

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM A JUDGMENT OF THE NOVA SCOTIA COURT OF APPEAL)**

BETWEEN:

HER MAJESTY THE QUEEN

**APPELLANT
(Appellant)**

and

NICOLE PATRICIA RYAN

**RESPONDENT
(Respondent)**

**CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES (CAEFS) and
WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF),
ATTORNEY GENERAL OF ONTARIO and
CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO**

INTERVENERS

FACTUM OF THE INTERVENERS

**CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES (CAEFS) and
WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF)**

**WOMEN'S LEGAL EDUCATION & ACTION
FUND**

60 St. Clair Avenue East, Suite 703
Toronto, ON M4T 1N5

BORDEN LADNER GERVAIS

Suite 1100, 100 Queen Street West
Ottawa, ON K1P 1J9

**CANADIAN ASSOCIATION OF ELIZABETH
FRY SOCIETIES**

701 – 151 Slater Street
Ottawa, ON K1P 5H3

CHRISTINE BOYLE Q.C.

Tel: (416) 595-7170
Fax: (416) 595-7191
Email: boyle@law.ubc.ca

NADIA EFFENDI

Tel: (613) 237-5160
Fax: (613) 230-8842
Email: neffendi@blgcanada.com

JOANNA BIRENBAUM

Tel: (416) 595-7170 ext. 223
Fax: (416) 595-7191
Email: j.birenbaum@leaf.ca

**CO-COUNSEL FOR THE INTERVENERS,
CANADIAN ASSOCIATION OF ELIZABETH
FRY SOCIETIES and WOMEN'S LEGAL
EDUCATION AND ACTION FUND**

**OTTAWA AGENTS FOR THE INTERVENERS,
CANADIAN ASSOCIATION OF ELIZABETH
FRY SOCIETIES and WOMEN'S LEGAL
EDUCATION AND ACTION FUND**

TO: THE REGISTRAR OF THE SUPREME COURT OF CANADA

AND TO:

**PUBLIC PROSECUTION SERVICE
OF NOVA SCOTIA**

Maritime Centre
Suite 1225 - 1505 Barrington Street
Halifax, NS B3J 3K5

WILLIAM D. DELANEY

Tel: (902) 424-6795
Fax: (902) 424-0653
Email: delanewd@gov.ns.ca

COUNSEL FOR THE APPELLANT

JOEL E. PINK LAW INC.

Suite 303
1583 Hollis Street
Halifax, NS B3J 2X1

**JOEL E. PINK, Q.C., BRIAN H. GREENSPAN,
ANDREW NIELSEN, NAOMI LUTES**

Tel: (902) 423-7777
Fax: (902) 423-9588
Email: jepink@criminaldefence.com

COUNSEL FOR THE RESPONDENT

ATTORNEY GENERAL OF ONTARIO

720 Bay Street, 10th Floor
Toronto, ON M5G 2K1

JOHN CORELLI

Tel: (416) 326-2618
Fax: (416) 326-4656
Email: john.corelli@ontario.ca

**COUNSEL FOR THE INTERVENER,
ATTORNEY GENERAL OF ONTARIO**

GOWLING LAFLEUR HENDERSON LLP

Suite 2600
160 Elgin Street
P.O.Box 466, Stn "D"
Ottawa, ON K1P 1C3

HENRY S. BROWN, Q.C.

Tel: (613) 233-1781
Fax: (613) 788-3433
Email: henry.brown@gowlings.com

OTTAWA AGENT FOR THE APPELLANT

GOWLING LAFLEUR HENDERSON LLP

Suite 2600 - 160 Elgin Street
P.O.Box 466, Stn "D"
Ottawa, ON K1P 1C3

BRIAN A. CRANE, Q.C.

Tel: (613) 233-1781
Fax: (613) 563-9869
Email: brian.crane@gowlings.com

OTTAWA AGENT FOR THE RESPONDENT

BURKE-ROBERTSON

70 Gloucester Street
Ottawa, ON K2P 0A2

ROBERT E. HOUSTON, Q.C.

Tel: (613) 566-2058
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com

**OTTAWA AGENT FOR THE INTERVENER,
ATTORNEY GENERAL OF ONTARIO**

**URSEL PHILLIPS FELLOWS
HOPKINSON, LLP**
10th Floor, 30 St. Clair Avenue W.
Toronto, ON M4V 3A1

SUSAN M. CHAPMAN
Tel: (416) 969-3061
Fax: (416) 968-0325
Email: schapman@upfhlaw.ca

**COUNSEL FOR THE INTERVENER,
CRIMINAL LAWYERS' ASSOCIATION
OF ONTARIO**

SUPREME ADVOCACY LLP
Suite 100
397 Gladstone Avenue,
Ottawa, ON K2P 0Y9

EUGENE MEEHAN, Q.C.
Tel: (613) 695-8855 ext. 101
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca

**OTTAWA AGENT FOR THE INTERVENER,
CRIMINAL LAWYERS' ASSOCIATION
OF ONTARIO**

TABLE OF CONTENTS

PART I – STATEMENT OF FACTS	1
PART II - POINTS IN ISSUE	1
PART III – ARGUMENT.....	2
(1) DISCRIMINATORY REASONING REINFORCES ENTRAPMENT AND ISOLATION OF ABUSED WOMEN.....	2
<i>No Requirement of Prior Consistent Statements.....</i>	<i>3</i>
<i>Corroboration helpful but not required</i>	<i>4</i>
<i>Temporal Connection Must Account for Dynamics of Abuse.....</i>	<i>4</i>
(2) EQUAL RIGHT TO THE PRINCIPLES OF FUNDAMENTAL JUSTICE.....	5
<i>Duress is Available</i>	<i>6</i>
<i>Equal Protection of Defences: Necessity and Self-Defence</i>	<i>7</i>
<i>Necessity could be Available</i>	<i>7</i>
<i>Self-Defence could be Available in this and Future Cases.....</i>	<i>8</i>
(3) CONCLUSION.....	10
PARTS IV AND V - ORDER AND COSTS	10
PART VI - AUTHORITIES	12
PART VII - LEGISLATION	16
APPENDIX A – Cross-References to Lower Court Judgments.....	18

PART I – STATEMENT OF FACTS

1. A woman is killed by her current or former male intimate partner every 6 days in Canada.¹ Intimate femicides most frequently occur within 2 years of separation.² Sometimes children and other family members are also killed.³ In many cases, the woman is killed in spite of restraining orders and living in shelters and safe-houses.⁴ Lethal risk factors include: actual or pending separation, prior physical or sexual violence, choking/strangulation, access to a weapon, threats to kill her, violence to others and to family pets; obsessive behavior or coercive control over her, and stalking her.⁵ All of these indicators of lethal danger were present in this appeal.⁶
2. CAEFS-LEAF takes no position on the facts of this appeal but makes submissions based on the facts accepted by the trial judge and relied on by the Court of Appeal that: the accused, (Ms Doucet) had been subjected to a “reign of terror” by Michael Ryan (Ryan), she reasonably feared that she and her daughter would be killed by Ryan, she made repeated attempts to seek the protection of the state, and she had “no other safe avenue of escape open to her”.⁷

PART II - POINTS IN ISSUE

3. CAEFS-LEAF’s submissions fall into two parts:
 - (1) Police, Crown counsel (and indeed courts) make what are essentially “life and death” decisions when women report, or testify about, violence, fear and danger. Such decisions must not deny women the equal protection of the law through subjection of their testimony

¹ Statistics Canada, *Juristat, Homicide in Canada, 2010* by T Mahoney (Ottawa: StatCan 26 October 2011) at 11, 12; Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2011* (Ottawa: StatCan 2011) at 37-38.

² Actual or pending separation is the top risk factor for intimate partner homicide cited by the Domestic Violence Death Review Committee, *Eighth Annual Report* (Ontario: Office of the Chief Coroner, 2010) [DVRDC]. The second and third risk factors are “history of domestic violence” and “obsessive behaviour displayed by perpetrator” (e.g. stalking); see also H Johnson & T Hotton, “Losing Control: Homicide Risk in Estranged and Intact Intimate Relationships” (2003), 7:1 *Homicide Studies* 58 at 59-61, 81 [Johnson and Hotton (2003)]; Statistics Canada, *Juristat: Spousal Violence After Marital Separation*, by T Hotton, Vol 21 No 7 (Ottawa: StatCan 2001) at 6,7 [Hotton (2001)]; M Wilson & M Daly, “Spousal Homicide Risk and Estrangement” (1993), 8 :1 *Violence and Victims* 3 at 8-10.

³ See Hotton (2001), *ibid* at 8.

⁴ See cases listed in DVRDC 2010, *supra* note 2.

⁵ Ontario Death Risk Factor Coding Form, DVRDC, *supra*, note 2; Nova Scotia, Public Prosecution Service, *Risk Assessments (ODARA) In Spousal/Partner Violence Cases* (Nova Scotia: 2009); Statistics Canada, *Measuring Violence Against Women: Statistical Trends 2006*, by H Johnson (Ottawa: StatCan, 2006) [Measuring Violence Against Women, 2006] at 30; Department of Justice, *Inventory of Spousal Violence Risk Assessment Tools Used in Canada* (Ottawa: Department of Justice, 2009 at 6, 7, 12, 16, referencing J Campbell, *Danger Assessment* (2004); J McFarlane et al, “Intimate Partner Stalking and Femicide: Urgent Implications for Women’s Safety” (2002), 20 *Behavioural Science and the Law* 51 at 66-67; Johnson and Hotton (2003), *supra*, note 2 at 81.

⁶ See Appendix A for cross-references of risk factors to findings in *R v Ryan*, 2011 NSCA 30 [NSCA].

⁷ *R v Ryan*, 2010 NSSC 114 at para 162 [TJ].

to discriminatory assumptions and tests. In this appeal egalitarian reasoning about fact determination is critical to the availability of the defence.

- (2) Women's equality demands that there be some defence available in law where women facing a grave danger to themselves or their children have no real choice as to how to protect themselves. All defences need to be developed to ensure they meet *Charter* standards, including the substantively equal protection of statutory and common law defences, as well as the principles of fundamental justice underlying these defences. The determination that duress was available in this case is supported by *Charter* ss.7, 15 and 28. CAEFS-LEAF opposes the Crown's submission that if duress were rejected, there should be no defence at all. Such a rejection would create immediate need to ensure that self-defence and/or necessity accounts for the complex and unique realities of abused women's lives.

PART III – ARGUMENT

(1) Discriminatory Reasoning Reinforces Entrapment and Isolation of Abused Women

4. The Appellant Crown challenges the findings of fact by the trial judge. The Respondent argues that it is not open to this Court to disturb the trial court's findings of fact. CAEFS-LEAF will not address this issue, but urges this Court to reject any argument that would test the facts found by the trial judge against a template replete with inequalities assumptions about the veracity of women testifying to assaults, sexual assaults, threats with guns, stalking, and systems of coercion and isolation. This Court should not adopt reasoning to the effect that the testimony of abused women cannot meet the air of reality test unless credibility is bolstered by prior consistent statements and corroboration. Nor should this Court adopt the assumption that assaults, murderous threats and stalking can be divided into snapshots of discrete events, each with diminishing danger over time, rather than a cumulative course of conduct. This Court has rejected the perpetuation of disadvantage on the basis of stereotyping in *R.v.Kapp*.⁸ Minimizing the grave dangers to women and children in abusive relationships and discrediting women's testimony of abuse on the basis of discriminatory legal tests and assumptions would conflict with that rejection, as well as the rejection of stereotyping of abused women in favour of the "fair adjudication" of their defences in *R. v. Malott*.⁹

5. Discriminatory reasoning and fact-finding by actors in the criminal justice system reinforce the social conditions which empower men to abuse. Neither the police nor the Crown, whose jobs include investigating/prosecuting men like Ryan and protecting women like Doucet, should be led to believe that they need not act on reports of abuse in the absence of corroboration or prior consistent

⁸ [2008] 2 SCR 483 at para 25.

⁹ *R v Malott*, [1998] 1 SCR 123 at para 40 (concurring judgment of McLachlin J and L'Heureux Dube J).

statements. Doucet, like so many abused women, was told by her abuser that he could act with impunity, he could do “whatever [he] wants”, that no one would know, and that if she complained, no one would believe her or help her.¹⁰ The trial judge held that Ryan’s threats proved true; Doucet reasonably believed “her appeals to the police and other agencies were going unheeded.”¹¹ He acquitted, giving the accused the equal benefit of the air of reality test, and recognizing the terror and isolation of a woman subject to lethal threat to herself and her child.

No Requirement of Prior Consistent Statements

6. The trial judge correctly considered Doucet’s evidence without falling into error by drawing an adverse inference from her (alleged) silence or finding that women’s accounts of abuse fail the air of reality test if they have not made prior consistent statements to friends, family and physicians (or even to persons offering to kill their partners).

7. CAEFS-LEAF submits that:

- Just as the rule against prior consistent statements generally precludes their admission to bolster credibility so should their (alleged) absence not be used to diminish credibility;¹²
- The evidence accepted by the trial judge included that Doucet had repeatedly reached out to the police and victim services for protection.¹³
- This Court recognized in *R.v.Lavallee* that a “manifestation of this victimization is a reluctance to disclose to others the fact or extent of the beatings.”¹⁴ Such understanding reflects women’s realities: domestic abuse is intended to silence women. The government of Nova Scotia’s own Domestic Violence Action Plan recognizes that (unlike Doucet) “most victims of domestic violence do not report it to a formal agency”.¹⁵ There are many reasons why women remain silent, deny abuse or only slowly reveal the abuse in fragmented accounts. Women fear being disbelieved, and they know that every failed effort to secure help from others, like police, enhances their abuser’s sense of invincibility and his anger that she has broken the silence and

¹⁰ NSCA, *supra* note 6 at paras 27, 23, 44.

¹¹ TJ, *supra* note 7 at para 162; NSCA, *supra* note 6 at para 129.

¹² C Boyle, “A Principled Approach to Relevance: The Cheshire Cat in Canada” in P Roberts & M Redmayne, eds, *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching*, (Oxford: Hart Publishing, 2007).

¹³ TJ, *supra* note 7 at paras 47, 162.

¹⁴ *R v Lavallee*, [1990] 1 SCR 852 at para 54 [*Lavallee*].

¹⁵ Nova Scotia, *Domestic Violence Action Plan* (Nova Scotia: 2010) at 2, online: Nova Scotia Advisory Council on the Status of Women <http://www.gov.ns.ca/assets/files/Domestic-Violence-Action-Plan.pdf>.

challenged his control.¹⁶ Trauma, lengthy periods of domestic entrapment, shame, self-blame, commitment to marriage, fear for their children and confusion regarding men's legal entitlements can also account for women's silence.

Corroboration helpful but not required

8. The trial judge properly identified sources of corroboration of the accused's testimony¹⁷ without erring by suggesting that a battered woman's claim to acting under duress has no air of reality without corroboration. In *R.v.Ruzic*, this Court acknowledged the "difficulties in the practical implementation of a defence of duress which involves a risk of abuse through unverifiable assertions of danger and harm,"¹⁸ but did not withhold the defence from Ruzic on this basis.

9. Yet the Crown challenges the judgments of the Courts below, suggesting that they improperly relied on Doucet's "uncorroborated evidence".¹⁹ The message to abused women is that the state will not protect or prosecute unless their evidence is corroborated and they have provided a scrupulous narrative to police, physicians and counsellors. Domestic abuse is primarily committed in the "private sphere" where it is witnessed, if at all, only by children. Abusers may take care to leave no marks, or require that their victims hide their injuries or lie about the source. The silencing and isolation of abused women by their abusers would thus be bolstered by a state demand that they provide corroborating evidence or suffer in silence.²⁰

Temporal Connection Must Account for Dynamics of Abuse

10. In finding that Doucet reasonably apprehended mortal danger, the trial judge properly considered the preceding 15 years of violence and control by Ryan, the ongoing effects of his conduct on Doucet and the heightened lethal danger posed by abusive men who stalk their spouses following separation.²¹ In this Court the Crown argues there was no "temporally close" culminating threat. In so doing, the Crown attempts to strip the danger faced by abused women of context by

¹⁶ *Measuring Violence against Women 2006*, *supra* note 5 at 55.

¹⁷ *TJ*, *supra* note 7 at paras 68-141.

¹⁸ [2001] 1 SCR 687 at para 87 [*Ruzic*].

¹⁹ In arguing that the trial judge fell into palpable error, the Appellant's factum notes at para 25: "Apart from the Respondent's testimony, there was no evidence that Mr. Ryan was a danger to Aimée." At para 72, the Appellant refers directly to "uncorroborated evidence of the Respondent."

²⁰ It is noted that the Nova Scotia Public Prosecution Service, *Directive, Spousal/Partner Violence (2004)* does not require corroboration of reports by abused women and encourages prosecution even where the complainant recants.

²¹ *Measuring Violence Against Women 2006*, *supra* note 5 at 30: "Stalking has been identified as one of the primary risk factors for attempted and actual murder of female partners."

treating acts of coercion and control through physical, psychological and sexual violence over a period of years as unrelated, discrete, separate and isolated acts. To the contrary, these acts constitute an aggregate pattern of coercive control, intended to keep women in a state of constant dread and to induce compliance with the abuser's demands.²² Here Ryan's threats to "kill", "destroy" and "annihilate" Doucet if she ever tried to obtain a divorce coupled with his stalking behaviour produced in Doucet a state of "constant terror,"²³ as described by the Court of Appeal.

11. The Crown seems to suggest that because Ryan had not physically attacked Doucet in the months following their separation, her fear of his impending violence was neither credible nor reasonable.²⁴ The snapshot approach fails to grasp the reality of a constant threat of uncertain temporal execution and minimizes the dangers to women following separation.²⁵

12. The Crown's submissions would impose uniquely disadvantageous and unequal legal standards on the testimony of abused women, eerily reminiscent of discredited rules in sexual assault prosecutions. Introducing such standards for abused women would offend ss 7, 15 and 28 *Charter* values. It would also substitute unequal standards of fact determination for ensuring defences are *Charter*-compliant.

(2) Equal Right to the Principles of Fundamental Justice

13. Accused women are entitled to the equal protection of the principles of fundamental justice which underpin all criminal law defences. It would be contrary to *Charter* ss.15, 28 and 7 to convict women such as Doucet on the basis that paradigmatic instances of defences fail to capture the range of diverse human experiences reflecting these principles, such as moral innocence and moral voluntariness.

²² Scholarly research on intimate partner violence identifies the centrality of "coercive control": M Dutton & L Goodman, "Coercion in Intimate Partner Violence: Toward a Conceptualization" (2005), 52:11 *Sex Roles* 743; E Stark, *Coercive Control: How Men Entrap Women in Personal Life*, (New York: Oxford University Press, 2007) at 5, 14-17. Intimate partner violence in the form of gendered power and control is also referred to as "intimate terrorism", see J Leone et al, "Victim Help Seeking: Differences Between Intimate Terrorism and Situational Couple Violence" (2007), 56:5 *Family Relations* 427; M P Johnson, *A typology of domestic violence: Intimate terrorism, violent resistance, and situational couple violence* (Boston: Northeastern University Press, 2008) at 5, 6, 13-16. Stark also notes that where the two factors of separation and a "highly controlling" violent abuser are present, a woman has a 900% greater chance of being killed than when these two factors are not present (at 276, 277).

²³ *NSCA*, *supra* note 6 at para 29.

²⁴ Appellant Factum paras 5, 6, 63, 65, 66 and 70.

²⁵ *Ruzic* involved a series of assaults and threats, including to others, with unspecified timing for action on the threats.

14. This case incorporates elements of duress, necessity and self-defence. Duress should not be precluded simply because the fact situation could also be conceived, in whole or part, in terms of self-defence or even necessity. Overlapping defences are not a novelty, given that an “accused may in some circumstances argue self-defence under multiple provisions of the *Code*, invoking whichever provision proves most “favourable””.²⁶ Firewalls should not be created between defences leaving abused women to fall through gaps.

Duress is Available

15. The defence of duress, whether in its statutory or common law form, applies to situations where the offence is directed at the threatener, rather than innocent third parties. No words in s.17 preclude its application to such a case.²⁷ This Court has declined other invitations to limit defences by reading-in words.²⁸ The genius of the common law is its capacity to address diverse situations, consistently with *Charter* imperatives, and drawing for inspiration on existing jurisprudence as appropriate.

16. Duress “is designed for the common man, not for a community of saints and heroes”.²⁹ It must also be designed for women, especially those women who are trapped in dire circumstances of desperation, subject to a brutal and continuing narrowing of options by constant threat against their lives coupled with an absence of adequate state protection. The judgments in the Courts below recognized the horror of an abused woman’s experience of being so terrified, isolated, endangered and lacking in alternatives or support that she is coerced into arranging a murder. This Court’s strong language in *Ruzic* reflects such understanding: “It would be contrary to the principles of fundamental justice to punish an accused who is psychologically tortured to the point of seeing no reasonable alternative, or who cannot rely on the authorities for assistance.”³⁰

17. The scope of both statutory and common law forms of duress cannot be constitutionally under-inclusive, and must respect the equal right to fundamental justice. CAEFS-LEAF opposes adding categories of excluded offences (such as “homicide”) to the common law defence of

²⁶ Vanessa MacDonnell, “Novel Applications of the Statutory Defence of Duress” (2011), C.R. (6th) 316 at 321; See also *R v McIntosh*, [1995] 1 SCR 686 [*McIntosh*] and *R v Pintar* (1996), 30 OR (3d) 483 (CA).

²⁷ *The Interpretation Act*, RSC 1985, c I-21, s12.

²⁸ *Ruzic*, *supra* note 18 at para 54; *McIntosh*, *supra* note 26 at para 26.

²⁹ *Ruzic*, *ibid* at para 40.

³⁰ *Ruzic*, *ibid* at para 88.

duress. The proportionality requirement for duress surely cannot mean that abused women and their children should be prepared to die rather than counsel homicide.

18. Ultimately, if this Court were to hold that duress does not apply to an accused who responds to coercion by targeting the threatener, the defence would be denied for behaviour that is less morally blameworthy, though just as morally involuntary, than if a third party were the victim. Such an irony heightens concern about defences falling short of the equal protection of the law.

Equal Protection of Defences: Necessity and Self-Defence

19. If duress were not available to this accused, then necessity or self-defence must be. Necessity and self-defence bear a close relationship to duress in terms of their juristic common ground of response to external danger.³¹ Section 8(3) of the *Criminal Code*³² provides a common law penumbra (currently occupied by necessity and the common law defence of duress) which can remedy under-inclusive legislation. Common law wisdom comes into play when the courts encounter a gap or weakness between an offence and the principles of fundamental justice. The on-going development of defences “would be one means...for the criminal law...to reflect and accommodate the experiences of women, aboriginal people, ethno-centric cultural groups and other disadvantaged minorities.”³³

Necessity could be Available

20. In *Ruzic* this Court struck down the immediacy and presence requirements of duress. In *Lavallee* this Court declined to read a requirement of imminent danger into self-defence.³⁴ In this appeal, necessity would apply if the “urgent situation” of “clear and imminent peril”³⁵ element were similarly understood from the perspective of abused women who face the chronic emergency of an unrelenting threat of death. The findings of fact of the trial judge included the chronic

³¹ *R v Hibbert*, [1995] 2 SCR 973 at para 50 [*Hibbert*].

³² The *Criminal Code*, RSC 1985, c C-46 (as amended).

³³ Report of the Parliamentary Sub-Committee on the Recodification of the General Part of the Criminal Code of the Standing Committee on Justice and the Solicitor General, *First Principles: Recodifying the General Part of the Criminal Code of Canada* (Ottawa: 1993), at 17.

³⁴ *Lavallee*, *supra* note 14 at para 41.

³⁵ *R v Morgentaler*, [1976] 1 SCR 616, at 678.

emergency faced by the accused, as well as the other elements of necessity: no reasonable legal alternative, and proportionality.³⁶

Self-Defence could be Available in this and Future Cases

21. If duress were not available, the finding of moral involuntariness would make it essential to trace another route to a defence consistent with the equal right to the principles of fundamental justice. There are two possible solutions: the use of s. 8(3) to apply the common law to counselling; or interpretation of s.37.

22. The existing self-defence provisions go a long distance in addressing the facts as found by the trial judge. Turning first to s.34(2), the vital elements are present: unlawful assault understood through the lens of *Lavallee*; a “reasonable apprehension of death or grievous bodily harm”;³⁷ and a belief, “on reasonable grounds, that [s]he cannot otherwise preserve [her]self from death or grievous bodily harm.”³⁸ The Court of Appeal noted the missing element as death or grievous bodily harm.³⁹ For this reason, counselling a murder (not committed) in self-defence (and some attempts) are not covered by s.34(2).

23. Proposed amendments to self-defence currently before Parliament in Bill C-26 provide a contrast in their broader wording for a reformed s.34:

A person is *not guilty of an offence* if

- (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
- (b), and
- (c) the act committed is reasonable in the circumstances.⁴⁰

24. Turning to s.37, it envisages the defence of others, such as children, and applies to the prevention of the “repetition” of assault, thus envisaging preventative force. However, the Court of

³⁶ *R v Latimer*, [2001] 1 SCR 3 at paras 26-30.

³⁷ *TJ*, *supra* note 7 at paras 149-156.

³⁸ *TJ*, *ibid* at paras 157-162.

³⁹ *NSCA*, *supra* note 6 at para 61.

⁴⁰ The Citizen’s Arrest and Self-defence Act, Second Reading in the Senate (15 May 2012).

Appeal expressed the view that s. 37 was not available, interpreting “using force” to mean “direct force”.⁴¹

25. Sections 34 and 37 do not bar planning nor seeking the assistance of others. As Professor Elizabeth Sheehy asks:

[H]ow can women who are trapped by a terrifyingly violent male partner ensure that they save their own lives without “planning”? Is there a moral difference between spontaneous self-defence, where a woman happens upon a weapon at just the right moment to fend off a potentially murderous attack, and planned self-defence, where the woman tries to guarantee her own survival by preparation? With no other option that would demonstrably save her life, seeking aid from a third party may well be a woman’s last resort. Jane Hurshman tried and failed to hire a hit man to kill Billy Stafford. In the end she committed the homicide herself, but does that change the fact in either scenario she was acting in self-defence?⁴²

26. This Court developed an equality analysis of self-defence in *Lavallee*. However barriers to the equal protection of the law remain.⁴³ As noted by the Court below, “all too often the law is drafted against the backdrop of a male norm. Thus, where women's experiences differ from those of men, the law may be incapable of responding to the realities of women's lives.”⁴⁴ This is true of self-defence, which requires some level of success in not covering attempts or counselling not resulting in death or grievous bodily harm. Women should not be required to fit into a stereotypical paradigm of a successful defence, contrary to ss.7, 15 and 28 of the *Charter*. Whether or not Parliament reforms the defence, a common law extension to attempts and counselling remains true to the fundamental elements of the defence.

27. Alternatively, self-defence could apply to facts found by the trial judge through interpretation of s.37 with its gap-filling role.⁴⁵ The words “in using force to defend himself or any one under his protection from assault” could be understood broadly as encompassing steps taken to prevent assault which do not involve physical contact. Had Ms Lavallee fired and missed, her action could have been described, in a common sense fashion, as using force. Similarly, Ms Doucet could be described as having been driven to using force to defend herself and her child

⁴¹ NSCA, *supra* note 6 at para 63.

⁴² E Sheehy, *Defending Battered Women on Trial: Lessons From the Transcripts* (forthcoming).

⁴³ E Schneider, *Battered Women and Feminist Lawmaking* (New Haven: Yale University Press, 2000) at 116-120 (equal right to self-defence) and 135-137 (unequal application of concepts of justification and excuse).

⁴⁴ NSCA, *supra* note 6 at para 89, citing M Shaffer, “Coerced into Crime: Battered Women and the Defence of Duress” (1999), 4 Can Crim L Rev 271 (WL Can) at 329-330.

⁴⁵ McIntosh, *supra* note 26 at para 45.

from assault. In essence it is CAEFS –LEAF’s position that either an interpretive or a common law route must be found.

28. The justification/excuse distinction should not be a barrier to the application of the defence to an abused woman who seeks the assistance of others to protect herself and her child from threats of lethal violence, particularly after reaching out to the police to no avail. It is difficult to see how an abused woman in the circumstances of Doucet is more morally blameworthy than an initial aggressor in a barroom brawl, who would be entitled to plead several versions of self-defence. An abused woman who acts to protect herself against a threat for which she is in no way responsible is no less justified than a man who protects himself from a threat that is in part of his own making.

(3) Conclusion


29. All too many women, children or other family members succumb, rather than resort to, violence. Crown decisions (about whether to prosecute abusive men or how to prosecute abused women) should not reflect stereotypical assumptions such as that women’s testimony about abuse needs corroboration, that if women were really abused they would tell all and sundry, or that stalking is not a constant threat. The law should not reflect an expectation that women should die in a saintly way, or engage in spontaneous hand-to-hand combat in an heroic way. To deny any defence to women in Ms Doucet’s desperate situation would be to place the burden of state failure to respond⁴⁶ to pleas for help on their shoulders alone.


PARTS IV and V - ORDER AND COSTS

30. CAEFS-LEAF seeks an order granting leave to make oral argument at the hearing of this appeal.

⁴⁶ Under both customary and conventional international law, Canada has a due diligence obligation for preventing, responding to, protecting against and providing remedies for acts of violence against women whether such acts are committed by State or non-State actors: United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation 19, Violence Against Women*, 11th Sess, UN Doc A/47/38 (1994) 1 at para 11; *Accelerating Efforts to eliminate all forms of violence against women: ensuring due diligence prevention*, Human Rights Council Res 14/12, UN Human Rights Council, 14th Sess, Supp No 36, UN Doc A/HRC/RES/14/12, (2010); *Jessica Lenahan (Gonzales) et al v United States* (2011), Inter-Am Comm HR, Report No 80/11 (and the instruments and case law cited therein at paras 122-134); A duty to protect has been recognized in Canada in *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police*, [1998] OJ No 2681 (Div Ct), leave to appeal dismissed [1991] OJ No 3673 (CA) and *BM v British Columbia (Attorney General)*, 2001 BCSC 419; appeal dismissed 2004 BCCA 402; leave to appeal denied [2004] SCCA No 428; see also J Koshan, “State Responsibility for Protection Against Domestic Violence: The Case of Jessica Lenahan (Gonzales)” University of Calgary Faculty of Law Blog (10 October 2011); M Randall, “Equality Rights and the Charter: Reconceptualizing State Accountability for Ending Domestic Violence”, in F Faraday et al eds, *Making Equality Rights Real, Securing Substantive Equality Under the Charter* 2d (Toronto: Irwin Law, 2009) 275.

All of which is respectfully submitted this 25th day of May 2012

fr 
Christine Boyle, Q.C.

fr 
Joanna Barenbaum

PART VI - AUTHORITIES

Cases	Paragraph Nos.
<i>B.M. v. British Columbia (Attorney General)</i> , 2001 BCSC 419	29
<i>Jane Doe v. metropolitan Toronto (Municipality) Commissioners of Police</i> , [1998] OJ No 2681 (Div Ct)	29
<i>R. v. Hibbert</i> , [1995] 2 S.C.R. 973	19
<i>R. v. Kapp</i> , [2008] 2 S.C.R. 483	4
<i>R. v. Latimer</i> , [2001] 1 S.C.R. 3	20
<i>R. v. Lavallee</i> , [1990] 1 S.C.R. 852	7, 20
<i>R. v. Malott</i> , [1998] 1 S.C.R. 123	4
<i>R. v. McIntosh</i> , [1995] 1 S.C.R. 686	14, 15, 27
<i>R. v. Morgentaler</i> , [1976] 1 S.C.R. 616	20
<i>R. v. Pinta</i> (1996), 30 OR (3d) 483 (C.A.)	14
<i>R. v. Ruzic</i> , [2001] 1 S.C.R. 687	8, 11, 15, 16
 Secondary Sources	 Paragraph Nos.
C Boyle, "A Principled Approach to Relevance: The Cheshire Cat in Canada" in Paul Roberts & Mike Redmayne, eds., <i>Innovations in Evidence and Proof: Integrating Theory, Research and Teaching</i> (Oxford: Hart Publishing, 2007)	7

J Campbell, et al, "The Danger Assessment validation of a lethality risk assessment instrument for intimate partner femicide", (2009), 24(4) <i>Journal of Interpersonal Violence</i> 653, downloaded online at www.sagepub.com	1
Department of Justice, <i>Inventory of Spousal Violence Risk Assessment Tools Used in Canada</i> (Ottawa: Department of Justice, 2009)	1
Domestic Violence Death Review Committee, <i>Eighth Annual Report</i> (Ontario: Office of the Chief Coroner, 2010)	1
M Dutton & L Goodman, "Coercion in Intimate Partner Violence: Toward a Conceptualization" (2005), 52:11 <i>Sex Roles</i> 743.....	10
Holly Johnson & Tina Hotton, "Losing Control: Homicide Risk in Estranged and Intact Intimate Relationships" (2003), 7:1 <i>Homicide Studies</i> 58	1
Michael P. Johnson, <i>A typology of domestic violence: Intimate terrorism, violent resistance, and situational couple violence</i> (Boston: Northeastern University Press, 2008)	10
Jennifer Koshan, "State Responsibility for Protection Against Domestic Violence: The Case of Jessica Lenahan (Gonzales)" <i>University of Calgary Faculty of Law Blog</i> (10 October 2011) online: ABlawg http://ablawg.ca/2011/10/10/state-responsibility-for-protection-against-domestic-violence-the-case-of-jessica-lenahan-gonzales	29
Janet M Leone, Michael P Johnson & Catherine L Cohan, "Victim Help Seeking: Differences Between Intimate Terrorism and Situational Couple Violence" (2007), 56:5 <i>Family Relations</i> 427.....	10
Vanessa MacDonnell, "Novel Applications of the Statutory Defence of Duress" (2011), C.R. (6 th) 316	14
J McFarlane, et al, "Intimate Partner Stalking and Femicide: Urgent Implications for Women's Safety" (2002), 20 <i>Behavioural Science and the Law</i> , 51	1
Nova Scotia, <i>Domestic Violence Action Plan</i> (Nova Scotia: 2010), online: Nova Scotia Advisory Council on the Status of Women http://www.gov.ns.ca/news/smr/2010-12-03-domestic-violence-plan/media/Domestic-Violence-Action-Plan.pdf	7
Nova Scotia, Public Prosecution Service, <i>Directive, Spousal/Partner Violence</i> (Nova Scotia: 2004).....	9
Nova Scotia, Public Prosecution Service, <i>Risk Assessments (ODARA) In Spousal/Partner Violence Cases</i> (Nova Scotia: 2009).....	1

Melanie Randall, "Equality Rights and the Charter: Reconceptualizing State Accountability for Ending Domestic Violence" in Faraday F., et al eds, <i>Making Equality Rights Real, Securing Substantive Equality Under the Charter</i> 2 nd ed. (Toronto: Irwin Law, 2009) 275	29
Report of the Parliamentary sub-Committee on the Recodification of the General Part of the Criminal Code of the Standing Committee on Justice and the Solicitor General, First Principles: Recodifying the General Part of the Criminal Code of Canada (1993)	19
Elizabeth Schneider, <i>Battered Women and Feminist Lawmaking</i> (New Haven: Yale University Press, 2000).....	26
Martha Shaffer, "Coerced into Crime: Battered Women and the Defence of Duress" (1999), 4 Can Crim L Rev 271 (WL Can)	26
Elizabeth Sheehy, <i>Defending Battered Women on Trial: Lessons From the Transcripts</i> (forthcoming)	25
Evan Stark, <i>Coercive Control: How Men Entrap Women in Personal Life</i> (New York: Oxford University Press, 2007).....	10
Statistics Canada, <i>Family Violence in Canada: A Statistical Profile, 2011</i> , (Ottawa: StatCan, 2011)	1
Statistics Canada, <i>Juristat: Spousal Violence After Marital Separation</i> , by Tina Hotton, Vol. 21 No.7 (Ottawa: StatCan 2001).....	1
Statistics Canada, <i>Juristat, Homicide in Canada, 2010</i> by Tina Hotton Mahoney (Ottawa: StatCan 26 October 2011).....	1
Statistics Canada, <i>Measuring Violence Against Women: Statistical Trends 2006</i> , by Holly Johnson (Ottawa: StatCan, 2006).....	1, 7, 10
Margo Wilson & Martin Daly, "Spousal Homicide Risk and Estrangement" (1993), 8:1 <i>Violence and Victims</i> 3.....	1

International Law

<i>Accelerating Efforts to eliminate all forms of violence against women: ensuring due diligence prevention</i> , Human Rights Council Res 14/12, UN Human Rights Council, 14 th Sess, Supp No 36, UN Doc A/HRC/RES/14/12, (2010)	29
<i>Jessica Lenahan (Gonzales) et al v United States</i> (2011), Inter-Am Comm HR, Report No 80/11.....	29

United Nations Committee on the Elimination of Discrimination Against Women, <i>General Recommendation 19, Violence Against Women</i> , 11 th Sess, UN Doc A/47/38 (1994) 1.....	29
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

Bills

The <i>Citizen's Arrest and Self-defence Act</i> , Second Reading in the Senate (15 May 2012)	23
--------------------------------------------------------------------------------------------------------	----

PART VII –LEGISLATION

Legislation

The Criminal Code, RSC 1985, c C-46 (as amended)

The Interpretation Act, RSC 1985, c I-21, s12

<p><i>The Criminal Code</i>, RSC 1985, c C-46 (as amended)</p>	
<p>Common law principles continued</p> <p>(3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.</p> <p>R.S., 1985, c. C-46, s. 8;1993, c. 28, s. 78; 2002, c. 7, s. 138.</p>	<p>Principes de la <i>common law</i> maintenus</p> <p>(3) Chaque règle et chaque principe de la <i>common law</i> qui font d'une circonstance une justification ou excuse d'un acte, ou un moyen de défense contre une inculpation, demeurent en vigueur et s'appliquent à l'égard des poursuites pour une infraction visée par la présente loi ou toute autre loi fédérale, sauf dans la mesure où ils sont modifiés par la présente loi ou une autre loi fédérale ou sont incompatibles avec l'une d'elles.</p> <p>L.R. (1985), ch. C-46, art. 8;1993, ch. 28, art. 78;2002, ch. 7, art. 138</p>

<p><i>DEFENCE OF PERSON</i></p> <p>Marginal note: Self-defence against unprovoked assault</p> <p>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.</p> <p>Extent of justification</p> <p>(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if</p> <p>(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</p> <p>(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.</p>	<p><i>DEFENSE DE LA PERSONNE</i></p> <p>Note marginale : Légitime défense</p> <p>34. (1) Toute personne illégalement attaquée sans provocation de sa part est fondée à employer la force qui est nécessaire pour repousser l'attaque si, en ce faisant, elle n'a pas l'intention de causer la mort ni des lésions corporelles graves.</p> <p>Mesure de la justification</p> <p>(2) Quiconque est illégalement attaqué et cause la mort ou une lésion corporelle grave en repoussant l'attaque est justifié si :</p> <p>a) d'une part, il la cause parce qu'il a des motifs raisonnables pour appréhender que la mort ou quelque lésion corporelle grave ne résulte de la violence avec laquelle l'attaque a en premier lieu été faite, ou avec laquelle l'assaillant poursuit son dessein;</p> <p>b) d'autre part, il croit, pour des motifs raisonnables, qu'il ne peut pas autrement se soustraire à la mort ou à des lésions corporelles graves.</p>
<p>Preventing assault</p> <p>37. (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.</p> <p>Extent of justification</p> <p>(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.</p>	<p>Le fait d'empêcher une attaque</p> <p>37. (1) Toute personne est fondée à employer la force pour se défendre d'une attaque, ou pour en défendre toute personne placée sous sa protection, si elle n'a recours qu'à la force nécessaire pour prévenir l'attaque ou sa répétition.</p> <p>Mesure de la justification</p> <p>(2) Le présent article n'a pas pour effet de justifier le fait d'infliger volontairement un mal ou dommage qui est excessif, eu égard à la nature de l'attaque que la force employée avait pour but de prévenir.</p>

<p>The <i>Interpretation Act</i>, RSC 1985,, c. I-21, s. 12</p>	
<p>Enactments deemed remedial</p> <p>12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.</p> <p>R.S., c. I-23, s. 11.</p>	<p>Principe et interprétation</p> <p>12. Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.</p> <p>S.R., ch. I-23, art. 11.</p>

APPENDIX A**Citations, footnote #6:**

Separation: NSSC paras 46, 115.

Prior Physical or Sexual Violence: NSSC paras 15, 20, 31, 36-39; NSCA paras 15, 20, 27, 35, 39.

Choking/Strangulation: NSSC para 15; NSCA paras 10, 12.

Access to a weapon: NSSC paras 31, 36-39; NSCA paras 22, 27, 34-36.

Threats to kill the woman and the child: NSSC paras 17, 33, 39, 42, 45; NSCA 15, 30, 39, 40, 42, 43.

Violence to others and family pets: NSSC paras. 39, 134-136, 140; NSCA paras. 22, 36.

Obsessive behaviour and control: NSSC paras 28-30, 34, 39, 56, 110, 139; NSCA paras 13, 26-32.

Stalking: NSSC para 53, 156; NSCA, para 46.