

CANADA
PROVINCE OF SASKATCHEWAN

IN THE COURT OF APPEAL FOR SASKATCHEWAN

IN THE MATTER OF APPEAL OF QUEEN'S BENCH NO. 4721 OF A.D. 1990
JUDICIAL CENTRE OF SASKATOON

BETWEEN:

A.L.

APPELLANT

- and -

THE CRIMES COMPENSATION BOARD (SASKATCHEWAN)

RESPONDENT

- and -

THE ATTORNEY GENERAL FOR SASKATCHEWAN

INTERVENOR

- and -

WOMEN'S LEGAL EDUCATION AND ACTION FUND

AMICUS CURIAE

FACTUM OF AMICUS CURIAE

WOMEN'S LEGAL EDUCATION AND ACTION FUND

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PART I

STATEMENT OF FACTS

1. This is an appeal from an application for judicial review of the July 31, 1990 decision of the Crimes Compensation Board.

2. The history of A.L.'s hearings before the Crimes Compensation Board and applications for judicial review of those proceedings is as follows:

i) The first hearing of A.L.'s application for compensation to the Crimes Compensation Board was on June 2, 1988. The Board issued its award the same day denying A.L. compensation pursuant to section 11(a) of the Crimes Compensation Act (hereinafter called "the Act") because she "knowingly put herself into circumstances that caused the injury to herself. She was aware of the accused's tendency to violence and yet continued to associate with him, which association resulted in injuries to herself".

Appeal Book - page 035: Crimes Compensation Board
Award, June 2, 1988

ii) A.L. then retained counsel, who asked for and was granted a re-hearing of the application for compensation. The re-hearing was conducted on December 8, 1988 at which time A.L.'s counsel introduced expert evidence with respect to the cycle of violence battered women undergo and the reasons - social, economic, religious and psychological - battered women remain

in their homes despite physical and mental abuse.

Appeal Book - page 001: Crimes Compensation Board
Award July 31, 1990

iii) The Board issued its second award the same day, denying A.L.'s application for compensation for the reasons set out in its first award.

Appeal Book - page 036: Crimes Compensation Board
Award, Dec. 8, 1988

iv) In a fiat delivered September 11, 1989 by Sirois J., the Court of Queen's Bench quashed the award of the Crimes Compensation Board on the basis that the procedure A.L. was subjected to was more than sufficient to raise a reasonable apprehension of bias on the part of the Board and ordered the Board to hear and determine A.L.'s application according to law.

Appeal Book - page 124: Fiat of Sirois J.

v) The Crimes Compensation Board re-heard A.L.'s application on March 15, 1990 and on July 31, 1990 delivered its decision which is the basis of the application for judicial review now under review.

vi) The Crimes Compensation Board found that A.L. was entitled to compensation pursuant to the Act for the injuries she sustained from an assault committed by her husband contrary to section 266 of the Criminal Code. The Board went on to find that the amount of compensation to which A.L. was entitled should be reduced pursuant to section 11(a) of the Act on the ground that A.L. was the author of her own injuries because a reasonably prudent person would have foreseen the

consequences of her actions.

Appeal Book - pages 005 - 006: Crimes Compensation Board Award July 31, 1990

vii) The Crimes Compensation Board made the following findings of fact in its decision dated July 31, 1990:

a) A.L. was a victim of crime within the meaning of the Act by reason of the assault committed by her husband on April 1, 1987, contrary to section 266 of the Criminal Code of Canada.

Appeal Book - pages 003 and 005: Crimes Compensation Board Award, July 31, 1990

b) On that date, in the course of an argument in their home, A.L.'s husband threatened to leave A.L. and the family and withdraw financial support of the family. A.L. said that she would pack his clothes, went down to their bedroom and proceeded to throw his clothing into a suitcase. Her husband was angry and enraged with her actions and preparedness to separate. He ran after A.L., hitting her in her back with his knee causing her to fall on the floor. She lay on the floor in pain until he left the room. She then crawled onto the bed.

Appeal Book - page 003: Crimes Compensation Board Award, July 31, 1990

c) As a result of the assault, she suffered a fractured vertebrae which has impaired her ability to work. She continues to suffer pain as a result of her injuries.

Appeal book - page 003 to 004: Crimes Compensation Board Award, July 31, 1990 (which also details injuries and treatment at those pages)

d) A.L. had been physically and mentally abused by her husband over a period of many years during their marriage. On one occasion, she sustained a broken nose as a result of an assault by her husband. On another occasion, he attempted to strangle her.

Appeal Book - page 004: Crimes Compensation Board Award, July 31, 1990

e) A.L. had undergone counselling for battered wife syndrome from September 1986 and continued until some time in 1988 or later, but had ceased as of March 15, 1990.

Appeal Book - pages 004 to 005: Crimes Compensation Board Award July 31, 1990

f) Other evidence presented before the Board in the course of the hearing included the following:

I. Over a period of approximately twenty-five years, A.L. was trapped in an abusive relationship for economic, social, psychological and emotional reasons;

Appeal Book - page 131 to 133: Griffith's Report

Appeal Book - page 48 to 73: Experts and Articles

II. A.L. lacked marketable skills and economic resources, as well as access to shelters;

III. A.L. was socially and physically isolated throughout most of her married life;

IV. A.L. had children remaining in the family home for whom she was primarily responsible;

V. A.L. feared the embarrassment of public exposure as well as continued harassment and violence by her husband;

VI. As a devout Roman Catholic, A.L. was heavily influenced by religious and cultural mores to submit to her husband's authority and endure his violence in order to keep her marriage and family together; and

VII. A.L. suffered the psychological impact of long term abuse, otherwise known as "Battered Women's Syndrome".

Exhibit "E", Appeal Book, pages 82-93

Exhibits "E" and "F", Affidavit of A.L. dated December 5, 1990, Appeal Book, pages 131 - 137

Appeal Book - page 135: Dr. Walton's Report

viii) The Board determined that the following actions or inactions of A.L. contributed to her injuries:

- a) A.L. continued to co-habit with her husband when she was fully aware of his violent behaviour toward her; and
- b) A.L. should have been aware that her behaviour on the date in question would aggravate her husband and lead to violence.

Appeal Book - page 006: Crimes Compensation Board's Award, July 31, 1990

ix) Pursuant to an Amended Notice of Motion dated December 5, 1990, A.L. applied to the Court of Queen's Bench for relief from the July 31, 1990 award of the Board.

Appeal Book - page 008: Amended Notice of Motion

3. On May 24, 1991, in a written decision on the application for judicial review, His Lordship Mr. Justice Maurice decided as follows:

i) there was no evidence upon which to conclude that the decision of the Board was biased;

Appeal Book - page 017: Judgment of Maurice J.

ii) the Board's interpretation of section 11(a) of the Act was not patently unreasonable;

Appeal Book - page 019: Judgment of Maurice J.

iii) the Court had no jurisdiction on the application for judicial review to find as a fact that A.L.'s Charter rights were violated because the Court was not in a position to weigh evidence and make findings of fact in this regard.

Appeal Book - page 019 to 020: Judgment Maurice J.

4. The Intervenor, the Attorney General of Saskatchewan, addressed the Charter issues raised by the motion in the Court of Queen's Bench.

5. The Amicus Curiae, the Women's Legal Education Action Fund (LEAF), obtained leave to intervene pursuant to the Order of Mr. Justice Walker of the Court of Queen's Bench dated February 6, 1991. As LEAF was not included in the style of cause in this appeal and was not served with documents in relation thereto, it

applied to this Honourable Court and obtained an Order from Mr. Justice Sherstobitoff, with the consent of the named parties, dated June 25, 1992, that the style of cause be amended to include the Women's Legal Education Action Fund as Amicus Curiae.

6. LEAF is a national charitable organization dedicated to and experienced in litigating to protect and advance the equality rights of women, including the rights under the Canadian Charter of Rights and Freedoms.

PART II

STATEMENT OF THE ISSUES

7. The Amicus Curiae will restrict its submissions to the application of sections 7, 15 and 28 of the Canadian Charter of Rights and Freedoms to the July 31, 1990 Award of the Crimes Compensation Board and the error of the learned Chamber Judge in relation to his finding on the application for judicial review that the Court did not have the jurisdiction to find as a fact that A.L.'s rights under the Charter were violated because the Court was not in a position to weigh evidence and make findings of fact in that regard. Accordingly, the Amicus Curiae submits the issues in this regard are as follows:

- a) Did the learned chamber judge err in finding the court was without jurisdiction to find whether there was a

- violation of A.L.'s rights under the Charter?
- b) Did the interpretation and/or application of section 11(a) of the Criminal Injuries Compensation Act by the Respondent Board deny A.L. equal benefit and protection of the law on the basis of sex contrary to section 15 of the Charter?
- c) Did the application of section 11(a) of the Criminal Injuries Compensation Act by the Respondent Board undermine the equality, security and liberty of the person of women in that it did not accord fundamental justice, contrary to sections 7, 15 and 28 of the Charter?

PART III

ARGUMENT

A. Jurisdiction of the Court to Apply the Charter

8. The learned judge below held that he had no jurisdiction, on judicial review, to find as a fact that A.L.'s Charter rights had been violated since to engage in the issue would involve a weighing of the evidence.

9. The issue of whether A.L.'s Charter rights were violated by the decision of the Board is a question of law. The Amicus Curiae

is not challenging the primary factual findings of the Respondent Board, but the interpretation and application of section 11(a) of the Act in a manner which severely restricts entitlement to compensatory relief for the victims of domestic violence, limiting the opportunity to acquire statutory benefits on the basis of sex contrary to sections 7, 15 and 28 of the Charter.

10. It is submitted that the Court in the case at bar has a proper factual and evidentiary basis upon which to consider whether the Respondent Board's interpretation and application of section 11(a) of the Act was consistent with the Charter. The evidentiary basis is clear. There is no contradictory evidence and no suggestion that the Respondent Board did not accept the evidence tendered. At issue is not the weighing of evidence but constitutionally correct legislative interpretation and application based on the established facts concerning domestic violence and the circumstances of A.L.

11. The Charter is the supreme law of Canada, and accordingly, statutes must be interpreted and applied in a manner consistent with the fundamental values enshrined in the Charter.

Hills et al. v. Canada (Attorney General), [1988] 1 S.C.R. 513 at 558.

R. v. Thompson, [1990] 2 S.C.R. 1111 at 1158.

RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 at 603.

12. Although the language of section 11(a) is broad, the Respondent Board's discretion under section 11(a) is not

unfettered. The Charter must be respected by administrative tribunals in the interpretation and application of their constituent statutes. Mr. Justice Lamer, as he then was, writing for the majority wrote:

Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the Charter, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the Charter... Accordingly, an Adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the Charter, and he exceeds his jurisdiction if he does so.

Slaight Communications Inc v. Davidson, [1989], 1 S.C.R. 1078 at

13. The failure of the Respondent Board to interpret and apply section 11(a) of the Act in a manner consistent with the Charter constitutes an independent and distinct ground for review.

Slaight Communications Inc. v. Davidson, supra per Dickson C.J., p 1049.

14. Courts have counselled restraint when reviewing decisions of administrative tribunals recognizing that such tribunals have specialized and unique expertise in the subject matter in issue. However, the Supreme Court of Canada has indicated that administrative tribunals are not entitled to curial deference where constitutional matters are at issue.

Cuddy Chicks v. Labour Relations Board (Ont.) (1991) 122 N.R. 361 (S.C.C.) at 374 per La Forest J.A.

B. Application of the Charter

i) The Constitutional Guarantee of Equality

15. Equality is one of the fundamental values of our society, against which the objects of all legislation must be measured. It has been identified as "the broadest of all guarantees in the Charter. It applies to and supports all other rights guaranteed by the Charter."

R. v. Oakes, [1986] 1 S.C.R. 103 at 136

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 185.

16. While section 15 does not itself guarantee social equality, equal law is seen as a means to attaining an equal society. Thus, the purpose of section 15 "is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration".

Andrews, supra at 171.

17. The importance of promoting the equality of disadvantaged groups has been well recognized. In the words of Madame Justice Wilson (as she then was), "section 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society..."

Andrews, supra at 154.

R. v. Turpin, [1989] 1 S.C.R. 1296.

18. For a practice or law to constitute sex discrimination under human rights legislation, it is not necessary that all women be disadvantaged or that all individuals who might be disadvantaged are women. It is sufficient that the practice or law has the effect of limiting access to societal benefits including equal benefit of the law on the basis of gender.

Brooks v. Canada Safeway Limited, [1989] 1 S.C.R. 1219 at 1247-1249.

Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252 at 1290.

19. The Supreme Court of Canada has considered the social and economic context of women's lives to ensure its decisions develop legal doctrine in a manner that affords equality for Canadian women. It has considered that the specific reality of women's experience of social, economic and sexual disadvantage must be appreciated in order that women are truly accorded equal protection and benefit of the law.

Brooks, supra.

Janzen, supra.

R. v. Lavallee, [1990] 1 S.C.R. 852 at 874-875.

20. The denial of full compensation through the Respondent Board's interpretation and application of section 11(a) of the Act in this case raises the issue of equality rights under section 15 of the

Charter and the right to equal security and liberty for women in accordance with the principles of fundamental justice under sections 7, 15 and 28.

ii) Wife Battering is a Sex Equality Issue

21. Although not all women are battered, victims of spousal abuse are overwhelmingly women (80 -90%) and abusers are overwhelmingly men. Further, at least one out of every ten married women or women in common law relationships in Canada are physically assaulted by their male partner. This is so because of sex inequality in society. The Supreme Court of Canada has recognized the existence of the power imbalance which leads to domestic violence.

R. v. Lavallee, Supra, at page 874;

Linda McLeod, Wife Battering in Canada: The Vicious Circle (Ottawa: Canadian Advisory Committee on the Status of Women, January, 1980) p. 21;

Michael D. Smith, "Women Abuse in Toronto: Incidence, Prevalence and Demographic Risk Markers", Dept. of Sociology, York University, North York, Ontario, April 1988

22. In R. v. Lavallee, Madame Justice Wilson writing for the majority examined the relevance of expert evidence on the psychological impact of battering to a defence by a woman charged with the murder of her abusive partner, and described the present situation of women who are battered within the historic context:

The gravity, indeed, the tragedy of domestic violence can hardly be overstated. Greater media attention to this phenomenon in recent years has revealed both its

prevalence and its horrific impact on women from all walks of life. Far from protecting women from it the law historically sanctioned the abuse of women within marriage as an aspect of the husband's ownership of his wife and his "right" to chastise her. One need only recall the centuries old law that a man is entitled to beat his wife with a stick "no thicker than his thumb".

Laws do not spring out of a social vacuum. The notion that a man has a right to "discipline" his wife is deeply rooted in the history of our society. The woman's duty was to serve her husband and to stay in the marriage at all costs "till death do us part" and to accept as her due any "punishment" that was meted out for failing to please her husband. One consequence of this attitude was that "wife battering" was rarely spoken of, rarely reported, rarely prosecuted, and even more rarely punished. Long after society abandoned its formal approval of spousal abuse tolerance of it continued and continues in some circles this day.

R. v. Lavallee, Supra, at page 872.

23. The dynamics of wife battering reflect the unequal social and economic position of women. The factors presented to the Board, based on the evidence cited in paragraph 2(vii) above, are indicators of that inequality. The evidence established that women are trapped in abusive relationships for the following reasons:

i) economic inequality which restricts women's ability to leave their home. Women are often dependent on men for the welfare and economic survival of their children and themselves, a dependency which is based on women's unpaid labour in the home, unequal pay in the workplace and unequal employment opportunities. Inadequate funding of shelters and other alternatives for women create further limitations;

ii) social and cultural norms which isolate and serve to

create barriers for women who think about leaving. Religious and social mores have held women largely responsible for the stability of their marriages and families and cast a duty on them to serve and defer to the authority of their husbands. There are inadequate social support networks for women in families because of the widespread tendency to see the family as a "private" realm and the tendency to blame women rather than their assailants for the violence suffered by them;

iii) the fear of violent retaliation in a social context of frequent intensification of violence when a woman leaves an abusive relationship, and inadequate state protection of the physical well-being of women who have been battered;

iv) concern for uprooting and displacement of children;

v) geographic isolation, particularly for full-time home makers, and the fear of public exposure; and

vi) the psychological impact caused by the violence often results in the "Battered Wives Syndrome", a complex set of symptoms which leads to a woman staying in a situation;

Appeal Book, pages 52-57: "Why Do Battered Women Stay"

Appeal Book, pages 58-65: D. Dutton and S.L.Painter, "Traumatic Bonding: The Bonding of Emotional Attachments in Battered Women and Other Relationships of Intermittent Abuse"

Appeal Book, pages 65-73: L. Walker and A. Brown, "Gender and Victimization by Intimates".

R. v. Lavallee, Supra at pages 878 - 886.

24. Different groups of women may face different and additional barriers. Rural women and women who experience multiple disadvantage, including women who are Aboriginal, immigrant, physically disabled, or poor, face increased barriers to leaving relationships in which they experience domestic violence. For example, women who are physically disabled will frequently be faced with difficulty in finding an accessible shelter, accessible buildings to obtain social assistance, or simply transportation to leave.

25. Wife battering is a social practice which not only results from but also reinforces the disadvantaged status of women in society. Domestic violence and other forms of violence against women and the fear it engenders enables men to assert their control and dominance over women and to maintain the system of gender inequality. The violence operates as both the symbol and reality of women's subordinate social status to men in a society in which masculinity as a social norm potentiates male aggression and defines women as its appropriate targets.

Russell, Diana E.H. and Van de Ven, eds. Crimes Against Women: Proceedings of the International Tribunal, (Millbray, California: Les Femmes, 1976)

26. The decision of the Respondent Board fails to recognize the context of sex inequality in which wife battering occurs. The

interpretation and application of section 11(a) of the Act by the Board has an adverse impact on women because women are overwhelmingly the victims of violence by male partners in their homes and because women are more likely to be trapped in abusive relationships as a result of their subordinate social status.

iii) The Foreseeability Test is Inconsistent with s. 15 of the Charter because it Unequally Burdens Women

27. The Respondent Board's interpretation and application of section 11(a) of the Act holds women who have been battered wholly or in part responsible for the violence of their spouses. This allocation of responsibility results in an unequal allocation of benefits under the Act and has the effect of limiting the opportunity to acquire social benefits on the basis of gender.

28. According to the Respondent Board, compensatory relief under section section 11(a) of the Act depends solely on whether the injury was a reasonably foreseeable consequence of the complainant's actions. The Amicus Curiae submits that the test of foreseeability adopted and applied by the Board adversely impacts on women who, in an unequal society, are the targets of widespread violence.

29. The result of applying a general test of foreseeability is that women are constrained or penalized in ways that men in this society are not. To the extent that the high incidence of wife assault and sexual assault may, regrettably, render resulting

injuries foreseeable, a test of foreseeability has the effect of unjustly blaming women and making them responsible for escaping or controlling the systemic violence directed against them.

30. As a result of using the foreseeability test, a woman's mere presence in a social setting where violence is a reality will be seen as acceptance of the risk of assault. Since violence is a pervasive reality for women both inside and outside the home, women may hence be penalized if they visit a bar alone or take an evening stroll alone just as they may be penalized for continuing to live with an abuser in their own home.

31. In a society where women are the targets of violence because they are women, the effect of the foreseeability test is to penalize women by way of reduced compensation for doing things that men can do freely and without penalty. To the extent that women are seen as contributing agents, the violence against them will be excused.

(a) Continuing Residence and Forseeability

32. In holding that continuing residence with an abusive spouse constitutes contributory behaviour under section 11(a) of the Act, the Respondent Board has denied the equal benefit and protection of Criminal Injuries Compensation legislation to the Appellant on the basis of sex contrary to section 15 of the Charter.

33. The effect of the Respondent Board's decision is that women who have been battered must leave their own homes in order to remain eligible for full benefits under the Act. The Board's ruling is analogous to holding victims responsible for pain and suffering endured because of racial and sexual harassment at work if they do not quit their employment or holding residents of high crimes districts responsible for crimes committed against their person or property if they do not leave their neighbourhood.

34. The Respondent Board's decision rests on a number of false stereotypical assumptions about the reality of women's lives in an unequal society and about the dynamics of domestic violence. It is respectfully submitted that section 15 of the Charter is violated when legislation is interpreted based on false or unsubstantiated stereotypes that reinforce women's disadvantage.

35. The Respondent Board's ruling assumes that women are in a position to leave their abusive spouses and that in leaving they will be safe from future harm. In applying the "reasonably prudent person" test, the Board's interpretation fails to take into account the social, economic and psychological context of unequal power in which domestic violence takes place. In addition, the interpretation fails to take into account the mounting evidence which tends to prove that even when women leave their homes because of violence, they risk their lives.

36. The Respondent Board ignores a number of factors particularly relevant to the situation of the Appellant including her concern for her children and their safety, her lack of marketable skills and economic resources, her social and physical isolation (the Appellant lacked a driver's licence), and the psychological impact of continued abuse established by way of expert testimony regarding the "battered women's syndrome".

37. In finding that continuing residence constituted a reason to reduce her award under section 11(a) of the Act, the Respondent Board not only apparently assumed, contrary to the evidence before it, that the Appellant was in a position to leave her home but also implicitly assumed, in the absence of evidence, that there was a safe or safer place to which she could go. However, the violence or danger directed against a woman by her abusive partner may well escalate if and when she leaves. Leaving by no means guarantees that the battering will end. Many women are murdered when they leave when they attempt to leave.

Appeal Book, 71: Walker and Brown

Woman Killing: Intimate Femicide in Ontario
(Toronto: Ministry of Community and Social Services,
1992).

McLeod, L. Supra, 44

38. It is submitted that the Respondent Board's assumption that the Appellant should have left her home thus putting herself at foreseeable risk is itself a denial of equality before the law.

The Board's failure to recognize factors which are the consequences of the subordinate social status of women has the effect of denying a statutory benefit on the basis of sex. The failure to take these factors into account in the interpretation and application of section 11(a) of the Act denies equality before the law and equal benefit and protection of the law with discrimination because it denies an advantage on grounds related to and identifiable by sex and because it both reflects and compounds social disadvantage based on sex.

39. In holding that continuing residence constitutes contributory behaviour, the Respondent Board shifts the responsibility for the abuse from the abuser to the abused woman. Her presence in the home becomes identified as a causal factor of the abuse.

40. Although wife battering is unlike other crimes, victims of wife battering, at the very least, should not be treated more harshly than victims of other multiple crimes. The mere possession of property, for example, would be an insufficient basis for holding property owners responsible for repeated thefts or burglaries.

41. The Supreme Court of Canada has recognized that many myths and stereotypes surround the subject of wife battering and the question of why women stay. The Court has described as erroneous the beliefs that women remain in the home because they either are not

as badly beaten as they claim or derive masochistic pleasure from the abuse. The Respondent Board's ruling reflects and reinforces damaging myths and stereotypes that women who are battered choose, provoke and deserve to be beaten and are ultimately responsible for the violence against them.

R. v. Lavallee, Supra.

Kelly, Liz, Surviving Sexual Violence, (Minneapolis: University of Minnesota Press, 1988) at 55.

Schneider, Elizabeth, "Describing and Changing: Women's Self Defence Work and the Problem of Expert Testimony on Battering", (1986) 9 Women's Law Reporter, 195.

Walker, Gillian, Family Violence and the Women's Movement: The Conceptual Politics of Struggle, (Toronto: University of Toronto Press, 1990).

42. In R.v. Lavallee, the Supreme Court of Canada held that an accused charged with murdering her abusive partner had no duty to retreat from her home according to traditional doctrine of self defence. If a woman who is battered can be exonerated for killing her abusive partner, it follows, *a fortiori*, that in this situation, an abused woman should be entitled to remain in her home without penalty.

R. v. Lavallee, Supra, 364 - 365.

43. In R. v. Bob, this Court held that administrative action requiring an Indian band to sacrifice a right to tax exemption under section 87 of the Indian Act in order to obtain a lottery licence constituted discrimination and a violation of section 15 of

the Charter. The Appellant and women who are battered are also being required by virtue of the Respondent Board's decision to sacrifice a right to possession of their home in order to obtain a statutory benefit.

R. v. Bob (1991), 88 Sask. R. 302 (Sask. C.A.)

(b) Foreseeability and the Appellant's Conduct on the Date of the Assault

44. The Respondent Board found that the Appellant contributed to her injuries by packing her husband's suitcases after he announced he would leave and withdraw financial support. In the opinion of the Board members, "the Applicant should have been aware that her actions on the date in question would aggravate him and lead to his violent behaviour". It is submitted that in so finding, the Respondent Board again contravened the Appellant's equality rights under section 15 of the Charter. To interpret section 11(a) of the Act in such a manner is to hold that women must conform to a submissive and subordinate role in relation to their husbands in order to remain eligible for full compensation under the Act. Deviation from their role is interpreted as provocation by the Respondent Board.

45. The Respondent Board implicitly recognized that initiating a separation is potentially dangerous for an abused woman, although they considered the Appellant's conduct aggravating. It is submitted, however, that the Board failed to apply this insight to

recognize the potential danger if A.L. had aggravated her husband by packing her own suitcases, and further, misallocated blame to the Appellant when she was doing what they said she ought already have done - take steps to separate.

46. Instead of viewing the Appellant's conduct as an understandable response to her husband's announcement that he was leaving and withdrawing financial support from his family and an act calculated to remove him from her presence hence promote her safety, the Respondent Board views it as conduct that "provoked" or precipitated her husband's subsequent violence. This implicitly assumes that she has no right to protest her husband's action, to try to get him out of her home, or to engage in any behaviour of which he might disapprove. By virtue of the Board's ruling, the Appellant is effectively penalized for any behaviour that could be seen by her husband as a challenge to his authority and his control over her. On such an interpretation, the Appellant is not only denied the equal benefit of the law because of her gender but is denied the fundamental right to dignity and respect which underlies all Charter guarantees.

47. In finding that the Appellant's behaviour on the date in question constitutes contributory behaviour under section 11(a) of the Act, the Respondent Board again, as in the case of continuing residence, deflects the responsibility for abuse from the abusive man to the abused woman. The Appellant is penalized for remaining

in the residence with an abusive man and for her willingness to have him leave. On the one hand she is viewed as too passive and is faulted for staying, and on the other hand, not passive enough and faulted for severing the relationship. In either case, the Respondent Board's ruling reflects a single underlying premise: the home is a sphere of male authority.

48. The Respondent Board's interpretation and application of section 11(a) of the Act harms women by reducing the compensation to which they would otherwise be entitled. Given the public role of the Crimes Compensation Board and its potential for influencing public perception, the Respondent Boards's interpretation also perpetuates the inequality of women by reinforcing gender roles of male dominance and female subordination as well as popular myths that women who are battered deserve to be physically beaten. According to R. Dobash, "the idea of provocation is a very powerful tool in justifying the husband's dominance and control and in removing moral indignation about his resort to force in securing, maintaining and punishing challenges to his authority".

R. Emerson Dobash and Russell Dobrash, Violence Against Wives: A Case Against Patriarchy, (New York: Free Press, 1979) p. 136

(iv) **The Board's Interpretation and Application of s.11(a) of the Act Violates the Rights of Women to Equal Security and Liberty Contrary to Sections 7, 15 and 28 of the Charter**

49. Section 28 of the Charter is an unconditional guarantee that the rights and freedoms referred to in the Charter apply equally to

men and women. It mandates that statutory interpretation not subtract from the rights or benefits guaranteed under the Charter, on the basis of sex.

50. Section 7 of the Charter provides that "Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." It is submitted that the Respondent Board's interpretation of section 11(a) of the Act violates the rights of women to equal security and liberty of the person in accordance with the principles of fundamental justice contrary to sections 7, 15 and 28 of the Charter.

51. In determining whether a section 7 breach has occurred, the Supreme Court of Canada has held that:

i) A threat to one's security of the person may violate an individual's section 7 rights.

Re: Singh and Minister of Employment and Immigration, [1985] 1 S.C.R. 177 at 207;

Morgentaler v. R., [1988] 1 S.C.R. 30 at 173;

ii) "State interference with bodily integrity and serious state imposed psychological stress at least in the criminal law context constitute a breach of security of the person."

Morgentaler v. R., Supra at 56.

iii) The "principles of fundamental justice" can relate to both procedure and substance depending on the circumstances of the case. These principles of fundamental fairness are found in the basic tenants of our legal system and the inherent domain of the judiciary as guardian of the justice system.

Reference Re Section 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486 at 499, 512 -513;

Morgentaler v. R., supra, 52-53;

(iv) the conviction of someone who acted without fault always violates the principles of fundamental justice and that where imprisonment is available as a penalty, there is also a breach of the right to liberty under section 7 of the Charter.

Reference Re Section 94(2) of the Motor Vehicle Act, supra, 521-522.

52. The Respondent Board's interpretation of section 11(a) of the Act undermines the equal right of women to security of the person by burdening women with the physical danger, material deprivation and psychological stress of having to vacate their own homes at the risk of losing benefits under the Act. The ruling also creates psychological stress for such women by finding them at fault or in some measure to blame for their own victimization and contributes to their stigmatized social status.

53. To the extent that the Respondent Board's interpretation establishes that women who are battered are responsible for the violence inflicted upon them and thereby exonerates batterers, it also silences victims of violence and as a matter of law, condones rather than condemns the alarming incidence of domestic violence in our society. To that extent, it participates in the victimization of women who are battered.

54. In ignoring or failing to take account of factors relevant to the situation of women who are battered and in basing its findings on unsubstantiated assumptions, it is submitted that the Respondent Board's ruling is partial, biased and arbitrary and therefore violates the principles of fundamental justice. The ruling also violates the principles of fundamental justice through its violation of s.15 of the Charter.

Morgenthaler v. R., supra, at 52-53, 1175;

Motor Vehicle Act Reference, supra, at 503.

55. In considering the import of the Charter, the Supreme Court of Canada accepted the "purposive interpretation" as the mode of interpretation best suited for the Charter.

See generally,

Hunter v. Sotham Inc. [1984] 2 S.C.R. 145 at 156;

R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295 at 344;

Motor Vehicle Reference, supra, at 500.

56. In expounding upon the purposive interpretation of the Charter, the Supreme Court has accepted and directed that this approach offers flexibility and opportunity for growth and expansion of rights in accordance with changing cultural standards. This thesis has been discussed by Eric Colvin in "Section 7 of the Canadian Charter of Rights and Freedoms", 68 C. Bar Rev. (No.3) 561 at pp 571 - 573. In particular, Eric Colvin states at pages 571 and 572:

The words used in Big M Drug Mart might seem to suggest that the "purposes" which are relevant in interpretation are those of the framers of the Charter. The Supreme Court has, however, had occasion to note the difficulty of ascribing any particular intent to the multiplicity of person who participated in the process leading to the adoption of the Charter. In addition, the Supreme Court has several times stated that the meaning of the Charter provisions is not fixed in time. There is the possibility of growth, development and "adjustment". Thus, when "purpose" is offered as a guide to interpretation, the term must be understood in a figurative sense. The reference cannot be real purposes which lie behind the constitutional text. The reference must instead be to such purposes as might be ascribed to the text in order to explain the content. Only in this way can the various statements by the Supreme Court be reconciled. Of course, such purposes could vary over time as the culture of the community shifts. The common sense of one era can be the nonsense of another era. Thus, purposive interpretation does not appear to mean that the correct interpretation of a Charter provision is that which provides the best fit with the intentions of the persons who originally chose the text. Instead, the message appears to be that the correct interpretation is that which provides the best fit with the present rationality of the text.

Thus, the ruling also violates the principles of fundamental justice through its violation of section 15 of the Charter

57. As there has been no suggestion in arguments before the Court

of Queen's Bench that section 1 the Charter can or should be invoked to justify the violations under sections 7, 15 and 28, this issue has not been addressed in the factum. In any event, it is difficult to conceive of a rational argument that could indeed be made for such justification.

PART IV

RELIEF REQUESTED

For a declaration that the Order granted by the Respondent violates or denies the Applicant's rights under sections 15, 7 and 28 of the Charter.

For a declaration that it is inconsistent with sections 15, 7 and 28 of the Charter to interpret section 11(a) of the Act to deny or reduce criminal injuries compensation in circumstances such as that of A.L.

In the alternative, for a declaration that to the extent section 11(a) of the Act is interpreted to deny or reduce criminal injuries compensation in circumstances such as that of A.L., section 11(a) is to that extent of no force or effect because it is

inconsistent with sections 15, 7 and 28 of the Charter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of
September, 1992.

FRANCINE CHAD SMITH, Counsel
for the *Amicus Curiae*, LEAF.

This factum was delivered by:

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LIST OF LEGAL AUTHORITIES

- Action Travail des Femmes v. C.N.R. [1987] 1 S.C.R. 143;
- Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143;
- Brooks v. Canada Safeway, [1989] 1 S.C.R. 1219;
- Cuddy Chicks Ltd. v. L.R.B. (Ont.) (1991), 122 N.R. 361 (SCC);
- Hills et al v. Canada (Attorney General), [1988] 1 S.C.R. 513;
- Hunter v. Sotham Inc., [1984] 2 S.C.R. 145;
- Janzen v. Platy Enterprises, [1989] 1 S.C.R. 1252;
- MacKay v. Manitoba (1989), 99 N.R. 116;
- Morgentaler v. R., [1988] 1 S.C.R. 30;
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- R.v. Bob (1991), 88 Sask. R. 302 (Sask. C.A.);
- R.v. LaVallee (1990), 1 S.C.R. 852;
- R.v. Morin (1989), 52 C.C.C.(3rd) 562 (Sask. C.A.);
- R.v. Oakes, [1986] 1 S.C.R. 103;
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- Re: Singh and Min. of Employment and Immigration, [1985] 1 S.C.R. 177;
- Ref. Re Section 94(2) of the Motor Vehicles Act, [1985] 2 S.C.R. 486;
- Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84;
- RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573;
- Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1078;