

**POLICE DOMESTIC VIOLENCE RECORDING
and the *CHARTER OF RIGHTS AND FREEDOMS***

(Workshop Presentation,
World Conference on Prevention of Family Violence 2005)

Monday, October 24, 2005

Mary Eberts

This paper was originally intended to be an account of a particular case, in which a woman accused of manslaughter, and intending to raise a self-defence defence, sought a stay of proceedings. The reasoning behind her request was that her previous attempts to get police help for abuse by her spouse were relevant to the defence of self-defence. She had gone to police seeking help, and any records held by police of such efforts would assist in her claim of self-defence. The Crown was thus obliged under *Stinchcombe*¹ to produce them. However, it appeared that the police had never made, or no longer held, records of her efforts to seek assistance. The Crown was thus not able to produce such records, and thus could not discharge its obligation under *Stinchcombe*². As a result, the accused would have to testify herself about her previous efforts, thus waiving her right not to testify on her own behalf under section 11 of the *Canadian Charter of Rights and Freedoms*. In these circumstances she was entitled to a stay of proceedings.

The argument thus had two elements. One was to argue that past, unsuccessful, attempts to seek police aid in cases of domestic abuse were relevant to the self-defence defence under section 34 of the *Criminal Code*. The second built upon the relevancy of these past complaints, arguing that lack of evidence that they had been made compromised the Crown's ability to pursue a charge of manslaughter.

It is not necessary, of course, always to make the arguments together. The first branch of the argument is, itself, worthy of consideration in a defence situation, whether or not one pursues the second.

¹ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326

² *R. v. Stinchcombe*, [1991] 3 S.C.R. 326

These arguments were not actually made in the case for which they were developed. Thus, there was no opportunity to gauge a judge's response to them. The arguments will be further developed and refined, as they seem to capture something essential about women's experience of domestic violence: police response to it is poor, and women are, in effect, taught by authorities' indifference that they are on their own when their spouses abuse them. This official teaching, which takes place on a broad systemic level, as well as in the particular circumstances of an individual life, should have an effect on the ability of the state to succeed in a prosecution of an abused woman for injuring or killing an abuser. What is "reasonable" for a woman to perceive in the midst of an attack upon her person surely should depend on whether she believes, or not, that she can depend on law enforcement authorities to assist her. What the authorities have done, and not done, in the past, is a measure of how reasonable her belief is.

Typically, the woman who will be claiming this defence is not one who has been rendered clinically "ill" by battered woman syndrome. She has tried, and is trying, to get official help for herself, and often her children, in the face of abuse. She is not passive, but active. She is essentially a believer in the legal system: why, otherwise, would she have tried to get assistance from the police in the past? This active moral agent may pose challenges to the criminal law, which has quickly, after the initial breakthrough of *R. v. Lavallee*³, accustomed itself to perceiving women in abuse situations as passive victims.

Even if one maintains a focus primarily on the first argument, dealing with the defence of self-defence itself, many questions arise. For many communities, the failure of police authorities to act in domestic violence situations is well-documented. This is abundantly true of Aboriginal communities, where several Commissions of Inquiry have criticized official indifference to the abuse of women and children. The question thus arises of the role that such systemic indifference, as distinct from a refusal to respond to an individual's specific requests for help, can play in the defence. Simply on an evidentiary

³ *R. v. Lavallee*, [1990] 1 S.C.R. 852

level, how does an accused woman establish that the overall indifference of the system, known to her and others in the community, made it reasonable for her to believe that no help would be forthcoming, and she was on her own to deal with her assailant?

The arguments fielded first in this one particular case will be further refined and developed. The Native Women's Association and Canadian Association of Elizabeth Fry Societies have plans for a workshop in which these arguments will be explored in the context of Aboriginal women's lives. Aboriginal women are charged and incarcerated in numbers radically out of proportion to their presence in the Canadian population, and the charges often relate to their defence of themselves, or their children, from domestic abuse. The asymmetry is striking and deplorable: Aboriginal women are rarely, if ever, protected by the state against predation, inside or outside the home, yet when they defend themselves, they are criminalized. One hopes that the development of arguments under section 34 that will take into account this bitter asymmetry will restore some balance to the treatment of Aboriginal women under Canadian law.

The attachment to this short introduction is the factum prepared for the stay motion which did not proceed. Some redactions have been made in order to mask the identity of the accused in the case, given that she still faces trial in 2006 on the manslaughter charge. I would like to acknowledge the contribution made to the development of these arguments of Professor Elizabeth Sheehy of the Faculty of Law, University of Ottawa, of Beverley Jacobs, President of the Native Women's Association of Canada, and of Kim Pate, Executive Director of the Canadian Association of Elizabeth Fry Societies, and the help I received from Ontario lawyer Suzanne Bouclin in putting together the factum filed with the Court. While I wish to give generous acknowledgement of their contribution to the evolution of these arguments, I also am quick to acknowledge that any misapprehensions of theory or faulty execution of argument which have seeped into the factum are mine. I also wish to acknowledge here the cooperation that we of the interveners have received from the accused and her counsel, whom I will not name at this time.

APPENDIX

Redacted Version of the Factum

[style of cause and facts portion of factum are omitted]

II. The Law

Equality Principles to be Applied

7. Section 15(1) of the *Charter* provides:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

8. Section 28 of the *Charter* provides:

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

9. Considering ss. 15 and 28 of the *Charter* in the context of whether [the accused] has a real right to make full answer and defence under ss. 7 and 11 of the *Charter*, and the availability of stay of a proceedings, is consistent with Supreme Court jurisprudence on the role of equality principles in interpreting and applying criminal law.

The majority of this Court recently concluded in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, that the common law must develop in a way that is consistent with *Charter* values. It follows that the common law governing the *mens rea* of sexual assault must be approached having regard to, *inter alia*, s. 15 of the *Charter*. As was the case in *R. v. Lavallée*, [1990] 1 S.C.R. 852, this Court must strive to ensure that criminal law is responsive to women's realities, rather than a vehicle for the perpetuation of historic repression and disadvantage [emphasis added].

R. v. Park, [1995] 2 S.C.R. 836 at para. 51

10. A clear articulation of this principle is also found in Madam Justice L'Heureux-Dubé's concurring reasons in *R v. Ewanchuk*:

Violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights. As Cory J. wrote in *Osolin*, [1993] 4 S.C.R. 595, p. 669, sexual assault "is an assault upon human dignity and constitutes a denial of any concept of equality for women". These human rights are protected by ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

R. v. Ewanchuk, [1999] 1 S.C.R. 330 at para. 69

11. In *R v. Mills*, the equality rights of a woman complainant were taken into account by the Supreme Court of Canada in deciding upon the scope of the male accused's right to make full answer and defence.

R v. Mills, [1999] 3 S.C.R. 668 at para. 90

The Context of Systemic Discrimination

12. An accused woman [redacted] should have her right to make full answer and defence, and the remedy for its denial, conditioned by her equality interests, especially where that defence involves a consideration of her history as a victim of violence. Her experience is necessarily informed by the reality that she is an Aboriginal woman who has experienced violence and the non-response of the criminal justice system.

13. It is respectfully submitted that in the circumstances of this case, the failure of the police to preserve records, or all the records, from the domestic abuse of [the accused] by [her common law partner] should result in the granting of a stay under s. 24 of the *Charter*.

14. The police records are integral to [the accused's] ability to put forward a full and effective defence under s. 34 of the *Criminal Code*. Their absence, in whole or in part, essentially deprives her of her ability to contextualize her own awareness of her need to defend herself.

15. They are relevant in a number of important ways. Having them is a requisite for trial preparation and the effective assistance of counsel. They might lead her lawyer in

a direction of other kinds of expert evidence that could inform the jury about [the accused's] circumstances and state of mind, like expert evidence on Aboriginal/police relations. They show her previous attempts to seek help from the state for domestic abuse, and what happened to those attempts. In these respects, they go directly to her claim of self-defence.

16. These records cannot be replaced by, for example, having [the accused] testify. This repairs one constitutional shortcoming by means of another. She would be giving up her rights under s. 11(c) if she had to take the stand to fill in the gaps left by the absent records, and would be liable to be cross-examined on the *res gestae*. The credibility of her oral evidence might, moreover, be prejudiced by the absence of the corroboration offered by these police records.

17. The police failure to make or keep in the first instance, or to preserve, records of [the accused's] domestic abuse by [her spouse], thus falls within the circumstances described referred to in the case law as justifying the stay remedy. It means that [the accused] is being prosecuted for an act of violence in circumstances where she does not have access to evidence of violence against her, and efforts to deal with it, that would go toward her s. 34 defence.

18. Satisfactory police response to domestic violence has been identified over and over again as an essential element in combating this grave social problem. As stated by the Parliamentary Sub-Committee on the Status of Women, "Police intervention is critical as they set the entire criminal justice process in motion". Shortcomings in police response to violence against Aboriginal women and children have been specifically identified. For example, the Canadian Panel on Violence states in its *Final Report* (1993) that "the failure of police to respond, or to respond appropriately, also affects future prosecutions. Statements may not be taken, injuries not documented, and evidence may be lost or destroyed".

Canadian Panel on Violence, *Final Report* (1993), p. 170, *Affidavit of Beverly Jacobs*, affirmed February 18, 2005, para. 21 and Exhibit H

Canada, House of Commons, Sub-Committee on the Status of Women, First Report: *The War Against Women* (June 1991), pp. 38-39

19. The shortcomings in the police behaviour referred to by the Panel would compromise the ability to prosecute persons for violence against their female victims. It has been recognized that the victims of domestic violence are, typically, female.

R. v. Malott, [1998] 1 S.C.R. 123, para. 44 (per L'Heureux-Dubé, J.)

20. Such shortcomings can thus be seen as a systemic dimension of the denial to women, and to Aboriginal women, of equality before the law and the equal protection and benefit of the law, as guaranteed by s. 15 of the *Charter*.

The War Against Women, *supra*, pp. 9-10, 48-49

21. The centrality of police response in determining or reflecting how the justice system as a whole will respond to an Aboriginal woman experiencing abuse is also noted by McGillivray and Comaskey in their study of *Intimate Violence, Aboriginal Women and Justice System Response*, done in Winnipeg in 1995. These researchers also identify systemic racism and disregard for women as factors which bear on police response.

Inadequate policing prolonged the abuse. Police racism had a chilling effect on decisions to call for help. Fear of police was based on how respondents believed police would see them in these extreme circumstances – a fear, for many, derived from experience. Policing was often contaminated by racism and stereotyping. Seeing themselves through the eyes of police – as responsible for the violence because of their inadequacies, as morally or culturally corrupt, as female and unworthy – reflected back to respondents the lessons of inferiority beaten into them by parents and partners. Victim-blaming, explicit in police comments and implicit in failures in police response, reinforced self-blame and feelings of worthlessness. How police respond is a central indicator to victims of how the justice system, strangers, and even society as a whole will respond to their situation. The system spoke that message when police did not come, or came too late, or showed by words or attitudes that the respondent was a nuisance or even just 'Native', or when she had engaged in 'fighting' or otherwise resisted the violence and so might be portrayed as an offender, or when she was intoxicated or ill or did not have broken bones or other convincing proof of her 'worthiness' as

a victim, and when charges were only reluctantly laid and lamely prosecuted. When an abuser convinced his victim that the police were on his side, or that her children would be apprehended, or that he would go straight to jail and his suffering would be her fault, if his family controls her access to telephones, if police do not charge because of 'who' he is, then the system spoke in its silence.

McGillvray, Anne and Brenda Comaskey. *Black Eyes All of the Time: Intimate Violence, Aboriginal Women, and the Justice System* (University of Toronto Press, 1999) at p. 139

22. Domestic abuse is not an isolated phenomenon. In about two thirds of all cases of spousal assaults against women the violence occurred more than once, and one-quarter to one-third involved more than ten episodes.

Federal-Provincial-Territorial Ministers Responsible for the Status of Women, *Assessing Violence Against Women: A Statistical Profile* (2002) at p. 10

23. Aboriginal women stand out as one group with much higher than average rates of spousal violence. These women reported spousal violence rates twice as high as Aboriginal men and three times higher than non-Aboriginal women and men. Spousal homicide rates for Aboriginal men outnumbered those for non-Aboriginal men by a factor of 18.

Assessing Violence, supra, at pp. 14 and 19

24. The issue of police response – or non-response – to domestic violence complaints is, then, even more crucial with respect to this disproportionately more vulnerable population. Specifically, [the accused's]ability to protect herself was severely hampered by the inadequacy of the police response and the other external resources available to her. Evidence that reveals a failure on the part of police to respond or provide adequate protection is clearly relevant, and evidence of efforts of poor or no response to [the accused's] and other Aboriginal women's attempts to enlist the protection of the criminal justice system would provide additional reinforcement of the reasonableness of her belief in the need to defend herself in the case at bar.

25. The Manitoba Aboriginal Justice Inquiry has said:

Aboriginal women and their children suffer tremendously as victims in contemporary Canadian society. They are the victims of racism, of sexism, and of unconscionable levels of domestic violence. The justice system has done little to protect them from any of these assaults. At the same time, Aboriginal women have an even higher rate of over-representation in the prison system than Aboriginal men. In community after community, Aboriginal women brought these disturbing facts to our attention. We believe the plight of Aboriginal women and their children must be a priority for any changes in the justice system.

Affidavit of Beverley Jacobs, affirmed February 18, 2005, para. 37

26. The *Final Report* of the Aboriginal Justice Implementation Commission referred back to the evidence heard by the Aboriginal Justice Inquiry, to the effect that one in three Aboriginal women experience domestic abuse, a much higher rate than that experienced by non-Aboriginal women, and that when Aboriginal women finally do turn to police for help with such abuse, the police are not always receptive to their complaints.

AJIC, *Final Report*, Chapter Nine, p. 1 (electronic version), *Affidavit of Beverley Jacobs*, affirmed February 18, 2005, Exhibit F

27. The *Final Report* also notes that even now, women in isolated First Nation communities do not have the same protection as do women in urban centers, where reforms were introduced following the Aboriginal Justice Inquiry. The Aboriginal Justice Implementation Commission states:

There is no doubt that, as pointed out by the AJI and RCAP, the abuse of Aboriginal women is pervasive and serious. It requires urgent policy review and assessment. The criminal justice system must treat these issues as seriously as it does other assaults. It is important that this approach be maintained in the interests of personal safety.

Affidavit of Beverley Jacobs, Exhibit F, p. 12 (electronic version)

28. The Supreme Court of Canada has acknowledged “the estrangement of the Aboriginal peoples from the Canadian criminal justice system”, saying in *R v. Gladue* that the excessive imprisonment of Aboriginal people is only the tip of the iceberg insofar as that estrangement is concerned. The Court cites the “striking yet

representative” statement of the Report of the Royal Commission on Aboriginal Peoples that “The Canadian criminal justice system has failed the Aboriginal peoples of Canada ... in all territorial and governmental jurisdictions” and the statement of the Manitoba Aboriginal Justice Inquiry that the justice system had failed Aboriginal people “on a massive scale”.

R v. Gladue, [1999] 1 S.C.R. 688, paras. 61-63

29. The Supreme Court goes on to say that these findings “cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it”. The Court sees sentencing, and in particular the sentencing reforms of s. 718.2(e) of *Criminal Code* as “an attempt to redress this social problem to some degree”.

Gladue, *supra*, at para. 64

30. The Supreme Court’s observations in *Gladue* identify the scale and the nature of the systemic problems faced by Aboriginal people in the justice system, and they do not confine to sentencing alone the scope of remedial measures that could be brought to bear to address them. It is thus submitted that it is entirely appropriate for this Court to take into account systemic discrimination faced by Aboriginal people when deciding whether to grant the stay requested.

31. Aboriginal women should not be criminalized for their response to behaviour against which the law is not protecting them. To permit the criminalization of Aboriginal women while countenancing the continued failure to attend to their safety is a piece of systemic asymmetry which violates the equality rights of Aboriginal women and requires a response from the Court.

32. Not only the interests of Aboriginal women, and of equality, but also the criminal justice system itself are served by an approach to this application which emphasizes the need for police to make and maintain adequate records of domestic abuse complaints.

33. Police record-keeping of complaints over time will allow prosecutors to show patterns of assaults or repeat assaults, either at the charging phase or in sentencing. Without such records, there is no reflection in official sources of anything like the real dimensions of the problem, with respect to a particular offender or a particular woman.

34. Since police records give rise to official statistics, failure by police to keep accurate records of domestic assault complaints may depress the statistics about domestic violence occurrences. This will, in turn, deprive policy-makers of information necessary to formulate effective anti-violence policies.

Johnson, Holly. "Methods of Measurement", in Katherine M.J. McKenna and June Larkin, *Violence Against Women: New Canadian Perspectives*. (Toronto, 2002), pp. 21-54

Application of Equality Principles and Systematic Discrimination Concerns to the Issues on the Stay Application

35. The equality principles and systemic discrimination concerns outlined above apply at each stage of the analysis on this application: understanding the claim of self-defence, considering [the accused's] rights to make full answer and defence under ss. 7 and 11 of the *Charter*, and determining whether a stay should be granted.

[redacted]

39. The *Criminal Code*, s. 222(5) provides that a person commits culpable homicide when he causes the death of a human being (a) by means of an unlawful act.

40. The *Criminal Code* provides in s. 34 the defence of self-defence against unprovoked assault:

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.

Criminal Code, R.S., c. C-34, s. 34

41. Pursuant to s. 34(2) of the *Criminal Code*, there are three constituent elements of self-defence where the person has died: (1) the existence of an unlawful assault; (2) a reasonable apprehension of a risk of death or grievous bodily harm; and (3) a reasonable belief that it is not possible to preserve oneself from harm except by killing the other person.

R v. Malott, supra, at para. 18

42. For all three elements, the trier of fact must determine how the accused perceived the relevant facts and whether that perception was reasonable. It is a mixed subjective/objective determination. The apprehension of a risk of death or grievous bodily harm must be both actual and reasonable. The accused's belief that it is not possible to preserve himself or herself in any way other than killing must be based on reasonable grounds.

R v. Pétel, [1994] 1 S.C.R. 3, per Lamer, C.J. at paras. 6 and 7

43. The accused need only raise a doubt about whether she acted in self-defence to secure an acquittal, but the barriers to women successfully invoking self-defence are legion. Practically, women who allege self-defence must be able to identify objectively verifiable evidence that supports their defence.

44. The objective "reasonable person" standard facilitates the introduction of evidence about women's collective experience of male violence and its legal response (see McLachlin and L'Heureux-Dubé, J.J.), which is critical to the court/jury's understanding of the context in which a woman evaluates her need to respond.

R v. Malott, supra, at para. 18

45. In *Lavallée*, the Supreme Court of Canada considered the self-defence claim in the context of a woman accused of killing an abusive spouse. The case is notable in two respects: its exploration of the elements of the s. 34 defence by a woman who had suffered domestic abuse at the hands of the man she killed, and its holding on the use of expert evidence in connection with a self-defence claim by such a woman. The recognition in *Lavallée* of the validity of the woman's perspective for purposes of the objective test in s. 34 of the *Criminal Code* is a vindication of the principle of equality before and under the law for the accused woman. Having an approach to the objective test which addresses the intersectionality of race and gender in taking women's reality into account, and does not allow their fate to be determined on the basis of stereotypical thinking, extends to women substantive equality.

R v. Lavallée, [1990] 1 S.C.R. 852

46. Under s. 34, if after hearing the evidence (including any expert testimony), the trier of fact is satisfied that the accused had a reasonable apprehension of death or grievous bodily harm, it must ask itself what the "reasonable person" would do in such a situation. The question is whether given the history, circumstances and perceptions of the accused, her belief that she could not prevent herself from being killed (or grievously harmed) except by killing the deceased was reasonable. The Court in *Lavallée* recognizes 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 determining the reasonableness of her beliefs. Moreover, Madam Justice Wilson recognizes that a woman's "size, strength, socialization and lack of training" are relevant in assessing whether she was justified in using force. To the extent that expert testimony can assist the trier of fact in making that determination, it is both relevant and necessary.

Lavallée, supra, pp. 19 and 20 (electronic version)

47. After the *Lavallée* decision of the Supreme Court of Canada, Judge Lynn Ratushny was requested by the Minister of Justice and the Solicitor General of Canada to undertake a review of cases where claims of self-defence were made by women who had been convicted. In her third, and final, *Report*, she comments upon her interpretation of the *Lavallée* decision. She says of her approach in the *Self-Defence Review*:

My approach to the application of both the subjective breach of the defence and the reasonableness standard under the current law, in light of *Lavallée*, involved taking account of the circumstances in which the applicant [for Review] 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.

Judge Lynn Ratushny, *Self-Defence Review Final Report* (June 11, 1997), p. 21 (“Self-Defence Review”)

48. Judge Ratushny states in her *Final Report* that in her view the significance of *Lavallée* is not in the recognition of the “battered women’s syndrome” although that aspect of the case has perhaps received the most attention. She states, “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 the defence”. Not only would expert evidence be relevant in those circumstances, but:

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.

Self-Defence Review, supra, pp. 50-51

49. Judge Ratushny observes:

In effect, *Lavallée* tells us that we must consider a broad range of factors that may influence the accused’s beliefs. Similarly, many of those factors will be relevant in assessing the reasonableness of those beliefs.

Self-Defence Review, supra, p. 51

50. She states that reasonableness is to be determined within the circumstances actually experienced by the accused person. One must take into account “the fact that she had been in like situations before”. 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.

Self-Defence Review, supra, pp. 53-54

51. Referring to the criticisms of the law of self-defence in Canada, Judge Ratushny includes in her *Final Report* a chapter on Reform Possibilities. She favours the continuation of a mixed subjective/objective approach to the interpretation and application of the defence, and agrees that it is very important to articulate the factors which should be taken into account in applying the standard.

Self-Defence Review, supra, chapter 5, particularly p. 149

52. The factors which Judge Ratushny considers relevant in determining the reasonableness of the belief of endangerment and the degree of responsive force may include the defender’s background, including any past abuse suffered; 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 offender or others; the age, race, sex and physical characteristics of both; the nature and imminence of the assault; and the means available for 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.

Self-Defence Review, supra, pp. 154-155

53. The Department of Justice Canada considered Judge Ratushny’s recommendation in its *Consultation Paper on Reforming Criminal Code Defences*:

Provocation, Self-Defence and Defence of Property, issued in 1998. The Paper acknowledges that “A list of factors might be a useful tool in guiding judges and juries in their understanding of the circumstances” but observes: “However, it should be noted that even in the absence of a statutory list, many if not all of these factors would likely be considered by the jury in assessing the reasonableness if these facts came out in evidence and were relevant to the particular circumstances”.

Consultation Paper on Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property

54. In her concurring reasons in *Malott*, Madam Justice L’Heureux-Dubé illuminates the broader principles behind the *Lavallée* decision.

Malott, supra, paras. 35 ff

55. Firstly, she states that the significance of the Court’s decision in *Lavallée* reaches beyond its particular impact on the law of self-defence. A crucial implication of the admissibility of expert evidence in *Lavallée* is the legal recognition that historically both the law and society have treated women in general, and battered women in particular, unfairly. *Lavallée* accepted that the myths and stereotypes that are the products and tools of this unfair treatment interfere with the capacity to determine justly a woman’s claim of self-defence, and can only be dispelled by expert evidence that is designed to overcome stereotypical thinking.

Malott, supra, para. 36

56. Secondly, L’Heureux-Dubé, J. states that the majority of the Court in *Lavallée* accepted that women’s experiences and perspectives may be different from the experiences and perspectives of men. In the context of self-defence, it is not enough to admit evidence of the subjective perceptions of battered women. Rather, a majority of the Court accepted that the perspectives of women, which historically have been ignored, must now equally inform the ‘objective’ standard of the reasonable person in relation to self-defence.

Malott, supra, para. 38

57. Justice L'Heureux-Dubé makes the point that a female accused should not have to establish that she fits a new stereotype of the battered woman (victimized, passive, helpless, dependent) in order to succeed in a claim of self-defence.

Malott, supra, para. 40

58. The legal inquiry into the moral culpability of a woman who is claiming self-defence must focus on the reasonableness of her actions in the context of her personal experiences, and her experiences as a woman, not her status as a "battered woman". Her experiences are both individualized, based on her own history and relationships, as well as shared with other women, within the context of a society and a legal system which have historically undervalued women's experiences.

Malott, supra, paras. 41, 43

59. In *Lavallée*, the Supreme Court of Canada recognizes that expert evidence is relevant to the issue of self-defence.

Malott, supra, para. 37, per L'Heureux-Dubé, J.

60. Expert evidence may be of use with respect to the justification in s. 34(2)(a) that the accused was "under reasonable apprehension of death or grievous bodily harm" from the deceased. The issue in this context is whether the accused actually and reasonably perceived risk of grievous bodily harm or death. Second, the expert evidence may have a bearing on the question of whether, given the history, circumstances and perceptions of the accused was her belief reasonable that she could not prevent herself from being killed or grievously harmed except by killing the deceased.

Malott, supra, at para. 20

61. In *Lavallée*, the accused had not testified, and the expert psychiatric opinion submitted by the defence was based on interviews with the accused, an interview with

her mother (who had not testified at trial either), a police report of the incident (including information regarding her statement to police) and hospital records of eight visits to emergency departments in four years.

62. The Supreme Court thus considered the propriety of the trial judge's charge to the jury concerning the weight to be given expert opinions based on hearsay evidence. Wilson J. states that as long as there is some admissible evidence to establish the foundation for the expert's opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony. The judge must, however, warn the jury that the more the expert relies on the facts not proved in evidence, the less weight the jury may attribute to the opinion.

Lavallée, supra, p. 23 (electronic version)

63. The case law establishes that an expert opinion can play a useful role in an accused's plea of self-defence. However, the weight of that opinion – and thus the accused's ability to make full answer and defence – depend upon the availability to the expert of material from independent sources as the basis for his or her report.

64. It is submitted that under s. 34 as interpreted in *Lavallée* and other case law, any history of domestic abuse suffered by [the accused] would be relevant to the issues of the reasonableness of her perception of impending grievous harm or death, and of the measures she used against [the deceased] giving rise to the charge herein. So, too, would the issue of whether she had, in the past, been able to secure police assistance against domestic abuse. Both of these factors could condition one's reactions and thus be relevant to the reasonableness inquiries in the self-defence claim.

65. It is submitted, therefore, that police records of any complaint by [the accused] of prior domestic abuse, and actions taken pursuant to such complaint or such abuse, are important evidence for the defence in this matter. The police records are needed to substantiate self-defence, in reliance on *Lavallée*, by showing a prior record of assault by her mate as well as the fact that based upon her past experience hers was a

reasonable belief that no help from authorities would be forthcoming.

66. Whether or not [the accused] is planning to tender an expert opinion on battered woman syndrome as part of her defence, then, her ability to make full answer and defence to the charge herein depends on the availability of the police records of abuse.

67. Without access to police reports of past domestic abuse [redacted], [the accused] faces an untenable set of alternatives. If she takes the stand to establish that such abuse occurred (instead of being able to rely on police reports), she will have relinquished her right under s. 11(c) of the *Charter* not to testify against herself. If she does not take the stand to testify about this prior abuse, then it will not form part of the record and there will not be any information to support in this regard her claim that past domestic abuse is a factor to be considered in determining the reasonableness of her actions vis-à-vis [the deceased]. [redacted]

Duty to Disclose

68. While the prosecutor's obligation to disclose has historically been considered an ethical one, in *R. v. Stinchcombe* the Supreme Court interpreted section 7 of the *Charter* to impose a duty of disclosure upon the prosecution.

R. v. Stinchcombe, [1991] 3 S.C.R. 326

69. This obligation stems from the principle that the Crown must seek justice in the public interest:

... the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for the use of securing a conviction but the property of the public to be used to ensure that justice is done.

Stinchcombe, supra, at para. 12, per Sopinka, J.

70. This safeguard is meant to guarantee an accused person's ability to exercise the right to make full answer and defence.

The way in which the disclosure of evidence was viewed in the past -- as an act of goodwill and cooperation on the part of the Crown -- played a significant part in catastrophic judicial errors. On this point, we need only recall that the Royal Commission on the Donald Marshall, Jr., Prosecution identified the failure to disclose all the relevant evidence as one of the causes of the judicial error that deprived Donald Marshall of his liberty for 11 years, for a crime he had not committed.

Royal Commission on the Donald Marshall, Jr., Prosecution: Findings and Recommendations (1989), vol. 1, at pp. 238 *et seq.* cited in *R. v. Taillefer*, [2003] 3 S.C.R. 307 at para. 1

71. As such, non-disclosure will generally violate section 7 of the *Charter* where it impairs an accused person's right to full answer and defence. Breach of this constitutional right entitles the accused person to a remedy under s. 24(1) of the *Charter*.⁴

O'Connor, supra, at para. 76

72. The Crown must disclose to an accused all relevant information it has under its control, whether inculpatory or exculpatory. This is subject to the exercise of the Crown's discretion to refuse to disclose information that is privileged or plainly irrelevant. The Crown has a duty to disclose such relevant information, before election or plea, whether or not it intends to introduce it in evidence. This duty is ongoing.

Stinchcombe, supra, at p. 343
Taillefer, supra, at para. 59

73. "Relevance" is assessed in relation to (1) the charge itself and (2) to the reasonably possible defences.

Stinchcombe, supra, at p. 343

74. To this end, the threshold for disclosure is set quite low and the concept of "relevance" has been broadly defined by the Supreme Court of Canada:

⁴ However, where the adverse impact upon the accused's ability to make full answer and defence is curable by a disclosure order and an adjournment, that will generally be the remedy applied (*O'Connor* at para 76)

One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed – [Stinchcombe at p. 345]. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.

R. v. Egger, [1993] 2 S.C.R. 451 at p. 467

75. The Crown's duty to disclose is triggered whenever there is "reasonable possibility of the information being useful to the accused in making full answer and defence".

R. v. Chaplin, [1995] 1 S.C.R. 727 at p. 742

R. v. Dixon [N.S.S.C. *sub nom. R. v. McQuaid*], [1998] 1 S.C.R. 244 at para 20

76. Further, the Crown's duty to disclose gives rise to a corresponding constitutional right to the accused to all material which meets this threshold.

The right to disclosure of material which meets the *Stinchcombe* threshold is one component of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the *Charter*. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice.

R. v. Carosella, [1997] 1 S.C.R. 80 at p. 106 (per Sopinka, J.)

Dixon, *supra*, at para 22

77. Therefore, if an accused person can demonstrate a reasonable possibility that the undisclosed information could have been used "in meeting the case of the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence" he or she has also established the impairment of his or her constitutionally protected right to disclosure.

Dixon, *supra*, at para 23

78. Police records of the abuse of the accused by [her spouse] are relevant under the tests developed in the case law. There is clearly a possibility that the records will be

useful to the accused in making full answer and defence. [The accused] is thus able to establish both a duty to disclose and also the impairment of her right to make full answer and defence.

Stay of Proceedings

79. A stay of proceedings prevents a prosecution from proceeding because of objectionable police or prosecutorial conduct or because of a violation of the accused person's rights. It forbids the prosecutor from taking any further steps against the accused on the charges before the court. It is thus the most "drastic" and the "ultimate remedy" for abuse of process or abusive conduct.

R. v. O'Connor, [1995] 4 S.C.R. 411 at 77

R. v. Regan (2002), 209 D.L.R. (4th) 41 at para. 53

R. v. Tobiass, [1997] 3 S.C.R. 391 at para. 89

80. A stay of proceedings remedies unfairness to the accused that has resulted from state misconduct that impacts upon the integrity of the judicial system or an accused person's right to a fair trial protected under section 7 and 11(d) of the *Charter*. The threshold for obtaining a stay of proceedings (both at common law and under the *Charter*) remains "the clearest of cases" where the prejudice to the accused person's right to make full answer and defence cannot be remedied.

R. v. O'Connor, [1995] 4 S.C.R. 411 per L'Heureux-Dubé J. at paras. 68, 73

81. However, there is also a "residual" category of abusive action, which does not affect the fairness of the trial, but nevertheless undermines fundamental justice:

This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

R. v. O'Connor, *supra*, at para 73

82. Non-disclosure by the Crown normally falls within this 'residual' category. Therefore, a challenge based on non-disclosure will usually require the accused to demonstrate actual prejudice to his or her ability to make full answer and defence.

R. v. O'Connor, supra, at para 74

83. Regardless of whether the abuse causes prejudice to the accused person's right to a fair trial or to the integrity of the justice system, a stay is only appropriate when:

(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and

(2) no other remedy is reasonably capable of removing that prejudice.

R. v. O'Connor, supra, para. 75

84. The first criterion reflects the reality that a stay is a prospective (rather than a retroactive) remedy that does not redress a wrong that has already been done. It aims to "prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole in future".

Tobiass, supra, at para 91

85. While the "mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings", the non-production of past abuse records goes well beyond mere 'shabbiness'. It deprives the accused of material integral to her self-defence claim in a way that she can only remedy by giving up her right not to testify accorded by s. 11 of the *Charter*. Even then, her testimony may suffer from the absence of corroboration which the records might provide.

Tobiass, supra, at para 91

86. In order for a stay to be appropriate in a case falling within the residual category, it has be shown that the misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice.

Where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.

R. v. Conway, [1989] 1 S.C.R. 1659 at p. 1667 (per L'Heureux-Dubé)

87. In these cases, the past misconduct is so egregious that the "mere fact of going forward in the light of it will be offensive".

Tobiass, supra, at para 91

88. That is, it is simply not possible to remedy through reasonable means the prejudice to the accused's right to make full answer and defense, and a stay may be necessary.

O'Connor, supra, at para. 77

89. Any abuse which may continue to manifest itself if the proceedings continue must be considered in relation to possible remedies "less drastic" than a stay. That said, if it is determined that the abuse will "continue to plague the judicial process" and that no remedy other than a stay can rectify the problem, a judge may exercise her or his discretion to grant a stay.

O'Connor, supra
Regan, supra, at para 55

Stay of Proceedings for Breach of Duty to Disclose

90. To obtain a s. 24 remedy for non-disclosure, the accused must show that there is a reasonable possibility that the non-disclosure affected the outcome of the trial or the overall fairness of the trial process.

R. v. C (M.H.), [1991] 1 S.C.R. 763 at p. 776
Stinchcombe, supra, at p. 348

91. However, the reasonable possibility "must not be entirely speculative". Rather, it must be based on the reasonable possibility of uses of the non-disclosed evidence or

reasonably possible avenues of investigation that were closed to the accused as a result of non-disclosure.

Dixon, supra, at para 34

92. Once an accused person establishes impairment of the right to make full answer and defence, he or she is entitled to a remedy under section 24(1). The degree of impairment or prejudice to the accused's rights must be assessed in relation to the remedy sought.

Dixon, supra, at para 34

93. In the case of a stay of proceedings, an accused must establish, on a balance of probabilities, not only that the right to make full answer and defence was impaired, but that there was irreparable prejudice to that right.

Dixon, supra, at para 35
Carosella, supra, at p. 112

94. Therefore, to determine whether an accused person's right to make full answer and defence has been impaired, the judge must engage in a two-step analysis:

First, to assess the reliability of the result, the undisclosed information must be examined to determine the impact it might have had on the decision to convict. If the court is convinced that it is reasonably possible that, on its face, the undisclosed information affects the reliability of the result at trial, a new trial should be ordered

However, even if the undisclosed information does not itself affect the reliability of the result, nondisclosure may affect the overall fairness of the trial. This second stage of analysis will be done by assessing, on the basis of reasonable possibility, the opportunities to gather additional evidence that could have been available to the defence if the relevant information was disclosed.

Dixon, supra, at paras 36-37

95. Inherent in the obligation to disclose is the duty to preserve the fruits of police investigation. Therefore, if evidence is lost, the Crown is required to establish that the loss or destruction is not due to unacceptable negligence. If the Crown is unable to

satisfy the judge in this regard, it has failed to meet its disclosure obligations, and there has accordingly been a breach of section 7 of the *Charter*.

R. v. La, [1997] 2 S.C.R. 680 at para 20
Stinchcombe, supra

96. In order to determine whether the explanation of the Crown is satisfactory, the Court will examine the circumstances surrounding the loss of the evidence. The main consideration is whether the Crown or the police took reasonable steps in the circumstances to preserve the evidence for disclosure.

Stinchcombe, supra

97. It is not necessary that an accused establish abuse of process for the Crown to have failed to meet its section 7 obligation to disclose.

The Crown's obligation to disclose evidence does not, of course, exhaust the content of the right to make full answer and defence under s. 7 of the *Charter*. Even where the Crown has discharged its duty by disclosing all relevant information in its possession and explaining the circumstances of the loss of any missing evidence, an accused may still rely on his or her s. 7 right to make full answer and defence. Thus, in extraordinary circumstances, the loss of a document may be so prejudicial to the right to make full answer and defence that it impairs the right of an accused to receive a fair trial. In such circumstances, a stay may be the appropriate remedy, provided the criteria to which I refer above have been met.

La, supra, at para. 24

Application of the Law to the Circumstances of this Case

98. It is respectfully submitted that in the circumstances of this case, the failure of the police to preserve records, or all the records, from the domestic abuse of [the accused by her spouse] should result in the granting of a stay under s. 24 of the *Charter*.

99. The police records are integral to [the accused's] ability to put forward a full answer and defence under s. 34 of the *Criminal Code*. They are an integral part of her self-defence claim under s. 34, whether or not she chooses to submit expert evidence on the battered woman syndrome. The reports, if available, support [her] self-defence

claim. Without them, it is undermined in an important respect. Having a full set of police reports on her past domestic abuse may suggest other kinds of expert evidence, or otherwise assist [the accused] in instructing counsel, or assist counsel in developing defence strategy.

100. Police reports with respect to past episodes of domestic violence would provide important insight into the relationship of the accused and the legal system, especially if they disclose episodes of serious violence where the state decided not to lay charges. Such experiences contribute to an understanding of the state of mind of the accused, and any belief on her part that she is alone, or without help, in coping with violence directed against her in a domestic setting. Any such understanding, a result of the systematic inequality affecting Aboriginal women vis-à-vis the legal system, is an important element in shaping the defence.

101. These records cannot be replaced by, for example, having [the accused] testify. This repairs one constitutional shortcoming by means of another. Even if she does testify, the absence of the reports to corroborate her testimony may impair her credibility or the weight to be given to her evidence. The absence of the records has a material bearing on the account of domestic abuse which may have influenced [the accused's] reactions on the evening in question. These records deepen and lengthen her history of abuse in ways that make it more understandable that it might have affected her reactions toward [the deceased].

102. The police failure to make or keep in the first instance, and to preserve, records of [her abuse], thus falls within the category of exceptional circumstances referred to in the case law. Allowing her to be prosecuted for an act of violence when she has not been protected against a history of violence offends one's basic sense of justice in the way that has been found necessary to support the granting of a stay.

103. An accused woman [redacted] should have her right to make full answer and defence conditioned by her equality interests, especially where that defence involves a

consideration of her history as a victim of violence. Her experience is necessarily informed by the reality that she is both Aboriginal and a woman who has experienced violence and the non-response of the criminal justice system.

104. Not fully recording or documenting the domestic violence complaints and experiences of an Aboriginal woman reflects the system's lack of equal regard for her, and it impedes her effective exercise of her equal right to mount a full and complete defence. The system's inattention to her as an Aboriginal woman victim of violent crimes unfairly ignores the impact of her experiences in informing her response to a violent attack and consequently unconstitutionally prejudices her constitutional rights as an accused.

105. The interveners submit that granting a stay of proceedings requested [redacted] is not only consistent with, but mandated by, the equality rights and interests of the accused.

[redacted]

**Schedule B [to the factum]
Constitution Act, 1982 (79)**

Enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, which came into force on April 17, 1982

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

- a) to be informed without unreasonable delay of the specific offence;
- b) to be tried within a reasonable time;
- c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
- d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- e) not to be denied reasonable bail without just cause;
- f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
- g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
- h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
- i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this

Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.