Battered Women's Defence Committee Update

Background

Following the 1990 decision of the Supreme Court of Canada in the *Lavallee* case, CAEFS commenced our Battered Women's Defence Project.

There is little doubt that the recognition of the "battered women's syndrome" in *Lavallee*, marked significant progress in the sense that, for the first time, we saw legal recognition of the significance of battering within the context of domestic homicide. In addition, in her decision, Madame Justice Wilson altered the traditional limits of the legal doctrine of self-defence. She stressed the need to examine the woman's own subjective fear, within the context of her experiences of abuse.

The court's interpretation not only challenged the traditional gender-biased "reasonable man" test of legal objectivity, it also effectively questioned the presumption that only imminent reaction can invoke the possibility of an acquittal on the basis of self-defence. Basically, as a result of the *Lavallee* decision, given the context of a battering relationship, if a judge or jury finds that a woman reasonably apprehended death or grievous bodily harm, and that she used an appropriate amount of force in response to the threat, then according to *Lavallee,* the woman should be acquitted. Accordingly, this decision set a precedent by determining that evidence of abuse could legitimately be raised at a woman's trial in Canada.

Many researchers have argued that the syndrome analysis pathologizes women and their histories by stressing the woman's victimization and consequent paralytic inability to remove herself from the abusive situation. As such, the `syndrome' analysis, where it has been raised, and, more importantly, accepted, tends to function as an explanation for what is characterized as the woman's irrational behaviour. As a result of the current understanding of what constitutes "battered woman syndrome", a woman who kills here abusive partner in self-defence runs the risk of having her behaviour defined in terms of her personal defects or incapacities. CAEFS would like to see a defence that more clearly recognizes the realities of women's experiences of abuse -- one that defines as "the problem", the man's abuse, rather than the woman's response. Such an interpretation would accord with an interpretation which stresses reasonable actions of self-preservation.

Process and Findings

Initially, CAEFS was interested in investigating potential avenues for obtaining relief for those women convicted prior to the *Lavallee* decision in relation to the deaths of abusive spouses. In so doing, we also hoped to provide an opportunity for the courts to broaden and reframe a battered women's defence. To this end, we attempted to identify women whose situations might provide the impetus for further examination of the legal construction of the "battered woman's syndrome".

Over the past three years, CAEFS has explored the circumstances of a number of women who have been charged and convicted as a result of their involvement in the deaths of abusive partners. Interviews have been conducted with more than fifteen women serving federal sentences. Some were convicted prior to and others subsequent to the *Lavallee* decision. Convictions range from first degree murder to manslaughter. Terms of imprisonment range from several years to life.

Because their cases preceded the *Lavallee* decision, some of the women were not able to avail themselves of the battered women's syndrome. Further, most of the women were precluded from putting any evidence of their histories of abuse before the courts. Even had this opportunity been afforded them, the evidence of abuse was then regarded as largely irrelevant by police and prosecutors, as a means of establishing motive; namely, if a woman had previously warded off attacks or otherwise defended herself, she was likely to have been characterized as the aggressor, perhaps even charged with assault, and consequently portrayed as

violent and her reactions were more likely to have been deemed planned or premeditated.

Similarly, women who had any prior criminal records or had lived anything but pristine lifestyles (i.e. that of the good wife, good mother, compliant woman) tended to consequently have their past histories dredged up and used against them. This, despite the fact that, except in terms of sentencing, such matters should not have had any bearing on the legality of their actions.

In some jurisdictions, the battered woman syndrome has evolved, as a result of broader recognition of the conditions that have resulted in the use by some women of lethal force to defend themselves and/or their children from violent partners. For the most part, however, women who have had to resort to such desperate action, generally have great difficulty having the circumstances surrounding their situations recognized. Too often, the criminal justice system ignores the lack of viable alternatives for women who are battered. Often overlooked are: a) women's fear of harm should they attempt to escape [many women are killed as they are leaving or after they have recently departed an abusive relationship]; and, b) the relative lack of police responsivity to situations of "domestic" violence.

Research shows that women who have resorted to lethal self-help, but do not fit the stereotypic psychological profile of a woman suffering from the "syndrome", tend to be judged more harshly than those who do fit the "syndrome" analysis. Not surprisingly, the former also tend to be penalized more severely than the latter.

At the present time, it would appear that there is no consistent resolution of these cases within the criminal justice system. In virtually identical circumstances, some women have been acquitted on the basis of self-defence and as a result of the court's acceptance of evidence of "battered women's syndrome", while others have received first degree murder convictions and life sentences. Suffice to say that there is wide disparity in sentencing practices. One of the explanations for such disparity is that the courts have not yet fully understood the similarities in circumstances and responses of battered women who kill abusive male partners.

To recap, while the decision in *Lavallee* has meant that some Crown Attorneys have decided not to lay murder and manslaughter charges in cases that present evidence of past violence by the deceased and evidence that the woman was trying to defend her life and safety, many other women have not been so fortunate. In our examination of the 15 cases of 15 women currently serving federal sentences, CAEFS has identified the following problems with the Lavallee decision:

- some of the women were convicted prior to 1990, and so they did not receive the benefit of this enlightened decision of our highest court;

- some Crown Attorneys and judges are using a rigid, stereotyped understanding of who is a "battered woman", so that women who are assertive, who have been violent themselves, or who have criminal records, have been unable to "qualify" for self-defence -- this narrow interpretation has a particularly harsh impact upon First Nations, Black and other visible minority women, whose lives and behaviour may be examined through the lens of racism;

- some defence lawyers have failed to introduce evidence of abuse and its impact on behalf of their clients because they fail to understand the scope of *Lavallee* or the reality of their clients' experiences;

- some police, Crown Attorneys, and judges have focused upon the women's failure to resolve their dilemmas non-violently, rather than locating the problem with the violent men and the inadequate response of the system in protecting women and children; and

- some lawyers, judges and juries cannot appreciate the risk and escalation of danger to women who leave abusive and controlling mates, so that they cannot see self-defence as necessary in situations where women have apparently escaped danger by leaving.

In addition to reviewing the limitations of "battered women's syndrome" and its application, we have also devoted considerable time and energy to explorations of the various avenues of appeal and release that are available to women who have been jailed as a result of their involvement in the killing of abusive partners.

The first obvious avenue would be the launching of appeals. Unfortunately, for most women, conviction and sentence appeals are virtually inaccessible. For some, this is because evidence of abuse was never raised and/or it was deemed irrelevant; thus, an argument that is new evidence could be problematic. For others, sentencing deals were accepted in exchange for guilty pleas to second degree murder or manslaughter charges.

Options such as clemency and pardons are very difficult to obtain and are rarely granted. Finally, pursuant to section 690 of the Criminal Code of Canada, the Minister of Justice has the authority to ask the judiciary to review matters. However, the Minister rarely exercises this option, the Marshall, Milgaard and Nepoose cases being exceptions to the Minister's usual response of denial to the 30+ applications received annually.

CAEFS first approached Kim Campbell, then Minister of Justice, in December 1992, requesting a meeting to discuss the results of our research thus far, and our desire for relief for the women with whom we are working. The request was reiterated to Pierre Blais when he assumed the Justice portfolio in January 1993. At the same time, a request for support was issued to Mary Collins, Minister Responsible for the Status of Women. In February, we met with representatives from the Department of Justice and Status of Women.

Immediately before the federal election in 1993, we were advised by Pierre Blais that women should apply for a section 690 review, as he did not perceive himself to have the statutory basis to conduct an en bloc review. The Leggatt and Marshall inquiries are but two examples of the types of commissions of inquiry that have occurred pursuant to current statutory powers. Furthermore, the Minister of Justice has the power to enact legislation that would enable the *en bloc* review.

Accordingly, in November of 1993, CAEFS then wrote to Allan Rock, the new Minister of Justice, asking that he meet with us to consider the matter. Initially, Allan Rock's response was merely a reiteration of his predecessor; namely, "that the Minister of Justice of Canada does not have the power to order the en bloc review", and encouraged us "to speak to the fifteen women in question about the powers of the Minister of Justice of Canada proceeding under section 690 of the Criminal Code."

CAEFS was extremely disappointed with this response and has therefore persisted in efforts to encourage Minister Rock to reconsider his decision. Meetings with the Minister continue, and CAEFS continues to devote significant resources and energy to pursuing this matter. We are very well aware of the Minister's powers, more importantly, the limitations thereto, pursuant to the provisions of s. 690 of the *Criminal Code of Canada*. As we outline below, the existing legislative provisions are inadequate to allow the sort of review necessary. Consequently, we continue to encourage the Minister of Justice to exercise his power to enact legislation that would enable the *en bloc* review.

Relief Sought

Individual avenues of relief are problematic because they do not allow the similarities of all of the cases to be examined at once, thereby limiting the extent to which individual actions in particular circumstances may be contextualized. This will require a process which permits the similarities between the cases to emerge. To summarize, CAEFS believes that existing processes of review are inadequate because their focus on discreet cases problematizes the behaviour of individual women rather than the social problem of abusive male partners. We believe that longer term change is more likely to be achieved by enhanced understanding of the situations faced by women who live in abusive situations.

For this to transpire we need a system of post-conviction relief which is not individually focused. Accordingly, CAEFS has requested that the government of Canada undertake an *en bloc* review of the cases of women currently serving federal sentences of up to life imprisonment as a result of their involvement in the killing of abusive partners. Such a mechanism has been used successfully in a number

of United States jurisdictions. It is a process which permits the cases of all women who are in similar situations to go before a review body at the same time. In this manner there is greater likelihood that the systematic nature of abusive and the inter-personal dynamic that it generates will be revealed.

Alternatively, CAEFS has encouraged the Minister to propose an alternate review process which would permit all of the women's claims to be examined together and in context. As we have discussed with the Minister and his staff, the review process we foresee must be capable of providing a wide array of remedial relief in order for individual women to have their cases decided in a just manner. To reiterate, some of the women we have identified were persuaded to plead guilty to a lesser charge, rather than face the prospect of standing trial for first degree murder. Others were unable to adduce evidence of past abuse. Still others unfortunately appear to have experienced lawyers and or courts who were insufficiently familiar with thelaw in this area, most significantly, the developments occasioned by the ***Lavallee*** decision. Accordingly, the nature of the reviewing body we envisage is one which would necessarily possess the power to grant full or conditional pardons where appropiate. In other words, at a minimum, the reviewing body should enjoy the powers of relief of both the Minister of Justice and the Solicitor General.

CAEFS has also raised concerns with the Minister of Justice regarding whether Department of Justice staff currently responsible for this matter have sufficient understanding of the dynamics of abuse to adequately review these cases. The precedent in the Kelly review of the appointment of separate and independent counsel to review that case encourages us that the Minister may similarly be predisposed to appoint independent counsel to review the cases of women incarcerated for defending themselves against abusive partners. In addition, CAEFS has requested that the Minister ensure that all of the women also have an opportunity to retain independent counsel. This would require the assistance of the Minister, whether through Legal Aid or direct funding from his Department. Most certainly, Allan Rock's commitment to ensuring appropriate legal representation of the women is critical to a just resolution of their cases.

The criminal justice and correctional system has permitted the unjust treatment of these women in the first instance. Any process adopted must be designed to offset what has been a glaring history of discrimination regarding these issues. To date, CAEFS conversations with the Minister on this matter have created the impression that Allan Rock is not prepared at this time to reexamine the appropriateness of s.690 to remedy cases of injustice for battered women. However, we also understand that, as a result of approaches by other groups, the Department of Justice may indeed be examining the limitations of this provision generally.

As recently as November 1994, the offer from Justice continues to be limited to s. 690. CAEFS has been requested to forward a sampling of the women's cases for s. 690 reviews. As they have done with the Kelly case, Justice has also committed to authorize the retention of counsel external to the Department of Justice to conduct the review(s). CAEFS is currently in the process of consulting with women who will be affected by any decision in this regard, in order to determine the most appropriate course of action.

CAEFS has also asked Justice to clarify its current position vis-a-vis s. 690. If, for instance, the Minister is willing to consider new interpretations of or amendments to current legislation either for these particular women, or more broadly, we are interested in contributing to the knowledge which will inform such a process of reform. We maintain that a group process that allows for broad remedial action is the only appropriate mechanism for dealing with the cases which we maintain must be reviewed.

While CAEFS remains firmly of the view that legislation ought to be introduced which would permit these post-conviction cases to be reviewed by an independent body which would be empowered to provide relief to women currently incarcerated, we are prepared to discuss alternatives such as the striking of a Commission of Inquiry whereby women's cases might be reviewed and recommendations made as to appropriate relief.

CAEFS believes that a process, such as that undertaken to review the cases of individuals designated as habitual criminals (ie. the Leggatt Inquiry), headed by a member of the judiciary who has some understanding of issues related to domestic violence, could be appropriate. If this were the Minister's preferred means of approaching this matter, we would propose that such a review body be empowered to:

- inquire into and review the cases of each of the approximately 16 women who are currently incarcerated on homicide charges for having defended themselves against abusive partners, with a view to determining which women should be granted relief from continued detention; and

- make recommendations in each case to the Minister of Justice and the Solicitor General of Canada, as to the most appropiate and expeditious mechanism for granting relief in each case.

CAEFS currently seeks a firm commitment from Minister Rock, demonstrated by his agreement on a fair and equitable process, that these women's cases will receive the careful attention that their prior unjust treatment under the law warrants. We sincerely hope that a more productive common ground for continuing discussions around the process for an ***en bloc*** review can be found. All of the cases need to be reviewed together and in context. The many reasons why individualized remedies will not serve these women and why CAEFS is calling for the *en bloc* review of their situations include:

- appeals of conviction and sentence are not available to all of the women because for some, the time periods for appeal have passed and for others, their lawyers entered guilty pleas on their behalves;

- appeals, where technically available, are unlikely to succeed because the women may not be permitted to introduce evidence of abuse and its effects as this evidence was, in fact, "available" at the time of the original trial;

- while pardons may be an option, this exercise of "mercy" is discretionary and rarely used for serious offenses like murder and manslaughter;

- judicial inquiries like those granted to Donald Marshall Jr. and David Milgaard are possible, but again this is an extraordinary remedy granted only rarely by the Minister of Justice, who receives over 30 requests per year;

- all of these remedies require legal assistance, which is not equally available to all of the women;

- none of the above remedies will expose to the public, to lawyers, and to judges, the systemic nature of violence against women and children and the justice system's role in its perpetuation;

- as individual remedies, the above possibilities will fail to reveal the problems with the law of self defence and thus will not generate an impetus for reform of BWS;

- there are precedents for this sort of review in other places (eg. some of the United States) and the Minister of Justice could utilize his legislative power to launch the *en bloc* review.

Conclusion

Some have raised the alarm that the recognition of a battered women's defence would lead to open season on men. Obviously, we too are concerned that women not end up in the sorts of desperate situations that have led to the deaths of men. We need to put this issue in perspective however. As the Women We Honour Action Committee documented in its report on Woman Killing, women are clearly at much greater risk from their spouses than are men, as the annual rate of spouse killings of males has decreased over time. In Ontario from 1974 through 1990, 417 women and 141 men were killed by their spouses -- women accounted for 75% of all victims of spouse killings. Furthermore, from 1974 - 1989, male victimization by spouses declined by 38% throughout Canada.

There is a growing perception that the women, whose cases we would like to see reviewed, were abused

not only by their partners, but also by a society that provides insufficient assistance and support to women in abusive relationships. In light of the lengthy waiting lists at shelters, the shoestring budgets of most women's services and other equity-seeking groups, it should come as little surprise that when their calls for help are not responded to, some women resort to drastic measures in order to escape their desperate circumstances and achieve some degree of personal safety. Our legal system, in turn, furthers the abuse by punishing the women.

Many women's and other justice-seeking groups have already indicated their support for an *en bloc* review. There is also support inherent in many federal reports -- from the proceedings of the 1991 National Symposium on Women, Law and the Administration of Justice, to the multi-party Report of the Standing Committee on Justice and the Solicitor General regarding Community Safety and Crime Prevention, to the recent report on Gender Equity in the Canadian Criminal Justice System and the Final Report of the Panel on Violence Against Women. Furthermore, the Liberal Party has identified battered women and violence against women as priorities in their policy document, ***Creating Opportunity: The Liberal Plan for Canada.***

Politicians have repeatedly voiced concern about and interest in addressing the root causes of crime, particularly by means that meet the needs of Canadian women and their children. They have also spoken of the need to address the broader social situation within which crime occurs, linking the injustices produced by economic and gender inequality. Moreover, during the election, Jean Chrétien articulated an interest in stemming the tide of imprisonment and facilitating the development of more effective responses to harmful behaviours in Canada.

With the assistance of women's groups, criminal and social justice groups and individuals, we are working to persuade the government to conduct a review of the situations of women currently incarcerated due to their involvement in the deaths of abusive partners. Amongst the supporters of this initiative are, the Native Women's Association of Canada, the Canadian Advisory Council on the Status of Women, the National Council of Women of Canada, the National Action Committee on the Status of Women, the National Association of Women and the Law, DisAbled Women's Network of Canada and the Canadian Association of Sexual Assault Centres.

K. Pate - 11/94