I also believe that this standard is one that juries will readily understand.

It will be noted that under clause (3), reasonableness is to be interpreted according to the defender's understanding of his or her circumstances. Again, this reflects my view that self defence should contain both subjective and objective elements. The circumstances that are relevant to reasonableness are those that may have had an effect on the defender's appreciation of the jeopardy he or she was in, the need to use force and the degree of force actually employed. It is within that context that the reasonableness standard should, I believe, be applied. The question is whether, in the circumstances facing the defender, the use of force in the measure actually employed by the defender represents a marked departure

from the conduct expected of an ordinary person. I have added the word "sober" in clause (3) to ensure, as under the current law, that the ordinary person is not deemed to be intoxicated[80], even if the defender was.

It will be noted that clause (4) applies only to the determination of reasonableness, not to the assessment of the defender's actual beliefs. Of course, many of the factors in clause (4) will be relevant to the defender's subjective state of mind. However, since clause (2) requires a determination of the defender's *actual* state of mind, I believe it is unnecessary to articulate the factors that should be considered in the course of that analysis. Among the circumstances I have included as relevant to reasonableness are the defender's mental and physical abilities (paragraph 4(e)). I believe that the reasonableness of a person's actions should be determined according to the standard of conduct that the person was actually capable of achieving. As such, the person's mental and physical abilities should be taken into account.

5. Sentencing for Homicide

(a) *The Existing Law*

The sentencing scheme for homicide convictions in Canada is as follows:

Murder

Pursuant to s. 235 of the *Criminal Code*, every one convicted of murder shall be sentenced to life imprisonment. The *Criminal Code* also provides that the life sentence will include a period during which the defendant will not be eligible for parole. A distinction is

[80] *R.* v. *Reilly* (1984), 42 C.R. (3d) 154 (S.C.C.).

made between first-degree and second-degree murder for determination of the parole ineligibility period. For first-degree murder, the parole ineligibility period is 25 years (s. 742(a)). For second-degree murder, the parole ineligibility period is a period of not less than 10 years and no more than 25 years (s. 742(b)). However, a second degree murder conviction will attract a minimum parole ineligibility period of 25 years where the defendant has a prior conviction for murder (s. 742(a.1)). Pursuant to s. 743, where a jury finds an accused guilty of second-degree murder, the trial judge, prior to imposing the period of parole ineligibility, must ask the jury if it has any recommendation to make in this respect. Section 743 indicates the question that the trial judge shall put to the jury:

> *You have found the accused guilty of second degree murder and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the number of years that the accused must serve before the accused is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining whether I should substitute for the ten year period, which the law would otherwise require the accused to serve before the accused is eligible to be considered for release on parole, a number of years that is more than ten but not more than twenty-five.*

Section 745 of the *Criminal Code* provides that a person convicted of murder whose sentence includes a period of parole ineligibility of more than 15 years may make an application to the Chief Justice of the province in which the conviction took place for a reduction in the length of the parole ineligibility period.

Manslaughter

In cases of manslaughter, the sentencing judge has a wide discretion. Section 236 of the *Criminal Code* provides that a person convicted of manslaughter is liable to imprisonment for life. There is no minimum punishment for manslaughter convictions, except in cases where a firearm is used in the commission of the offence. In the latter case, a minimum

term of imprisonment of 4 years must be imposed (s. 236(a)). In all other cases, sentences for manslaughter can range from suspended sentences to imprisonment for life.[81]

(b) *The Problem - The Pressure to Plead Guilty*

I have seen, over the course of my Review, cases where the accused person faced irresistible forces to plead guilty even though there was evidence that she acted in self defence. In some cases, this evidence was very strong.

These irresistible forces are the product of the *Criminal Code*'s mandatory minimum sentences for murder. A woman facing a murder charge risks imposition of a mandatory sentence of life imprisonment with parole eligibility after between 10 and 25 years, as described above. By contrast, a woman who pleads guilty to manslaughter will generally receive a sentence of between three and eight years with eligibility for full parole after serving one-third of her sentence. A woman who killed an abuser and is facing a second-degree murder charge may have the following choices:

1. Go to trial and put forward a claim of self defence.

   This choice risks conviction on the second-degree murder charge and a life sentence if her claim of self defence is unsuccessful. If convicted, she will spend a minimum of 10 years in prison and the

[81] Pursuant to s. 741.2 of the *Criminal Code*, the sentencing court has the power, in certain circumstances, to delay parole for convictions of those offences set out in Schedules I or II to the *Corrections and Conditional Release Act*. Manslaughter is included in Schedule I to that Act. Section 741.2(1) of the *Criminal Code* provides that where a sentence for an offence listed in Schedules I or II to the *Corrections and Conditional Release Act* is of imprisonment for 2 or more years, the sentencing court may order the defendant to serve one half of the sentence or 10 years, whichever is less, before (s)he may be released on full parole.

remainder of her lifetime on parole, subject to limitations on her freedom and supervision.

2. Plead guilty to manslaughter (if the Crown prosecutor agrees to reduce the charge).

   This choice offers the likelihood of a sentence under 10 years' imprisonment. If there is evidence of abuse of the accused by the victim, the sentence will fall to the lower end of the scale. The guilty plea in itself will be taken by the court to be an expression of remorse that will gain the woman a further discount in her sentence. She will be entitled to apply for full parole after one-third of her sentence, so that she may be out in the community in one to three years. She will be on parole only for the remainder of her sentence.

This would obviously be a difficult choice for *any* person accused of second-degree murder to make. Consider, however, the effect that additional factors may have on a woman having to make this choice:

- she has a young family to care for;
- she has been the victim of abuse all her life and, despite her embarrassment and desire to put this behind her, she knows that if she goes to trial she would have to testify publicly about that abuse before a court of law;
- she would also have to tell the court about the abusive behaviour of the deceased in front of the deceased's family and friends;

- she is genuinely remorseful and even though she feels she had to act to defend herself, she has difficulty justifying taking another person's life even to herself.

For a woman in this situation, the forces impelling her to plead guilty are considerable.

Of course, a woman accused of homicide does not usually make the choice to plead guilty alone. Generally, she has the advice of counsel. No defence counsel would advise a client whom he or she believes to be innocent to plead guilty. However, defence counsel will be as aware of the forces that bear on the accused as the accused herself. Counsel is duty bound to explain to the accused the stark choices set out above. Further, in a self defence context, "innocence" is an elusive concept, particularly at the pretrial stage. There are a number of reasons why this is so:

- the complexity of the law of self defence makes it difficult to know whether reliance on the defence is likely to succeed in a particular fact situation;

- there is a paucity of case law on the application of self defence in situations where the accused was the object of abusive behaviour on the part of the victim. This makes it particularly difficult to advise clients on the likelihood of success in raising self defence in these situations;

- there are typically no independent witnesses to verify the accused's claim that she was responding to abusive conduct on the part of the victim. Sometimes, medical or other forensic evidence will support a claim of self defence. Often, such evidence is equivocal as to self defence. As such, a claim of self defence will usually rest heavily on the accused's own testimony and, therefore, on her

> credibility with a jury. It is very difficult, if not impossible, to estimate the potential impact of an accused person's testimony prior to trial.

In this context, through counsel's presentation of the options and the factors to be taken into account, it will be apparent to many accused persons who might have raised a claim of self defence that the better course would be to plead guilty. Indeed, defence counsel may (quite properly, I think, in the circumstances) encourage the accused to do so.

The result of all this is that women accused of murder and whose cases present a justiciable issue of self defence are likely to plead guilty (usually to manslaughter).[82] Their claims of self defence are often not heard by a court, except at sentencing. Even then, the evidence is usually presented in a "sanitized" form. By this, I mean that the evidence is usually presented in such a way that it does not cast doubt on the accused's liability. Any agreed facts, therefore, to the extent they refer to evidence of aggression on the part of the victim, will stop short of describing a scenario consistent with self defence. In effect, the prosecutor and defence counsel sometimes draft agreed facts so as de-emphasize some of the self defence evidence. They do so out of the highest motives: respect for the wishes of the accused, who, for the reasons given above, simply wants to plead guilty. If too much evidence of self defence makes its way into the agreed facts, then there is a risk that the sentencing judge will refuse to allow the accused to plead guilty.

---

[82] See Martha Shaffer, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After *R. v. Lavallée* (1997), 47 Univ. of Toronto L.J. 1, in which the author concludes that of 16 homicides involving battered women as accused persons, 9 resulted in guilty pleas to manslaughter (at 18).

This situation causes me serious concern. It means that women[83] may be pleading guilty to manslaughter when they are legally innocent because they acted in self defence. If these women were pleading guilty as a result of a true assessment of the strength of the defence evidence and their genuine desire to acknowledge legal responsibility for their crimes, I would obviously not have the same concern. It is because these guilty pleas are influenced in whole or in part by forces extraneous to the merits of the cases that they are worrisome.

I recognize that there is almost always some pressure on an accused person to plead guilty. Normally, this pressure derives from the unavoidable stigma and stress that comes from being subject to a criminal charge. There is also a general pressure imposed on accused persons that is similar to that which applies in homicide cases in that it derives from the fear that the sentence imposed after a trial will be more severe than the sentence forming part of a plea agreement. However, in these cases, the decision to plead guilty will be the product primarily of a true assessment of the strength of the defence evidence. This is not so in homicide cases. Homicide cases are entirely different because of the extraordinary forces, described above, that bear on the accused person. The risks of going to trial are far higher than is true for other offences.

I am concerned, therefore, that there may be persons pleading guilty to manslaughter in circumstances where there is a strong foundation for a defence such as self defence. My concern is particularly acute in relation to *women* accused of homicide because of the special circumstances (*e.g.* family responsibilities) they so often face and I fear that women who would have been acquitted had they gone to trial are, instead, serving sentences for manslaughter. I can be sure about one such case among the 98 applications I reviewed and that case formed the basis of the sole recommendation arising from the second phase of my

[83] Obviously, men in the same situation may be subject to similar pressures.

review. There, the applicant had pleaded guilty to manslaughter in the face of strong evidence of self defence. I did come across other similar cases, but I was not able to help those other women who had pleaded guilty because their cases did not meet my standard of review.[84]

This problem is a very serious one. Miscarriages of justice may be occurring as a result of systemic forces. In addition, there is little opportunity for evolution in the law of self defence in a situation where many or most homicide changes result in guilty pleas. This may mean that implementation of cases like *Lavallée* is delayed or frustrated by the dynamics I have described.[85] Below, I propose four ways in which this problem should be addressed. The first two relate to the charging process; the third deals with plea discussions; and the fourth addresses the problem more directly by proposing changes to our sentencing laws for murder.

(c) *Charge Screening*

Charge screening is a procedure by which charges contemplated or laid by police are subsequently reviewed by prosecutors in order to ensure that the charges conform with the available evidence. In the situation where prosecutors are consulted by the police prior to charges being laid, the process is referred to as pre-charge screening. When prosecutors are consulted after police have laid charges, the process is called post-charge screening. In both cases, the purpose of charge screening is to improve the quality of charges out of a

[84] For example, on the basis that there was no new evidence (in post-*Lavallée* cases).

[85] See Shaffer, above note 82, who observes that "it seems clear that so far, *Lavallée* has not meant that women charged with killing their batterers are securing acquittals in great numbers." (at 19). She found that there were acquittals in 3 of the 16 post-Lavallée cases she could find.

recognition that it is unfair for a person to be subject to a charge that is not borne out by the evidence.

Three Canadian jurisdictions employ a system of pre-charge screening. In Québec, the obligation of provincial prosecutors to review charges is expressly provided in the provincial legislation that governs them. The statute provides:

> 4. In addition to the duties and functions which the Attorney General determines, every prosecutor shall fulfil, under the authority of the former, the following duties and powers:
>
> (a) he shall examine the proceedings and documents relating to offences against the Criminal Code and, where necessary, authorize prosecutions against the offenders except in cases where the previous authorization of the Attorney General is required, cause the evidence submitted to be completed, and see to the summoning of witnesses and to the production of pertinent documents.[86]

Similarly, in British Columbia, pre-charge screening has been given a statutory footing. The *Crown Counsel Act*[87] provides that prosecutors have authority to "examine all relevant information and documents and, following the examination, to approve for prosecution any offence or offences that he or she considers appropriate." I note that the language of the statute does not make pre-charge screening mandatory as is the case in Quebec.

New Brunswick has adopted a system of mandatory pre-charge screening, but as a matter of policy rather than legislation. The New Brunswick *Public Prosecutions Operations Manual* provides:

---

[86] *An Act Respecting Attorney General's Prosecutors*, R.S.Q. 1977, c. S-35.

[87] R.S.B.C. c. 84.5, s. 4(3)(a).

> 1. Crown prosecutors are to scrutinize and give their consent to all charges before they are laid by the police. In routine cases this may be a matter of form only, but for criminal offences the major role of the Crown Prosecutor is to determine whether a criminal offence is disclosed by the police investigation, whether a sufficient case is made out, and whether a prosecution is justified in the circumstances. In order to make this decision the Crown prosecutor must be provided with a full police report or court brief on the case although local policy may vary this requirement for minor charges.[88]

The issue of charge screening has been examined in a number of recent studies. The Law Reform Commission of Canada recommended in 1990 that police should always obtain the advice of prosecutors on the validity and appropriateness of the charges contemplated.[89] This would ensure involvement of prosecutors in the charging decision without requiring their consent for charges to be laid.

In the same year, a public inquiry in British Columbia examined the process of pre-charge screening in that province and concluded that it was "a principled and reasonable one which should not be changed."[90] The Inquiry's discussion of the merits of a pre-charge screening system included the following advantages:

---

[88] New Brunswick Public Prosecutions, *Operations Manual* (Chapter III - Initiating Prosecutions), April 6, 1987, at 130-1.

[89] Law Reform Commission of Canada, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (Ottawa: Law Reform Commission of Canada, 1990), at 73.

[90] Discretion to Prosecute Inquiry, *Commissioner's Report (Volume One - Report and Recommendations)* (Stephen Owen, Inquiry Commissioner) (November 1990), at 102.

a. It is more fair to the accused.

b. It ensures that only those cases where there is a high likelihood of conviction proceed.

c. It is more efficient.

d. It is more objective.[91]

In Ontario, the matter of charge screening was thoroughly examined by the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (the Martin Committee).[92] The Committee recommended that Ontario adopt a system of *post*-charge screening. It preferred post-charge screening to the pre-charge screening processes in other jurisdictions on the grounds that the police have historically had the role of deciding whether charges should be laid and the Attorney General has had the responsibility of deciding whether those charges should be prosecuted. At the same time, the Committee felt that the tradition of police consultation with prosecutors prior to charges being laid should continue when warranted.[93]

The Martin Committee recommendation was adopted in Ontario, making it, I believe, the only jurisdiction in Canada with a requirement of post-charge screening. The Ontario *Crown Policy Manual* now provides:

---

[91] *Ibid.*, at 25-7.

[92] See *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Hon. G. Arthur Martin, Chair) (Toronto: Queen's Printer, 1993).

[93] *Ibid.*, at 120-7.

> 1.(a) Every charge must be screened by Crown counsel as soon as practicable after the charge arrives at the Crown's office and prior to setting a date for preliminary hearing or trial.
>
> (b) Screening is the on-going review by the Crown Attorney's office of every charge in the criminal justice system to determine:
>
> (i) whether there is a reasonable prospect of conviction;
>
> (ii) whether it is in the public interest to discontinue a prosecution even though there is a reasonable prospect of conviction;
>
> (iii) whether the proper charge has been laid.[94]

In my view, the matter of charge screening is extremely important in homicide situations. As I described above, a person accused of murder will often feel extraordinary pressure to plead guilty even where there is evidence that could support an exculpatory defence such as self defence. Accordingly, once a charge of murder is laid, these pressures will be brought to bear on the accused. It is extremely important, therefore, that the charge be borne out by the evidence. Otherwise, the accused person may succumb to the pressure and plead guilty to manslaughter when there is a serious possibility that he or she would have been acquitted if the matter had gone to trial.

The complexity of the law of homicide is such that early involvement of prosecutors, by way of pre-charge screening, should be required in *all* homicide cases. Post-charge screening would not be effective. To take an example, I was informed by a defence counsel that it is the common practice of police in his jurisdiction to charge first-degree murder in all cases of homicide. The charge that is truly merited by the evidence is not determined

---

[94] Ministry of the Attorney General, *Crown Policy Manual* (Policy # C.S.-1), January 15, 1994, updated February 10, 1995.

until the conclusion of the preliminary inquiry. One can imagine the fear that would be instilled in a person charged with first degree murder who is in custody awaiting a preliminary inquiry. One can also imagine the willingness of that person to plead guilty if there was an indication from the prosecutor that he or she would be willing to entertain plea discussions in relation to manslaughter.

In other circumstances, not involving homicide, the laying of a charge that is more serious than is warranted by the evidence does not create the same problems. It is only in the case of homicide offences, with the enormous gap between the mandatory sentences for murder and the discretionary sentence for manslaughter, that the risk of injustice is so great.

Accordingly, I recommend that pre-charge screening should occur in all homicide cases:

Recommendation 1:

In all homicide cases, police should be required to consult with a prosecutor to ensure that the charge to be laid against the accused (*i.e.* first-degree murder, second degree murder or manslaughter) is appropriate in the circumstances.

(d) *Guidelines for Prosecutors*

To guide the exercise of prosecutorial discretion, most Canadian jurisdictions have formulated prosecutorial guidelines. These guidelines cover a broad range of matters such as the duties and responsibilities of Crown counsel, the discretion to prosecute and the conduct of plea discussions. In those jurisdictions where charge screening exists, prosecutorial guidelines govern the decision whether charges should go forward.

I am concerned about the exercise of prosecutorial discretion in homicide cases because of the problem I have described above - the pressures on a person charged with murder to plead guilty to manslaughter. Obviously, it is important that prosecutorial discretion be exercised appropriately to ensure that murder charges are always supported by the available evidence. There are two aspects of prosecutorial discretion I would like to examine. The first relates to the decision to prosecute. The second relates to the conduct of plea discussions.

The Decision to Prosecute

There are two aspects to the exercise of this form of prosecutorial discretion - the decision whether to prosecute. First, there must be sufficient evidence supporting the charge. The actual test that is applied varies somewhat from jurisdiction to jurisdiction. As mentioned, in Ontario, the test is whether there is a "reasonable prospect of conviction". This is the threshold that had been recommended by the Martin Committee.[95] The same test applies in New Brunswick[96] and at the federal level.[97] In Nova Scotia, the wording is slightly different - the issue is whether there is a "reasonable chance that a conviction will result if the case proceeds to trial."[98] In British Columbia, on the other hand, the threshold

---

[95] Above note 92, Appendix J, Recommendation 1, at 461.

[96] Above note 88, Chapter II - Guidelines for Initiating Prosecutions, at 120-2.

[97] Minister of Justice and Attorney General of Canada, *Crown Counsel Policy Manual*, (January 1993).

[98] See Directive of the Director of Public Prosecutions Regarding the Exercise of Prosecutorial Discretion.

is whether there is a "substantial likelihood of conviction."[99] The latter appears to be a more rigorous standard.

The second aspect of prosecutorial discretion in the context of the decision to prosecute is the question whether a prosecution is in the public interest.[100] This consideration only arises after the first threshold has been surpassed. In other words, if there is sufficient evidence to justify a prosecution one must then consider whether the public interest justifies it. If there is not sufficient evidence, the charge should simply not go forward. There is a broad range of factors that may be taken into account in assessing the public interest in a prosecution. By way of example, the factors addressed in the federal Crown Counsel Policy Manual are included in Appendix F of this Report.

In homicide matters, more so than for other offences, it is essential that the charge laid against the accused be borne out by the evidence. Because there is a choice of charges in homicide situations - first-degree murder, second-degree murder and manslaughter - prosecutorial discretion plays a large part in determining the charges that go forward and the outcome of the case. For example, once a prosecutor determines that the appropriate charge is second-degree murder, the likelihood that the accused person will want to plead guilty to manslaughter increases significantly. If the charge laid is first-degree murder, the person will feel pressure to plead guilty to second degree murder or manslaughter. It is important, therefore, that such charges be justified by the evidence. Otherwise, a conviction may result from the pressures imposed on the accused person rather than the strength of the evidence.

---

[99] Ministry of Attorney General, *Crown Counsel Policy Manual*, Resolution Discussions and Stays of Proceedings, May 1, 1997. [Note: I am informed that the B.C. guidelines are currently under review.]

[100] See, *e.g.*, the federal prosecution guidelines set out in Appendix F: *Justice Canada - Crown Counsel Policy Manual.*

In determining whether there is sufficient evidence on a particular charge to justify its prosecution, the prosecutor must obviously take account of evidence that supports any affirmative defence, as well as evidence supporting the essential elements of the offence itself. In order to decide whether there is a reasonable prospect of conviction, for example, the prosecutor would have to consider the evidence that may support a claim of self defence. This is explicit in some of the prosecutorial guidelines I have reviewed. For example, the federal guidelines state: "Crown counsel should also consider any defences that are plainly open to or have been indicated by the accused, and any other factors which could affect the prospect of a conviction."[101] The Ontario guidelines instruct prosecutors to take into account "any defences that should reasonably be known or that have come to the attention of the Crown."[102] The British Columbia guidelines require prosecutors to consider "viable, not speculative, defences."[103] On the other hand, the guidelines of Nova Scotia and New Brunswick make no express reference to defence evidence. In New Brunswick, the guidelines merely state that prosecutors should consider "the availability and admissibility of evidence, the credibility of witnesses and their likely impression on a judge or jury; the admissibility of any confessions, the reliability and admissibility of any identification; and generally will draw on experience to evaluate how strong the case is likely to be when presented in court."[104] The Nova Scotia guidelines state: "Crown Attorneys will be guided by the principle that a prosecution should only go forward where there is evidence available on each essential element of the offence charged and the Crown Attorney believes there is a reasonable chance that a conviction will result..."[105]

---

[101] See Appendix F of this Paper.

[102] Above, note 94, s. 2(b)(iv).

[103] Above, note 99.

[104] Above, note 88.

[105] Above, note 98.

In my view, at least in homicides, the prosecutor should review the totality of the evidence available to him or her in determining the appropriate charge, if any, that should be laid against the accused. A consideration of the evidence supporting self defence, for example, may persuade the prosecutor that there is no reasonable prospect of conviction for any homicide offence. If the prosecutor only reviews the evidence relevant to the essential elements of the offence, he or she may decide that the appropriate charge against a person responsible for a killing is first-degree or second-degree murder. At that point, the accused who acted in self defence may decide to plead guilty to manslaughter notwithstanding the possibility of an acquittal on the charge if the matter went to trial.

In my view, the obligation to consider defence evidence must be express and assiduously respected. There may be a natural inclination for prosecutors to discount the significance of defence evidence and this should be countered by explicit guidelines to the contrary. One could understand, for example, the point of view of a prosecutor who was satisfied that there was evidence supporting the essential elements of a murder charge and, with respect to evidence of self defence, concluded that the significance of that evidence was for the jury to decide. In other words, satisfied that the prosecution could mount evidence to support a murder charge, the prosecutor may be inclined simply to leave the matter of a possible defence for the court to consider.

As understandable as such an approach may be and as appropriate as it may be for other offences, this would be a worrisome tactic in homicide matters. Once the decision was taken to proceed on a murder charge, the extraordinary pressures that a person accused of murder faces would surface and could well influence the person to plead guilty to manslaughter. The irony is that if the prosecutor decides that the best course is to prosecute the case at trial where all of the evidence can be put before a jury, it is unlikely the jury will ever hear it because the accused person will probably plead guilty.

I realize that the prosecutor can only exercise his or her discretion on the evidence available. It may be that at the pre-charge stage, the only evidence available is evidence that supports a murder charge. The accused may have declined to give a statement explaining her conduct. The forensic evidence may be equivocal or not yet available. Information about the violent nature of the victim may not have been received. Still, it is the prosecutor's obligation to review the evidence on an ongoing basis to ensure that the threshold test of sufficient evidence in support of the charge is always met. If information comes to light that suggests that there is no longer a reasonable prospect of conviction, the prosecutor has an obligation to withdraw the charge.

Accordingly, I recommend the following:

Recommendation 2:

Prosecutorial guidelines should require prosecutors to consider *all* of the evidence available to them, including evidence that may support a defence such as self defence, in determining whether there is sufficient evidence to justify or continue a prosecution for homicide.

Plea Discussions

In deciding whether to enter plea discussions, prosecutors should be guided by the same considerations that apply to the decision whether to prosecute. In other words, if the basis for a prosecution is not present, then the prosecutor should neither pursue nor entertain plea resolution discussions. The Martin Committee Report states:

> [T]he factors relevant to the decision to either hold a trial or resolve a case through resolution discussions, are similar in substance to the public interest factors relevant to continuing or discontinuing a prosecution . . . Those factors that are not to be taken into account for purposes of charge screening, for example, the fortunes of the political party in power, should likewise not play any role in resolution discussions. Thus, the chapter on charge screening is, in many respects, instructive on the issue of resolution discussions, remembering, of course, that many decisions in the conduct of resolution discussions are of a more limited and procedural nature, such as agreements on continuity of exhibits, or the need to call particular witnesses.[106]

The federal prosecution guidelines are explicit in requiring that the guidelines on the decision to prosecute be respected in the plea resolution process:

> Crown counsel may initiate plea and sentence negotiations or may respond to them if initiated by the defence providing, in all instances, Crown counsel does not proceed with a plea of guilty if there is reason to believe that the charge approval standard described in Chapter II-1, "The Decision to Prosecute", has not been met. In addition, counsel's approach to plea and sentence negotiations must be based on several important principles: fairness, openness, accuracy, and the interest of the public in the effective and consistent enforcement of the criminal law.[107]

This means, for example, that the threshold test governing the sufficiency of evidence must be respected in deciding whether to accept a plea. This is also provided in the British Columbia guidelines, which provide that prosecutors should "accept a plea of guilty only to

---

[106] Above, note 92, at 305.

[107] *Crown Counsel Policy Manual*, at II-6-1.

charges which meet the charge approval standard,"[108] as well as in the Ontario guidelines.[109]

As mentioned above, when a person charged with second-degree murder pleads guilty to manslaughter and there is some evidence that the person may have acted in self defence, the facts presented on sentencing stop short, necessarily, of describing the accused's acts as defensive. In its 1993 Report, the Martin Committee stated that the proposition that "Crown counsel should not accept a plea of guilty to a charge when he or she knows that the accused is innocent" was "self evident."[110] The same principle applies, according to the Committee, when the accused *claims* to be innocent.[111] The Committee stated:

> Departing from this rule, under any circumstances, contravenes a number of principles that are fundamental to the criminal justice system and its repute in the eyes of the community, as discussed in the Committee's Report. First and foremost, accepting a plea of guilty from an innocent person does not fulfil some of the most basic aims of the criminal justice process: it does not identify and denounce an offender; and it does not permit an offender to be either punished or rehabilitated. Further, accepting such a plea contravenes counsel's professional status as officer of the Court, and violates the duty of uncompromising integrity; it resembles an attempt to perpetrate a fraud upon the Court. Such a practice would also sacrifice Crown counsel's duty to act at all times as an impartial minister of justice, supplanting it with an ethic of achieving a conviction at any cost.[112]

---

[108] Above, note 99.

[109] Above, note 94, Policy # R-1.

[110] Above, note 92, at 291.

[111] *Ibid.*, footnote 50.

[112] *Ibid.*, at 291.

The Committee recognized that accused persons sometimes have compelling reasons to plead guilty, even where they claim innocence. They may be protecting another person, for example. Some jurisdictions[113] permit guilty pleas in such circumstances on the grounds that the right to a trial and the right to be presumed innocent are rights that can be waived by an accused person. The *Alford* case in the United States is most similar to the kind of situation I have seen in some of the applications before me. There the accused plead guilty, not to protect someone else, but to avoid the death penalty. He pleaded guilty to second degree murder to avoid conviction for first degree murder and possible imposition of the death penalty. The U.S. Supreme Court stated:

> While most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandably consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.[114]

These so-called "equivocal pleas" have not, to date, been approved by Canadian courts.[115] The Martin Committee was firmly of the view that they have no place in the Canadian legal landscape:

---

[113] *E.g.*, United Kingdom: *R.* v. *Herbert* (1992), 94 Cr. App. R. 230 (C.A.); United States: *North Carolina* v. *Alford*, 400 U.S. 25 (1970).

[114] *Ibid.*, at 37.

[115] Fitzgerald, O., *The Guilty Plea and Summary Justice* (Scarborough: Carswell, 1990), at 34-41.

> Despite the authority from other jurisdictions to the contrary, the Committee is of the opinion that it is not in the interests of justice in Ontario to permit a guilty plea to stand where an accused maintains his or her innocence. While the right to be presumed innocent until proven guilty in a fair and public trial can undoubtedly be waived by an accused person, the interests of justice in these circumstances extend well beyond the particular priorities of an accused person alone.[116]

The Committee concluded its discussion of this issue by stating that "[a] plea of guilty must be an admission by the accused of all of the legal ingredients necessary to constitute the crime charged. A guilty plea must be unequivocal."[117]

The Ontario prosecution guidelines do not go as far as the Martin Committee's position. The guidelines provide that "Crown counsel must not accept a guilty plea to a charge knowing that the accused is innocent."[118] The guidelines do not address the situation where the accused person wishes to plead guilty while at the same time maintaining his or her innocence. Acceptance of a so-called "equivocal plea" would appear not to offend the Ontario prosecutorial guidelines. Nor is there any express reference to such a situation in the other guidelines I have reviewed. However, I note that the New Brunswick guidelines prohibit prosecutors from failing to disclose relevant facts to the judge as part of a plea agreement.

I believe that some guilty pleas to manslaughter represent "equivocal pleas." The accused is pressured into pleading guilty by the risk of conviction on a murder charge. When this occurs, the prosecutor, defence counsel and even the sentencing judge allow it

---

[116] Above, note 92, at 293.

[117] *Ibid.*, at 295.

[118] Above, note 94, Policy #R-1.

because they know that the consequences of a murder trial may be disastrous from the point of view of the accused. I am not critical of these professionals. I believe they are making the best of a bad situation. The question is whether the situation can be improved.

In my view, on the law as it stands, prosecutorial guidelines should deal expressly with the situation I have described. Guidelines could do two things. First, they could impose a duty on prosecutors to exercise extreme caution in dealing with homicide cases and be aware of the possibility that an accused person's willingness to plead guilty may be the product of the operation of our sentencing laws for murder rather than a true acknowledgment of legal responsibility for the crime. Second, where this is the case, I believe that guidelines should suggest that prosecutors at least consider prosecution for manslaughter rather than murder. In other words, if the prosecutor is of the view that the accused is willing to plead guilty to manslaughter solely as a means of avoiding a risk of conviction for murder and that there is evidence that may support an exculpatory defence, then the prosecutor should consider withdrawing the murder charge and proceeding on manslaughter.

Prosecutors may object to this approach on the grounds that the facts in these situations would typically be consistent with a murder prosecution rather than a manslaughter charge. There may be clear evidence of an intention to kill or cause serious bodily harm, for example. As such, it would be peculiar and out of keeping with the evidence to proceed on a manslaughter charge rather than a murder charge. But this is no more true in a prosecution than it is in a plea resolution situation. If a prosecutor would be satisfied with a manslaughter conviction as part of a plea resolution, should there be any objection to proceeding to trial on manslaughter rather than murder? If manslaughter does not fit with the evidence, then why would the prosecutor accept a guilty plea to it?

My suggestion that in these extraordinary circumstances prosecutors should consider proceeding on manslaughter charges rather than murder charges would allow evidence that may support a substantive offence to be put before the court. An accused charged with manslaughter would be far more likely to go to trial and present the evidence relevant to self defence than would a person accused of murder. One could be sure that if the result was a conviction on manslaughter it would represent the failure of that defence evidence to create a reasonable doubt rather than the "duress" of current sentencing laws. I also note that the "downside" for the prosecution in proceeding this way is minimal. If it should turn out that the defence fails and the accused is convicted of manslaughter in any case, the prosecutor may seek a sentence at the high end of the scale for manslaughter. True, the accused would be unlikely to receive a sentence equivalent to that for murder. Still, she may receive a very lengthy prison sentence that reflects the gravity of the offence.

Accordingly, I recommend the following:

Recommendation 3:

Prosecutorial guidelines should instruct prosecutors to exercise extreme caution when involved in plea discussions concerning homicides where there is some evidence supporting a defence such as self defence. Specifically, they should be directed to consider whether the person's apparent willingness to plead guilty to manslaughter is a true expression of their acceptance of legal responsibility for the killing or is an equivocal plea. If the latter, the prosecutor should consider proceeding on manslaughter rather than murder so that the defence evidence can be heard at trial.

I note, in connection with this recommendation, that where the accused wishes to plead guilty and, as such, waive the right to a trial "[i]t is the duty of defence counsel to ensure that a client contemplating such waiver is aware of the consequences."[119] In the *Criminal Defence Counsel Checklist* published by the Law Society of Upper Canada, the subject of guilty pleas contains the following entry:

> *Guilty Pleas*
>
> 1. Exploring Early Guilty Plea
>
> a. does client wish to plead guilty?
>
> b. advise client of possibility of acquittal
>
> c. advise client of likely range of sentence if client pleads guilty based upon research of relevant cases
>
> d. advise client of likely range of sentence if client found guilty after trial based upon research of relevant cases
>
> e. obtain instructions that client committed the offence and had the necessary mental element
>
> f. confirm instructions in writing and have client sign
>
> g. contact prosecutor or raise issue at pre-trial to obtain their position on early guilty plea
>
> h. obtain from prosecution a summary of facts to be alleged
>
> i. review facts with client before entering plea
>
> j. where a dispute exists as to the facts to be alleged, meet with prosecutor and attempt to resolve matters in an agreed statement

[119] Above, note 92 at 284.

k. where prosecutor does not accept the proposed amendments, determine if prosecutor will attempt to establish aggravating facts on a trial of an issue

l. defence should not admit any fact which the prosecution could not establish (Crown Policy Manual indicates on pleas Crown must include all provable facts)

2. Preparation for Guilty Plea

a. for research areas; see Sentencing Section

b. advise client that he/she will be asked to enter plea and admit facts

c. discuss with client the three areas which judge may question accused on before pleas, pursuant to recommendation #55 of Martin Committee:

(1) that the plea of guilty is voluntary

(2) that client admits the factual allegations and that client possessed the requisite mental element at the time of the offence

(3) that the Court is not bound by any joint submission of counsel on sentence

In this checklist there is no reference to the need for defence counsel to ensure that there is no evidence or insufficient evidence supporting an affirmative defence. Defence counsel is advised to obtain instructions from the client that he or she committed the offence with the necessary mental element (1.e), but has no obligation to obtain instructions about possible defences. Counsel should advise the client of the possibility of an acquittal (1.b), but that is not a specific direction to consider the possibility of mounting a defence to the charge. There is a potential gap here. A person may well admit that he or she committed the wrongful act with the necessary intent and, at the same time, assert an exculpatory

defence. A clear example would be where the accused admits to killing the victim intentionally while claiming the defence of self defence. The Law Society of Upper Canada's checklist on guilty pleas makes no reference for the need to ascertain the client's position as to possible defences. If counsel fails to address this issue, there is the possibility that his or her advice will be incomplete or misleading to the client. This, in turn, could cause clients to plead guilty based on a misapprehension of their legal position.

(e) *Sentencing Reform*

All of the reforms discussed above - improvements in the law of self defence, charge screening in homicide cases and more detailed prosecutorial guidelines on homicide - as important as they are, do not address the problem directly. The problem, as I characterized it above, is the result of the mandatory minimum sentences for murder. Because a person charged with second-degree murder, for example, faces a mandatory life sentence with no parole eligibility for at least 10 years, there is extreme pressure on that person to plead guilty to manslaughter, which has no mandatory or minimum sentence, even where there is evidence consistent with an exculpatory defence such as self defence. I believe that this problem should be addressed, in addition to the measures discussed above, by a modest modification in our sentencing laws for homicide. Before discussing the possibilities for reform, it is instructive to review the sentencing situation in some other common law countries.

In the United Kingdom, there is a mandatory life sentence imposed for murder,[120] as in Canada. There is no statutory minimum period of incarceration (or parole ineligibility period), although the sentencing court has the power to recommend that the convicted person spend a certain number of years in prison. The punishment for manslaughter is life

[120] *Murder (Abolition of Death Penalty) Act, 1965*, s. 1(1).

imprisonment or any shorter term.[121] Again, there is no statutory minimum period of incarceration and neither can a court recommend one.[122]

In Australia, punishment for homicide varies from state to state. Looking at the two most populous states, New South Wales and Victoria, neither of them has mandatory sentences or statutory minimum periods of incarceration as punishment for homicides. In New South Wales, the punishment for murder[123] is life imprisonment[124] but the sentencing judge has the discretion to impose a lesser sentence.[125] In a 1995 study of murder sentences, the following range of sentences for murder was found:

> There were 93 offenders sentenced under s. 19A in this study. All offenders received a custodial sentence. Six offenders (6.5%) received sentences of "natural life." The remaining offenders received determinate sentences, as follows -
>
> (1) Forty offenders (43%) received a minimum term greater than eight years but not exceeding 12 years;
>
> (2) Thirty three offenders (35.5%) received a minimum term greater than 12 years but not exceeding 16 years.[126]

---

[121] *Offences against the Person Act, 1861*, s. 5, as amended by the *Criminal Justice Act, 1948*, ss. 1(1), 83(3).

[122] *R.* v. *Fleming*, [1973] 2 All E.R. 401 (C.A.)

[123] Murders are not classified as first-degree or second-degree.

[124] *Crimes Act, 1900*, s. 19A(1), enacted by *Crimes (Life Sentences) Act, 1989.*

[125] *Ibid.*, s. 442.

[126] Donnelly, Hugh, *et al.*, *Sentenced Homicides in New South Wales 1990-1993, A Legal and Sociological Study* (Sydney: Judicial Commission of New South Wales, 1995), at 75-6.

Under this approach, murder sentences can be set according to the particular circumstances of the case, with domestic homicides, for example, generally falling toward the lower end of the scale.[127] Factors that may be taken into account in sentencing include pre-meditation, vulnerability of the victim, a rejected defence, subjective or mitigating factors, the fact that the offender pleaded guilty and the youth or prior record of the offender.[128] A life sentence is reserved for the worst category of offence and offender.[129] Sentences for manslaughter are entirely discretionary with a maximum of life imprisonment and are determined on a case by case basis, as in Canada.

The situation in Victoria is similar to that in New South Wales. Murder is punishable by a life sentence or some shorter period as is fixed by the sentencing court.[130] Manslaughter is punished by a maximum of 15 years' imprisonment.[131]

In New Zealand, murder and manslaughter are both punishable by a maximum sentence of life imprisonment and there is no minimum period of incarceration.[132]

From the foregoing, it is clear that there is no equivalent to Canada's mandatory life sentences and minimum parole ineligibility rules in the homicide laws of the United Kingdom, Australia or New Zealand. Turning to the United States, we often think of that country as having far harsher sentencing laws than Canada. For example, some U.S. states

---

[127] *Ibid.*, at 79-80.

[128] *Ibid.*, at 81-7.

[129] *Ibid.*, at 82.

[130] *Crimes (Amendment) Act, 1986*, c. 37, s. 3.

[131] *Crimes Act, 1958*, s. 5.

[132] *Crimes Act, 1961*, ss. 172, 177.

have the death penalty for murder and many of them have sentencing guideline systems that create presumptive minimum sentences. However, in reviewing a sample of U.S. state sentencing laws, as well as the Federal Sentencing Guidelines, I have found there is more discretion in the U.S. system than I would have expected.

At the federal level in the United States, guidelines apply to the determination of sentences. Sentences are determined primarily according to the nature of the crime and the criminal history of the offender. Sentences are generally expressed as falling within a certain range, with some discretion exercised by sentencing judges in fixing an appropriate sentence within that range. For homicide offences, there is a mandatory sentence of life imprisonment for first degree murder and a potential range from 135 to 293 months' imprisonment for second degree murder, depending on the characteristics of the offender. Manslaughters are broken down into three categories with sentencing ranges of 6 to 30 months, 15 to 46 months and 57 to 137 months, depending on the mental element of the crime and the offender's criminal history.[133] There is no eligibility for parole. The effect of the Guidelines, in most cases, is to create minimum and maximum sentences.

However, the U.S. Sentencing Guidelines also allow for departures from the minimums and maximums under certain conditions. Generally speaking, departures are permitted where the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[134] There is also a set of specific grounds that would, in the U.S. Sentencing Commission's opinion, justify departures from the guidelines. Most of those grounds represent aggravating factors that would allow for imposition of a sentence beyond the

---

[133] United States Sentencing Commission, *Guidelines Manual* §3E1.1 (Nov. 1992), at 35-6.

[134] *Ibid.*, at 330, quoting 18 U.S.C. §3553(b).

maximum set out in the Guidelines. However, there are some grounds that would justify downward departures from the guidelines resulting in imposition of a lower sentence. Among them is the following:

> §5K2.10 *Victim's Conduct (Policy Statement)*
>
> If the victim's wrongful conduct contributed significantly to provoking the offense behaviour, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding the extent of a sentence reduction, the court should consider:
>
> (a) the size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant;
>
> (b) the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;
>
> (c) the danger reasonably perceived by the defendant, including the victim's reputation for violence;
>
> (d) the danger actually presented to the defendant by the victim; and
>
> (e) any other relevant conduct by the victim that substantially contributed to the danger presented.

This means that in circumstances where the accused was responding to violence on the part of the victim but, obviously, had been unsuccessful in claiming self defence, the sentencing judge could take account of that fact in determining the appropriate sentence. In effect, the mandatory life sentence for murder and the minimum sentences for manslaughter could be departed from under these circumstances.

Most homicides are prosecuted under state laws in the United States. As such, it is important to look at the homicide sentences in the various states to get a true picture of the sentences actually imposed there. I surveyed a sample of state laws.[135]

In New York, murder-1 is punishable by a mandatory sentence of death or life imprisonment. There is a possibility of parole after 20 to 25 years.[136] Murder-2 is punishable by life imprisonment with parole eligibility after between 15 and 25 years.[137] Manslaughter is punishable by imprisonment for at least 6 years and up to 25 years.[138] The situation in New York with respect to second-degree murder, then, differs only slightly from that in Canada in that the minimum period of imprisonment there is 15 years, whereas here it is 10 years.

In California, first-degree murder is punishable by death or life imprisonment. There is a possibility of parole after 25 years.[139] Second-degree murder is punishable by a term of 15 years to life.[140] The minimum parole ineligibility periods for murder can be reduced for good behaviour. Manslaughter is punishable by a range of sentences, from two to eleven

---

[135] I chose to look at the states of California and New York because they are the most populous states, the state of Minnesota because it has had a sentencing guideline system in place for many years, the state of Florida because its sentencing laws for homicide are generally regarded as among the most severe and the state of Kentucky because it has specifically addressed the situation where the accused person has been the victim of violence on the part of the deceased.

[136] *New York Consolidated Laws Service*, §60.06.

[137] *Ibid.*, §§125.25, 70.00.

[138] *Ibid.*, §70.02.

[139] *Annotated California Codes, Penal Code*, §190.

[140] *Ibid.*

years, depending on the circumstances.[141] Mitigating circumstances may be considered in sentencing for manslaughter. Among the circumstances recognized by the California Rules of Court are the following:

- the victim was an initiator of, willing participant in, or aggressor or provoker of the incident
- the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur
- the defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense
- the defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime; and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the facts concerning the abuse do not amount to a defense.[142]

In Minnesota, sentencing guidelines provide the terms of imprisonment for state crimes in much the same way as the U.S. sentencing guidelines do at the federal level. First degree murder carries a mandatory life sentence.[143] Intentional second degree murder (which would appear to be comparable to second-degree murder in Canada) is punishable by a range of sentences, depending on the offender's criminal history. The sentence may be as low as 299 months or as high as 433 months. There would appear to be no offence of manslaughter, but there is an offence of third-degree murder, punishable by imprisonment

---

[141] *Ibid.*, §193.

[142] *West's Annotated California Codes, California Rules of Court*, Rule 423(a).

[143] *Minnesota Statutes Annotated,* §244, Appendix (Sentencing Grid).

for 144 to 246 months. As at the federal level in the U.S., the guideline sentences in Minnesota may be departed from under certain circumstances. The Guidelines provide:

> The sentences provided in the Sentencing Guidelines Grid are presumed to be appropriate for every case. The judge shall utilize the presumptive sentence provided in the sentencing guidelines unless the individual case involves substantial and compelling circumstances. When such circumstances are present, the judge may depart from the presumptive sentence and stay or impose any sentence authorized by law. When departing from the presumptive sentence, the court should pronounce a sentence which is proportional to the severity of the offense of conviction and the extent of the offender's prior criminal history, and should take into substantial consideration the statement of purpose and principles in Section I, above. When departing from the presumptive sentence, a judge must provide written reasons which specify the substantial and compelling nature of the circumstances, and which demonstrate why the sentence selected in the departure is more appropriate, reasonable, or equitable than the presumptive sentence.[144]

Where there exists a basis for departing from the Guidelines, then, the judge has the discretion to impose a sentence that is appropriate in the circumstances. The Guidelines provide certain "factors that may be used as reasons for departure." Among them is the fact that the "victim was an aggressor in the incident."[145] As such, in a homicide case in which the accused was the object of violence on the part of the victim, there would exist a basis for departing from the presumptive guidelines. The sentencing court could then use its discretion to fashion a just sentence. For example, in *State* v. *Hennum*,[146] the deceased had subjected the accused to a series of violent assaults and a particularly brutal physical attack on the night of the killing. The accused shot the deceased while he was asleep. At

---

[144] *Ibid.*, IID.

[145] *Ibid.*, II.D.2.a.(1).

[146] (1989), 441 N.W.2d 793.

trial, a defence of self defence was raised and evidence that the accused suffered from battered woman syndrome was tendered. Nevertheless, she was convicted of second-degree felony murder which, at the time, attracted a presumptive sentence of 105 months. The court took into account the fact that the deceased had been the aggressor and substituted a sentence of 54 months instead.

A similar approach applies in the state of Florida.[147] Departures from presumptive guidelines are available and have been granted in situations where the deceased was an aggressor.[148]

The final state I want to refer to is Kentucky. Murder is an offence punishable by the death penalty in that state.[149] However, an offender may receive a life sentence in lieu of the death penalty. If so, the person may be required to serve a minimum of 12 or 25 years before receiving parole.[150] The sentence for manslaughter is discretionary but an offender must serve at least one-half of the sentence imposed before being eligible for parole.[151] However, the parole ineligibility rules in homicides do *not* apply to a person who is a victim of domestic violence and abuse.[152] This means that if a person can show that he or she

---

[147] West's Florida Statutes Annotated, Rules of Criminal Procedure, Rule 3.701.

[148] See, *e.g.*, *State* v. *Mathis* (1989), 541 So.2d 744; *State* v. *Tai Van Le* (1989), 553 So.2d 258.

[149] *Kentucky Revised Statutes*, 507.020(2).

[150] *Ibid.*, 439.3401(2).

[151] *Ibid.*, 439.3401(3).

[152] *Ibid.*, 439.3401(4). According to 403.720, "'domestic violence and abuse' means physical injury, serious physical injury, assault or the infliction of fear of imminent physical injury, serious physical injury, or assault between family members."

was a victim, the requirement to serve a minimum period of imprisonment before parole does not apply.

From the foregoing, it is apparent that Canada's sentencing laws for homicide are relatively severe. Because it is the mandatory aspect (i.e. a mandatory life sentence and a minimum period of incarceration) of our sentencing laws for murder that causes the problem I described above, *i.e.* the pressure to plead guilty to manslaughter, the range of sentences in these other jurisdictions is of particular interest. Looking at their sentences for second-degree murder, for example, the only ones that are as harsh or harsher than the Canadian provision exist in New York State and, possibly, California (depending on whether the offender receives early parole for good behaviour). In all of the other jurisdictions I surveyed, mitigating circumstances can be taken into account in sentencing the offender. There is generally a role for judicial discretion in determining the appropriate sentence for murder, unlike in Canada.

I am most concerned about the mandatory aspect of our sentencing laws for second-degree murder. In all of the cases before me that have caused me concern because the accused plead guilty to manslaughter despite an apparently viable defence of self defence, second-degree murder was the most serious charge that the evidence could sustain. Most homicides involving self defence involve intentional killings, but not planning and deliberation. It is possible, of course, for such a case to arise but I believe it would be rare. Accordingly, my view is that there should exist some room for discretion in determining the appropriate sentence for second-degree murder in order to address those situations where there are mitigating circumstances, such as violence on the part of the victim toward the accused. For example, if it were the case in Canada that the mandatory life sentence and 10-year minimum period of parole ineligibility could be departed from in circumstances akin to those recognized in the U.S. Sentencing Guidelines, the California Rules of Court, the Minnesota Sentencing Guidelines or the Kentucky statute, I believe that far fewer offenders,

particularly women, would feel pressured to plead guilty to manslaughter. In my view, all that is required is the creation of some discretion on the part of the sentencing judge to depart from the strict sentencing rules currently in place. If the possibility existed that a lesser sentence could be imposed, persons accused of homicide might be more willing to go to trial and put their defence before the court. If they failed, then the defence evidence could at least mitigate the sentence imposed, so they may have gained something by going to trial.

The need for such a provision, as I have explained, is to relieve some of the pressure on an accused person who would go to trial if the stakes were not so high. I believe there is another advantage to such a reform. It would take account of those situations where the accused person was entitled to use some force to repel an adversary but the force was excessive. This would not amount to creation of a new defence of excessive force in self defence. Rather, it would simply acknowledge that a person who made an error of judgment in measuring the degree of defensive force required is not as culpable as a person who intentionally kills another without justification of any kind. At present, both are treated the same under our sentencing laws for second-degree murder.

In terms of how the sentencing law I have in mind would actually work, I believe that the jury should continue to play a role, as it does at present in second-degree murder cases. At present, as described above, the trial judge must give an opportunity to the jury to make a recommendation to the sentencing judge on an appropriate period of parole ineligibility. The judge says to the jury:

> You have found the accused guilty of second degree murder and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the number of years that the accused must serve before the accused is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining whether I should substitute for the ten year period, which the law would otherwise require the accused to serve before the accused is eligible to be considered for release on parole, a number of years that is more than ten but not more than twenty-five. (s. 745.2)

At present, the jury cannot make a recommendation for leniency. In my view, the jury should also be asked whether it believes that the accused person, because of the exceptional circumstances in which the killing occurred, should be considered for a more lenient sentence. If the jury so recommends (or where the matter is before a judge without a jury, the judge finds such exceptional circumstances to exist), then I believe that the sentencing judge should determine the appropriate punishment, with a life sentence being the maximum. Parole ineligibility should then be determined according to the usual rules under the *Corrections and Conditional Release Act*[153] or according to the judge's discretion to set a lengthier period (to a maximum of 10 years) under s. 743.6 of the *Criminal Code*.

For two reasons, I make no recommendation in relation to sentences for first degree murder. First, I encountered few cases involving convictions for first degree murder in the course of my Review and, as such, I am not well-placed to make suggestions to changing the law in that area. Second, it may well be that the special circumstances that form part of the definition of first degree murder (*e.g.* planning and deliberation) justify the current sentence of life imprisonment with parole eligibility after 25 years.

---

[153] R.S.C. 1985, c. C-44.6, s. 120.

Accordingly, I recommend the following:

Recommendation 4:

The sentence for second degree murder set out in the *Criminal Code* should be amended to:

(1) allow a jury to recommend, in exceptional circumstances, that a person convicted of second degree murder be considered for leniency; and

(2) where a jury so recommends, or where a judge sitting without a jury so finds, the judge may determine the appropriate sentence in the circumstances, with a life sentence being the maximum available. Parole eligibility should then be determined according to the usual rules under the *Corrections and Conditional Release Act* or any period specified by the judge under s. 743.6 of the *Criminal Code*.

CHAPTER 6 - SUMMARY OF LAW REFORM RECOMMENDATIONS

I. A Model Self Defence Law

Self Defence

Defender

(1) In this section, a "defender" is a person who uses force against another person.

General Rule

(2) A defender is not liable for using force against another person if

Subjective Elements

(a) the defender actually believes

(i) the other person is committing or is going to commit an assault, and

(ii) the use of force is necessary for self-protection or the protection of a third person from the assault;

Objective Elements

(b) those beliefs are reasonable; and

(c) the degree of force used is reasonable.

Definition of Reasonableness

(3) The defender's actual beliefs and the degree of force used are reasonable if they do not constitute a marked departure from what an ordinary sober person would have believed or used, as the case may be, if placed in the circumstances as the defender believed them to be.

Determining Reasonableness - Relevant Circumstances

(4) The circumstances that shall be considered in determining reasonableness are those that may have influenced the beliefs and the degree of force used by the defender and may include:

(*a*) the defender's background, including any past abuse suffered by the defender;

(*b*) the nature, duration and history of the relationship between the defender and the other person, including prior acts of violence or threats, whether directed to the defender or to others;

(*c*) the age, race, sex and physical characteristics of the defender and the other person;

(*d*) the nature and imminence of the assault; and

(*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.

II. Recommendation 1:

In all homicide cases, police should be required to consult with a prosecutor to ensure that the charge to be laid against the accused (*i.e.* first-degree murder, second degree murder or manslaughter) is appropriate in the circumstances.

III. Recommendation 2:

Prosecutorial guidelines should require prosecutors to consider *all* of the evidence available to them, including evidence that may support a defence such as self defence, in determining whether there is sufficient evidence to justify or continue a prosecution for homicide.

IV. Recommendation 3:

Prosecutorial guidelines should instruct prosecutors to exercise extreme caution when involved in plea discussions concerning homicides where there is some evidence supporting a defence such as self defence. Specifically, they should be directed to consider whether the person's apparent willingness to plead guilty to manslaughter is a true expression of their acceptance of legal responsibility for the killing or is an equivocal plea. If the latter, the prosecutor should consider proceeding on manslaughter rather than murder so that the defence evidence can be heard at trial.

V. Recommendation 4:

The sentence for second degree murder set out in the *Criminal Code* should be amended to:

(1) allow a jury to recommend, in exceptional circumstances, that a person convicted of second degree murder be considered for leniency; and

(2) where a jury so recommends, or where a judge sitting without a jury so finds, the judge may determine the appropriate sentence in the circumstances, with a life sentence being the maximum available. Parole eligibility should then be determined according to the usual rules under the *Corrections and Conditional Release Act* or any period specified by the judge under s. 743.6 of the *Criminal Code*.

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 wil be required before any decision is made regarding the suitability of my case for review, and that my completion of thi 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 before and around the time of the killing who might have been aware of your relationship with the deceased:

	NAME	PRESENT PHONE #	PRESENT ADDRESS
FAMILY MEMBERS			
FRIENDS			
NEIGHBOURS			
EMPLOYERS			
CO-WORKERS			
CLERGY			
POLICE			
SHELTER WORKERS			
SOCIAL WORKERS			
LAWYERS			
DOCTORS			
NURSES			

	NAME	PRESENT PHONE #	PRESENT ADDRESS
TEACHERS			
HOSPITALS			
SCHOOLS			
DECEASED'S FAMILY			
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			
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 - Letter to Applicants Asking for Their Story

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

April 9, 1996 Our file #: SDR -

Dear [Applicant]:

As I indicated in my last letter to you, I am gathering and reviewing all the legal records on your conviction. This is a very detailed and careful process which, unfortunately, takes time and takes more time than I would like. I expect, in many cases, that these documents will not tell me the whole story of the circumstances which so dramatically affected your life.

No matter how many records we review or people we speak to, it is still your account of your life back then which remains central to our process. You are the person I most want to hear from. Some applicants have written me already or phoned, although phone calls often get cut short. I value these letters and calls.

Please feel free to write me with your story about you and the deceased, about your court proceedings, about anything you want me to know regarding your conviction. Write in your own way. Turn to your counsel on your review if you want her to help you. Whatever you write, I will welcome as helping me understand your role in the tragedy.

If you don't want to write me or can't, for whatever reason, that's fine too. All I want you to know from this letter is that as you are the most important person in this review, your personal comments would be most welcome and helpful.

Yours sincerely,

Judge Lynn Ratushny

Appendix D - 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 E - List of Closed Files

TOTAL: 91 ***June 9, 1997***

File #	*Pre or Post Lavallée Conviction*	*Date File Closed*	*Reason*
SDR-01	*POST*	*May 15/97*	*The Applicant claims that the killing was an accident and as she is not claiming that she killed in self defence, her case does not fall within the terms of reference of the SDR.*
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-05	*POST*	*Mar 24/97*	*The Applicant's appeal remained outstanding; advised of s. 690 C.C..*
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-08	*PRE*	*May 7/97*	*The Applicant's claim is one of provocation only and not arising out of self defence so that it does not come within the terms of reference of the SDR.*
SDR-09	*PRE*	*Jun 2/97*	*The Applicant's claim of self defence could not create a reasonable doubt in the mind of a reasonable trier of fact properly instructed on the law.*

File #	Pre or Post Lavallée Conviction	Date File Closed	Reason
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-11	POST	Mar 24/97	The Applicant's appeal remained outstanding; advised of s. 690 C.C..
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-13	POST	Jun 2/97	There is no air of reality to the Applicant's claim of self defence.
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-15	POST	Apr 18/96	The Applicant did not respond to the SDR's inquiries; her file was closed as abandoned.
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.
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.

File #	Pre or Post Lavallee Conviction	Date File Closed	Reason
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-26A	*PRE*	*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-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-27	*PRE*	*May 27/97*	*There is no air of reality to the Applicant's claim of self defence.*
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.*

File #	Pre or Post Lavallée Conviction	Date File Closed	Reason
SDR-30	PRE	Apr 28/97	There is no air of reality to the Applicant's claim of self defence and a claim of defence of another is not reasonably capable of belief.
SDR-31	PRE	Mar 24/97	There is no air of reality to the Applicant's claim of self defence.
SDR-32	PRE	May 20/97	There is no air of reality to the Applicant's claim of self defence.
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-34	POST	Jun 9/97	The Applicant's claim of self defence is not supported by evidence which is reasonably capable of belief.
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.
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-40	PRE	Dec 18/95	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-41	PRE	Apr 30/97	The Applicant withdrew from the SDR.

File #	Pre or Post Lavallee Conviction	Date File Closed	Reason
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-43	PRE	May 28/97	The Applicant's claim of self defence is not supported by evidence that is reasonably capable of belief.
SDR-44	POST	Mar 24/97	The Applicant's appeal remained outstanding; advised of s. 690 C.C..
SDR-46	PRE	Jan 3/96	There is no air of reality to the Applicant's claim of self defence.
SDR-47	PRE	May 14/97	There is no air of reality to the Applicant's claim of self defence and neither is her claim reasonably capable of belief.
SDR-48	PRE	Apr 22/96	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-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-52	PRE	May 12/97	There is no air of reality to the Applicant's claim of self defence.
SDR-53	PRE	Feb 24/97	The Applicant withdrew from the Self Defence Review.

File #	Pre or Post Lavallée Conviction	Date File Closed	Reason
SDR-54	PRE	May 7/97	There is no air of reality to the Applicant's claim of self defence.
SDR-55	PRE	Apr 11/96	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 the group responsible for s. 690 C.C., with the SDR's legal materials, on the Applicant's instructions.
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 the group responsible for 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.
SDR-61	POST	Mar 24/97	The Applicant's appeal remained outstanding; advised of s. 690 C.C..
SDR-62	POST	Mar 24/97	The Applicant's appeal remained outstanding; advised of s. 690 C.C..
SDR-63	PRE	Mar 24/97	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 the group responsible for 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-69	*POST*	*Apr 18/97*	*The Applicant's appeal remained outstanding.*
SDR-70	*POST*	*Mar 24/97*	*The Applicant's appeal remained outstanding; advised of s. 690 C.C..*
SDR-71	*POST*	*Aug 13/96*	*The Applicant cannot remember anything of what happened, so that 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-73	*POST*	*Feb 5/97*	*The Applicant did not respond to the SDR's inquiries; her file was closed as abandoned.*

File #	Pre or Post Lavallée Conviction	Date File Closed	Reason
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 the group responsible for s. 690 C.C., with the SDR's legal materials, on the Applicant's instructions.
SDR-77	POST	Mar 11/97	There is no evidence that the Applicant actually believed she was at risk of death or serious bodily harm.
SDR-78	POST	Mar 28/97	The Applicant's appeal remained outstanding; advised of s. 690 C.C..
SDR-79	POST	Jun 9/97	There is no evidence reasonably capable of belief that the Applicant actually believed it was necessary to poison the victim in order to protect herself.
SDR-80	POST	Apr 22/97	The Applicant did not respond to the SDR; her file was closed as abandoned.
SDR-81	POST	May 28/97	There is no air of reality to the Applicant's claim of self defence.
SDR-82	POST	Jun 2/97	There is no "new" evidence of self defence allowing the SDR to reconsider the issue for this post-Lavallée conviction.
SDR-83	POST	Nov 4/96	The Applicant withdrew her application because she was soon to be released.

File #	Pre or Post Lavallée Conviction	Date File Closed	Reason
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.*
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-88	*POST*	*May 27/97*	*Because the Applicant cannot remember the stabbing, there is no evidence that she was under an actual belief that it was necessary to stab the deceased in order to protect herself.*
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-90	*PRE*	*May 26/97*	*There is no air of reality to the Applicant's claim of self defence.*
SDR-91	*PRE*	*Jun 2/97*	*There is no evidence reasonably capable of belief that the Applicant actually believed it was necessary to kill the victim in order to protect herself.*
SDR-92	*POST*	*May 23/97*	*Self defence and Lavallée were raised at trial and there is no "new" evidence 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.*

File #	Pre or Post Lavallée Conviction	Date File Closed	Reason
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-95	*POST*	*Mar 24/97*	*The Applicant's appeal remained outstanding; advised of s. 690 C.C..*
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.*
SDR-97	*POST*	*Jun 4/97*	*There is no "new" evidence of self defence allowing the SDR to reconsider the issue for this post-Lavallée conviction.*

Appendix F - Prosecutorial Guidelines

1. Justice Canada - Crown Counsel Policy Manual[154]

The Decision to Prosecute

. . .

Deciding whether to prosecute is among the most important steps in the prosecution process. Considerable care must be taken in each case to ensure that the right decision is made. A wrong decision to prosecute and, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system.

Fairness and consistency are important objectives in the process leading to the institution of criminal proceedings. However, fairness does not preclude firmness in prosecuting, and consistency does not mean rigidity in decision-making. The criteria for the exercise of the discretion to prosecute cannot be reduced to something akin to a mathematical formula; indeed, it would be undesirable to attempt to do so. The breadth of factors to be considered in exercising this discretion clearly demonstrates the need to apply general principles to individual cases and to exercise good judgment in so doing.

Counsel must consider two main issues when deciding whether to prosecute. First, is the evidence sufficient to justify the institution or continuation of proceedings? Second, if it is, does the public interest require a prosecution to be pursued?

---

[154] Above note 96, Chapter II-1.

Sufficiency of the Evidence

In the assessment of the evidence, a bare *prima facie* case is not enough; the evidence must demonstrate that there is a *reasonable prospect of conviction.* This decision requires an evaluation of how strong the case is likely to be when presented at trial. This evaluation should be made on the assumption that the trier of fact will act impartially and according to law.

A proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the trier of fact, as well as the admissibility of evidence implicating the accused. Crown counsel should also consider any defences that are plainly open to or have been indicated by the accused, and any other factors which could affect the prospect of a conviction.

Crown counsel are expected to apply this evidential standard throughout the proceedings - from the time the investigative report is first received until the time of trial. When charges are laid, the test may have to be applied primarily against the investigative report, although it is certainly preferable - especially in borderline cases - to look beyond the statements of the witnesses. Later in the proceedings, especially after a preliminary inquiry, counsel may be able to make a more effective assessment of some of the issues, such as the credibility of witnesses. Assessments of the strength of the case may be difficult to make, and of course there can never be an assurance that a prosecution will succeed. Nonetheless, counsel are expected to review the decision to prosecute in light of emerging developments affecting the quality of the evidence and the public interest, and to be satisfied at each stage, on the basis of the available material, that there continues to be a reasonable prospect of conviction.

The Public Interest Criteria

. . .

Where the alleged offence is not so serious as plainly to require criminal proceedings Crown counsel should always consider whether the public interest requires a prosecution. Public interest factors which may arise on the facts of a particular case include:

(a) the seriousness or triviality of the alleged offence;

(b) significant mitigating or aggravating circumstances;

(c) the age, intelligence, physical or mental health or infirmity of the accused;

(d) the accused's background;

(e) the degree of staleness of the alleged offence;

(f) the accused's alleged degree of responsibility for the offence;

(g) the prosecution's likely effect on public order and morale or on public confidence in the administration of justice;

(h) whether prosecuting would be perceived as counter-productive, for example, by bringing the administration of justice into disrepute;

(i) the availability and appropriateness of alternatives to prosecution;

(j) the prevalence of the alleged offence in the community and the need for general and specific deterrence;

(k) whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive;

(l) whether the alleged offence is of considerable public concern;

(m) the entitlement of any person or body to criminal compensation, reparation or forfeiture if prosecution occurs;

(n) the attitude of the victim of the alleged offence to a prosecution;

(o) the likely length and expense of a trial, and the resources available to conduct the proceedings;

(p) whether the accused agrees to co-operate in the investigation or prosecution of others, or the extent to which the accused has already done so;

(q) the likely sentence in the event of a conviction; and

(r) whether prosecuting would require or cause the disclosure of information that would be injurious to international relations, national defence, national security or that should not be disclosed in the public interest.

The application and weight to be given to these and other relevant factors will depend on the circumstances of each case.

The proper decision in many cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. Mitigating factors present in a particular case can then be taken into account by the court in the event of a conviction.

Irrelevant Criteria

A decision whether to prosecute must clearly *not* be influenced by any of the following:

(a) the race, national or ethnic origin, colour, religion, sex, sexual orientation, political associations, activities or beliefs of the accused or any other person involved in the investigation;

(b) Crown counsel's personal feelings about the accused or the victim;

(c) possible political advantage or disadvantage to the government or any political group or party; or

(d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

Spousal Assault Prosecutions

(a) Responsibility of Peace Officers

(i) Investigation and Arrest

All complaints of domestic violence involving spousal assault should be investigated immediately and thoroughly, with the intention of charges being laid for court prosecution, irrespective of whether the assaulted spouse wishes to proceed with charges. An early objective of the investigation should be the protection of and assistance to victims.

. . .

(ii) Swearing of Charges

Where an investigation supports the conclusion that a spousal assault has been committed, charges should be laid by the investigating officer, the victim served with a subpoena for the earliest possible trial date, a complete brief supplied to the Crown Attorney and the case set to the earliest convenient court docket for appearance. This directive should be considered mandatory and completed irrespective of the wishes of the victim.

Plea and Sentence Discussions

Crown counsel may initiate plea and sentence negotiations or may respond to them if initiated by the defence providing, in all instances, Crown counsel does not proceed with a plea of guilty if there is reason to believe that the charge approval standard described in Chapter II-1, "The Decision to Prosecute", has not been met. In addition, counsel's approach to plea and sentence negotiations must be

based on several important principles: fairness, openness, accuracy, and the interest of the public in the effective and consistent enforcement of the criminal law.

. . .

(i) *Charge Negotiations*

Charge negotiations may properly include the following:

- reducing a charge to a lesser or included offence;
- withdrawing or staying other charges;
- agreeing not to proceed on a charge or agreeing to stay or withdraw charges against others (for example, friends or family of the accused, or individual corporate officers);
- agreeing to reduce multiple charges to one all-inclusive charge (where permitted by law); and
- agreeing to stay certain counts and proceed on others, and to rely on the material facts that supported the stayed counts as aggravating factors for sentencing purposes.

The following practices are not acceptable:

- instructing or proceeding with unnecessary additional charges to secure a negotiated plea;
- agreeing to a plea of guilty to an offence not disclosed by the evidence; or
- agreeing to a plea of guilty to a charge that inadequately reflects the gravity of the accused's provable conduct unless, in exceptional circumstances, the plea is justifiable in terms of the benefit that will accrue to the administration of justice, the protection of society, or the protection of the accused.

2. Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions (*Martin Committee Report*)[155]

It is a fundamental principle of the administration of justice in this country that not only must there be sufficient evidence of the commission of a criminal offence by a person for a criminal prosecution to be initiated or continued, but the prosecution must also be in the public interest.

The question of what standard to apply when determining the sufficiency of evidence and the public interest in prosecuting is an extremely important one. In the Committee's view, the proper standard, or proper threshold test, must be one that does not unduly restrict Crown counsel's prosecutorial discretion, but at the same time prevents the process of the criminal law from being used oppressively, where there is no realistic prospect of a conviction on the evidence. The prosecution must also be in the public interest. Crown counsel when assessing whether it is in the public interest to recommend commencing criminal proceedings against a person, or discontinuing criminal proceedings against an accused, must take into account more than the sufficiency of the evidence against that person: all relevant circumstances must be considered, keeping in mind that "the contemporary view favours restraint generally in the exercise of the criminal law power." (citing R. v. McDougall)[156]

---

[155] Above note 92.

[156] Above, note 92, at 51.

Appendix J[157]

Threshold Test for Commencing or Continuing a Prosecution

1. The Committee recommends that for the purposes of a threshold test regarding the screening of charges by the prosecutor, the test of a "reasonable prospect of conviction" be adopted for all offences.

2. The review to determine whether the threshold test has been met should include an assessment of the probative value of the evidence, including some assessment of the credibility of witnesses.

3. The review to determine whether the threshold test has been met should include consideration of the admissibility of evidence. The threshold test will not be met where evidence necessary to the prosecution is clearly or obviously inadmissible.

4. The review to determine whether the threshold test has been met should include a consideration of any defences, for example alibi, that should reasonably be known, or that have come to the attention of the Crown.

5. The same threshold test applies for commencing, continuing, or discontinuing a prosecution.

The Threshold Test and the Public Interest

6. The Committee recommends that public interest factors should only be considered after the threshold test has been met, and then should only be used to refrain from commencing, or to discontinue a prosecution.

---

[157] Above, note 92, at 461.

Various Public Interest Factors that May be Relevant

7. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the charge or charges that best reflect the gravity of the incident.

8. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should **not** consider any political consequences for the government flowing from the prosecution.

9. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent should consider the circumstances and attitude of the victim. The attitude of the victim is not, however, decisive.

10. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the entitlement of the victim to compensation, reparation, or restitution if a conviction is obtained.

11. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should **not** consider the status in life of either the accused or the victim.

12. The Committee recommends that, in determining whether a prosecution is in the public interest, the Agent of the Attorney General should consider the need to maintain public confidence in the administration of justice, and the effect of the incident or prosecution on public order.

13. The Committee recommends that the agent of the Attorney General should take into account national security and international relations in determining whether a prosecution is in the public interest.

14. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the availability and efficacy of alternatives to prosecution.

15. The Committee recognizes that the factors specifically discussed above are not an exhaustive enumeration of the considerations that may be relevant to an assessment of the public interest in a prosecution.

The Threshold Test and Policies, Directives and Guidelines in General

16. The Committee recommends that guidelines regarding the threshold test and what factors are included in the term "public interest" should be published by the Attorney General.

17. The Committee recommends that directives from the Attorney General to his or her agents should be few and far between.

18. The Attorney General should instruct his or her agents through the use of guidelines, which formally permit the exercise of discretion in their application.

19. Such guidelines and the rare directives which may issue should not be taken into account by agents of the Attorney General until they are published or otherwise made known to the public.
