No Place like Home: Assaulted Migrant Women's Claims to Refugee Status and Landings on Humanitarian and Compassionate Grounds

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INTRODUCTION

A significant portion of the immigration law work at Parkdale Community Legal Services involves assisting migrant women who have been assaulted by their male partners, either here or in their home country, or both. The stories usually fall into one of two groups, with many variations in the individual facts.

In one group are women who have fled their home country because of the violence of their husbands, and now seek asylum in Canada. Some of these women have made refugee claims and are in various stages of the backlog in the Canadian immigration process or in the new refugee determination system. Some have come as visitors, overstayed their visas and are now without status. Sometimes, the abusive husband has followed them to Canada.

The other group comprises women who have been sponsored by their husbands while in Canada but are not yet permanent residents. If they leave their husbands because of abuse, the sponsorship will usually be withdrawn, and they face deportation.

1. The authors were both articling at Parkdale Community Legal Services at the time the ideas in this paper were developed. We would like to acknowledge and thank Jacqueline Greatbatch, staff lawyer in the immigration law section at Parkdale Community Legal Services, for inspiring much of the work presented here, and D., whose situation compelled us to get it written. We also owe thanks to Professor Shelley Gavigan of Osgoode Hall Law School, Mary Marrone, of Community and Legal Aid Services Programme at Osgoode Hall Law School, and Diane Roberts of Parkdale Community Legal Services for reading a very rough first draft on short notice and offering us their comments and encouragement. We also thank Professor Janet Mosher of the University of Toronto for her many very useful comments.
The *Immigration Act* (hereinafter the *Act*) and the *Immigration Regulations* (hereinafter the *Regulations*) and policies developed under it provide several potential avenues for admission of these women to Canada as permanent residents: independent applicants, family sponsorship, Convention refugee claims, and humanitarian applicants. However, all of them are fraught with difficulties flowing from the objectives of the *Act* itself and the male bias inherent in the legislation. The main objective of the *Act* is to "promote the domestic and international interests of Canada". Subsumed in this are the needs to promote a viable economy, to facilitate family reunification, and to fulfill Canada's international obligations with respect to refugees and our humanitarian tradition. All applicants must meet medical and criminal admissibility standards, and all except refugees, must show their ability to be financially self-sufficient, so as not to be a burden on Canada's social services.

The *Act*’s other objective, "development of a strong and viable economy", is the basis of the selection criteria for investors, business entrepreneurs and independent applicants. Members of these classes are admitted to Canada because they bring in money, jobs or skills deemed valuable to the Canadian labour force. Many of our clients come from countries where education is not available to women, or where it is not encouraged. Further, their job skills may be limited because of actual and expected childcare responsibilities, or because they have been confined in low-paying, low-skill jobs that women traditionally fill. This route to admission is therefore of limited value to most of our clients. It is relevant here only insofar as it locates the dis-

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3. *Immigration Act*, *ibid*. at s. 3. The *Act* also requires that applications for permanent resident status must be made abroad (s. 9(1)). This can be circumvented on humanitarian and compassionate grounds, and is discussed later in the paper.

4. These standards may be waived under exceptional circumstances on humanitarian grounds, but the ability to be self-supporting is a factor considered in assessing an application on humanitarian and compassionate grounds, discussed more fully later in the paper.

5. *Supra*, note 2, s. 3(h).
cussion of assaulted migrant women in the larger framework of Canada's immigration policy in general.

The objective of family reunification is implemented primarily through sponsorship of family class applicants, wherein a Canadian resident or citizen may sign an undertaking of assistance, or sponsorship agreement, agreeing to assume financial responsibility for an applicant who is a close family member. Women fleeing abusive husbands in their home country usually don't have close relatives in Canada who are willing and able to sponsor them under this program. In some cases women who are escaping abusive sponsoring husbands may be able to have another relative assume the sponsorship agreement, but generally they too cannot avail themselves of this program.

Refugees may be admitted if they can prove that their situations fit the definition of Convention refugee under the Act. They must show a well-founded fear of persecution for reasons of race, nationality, religion, political opinion or membership in a social group, and that they are unable or unwilling to avail themselves of the protection of the State.

However, the Convention refugee definition itself has been called discriminatory against women, in that it recognizes persecution based only on the publicly apparent enumerated grounds listed above, which often do not reflect the private reality of women's lives. It also requires a state connection to the persecution feared by the refugee claimant. Women who are abused in their homes, especially those who have not sought police protection because of shame or because they did not believe protection would be forthcoming, may have difficulty showing that what they have suffered is persecution, that it was because of one of the enumerated grounds, and that the state was sufficiently con-

6. Only spouses and dependent children are eligible to be sponsored without the sponsor meeting a means test. Unmarried children and parents may be sponsored upon proof of financial ability by the sponsor or sponsors. Family members who are not as close in relationship as family class members may sign an undertaking of assistance for a relative who has applied as an independent immigrant, increasing the applicant's chance of acceptance.

7. Supra, note 2, s. 2. This definition is treated in detail later in the paper.

nected to the persecution to bring the case under the definition of ref-
ugee in the Act.

The final route available under the Act is landing on humanitarian
grounds. There is no statutory definition of "humanitarian". The
authority to grant someone permanent resident status on these
grounds lies with the Minister of Employment and Immigration. It is a
discretionary power, with decisions made on a case by case basis. How-
ever, there are guidelines contained in the policy manuals and
operations memoranda issued by the Minister. In general, permanent
resident status may be granted on humanitarian and compassionate
grounds if the applicant can show undeserved or disproportionate
hardship if returned home, as well as the ability to be financially self-
sufficient if permitted to remain in Canada. This route is thus poten-
tially open both to women whose sponsorship has been withdrawn
and to women who have fled their home country because of abuse.
Although this may be an easier route to admission than a refugee
claim, ignorance about wife assault and its almost universal occur-
rence may make it difficult to show that the hardship a woman faces
on return is sufficient to justify landing, or that allowing her to remain
in Canada will ameliorate her situation.

OBJECTIVES

The objective of this paper is to consider how, as advocates, we can
fruitfully advance refugee claims and humanitarian applications on
behalf of assaulted migrant women.\(^9\) We start from the perspective
that the Act and policies reflect a view of the world which does not
take women's experiences of that world into account and thus disad-
vantages women. We have attempted, therefore, to show how the Act
and policies can be interpreted so as to redress that lacuna.

In the first section we discuss the issue of wife assault itself, to provide
background for the later, more legalistic sections and to provide the
reader with sufficient knowledge and sources to be able to frame their

\(^9\) The pangeographic and private nature of wife assault have led to the proposi-
tions that either there is no solution, or the solution lies in the international
dismantling of patriarchy. In this paper, we take the position that providing
international protection to battered women does not conflict with an ultimate
goal of dismantling patriarchy. Further, in our casework we work with real
women who are individually in danger and need what assistance we can pro-
vide them now.
own clients' cases. We follow that with an examination of the definition of Convention refugee, in particular as it applies to the situation of assaulted migrant women. We discuss not only how, why and when refugee claims may and should work for assaulted migrant women: but, also examine the points of resistance we have encountered to considering wife assault victims as subjects for international protection under the Convention refugee definition. The third section treats applications for landing on humanitarian and compassionate grounds, both for women in the refugee stream and those whose sponsorship has been withdrawn following separation because of abuse. In the final section, we outline some of the non-legal as well as legal strategies being developed by the staff at Parkdale Community Legal Services to assist assaulted migrant women.

We see this paper as a first step, flowing from the perceived needs and possibilities we have encountered in our own work. It also stems from the knowledge that the current awareness of wife assault as a social problem, with social and political solutions, is very recent even in Canada. In 1982, it was still possible for Canada's political leaders to greet the issue with laughter in the House of Commons. Yet less than a decade later, Madame Justice Wilson delivered a landmark decision on battered wives in *R. v. Lavallee*, in which she recognized both the gravity of the problem and the role of ideology in its perpetuation. In that decision, she challenged the notion that we as individual members of society are knowledgeable about the experience of battered wives; "common knowledge" about wife assault may in fact be built on myths and stereotypes. The decision in *Lavallee* urges a rethinking and challenging of conventional wisdom about the nature of violence against women. This paper forms part of the challenge to the way conventional wisdom informs current theory and practice in immigration law.

WIFE ASSAULT
We use 'wife assault' or 'wife battering' in this paper to mean physical and sexual abuse by an intimate partner, whether the couple are or were legally married, living together, or dating. Occasionally, the intimacy is defined by his obsession with her: they may or may not have ever had a 'relationship', but he has fixated on her as the main target for his violence.13

We chose these over other terms such as 'spousal assault' and 'domestic violence' because they clearly import the notion that it is women who are being beaten by men. Although women are occasionally violent towards men, the incidence outside of self-defence is very small.14 Wife assault also has a different cultural meaning and different consequences than husband abuse, as men continue to hold power in society and in families, and as they are usually physically bigger and stronger than women.15

We use the term 'assault' to mean any act which constitutes a threat to the woman's physical integrity. It thus encompasses not only assaults with fists, choking and unwanted sexual acts, but also assaults with weapons, including but not limited to knives, irons, cigarettes, lit can-

12. For one of us, 'assault' was more evocative of the horror of the stories we have heard; for the other, 'battering' was. In the end, we decided we both used them to mean the same thing, and so they appear interchangeably in the text.

13. Noble v. Minister of Employment and Immigration (hereinafter Noble) (Immigration Appeal Board Decision T86-10176, C.L.I.C. No. 108.16, 10 June 1987) fits this category: although they had never had an intimate relationship, Ms. Noble was pursued by her assailant over many years, for no apparent reason. Aside from the lack of intimate relationship, the facts with respect to the assailant hunting her down are similar to wife assault cases.


15. MacLeod, supra, note 10 at 17-18. A recent Hamilton, Ontario case reported that an "abused husband" who strangled his wife in a "domestic dispute" was given a two-year sentence for manslaughter. "He said he was trying to fend off a knife attack from his wife when he strangled her to death with one hand...". K. Marron, The [Toronto] Globe and Mail (8 August 1990) A7.
dles, saws and guns, as well as bottles and metal rods forced up the vagina. It also includes forcible confinement, and threats with weapons (knives thrown at the woman, guns aimed at her). Although much of the abuse we have heard about is confined to a series of single violent incidents, in some cases the woman has been tortured over a period of hours or days, often with a variety of methods used in a single incident.

'Wife abuse' is a broader term than 'wife assault'. It includes not only physical and sexual abuse, but also emotional abuse (verbal denigration and humiliation), psychological abuse (acts of terrorism such as threats, destruction of pets and property) and economic abuse (withholding of economic resources resulting in the woman being virtually penniless regardless of the husband's assets or income). Although women report that these forms of abuse are often more damaging and long-lasting than physical attacks, we concentrate in this paper on physical abuse because it is easier to prove and easier to see as life threatening in an immediate sense.

Obtaining accurate figures on the occurrence of wife assault is extremely difficult. In a 1980 study, it was estimated that one in ten women in Canada was battered by her husband. A more recent study of Metropolitan Toronto suggests that the figure is actually closer to one in four. Further, almost half of all wife assault incidents result in physical injuries. Spousal homicide figures show that wives were 3.3 times as likely to be killed by their husbands as hus-

16. The similarities in the effects of wife abuse and torture are more fully developed infra in the section on “Wife assault as a form of persecution”.

17. MacLeod, supra, note 10 at 11-15.


bands were by their wives,21 and that wives accounted for 62% of all female homicide victims.22

Wife assault cuts across class, race, ethnic and religious lines.23 Although some researchers have found a correlation between poverty and wife assault,24 it may be that women with fewer resources more frequently seek the help of public agencies where they will more readily come to the attention of researchers.25

Figures on wife assault in the international context are very difficult to obtain. Even when figures are presented, they are often hard to interpret, as research methods and even definitions of wife abuse may vary.26 However, researchers appear to agree that wives are the most common victims of spousal assault in all countries investigated to date.27 For the purposes of this paper, the incidence rate in individual countries is probably less important than an understanding of the near universality of the phenomenon of wife assault.28

21. Wilson & Daly, supra, note 14 at 1.
25. Martin, supra, note 23 at 55.
27. Ibid. at 16.
Much has been written in the last two decades on the sociology and psychology of wife assault in the North American and British contexts. Recently, as counselling programs with batterers develop, the question of why men batter is also being addressed. The following thumbnail sketch concentrates only on the aspects of wife assault which are necessary to understand to advocate effectively for assaulted women, and does not pretend to cover all the issues. Further, it must be remembered that ‘wife assault’ is not a single phenomenon or experience: the form it takes is often culturally specific, and the experience of it is influenced by age, race, religion and ethnic origin.

There are many myths surrounding wife assault. The first one is that women enjoy the battering; otherwise they wouldn’t stay. Walker has used the term ‘cycle of violence’ to describe the normal progression of wife assault. The first stage in the cycle is a buildup of tension, followed by the assaultive incident and then by the ‘honeymoon phase’. During the honeymoon phase, the partner is remorseful, often showers her with gifts and loving attention and promises to never do it again.


32. Randall, supra, note 19 at 4.

33. Walker, supra, note 29, c. 3. She also lists and rebuts many other myths surrounding wife assault in Chapter 1. Wilson J. cited Walker’s theory on the cycle of violence in Lavallee, supra, note 11, as well as discussing other myths.
If there is anything in this pattern which women like, it is this latter
phase. There is no support for the theory that women enjoy the vio-
ence itself.34

Although abusive behaviour is sometimes apparent before the couple
begins cohabiting, it more often begins later in the relationship. Pre-
gnancy is a frequent trigger for violence,35 as is marriage itself.36 The
behaviour usually starts with threats or mild assaults, but then esca-
lates in severity and frequency of violence over time.37

Women stay or return for a variety of reasons. One is a belief that
their partner really can change, or that he is in trouble and needs her.
Another is a belief that the success of the relationship is the woman’s
responsibility; if it fails it is her fault and her shame. Although these
feelings appear to occur across cultures, the importance of them varies
among cultures. Another reason is a very real lack of options: women
with few skills, limited availability of day care and affordable housing
and children to house and feed may find the possibility of escape and
making it on their own unimaginable.38

The battering itself may contribute to limiting a woman’s perceived
options. A common feature of abusive relationships is progressive iso-
lation. Abusive men are often very dependent on their wives, and jeal-
ous of any outside relationships they may have.39 The abusive
husband may create a scene when his wife sees other people to the

34. Abused women have recently been compared to hostages held by terrorists,
however, with the concomitant identification with and even love for the hostage
taker seen in other hostages. See D.L.R. Graham, E.Rawlings & N. Rimini,
"Survivors of Terror: Battered Women, Hostages and the Stockholm Syndrome"
in Yllo & Bograd, supra, note 14 at 217.

35. Forty percent of wife assault incidents begin during pregnancy: Education
Wife Assault, *Fact Sheet on Wife Assault in Canada* (Toronto, 1985). See also
Gelles, supra, note 29, c. 7; MacLeod, supra, note 18 at 11.

36. Several of our clients reported violence within the week after marriage, usu-
ally accompanied with demands and statements like "now you're my wife
you have to do what I say".

37. Sinclair, supra, note 29 at 19; Walker, supra, note 29 at 30.

38. Freedman, supra, note 29 at 53-55; Gelles, supra, note 29, c. 6; Martin, supra,
note 23, c. 5; MacLeod, supra, note 18, c. 5; Pressman, supra, note 23, c. 2.

39. Freedman, *ibid.* at 47; Pressman, *ibid.* at 17-18; Randall supra, note 19 at 3.
point where she feels it is not worth trying to maintain these relationships. He may also abuse her close friends and family so that they will no longer see her. When a woman in this situation tries to escape, she may have few supports to help her do so.

Living in constant fear produces a sense of powerlessness in many women, a sense that they cannot control their lives sufficiently to escape. Concomitantly, the abuser is perceived as so powerful that she cannot ever hope to get away. The latter perception is grounded in reality: 44% of women in a shelter reported violence after separation from their husbands. And 23% of women killed by their legal husbands in 1985 were separated at the time. Constant verbal degradation contributes to the feeling that she is worthless and cannot survive on her own.

No discussion of wife assault is complete without at least a reference to the difficulties women have in obtaining police protection and justice in the court system. After years of activism on this issue, the situation in Canada has improved. However, there are still police officers who refuse to lay charges or enforce peace bonds, restraining orders or probation orders, and still judges who trivialize wife assault. Even when the police and court system cooperate to punish the offender, there are still situations where only a 24-hour bodyguard would provide adequate protection. Many women know this, and the ineffectiveness of police protection and fear of further reprisals from the assailant combine to inhibit police contact. The police are generally used as a last resort.

Immigrant women in Canada face special barriers in wife assault situations, as well as the ones shared with Canadian-born women. Cultural values may exacerbate feelings of responsibility and shame for breaking up the family. Lack of language skills often limit their knowledge of laws which could protect them. Wife assault is not a crime everywhere, and they may not be aware that it is a crime in Canada.

40. Walker, supra, note 29, c. 2; Graham & Rawlings, supra, note 34 at 222-225.
41. MacLeod, supra note 10 at 20.
42. Wilson & Daly, supra, note 14 at 3.
43. Gelles, supra, note 29 at 112. Women are beaten 35 times on average before they call the police: Sinclair, supra, note 29 at 19.
44. ARA Consultants, Wife Battering Among Rural, Native and Immigrant Women (March, 1985, located at Ontario Women's Directorate) at 13; MacLeod, supra, note 10 at 26.
If their husband knows English and they do not, then their power base within the family may be even further eroded. Calling crisis telephone lines, or the police, may be impossible because of language skills. Many non-English-speaking women report calling the police only to have the police take the 'story' from the husband, or use the children as interpreters. Few charges are laid under these conditions.\(^4\)

Calling the police itself may not be feasible for some women because of their cultural background. If they come from a country with a repressive regime, they may be extremely reluctant to call uniformed male authority figures to help them with their problem.\(^4\)\(^6\) Their husbands may have threatened to call Immigration and have them deported if they call the police. Alternatively, they may be afraid their husband will be deported. They usually only want to stop the beating, not have him thrown in jail and deported,\(^4\)\(^7\) especially if he is a refugee himself.

There is also sometimes a sense of betraying the community. Many women who do not self-identify with the dominant culture or feminism may see calling the police or going to a shelter as a betrayal of their community through exposing their men to white Anglo authority and exacerbating the stereotype of violence in their community.\(^4\)\(^8\) This may be reinforced by the community itself, and the woman in so doing may find herself ostracized.\(^4\)\(^9\)

Threats of deportation are a form of wife abuse common to immigrant women, whether or not they are permanent residents. Believing their husband to be all-powerful, they often believe he has the power to have them deported. At the least, deportation means uprooting from her community here and a reduced standard of living; it may also mean being sent back to the home country to face shame and ostrac-
cism, and separation from her children. The fear of deportation is not always unrealistic, as discussed below.

APPLICATION OF THE CHARTER
It is clear that the Immigration Act must be interpreted in a manner consistent with the guarantees of the Canadian Charter of Rights and Freedoms (hereinafter the Charter). Paragraph 3(f) of the Act provides that Canadian immigration policy, rules and regulations are to be designed and administered in a way that ensures that standards of admission to Canada do not discriminate in a manner inconsistent with the Charter. In any case, as a piece of federal legislation, the Immigration Act must conform to the equality guarantees in section 15 of the Charter.

In Andrews v. Law Society of British Columbia the Supreme Court of Canada stated:

"Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another."

The Court went on to define discrimination as:

"A distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society."


51. "No problem regarding the scope of the word 'law', as employed in s. 15(1), can arise in this case because it is an Act of the Legislature which is under attack." Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 164 per McIntyre J.

52. Ibid.

53. Ibid. at 164.

54. Ibid. at 174.
The definition of refugee in the Act must be interpreted and applied in a way that recognizes the reality of women's lives.\textsuperscript{55} Similarly, policies for the admission of persons based on humanitarian and compassionate grounds must be administered in a way that takes into account experiences of women that do not have a parallel in men's experience. To do otherwise would produce a disparate impact on women, by denying many women the benefit of international protection.

**DEFINITION OF CONVENTION REFUGEE**

The definition of refugee in the 1951 Convention relating to the Status of Refugees\textsuperscript{56} was developed to deal with those people displaced as a result of the Second World War, in particular survivors of the Holocaust and displaced persons. The 1967 Protocol relating to the Status of Refugees\textsuperscript{57} extended the protection of the Convention to persons who had become refugees after the adoption of the Convention. Although the time restriction in the Convention was thus formally abolished for signatories of the Protocol, the wording of the actual definition was not altered. In order to be recognized as a refugee, a person is still required to establish that:

"Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, [she or he] is outside the country of [her or] his nationality and is unable or, owing to such fear, is unwilling to avail [herself or] himself of the protection of that country....\textsuperscript{58}"

The Convention does not specifically protect persons persecuted because of their sex.

\textsuperscript{55} The Supreme Court of Canada took this approach in *Brooks v. Canada Safeway Ltd.* (1989), 59 D.L.R. (4th) 321 (S.C.C.) and *Janzen v. Platy Enterprises Ltd.* (1989), 59 D.L.R. 352 (S.C.C.) when it decided that discrimination on the basis of pregnancy and sexual harassment were forms of sex discrimination because only women can become pregnant (*Brooks*) and it is predominantly women who face sexual harassment at work (*Janzen*).

\textsuperscript{56} United Nations *Treaty Series*, vol. 189 at 137.

\textsuperscript{57} *Ibid.* vol. 606 at 267.

\textsuperscript{58} *Supra*, note 56, Article 1 (A)(2).
WOMEN AS REFUGEES

Today, as noted by the Executive Committee of the United Nations High Commissioner for Refugees, the majority of the world's refugees are women and girls.\(^5\) Despite this fact, most refugee claimants are men. Responsibility for the day to day care of children, lack of financial resources, cultural and other restrictions make it difficult for a woman to travel to a potential country of resettlement such as Canada to make a claim for refugee status. Instead, refugee women are much more likely to migrate with other members of their community to refugee camps from which, if they are among the relative few to meet the selection criteria, they may be resettled in countries such as Canada.\(^6\)

Because some women are deprived of the protection of their state for the reasons recognized in the definition, and because not all men are protected by the Convention,\(^6\) the definition of refugee may appear to be gender-neutral. Anyone persecuted for one of the Convention reasons is eligible for international protection. The position of women throughout most of the world, however, is such that they are much less likely to be involved in politics (as it has been traditionally defined) or the publicly active religious, racial, nationalistic or social groups whose persecution or lack of state protection are well-known.\(^6\)

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59. Executive Committee Conclusion No. 39 (XXXVI) Refugee Women and International Protection, 1985 (Executive Committee—36th Session), paragraph (c).

60. Because of resettlement policies which emphasize self-sufficiency over need for protection and selection criteria based on the refugee's employment history and education, which discriminate against most women, women in refugee camps are generally less likely to be selected for resettlement than men. See N. Kelly, Working with Refugee Women: A Practical Guide (Geneva:1989) at 17.

61. The geographical bias of the Convention is evident in its failure to protect men or women who flee their countries because of "events seriously disturbing public order", a provision of the Convention Governing the Specific Aspects of Refugee Problems in Africa adopted by the Organization of African Unity on 10 September 1969.

62. See Indra, supra, note 8, for a discussion of the Convention definition's emphasis on "public sphere" activities and the implications for women refugee claimants.
In Canada, the great majority of refugee claimants are single men or men with families.63 The interpretation of the Convention definition has therefore created a body of caselaw based on the experiences of claimants who are, for the most part, male. Decision-makers have not often been called upon to consider issues such as female-specific definitions of 'social group' and 'political opinion', forms of persecution directed at women, and what effective state protection for women means in practice.

Unfortunately for many women, the Convention does not obviously protect them from persecution. International protection may not readily be available to women unless the circumstances prompting them to leave their country of origin are the same as or analogous to the reasons that men flee. One way to deal with this problem of the disparate impact of the refugee definition is to interpret the definition in a way that recognizes that women’s resistance does not always manifest itself in the same way as men’s resistance. What appears to be non-political activity by women may, on more careful inspection, turn out to be a form of political protest or organization. As Jacqueline Greatbatch has noted,64 the refusal of some Iranian women to adopt the chador is an expression of opposition to the Islamic fundamental-

63. Interview with Michael Schelew, President of Amnesty International—Canadian Section, transcribed in S. Arend, "Deux Entrevues" (1989) 10:1 Canadian Women's Studies/les cahiers de la femme 91

The breakdown by sex of the decisions of the Immigration Appeal Board and Immigration and Refugee Board on file at the Refugee Law Research Unit, Toronto, Ontario, as of August 9, 1990 reflects the imbalance in numbers of male and female claimants to which Mr. Schelew referred: 470 female claimants and 2758 male claimants. A number of the women claimants will have based their claim entirely on their husband’s claim. While not all claimants will receive a written decision (since written decisions are only required for negative determinations), the difference is nonetheless so extreme that the imbalance remains clear.

Similar to the search for missing relatives, the communal kitchens and co-operative nurseries organized by Chilean women in the 1970s and 1980s were a form of resistance against the Pinochet regime in Chile. Thus, where an ostensibly non-political act such as choice of dress is seen to in fact be political in nature, it may provide the basis for a claim to refugee status.

However, this analysis is not sufficient to counteract all the gender bias in refugee determination. The decision-maker may fail to recognize the political nature of the claimant's activity or affiliation or it may simply be that no analogy to the types of activities and affiliations traditionally recognized as falling within the Convention definition exists. For example, the Immigration and Refugee Board has refused to recognize as a refugee a Chinese woman who had been forced by the authorities to have two abortions, one late in the pregnancy. The Board did not consider whether or not the claimant's actions were an expression of a religious or political opinion nor whether or not unwanted third-trimester abortions were a form of persecution. A more thoughtful panel may have found an analogy between this claimant's experience and that of a conscientious objector who refuses to serve in the military and as a result suffers dis-

65. Ibid. at 520-521. An Iranian woman whose claim was in part based on her opposition to her country's dress code for women was recently refused by the Immigration Appeal Board. The Minister of Employment and Immigration subsequently exercised her discretion to allow the woman to remain in Canada. The Iranian embassy had refused to issue the woman with travel documents because she had not worn the chador for the photographs she had submitted to the embassy. C. Montgomery, "Iranian woman allowed to stay" The [Toronto] Globe and Mail (1 August 1990). It is worth noting that the U.N.H.C.R. Handbook characterizes a refusal to provide travel documents as a refusal of protection. See Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the status of Refugees (Geneva: 1979) at paragraph 99 (hereinafter the Handbook).

66. Ibid. at 522-523.

67. Immigration and Refugee Board Decision T89-00882, June 1989. Because of the claimant's confusion over the dates of the abortions, the Board appears not to have believed that they did, in fact, occur. Rather than attributing the difficulty with dates to the stress of the forced abortions, the Board chose not to pursue the issue of imposed medical procedures as a form of persecution.
proportionately severe punishment. In the case of women who experience violence from their partners, there is no realistic analogy to male experience. The nature, effects and documentation of continuing violence at the hands of a husband or boyfriend from which a woman cannot expect the protection of the state are fundamentally different from the kinds of persecution faced by men. The differences are manifested in ways that make it difficult for women to establish their claim to refugee status because the image of what constitutes a refugee has been shaped to such an extent by male experience.

The challenge for those who work on behalf of battered migrant women is to find a way to make the Convention fit these women’s circumstances in order for them to receive the international protection they require. The Convention definition has been directly incorporated into Canadian law. While the history of the Convention and its application in other countries will have an impact on its interpretation by Canadian courts and tribunals, Canadian decision-makers must also interpret the Convention in a manner that is consistent with the Charter. Decision-makers can provide international protection in a non-discriminatory way by interpreting the terms “social group”, “well-founded fear of persecution” and state “protection” in a way that accommodates the differences between men and women.

MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

The U.N.H.C.R. Handbook describes a “particular social group” as a group normally comprised of “persons of similar background, habits or social status”. Atle Grahl-Madsen describes this category as one which, like race, is “beyond the control of the individual”. The caselaw regarding “social group” has defined the term more broadly

68. See paragraphs 169-173 of the U.N.H.C.R. Handbook, supra, note 65, regarding the circumstances in which the refusal to perform military service may form the basis of a claim to refugee status.

69. Act, supra, note 2, s. 2(1).

70. “[T]he accommodation of differences...is the essence of true equality...” Andrews v. Law Society of British Columbia supra, note 51 at 169 per McIntyre J.

71. Supra, note 65 at paragraph 77.

than Grahl-Madsen to include associations of a voluntary nature, thus taking a more comprehensive approach such as the one advocated by Guy Goodwin-Gill:

"In determining whether a particular group of people constitutes a 'social group' within the meaning of the Convention, attention should... be given to the presence of unifying factors such as ethnic, cultural, and linguistic origin; education; family background; economic activity; shared values, outlook, and aspirations. Also relevant are the attitude to the putative social group of other groups in the same society and, in particular, the treatment accorded to it by state authorities." [emphasis added.]

Women constitute a social group both because they share certain 'immutable' characteristics and because they are frequently treated differently from men. To a greater extent than most social groups, women are an easily identifiable 'group'. As recognized by the Supreme Court of Canada in R v. Lavallee, women's size, strength, socialization and lack of training in self-defence are generally different from men's in

73. An example of one voluntary association recognized as a social group is that of the tontons macoutes: Lucien v. Minister of Employment and Immigration Immigration Appeal Board File M86-1649X (4 May 1987).

In Requena-Cruz v. Minister of Employment and Immigration Immigration Appeal Board Decision T83-10559 (8 April 1986) per G. Vidal at 5, the Board stated that "...the ground 'membership in a particular social group' is a ground which must be given a broad and liberal interpretation in order to protect groups or individuals who do not necessarily have political, religious or racial ties at the root of their fear of persecution. Otherwise, this ground of 'social group' would be of very little value." This interpretation is consistent with the drafting history of the 1951 Convention which shows that the category of social group was included in the definition after the other four categories as a 'catch-all'. See A.C. Helton, "Persecution on Account of Membership in a Social Group As a Basis for Refugee Status" (1983) 15 Col. H. Rts. L. R. 39 at 40-42.

74. The Refugee in International Law (Oxford: Clarendon Press, 1983) at 30. While in this text Goodwin-Gill questions whether or not women constitute a social group (ibid. at 31ff), this seems to be because of his uncertainty as to whether the discrimination women suffer is sufficient to constitute persecution within the meaning of the Convention. Rather than consider the extent of the discriminatory treatment under the issue of "social group", it would be more logical to accept that women are a social group because of their similar treatment by or with the acquiescence of the state, and look at the nature of the discrimination/persecution separately.
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ways that typically work to women’s disadvantage. Only women can become pregnant, and women generally are children’s primary caregivers. Women’s position in the economy is inferior to that of men; women are paid less for their work (and in the case of homemakers, receive no wage at all), are subjected to harassment in the workplace and elsewhere because of their sex, and are less likely to reach senior positions in the workforce. This combination of biological and socially attributed characteristics make women a social group within the meaning of the Convention definition.

The existence of the 1953 Convention on the Political Rights of Women and the 1979 Convention for the Elimination of all Forms of Discrimination Against Women supports the notion that women as a group are in need of international protection of their human rights. In 1984 the European Parliament adopted a resolution encouraging states to recognize as refugees women who faced persecution because they had transgressed the social mores of their communities. The 1985 Soesterburg Conference on refugee women adopted a comparable resolution. In 1985 the Executive Committee of the U.N.H.C.R. endorsed Conclusion No. 3979 which recognized that states are free to adopt an interpretation of social group that would include women asylum-seekers “who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live”. This interpretation has been adopted in Criteria for Determining

75. Supra, note 11 at 357.
80. Although the wording of the conclusion appears rather cautious, it is a clear signal that any state with the political will to do so has the approval of the U.N.H.C.R. to recognize women in this situation as members of “a particular social group” for the purposes of refugee determination.
81. Supra, note 79 at (k).
"Convention Refugee" Status, guidelines provided by the U.N.H.C.R. Legal Project in Canada. More recently, the first International Consultation on Refugee Women, which took place in Geneva in November, 1988, "called upon all States, party to international and regional refugee instruments, to consider women who have been persecuted on the basis of their sex as part of a 'particular social group', within the meaning of the refugee definition." These approaches recognize that the Convention definition of refugee can provide international protection from women-directed persecution by interpreting social group so as to include women.

Sub-groups of women have been accepted as social groups for the purposes of refugee determination. In Incircyan v. Minister of Employment and Immigration, the Immigration Appeal Board held that two women from Turkey belonged to the social group comprising "single women living in a Moslem country without the protection of a male relative". Young Tamil women have been recognized as a social group by the Immigration and Refugee Board. The acceptance of 'family' as a form of social group is one which has facilitated the recognition as refugees of many women who are not publicly active in party politics on the basis of their potential identification with their more publicly active husband, father, or brother and therefore risk persecution.


84. Immigration Appeal Board Decisions M87-1541X and M87-1248, C.L.I.C. No. 113.12, 10 August 1987. This formulation of a social group was adopted by the Immigration and Refugee Board in its Decision T89-00260, July 1989.

85. Ibid. at 1, P. Davey.


87. In Zarketa v. Minister of Employment and Immigration Immigration Appeal Board Decision 81-9776, C.L.I.C. No. 80.6, 12 November 1985 per J-P. Houle at 2 the Board appeared to dismiss the claimant's fear of persecution because of political opinion, stating that her fear related to her relationship to her father. In Barra-Velasquez v. Minister of Employment and Immigration Immigration Appeal Board Decision 80-6300, C.L.I.C. No. 39.7, 30 June 1982 per H.M. Hlady at 3, the Board held that the claimant's persecution arose out of her membership in a close-knit extended family.
The Federal Court of Appeal recently considered the meaning of the term "social group" in Canada (Attorney General) v. Ward\(^8\) (hereinafter Ward). The majority decision interpreted the U.N.H.C.R. Handbook discussion of the definition of "social group" to mean that "... persecution arising from membership in the group must arise from its activities perceived to be a possible danger of some kind to the government".\(^8\) This statement by the majority conflates the two distinct enumerated grounds of social group and political opinion.\(^9\) In addition, the majority appears to have ignored the word "may" in the Handbook's statement: "Membership in a social group may be at the root of persecution because there is no confidence in the group's loyalty to the government ..."\(^9\)\(^1\) The dissent in Ward argued against such a restrictive definition of "social group".\(^9\)\(^2\)

In a subsequent decision of the Federal Court of Appeal, Salibian v. Minister of Employment and Immigration (hereinafter Salibian),\(^9\)\(^3\) the Court held that an Armenian Christian citizen of Lebanon was not barred from making a claim to refugee status merely because of the situation of civil war in Lebanon. This calls into question the ruling of the majority in Ward in that it appears to permit a positive determination in a situation in which a person is persecuted for her membership in a social group by a party other than the state and the state is unable to protect her because of the situation of civil war. If the persecution comes from a source outside the state and the state is willing, but unable, to protect the claimant, it does not follow that the social group to which a person in this situation belongs is a danger to the state. Further, the model of refugee as perceived threat to the state does not reflect the reality of many women's lives. It is women's gen-

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89. Ibid. at 65, Urie J.A.

90. Political opinion includes imputed political opinion. For example, in Astudillo v. Minister of Employment and Immigration (1979), 31 N.R. 121 (F.C.A.D.) the Court held that the Immigration Appeal Board had erred in not taking into account the Chilean government's perception of the claimant's soccer club activities as a form of political opposition.

91. Supra, note 65 at paragraph 78.

92. "There is in fact nothing absolute about social groups, particularly non-natural social groups." Ward, supra, note 88, MacGuigan J.A. at 73.

eral lack of power (and thus the improbability of women posing a threat to the state) that makes it possible for the state and private citizens whose actions are sanctioned by the state to pay women less for their work, to limit their participation in academic, cultural, and political life, to harm them physically, and to discriminate against or persecute women in other ways. One of the most recognizable forms of violence against women are the dowry burnings and murder of non-virgins by their families that claim the lives of many women throughout the world. While the women who are killed in these ways pose no threat to their state, the state lacks the resources or the will to protect them. To interpret the definition as the majority did in Ward will reduce the already disproportionately low numbers of women recognized as refugees through inland claims procedures. This is a form of discrimination against women and arguably violates section 15 of the Charter.

Counsel for Mr. Ward has made an application for leave to appeal the decision to the Supreme Court of Canada. It would appear that there are enough weaknesses in the decision to limit it to its facts until the Supreme Court rules on the application for leave and, possibly, the appeal itself.

In applying the Convention refugee definition to battered women, one of the issues to be addressed is the best way in which to characterize the social group to which they belong. If the group is to be defined on


95. Women who resist their oppression do pose a threat to the state insofar as their resistance may call into question state-sanctioned forms of discrimination and persecution against women, particularly when the form of oppression is financially advantageous to the government (as in the case of unwaged, pensionless childcare and care of the elderly). Women's resistance may be 'disappeared' or denied however, as in the case of the Iranian woman who refused to adopt the prescribed dress code for women [supra, note 65]. The cultural attache of the Iranian embassy characterized the woman's position as finding a loophole in Canadian immigration laws, rather than a principled political stand.
the basis of the characteristics shared by the members, then it is most logical to define the group as women in general, since battered women are not all from a single class, race, nationality, or religion. Alternatively, if the group is to be defined by its treatment by society, it makes most sense to define the group as battered women, since the treatment that all of the group members have experienced is socially sanctioned abuse by their partners.

Because battering is not the only form of persecution women experience, it makes sense to define the group as ‘women’ and consider the battering under the category of persecution, that being the form persecution takes in these cases. One difficulty with this approach would be the need to counter the ‘floodgates’ argument that would almost certainly be raised in opposition to a definition of social group which includes millions of members. Practically speaking, this concern has little foundation, if only because of the economic and social impossibility of migration for most women. In addition, women who claim refugee status on the basis of belonging to the social group ‘women’, must still prove that they have a well-founded fear of persecution in their country of origin, from which the state does not protect them. In any case, as noted by Grahl-Madsen, “[o]nce a person is subjected to a measure of such gravity that we consider it ‘persecution’, that person is ‘persecuted’ in the sense of the Convention, irrespective of how many others are subjected to the same or similar measures”.

There are also potential problems associated with the social group ‘battered women’. There is a possibility that, once removed from the battering situation, a woman would not be considered to be a member of that group. The counter argument, of course, is that the refugee definition is forward-looking, and that, if returned to her home coun-

96. Supra, note 72, at 213.

97. In Noble, supra, note 13, per G. C. Eglinton at 6, the Board disputed the applicability of the social group on which Ms Noble based her claim, that of "poor aging single undefended women", stating that she had not belonged to that group throughout the period in which she had been persecuted. In Sanchez-Trujillo v. I.N.S. 801 F. 2d 1571 (9th Cir. 1986) at 1575, while applying a much stricter definition of social group than is used in Canada, an American Court of Appeal stated in obiter that one of the petitioners who had reached the age of 33 was, as a result, excluded from the social group of "young men of military age".
try, the claimant will again face the same treatment as other battered women. Another objection to this definition of social group is that since any woman can become a battered woman because battering crosses all boundaries, the category is no more distinct than 'women'. Further, women face different forms of discrimination and persecution all over the world because they are women.\textsuperscript{98} It thus seems more appropriate to consider battering under the heading of persecution, particularly in cases where the claimant alleges other forms of sex-directed persecution as well. Because the wrong characterization of the grounds for the claim to refugee status could result in a negative determination, claimants should base their claims on both definitions of the social group outlined above until the decision-makers choose one or the other.

**WIFE ASSAULT AS PERSECUTION**

The meaning of the phrase "well-founded fear of persecution" must also be interpreted in a way that recognizes women's experience. Decision-makers must be shown that battering is a form of persecution and that the evaluation of the "well-foundedness" of a claim based on this form of persecution requires an approach that takes into account women's experience of the cycle of violence associated with battering.

As is commonly noted in discussions of the meaning of "persecution" as it relates to refugee determination, that term is not defined in the Convention. The U.N.H.C.R. Handbook states:

"From Article 33 of the Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership in a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution."\textsuperscript{99}

It may well be that the abuse suffered by a woman whose claim is based on her well-founded fear of being battered by her partner constitutes a threat to her life or freedom. Certainly women are murdered by their partners.\textsuperscript{100} As noted in the discussion of battering above, the

\textsuperscript{98} For a survey of some of the forms women's oppression takes in the world today, see Heise, supra, note 28, WIN News (Quarterly published by Women's International Network), and Davies, supra, note 28.

\textsuperscript{99} Supra, note 65 at paragraph 51.
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The technique of forcible confinement used by many batterers is a typical form of abuse which, in some cases, would be sufficiently severe to constitute a threat to a woman’s freedom.

The provisions of international human rights conventions are an important source of guidance to decision-makers considering whether or not certain treatment constitutes a serious violation of human rights and thus persecution within the meaning of the Convention. Article 3 of the Universal Declaration of Human Rights provides that “[e]veryone has the right to life, liberty and security of the person”101. Grahl-Madsen states that violations of Article 3 clearly constitute persecution.102 In a recent case, the Immigration and Refugee Board explicitly adopted this definition of persecution in its statement that it “agree[d] that a serious threat to the claimant’s ‘right to life, liberty and security of the person’ amounts to persecution”.103

The wording of Article 3 corresponds to the wording of section 7 of the Charter.104 In Morgentaler v. the Queen105 the Supreme Court of Canada held that “security of the person” protects a person’s physical and psychological integrity.106 In R. v. Mills107 Lamer J. stated that the guarantee of “security of the person” protects a person from psychological trauma. In Singh v. Minister of Employment and Immigration108

100. Between 1974 and 1983 there were 812 women killed by their husbands. These cases account for 41% of the total number of adult female homicides during that period. Wilson & Daly, supra, note 14.


102. Supra, note 72 at 195.

103. The Board also referred explicitly to Article 3 of the Universal Declaration of Human Rights in Immigration and Refugee Board Decision V89-00683, March 1990 at 7.

104. Section 7 states: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice,” supra, note 50.


106. Ibid. at 173, per Wilson J.


Wilson J. held that, at least, "‘security of the person’ must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself". The point here is not that battered migrant women should necessarily seek protection under section 7 of the Charter, but that the way that this section has been interpreted by Canadian courts provides guidance to the meaning of Article 3 of the Universal Declaration of Human Rights. The type of treatment described in the discussion of wife battering above clearly threatens a woman’s physical and psychological integrity, causes psychological trauma, and involves both the threat and the reality of physical suffering. As such, it violates her right to life, liberty and security of the person, in contravention of the Universal Declaration of Human Rights, and thus constitutes persecution within the meaning of the refugee definition.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is the only Convention other than the Convention relating to the Status of Refugees to incorporate the principle of “non-refoulement”. It is therefore appropriate to refer to the Convention Against Torture in any consideration of the Refugee Convention. Clearly “persecution” must comprise, at least, the definition of torture in the Convention

109. Ibid. at 460.

110. The Supreme Court of Canada cases cited in this section were generally concerned with a piece of legislation that allegedly infringed a person’s rights under s.7 of the Charter. In these cases the Court held that state intervention was required for there to be a violation of s. 7. This does not mean that state action is required for the positive determination of claims to refugee status however, since there is a separate body of authorities regarding the role of the state in refugee claims. This is discussed below.


112. Article 3(1) of the Convention against Torture States:

“No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”. Note that this Convention’s standard of “substantial grounds” is higher than that of Canadian refugee caselaw.

The idea of comparing the Refugee Convention with the Convention against Torture was suggested by Noel St. Pierre, U.N.H.C.R. Legal Project Officer at the Immigration and Refugee Board in Montreal, in a personal communication on 3 April 1990.
Assaulted Migrant Women’s Claims to Refugee Status

Against Torture. The Convention Against Torture includes in its definition of torture:

“[A]ny act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for such purposes as intimidating or coercing [her] or a third person, or for any other reason based on discrimination of any kind.”

This definition of torture includes the kind of violence against women described earlier in this paper. The Report on Torture published by Amnesty International outlines methods of torture used against prisoners around the world. A comparison of the chart below with the literature regarding wife abuse shows that there is a remarkable similarity between these techniques and those used by abusive partners.

113. Article 1, Convention Against Torture supra note 111.
115. The comparison between techniques of torture and those of wife abuse is taken from submissions written by Jacqueline Greatbatch, staff lawyer and co-leader of the Immigration Law Group, Parkdale Community Legal Services, Toronto.
# Biderman's Chart of Coercion

<table>
<thead>
<tr>
<th>General Method</th>
<th>Effects and Purposes</th>
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<tbody>
<tr>
<td>a) Isolation</td>
<td>- Deprives victims of all social support [for the] ability to resist&lt;br&gt;- Develops an intense concern with self&lt;br&gt;- Makes victim dependent upon interrogator</td>
</tr>
<tr>
<td>b) Monopolization of Perception</td>
<td>- Fixes attention upon immediate predicament; fosters introspection&lt;br&gt;- Eliminates stimuli competing with those controlled by captor&lt;br&gt;- Frustrates all actions not consistent with compliance</td>
</tr>
<tr>
<td>c) Induced Debility and Exhaustion</td>
<td>- Weakens mental and physical ability to resist</td>
</tr>
<tr>
<td>d) Threats</td>
<td>- Cultivates anxiety and despair</td>
</tr>
<tr>
<td>e) Occasional Indulgences</td>
<td>- Provides positive motivation for compliance</td>
</tr>
<tr>
<td>f) Demonstrating &quot;Omnipotence&quot;</td>
<td>- Suggests futility of resistance&lt;br&gt;- Degradation&lt;br&gt;- Makes cost of resistance appear more damaging to self esteem than capitulation&lt;br&gt;- Reduces prisoner to &quot;animal level&quot; concerns</td>
</tr>
<tr>
<td>g) Enforcing Trivial Demands</td>
<td>- Develops habit of compliance</td>
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Caselaw on the meaning of persecution defines this term to include much more than torture. In Rajudeen v. Minister of Employment and Immigration\textsuperscript{116} (hereinafter Rajudeen) the Federal Court of Appeal quoted with approval dictionary definitions of "persecute" which emphasized the repetitive or persistent nature of the cruelty or punishment inflicted.\textsuperscript{117}

The claimant in this case experienced the following forms of persecution: vandalism of property in the riot of August 1977; beatings by private citizens in January 1978 and August 1978, from which the police did not protect him; three incidents of threats of violence being made against him by private citizens in March and April 1978 and November 1981. In Araya Heredlo v. Minister of Employment and Immigration\textsuperscript{118} the Immigration Appeal Board held that, while the Convention does not define torture, "it is quite certain that persecution does not consist solely in physical torture...."\textsuperscript{119} The Board went on to state:

"... [A]n essential element of persecution is harassment, so much so that real persecution would be present in the case of a person who was denied all opportunity to work or even one who, in order to survive, was forced to accept work manifestly incompatible with his occupational training. Any repeated or sustained attack on not only a person's physical integrity, but also on his moral integrity, constitutes persecution...."\textsuperscript{120} [emphasis added.]

The Board decided that the threats of rape made to Mrs. Araya constituted persecution and found her to be a refugee. Actions described in the preceding cases such as rape, threats, beatings and destruction of property are all part of the phenomenon of wife abuse. As such they clearly constitute persecution within the meaning of the refugee definition.

One approach to the definition of persecution evident in the caselaw of the Immigration and Refugee Board is the assessment of the degree of persecution with reference to the extent of the violation of interna-


\textsuperscript{117} Ibid. at 134.

\textsuperscript{118} Immigration Appeal Board Decision 76-1127, C.L.I.C. No. 1.11, 20 March 1979.

\textsuperscript{119} Ibid. at 6.

\textsuperscript{120} Ibid. at 6-7.
tional human rights. In the context of a claim based on political opinion, the Board stated:

"In deciding whether or not a refugee claimant has good grounds to fear persecution, one should look at a claimant's personal history of political involvement and at the scope and seriousness of human rights violations the claimant has endured." 121

The Board went on to consider the nature of the claimant's violated rights and concluded that 'high level' human rights, such as those relating to his physical well-being and liberty had been violated as well as several lower level rights. 122 While the violation of a lower level right would not, on its own, constitute persecution, the Board found that the claimant had a well-founded fear of persecution on cumulative grounds. 123

The facts of each case of migrant women fleeing abuse will have to be applied separately to the definitions of persecution developed in the caselaw and from the application of international instruments as outlined above. Nonetheless, it is clear from the literature on violence against women that the abuse from their partners is comparable to or the same as the treatment that, when directed at people either by the state or with the acquiescence of the state, has been recognized as persecution within the meaning of the Convention.

RESISTANCE TO VIEWING WIFE ASSAULT AS PERSECUTION

Despite the fact that the acts of wife assault have a direct parallel in acts recognized as persecution under the Convention definition, we have encountered several points of resistance from practitioners and lay-people in the conceptualization of wife assault as the type of persecution whose victims should be protected under international law. This resistance takes several forms.

One objection is that since so many women in Canada are abused by their partners, refugee status cannot protect these claimants from future violence. The response to this objection is a very practical one:

121. Immigration and Refugee Board Decision M89-0293, September 1989, at 5.
122. Ibid. at 5-6.
123. Ibid. at 7. The Board referred to paragraph 53 of the U.N.H.C.R. Handbook's discussion of "cumulative grounds" for the basis of a refugee claim in its decision. The Board took a similar approach in an earlier decision: Immigration and Refugee Board Decision T89-00146/T89-00147; July 1989.
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while we cannot guarantee a woman's safety forever from wife abuse by recognizing her as a refugee, refugee status has never been an unconditional and permanent guarantee of safety. Compliance with the Convention means neither that the state of refuge has a perfect human rights record nor that the rights violated in the country of origin will be absolutely protected in the country of refuge. A coup, the imposition of a state religion, or the flaring of racial tensions in any given country could well put a resettled refugee at risk of persecution of the same nature as the treatment she originally fled. On the other hand, according refugee status to a woman whose violent partner has no right to enter Canada does provide her with what is probably the most effective form of protection against further abuse: distance.

An argument based on distance is only effective if the abuser is not in Canada. If taken to the extreme this may lead to the proposition that if the abuser is legally in Canada, returning the woman to her home

124. We note here the example of the recognition of a black South African as a refugee by Canada, [see Thomas v. Minister of Employment and Immigration Immigration Appeal Board Decision M82-1096, C.L.I.C. No. 59.7, 25 April 1983] a country in which the oppression of indigenous peoples is institutionalized.

125. For example, a person who was recognized as a refugee because of her fear of persecution for her activities within the formerly outlawed Solidarity will also face some restrictions on her union activity in Canada.

126. During a discussion with an employee of the Immigration and Refugee Board a concern was raised regarding the possibility that the control exerted by an abusive partner could be used to force a woman to sponsor her husband. In our experience at Parkdale Community Legal Services we have observed that women do not easily leave their homes and extended family in order to escape their partners; they leave because they know they face serious harm, even death if they do not and their worst nightmare is that their partners find them again. They would not do anything that would make it possible for their husbands to come to Canada. That said, it remains true that one of the elements in a spousal sponsorship is that the visa officer must be satisfied that the marriage is genuine. If a woman has been admitted to Canada through a refugee claim based on persecution by her husband, it is reasonable to presume that the sponsorship is not bona fide. While we are not eager to provide immigration officers with another presumption against a positive recommendation for landing, this presumption would only apply to women whose successful refugee claims were based on wife assault and, like all presumptions, it would be rebuttable (e.g. if there were evidence of the husband's complete rehabilitation).
country would be an appropriate solution. However, if the woman actually believes she will be safest in her home country, she will probably elect to go home and will not appear in a law office. In any case, there is often no way of ensuring that her spouse will not follow her if she is deported, or that he will not enjoin his or her family or friends remaining in the home country to punish her upon her return.

Further, the position of a separated or divorced woman may be untenable in the country of origin.

Although Canada still falls short of protecting women, the shelter movement and action around the issue of violence against women in the last twenty years has provided options and support networks which make Canada "safer" than many other countries. Wife assault and marital rape are crimes for which the perpetrator may be punished in Canada where they are not in many other countries. Also, although single women are still generally ghettoized and differentially poor in Canada, they are not ostracized, or stoned or starved to death as in some other countries. Therefore, while the distance argument may not apply in all cases, there are still reasons why a woman may receive better protection in Canada than she would in her country of origin, despite the presence of the abusive man.

A further objection to the acceptance of refugee claims by battered women is that Canada should not be critical of other cultures' values and practices. Certainly the recognition as refugees of victims of violence against women implies censure of that violence in the same way that the recognition of claimants whose claims are based on their

127. This is most pertinent to women whose sponsorships have been withdrawn, discussed in detail below, but also arises in the case of refugee women when both spouses have claimed refugee status in Canada.

128. Although we have no documentary evidence of this occurring since it would require continued contact with the client after departure from Canada, in Parkdale Community Legal Services' experience it is a common threat by husbands to women who express their wish to separate from them.

129. This is supported by J. Seager & A. Olson, Women in the World: An International Atlas (London: Pan Books, 1986). Canada ranks among the top countries with respect to a Status of Women Index based on literacy, suffrage, paid work and life expectancy (Map 1), as well as being among the top in the number of shelters (Map 3). Although not directly measuring safety, they do indicate state and community support for battered women, as well as greater options available to women.
political opinion "implicitly condemns the regime from which they flee". This is because it acknowledges that there has been a serious violation of international standards of human rights. That recognition as a refugee is the obverse of the coin of international human rights law is clear from the approach of the Immigration and Refugee Board in the case cited above. As noted by Arthur Helton: "presumably, where the U.N. sees fit to outlaw persecution aimed at a particular group, it would also wish to provide sanctuary for those who suffer at the hands of transgressor states".

In the same way that the Convention protects those facing persecution because their religion or culture violates another culture's requirement of 'purity', the Convention must protect a member of any social group whose desire for basic human rights offends the dominant culture. In doing so the Convention employs the least intrusive means possible; there is no direct interference with the impugned cultural practices since, by definition, a refugee must be outside her country of origin in order to make a claim to protection. If the potential claimant has already rejected the discriminatory practices of her culture (and how something that is imposed on half of the members of the cultural group constitutes part of the culture is an interesting question) then refugee status offers her protection without direct interference in the country of origin or the international publicity of formal diplomatic protest. As a form of censure it is definitely at the low end of the 'intrusiveness' scale.

Further, Canada as a country has a strong commitment to equality and to human rights, as shown by the equality provisions and human rights

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131. Supra, note 73 at 40.

132. "There is nothing 'African' about injustice or violence, whether it takes the form of mistreated wives and mothers, or slums, or [female] circumcision ..." Quotation from the Kenyan women's magazine VIA in Heise, "Crimes of Gender", supra, note 28 at 19.

133. In any case, as a signatory to both the Convention and the Protocol, Canada has an obligation to provide protection to people who meet the refugee definition. The Convention does not exempt from protection those people whose persecution arises out of the culture of the country of origin.
contained in the *Charter*, and expressly incorporated into the *Immigration Act*. Canada is also a signatory to the Universal Declaration of Human Rights and the United Nations Convention on the Elimination of Discrimination Against Women. The right to physical integrity is a basic human right, guaranteed equally to men and women.

A final difficulty in fitting wife assault to the popular conception of refugee may be the source and location of the persecution. Wife assault generally occurs in the home, in what has been labelled the private as opposed to the public sphere. By definition the assailant has a personal relationship with the potential claimant; he is not an anonymous representative of the state. In Western liberal democratic thought, the private sphere is that which is unregulated by government:134 "a man's home is his castle". This has several important ramifications for the work presented here. First, persecution, including recognized persecution against women, is conceptualized as occurring in the public sphere, with normatively male forms of oppression and resistance.135 An acceptance of the public/private dichotomy leaves this construction unexamined. Further, the state connection required in the definition of refugee may be difficult to see, since the state never actively commits and seldom overtly condones this type of violence against women. Although the state connection requirement is treated in detail in the following section, the public/private issue bears directly on the difficulties in making that connection. Finally, the location of wife assault out of the public eye renders the compilation of evidence to support a case difficult.

The bifurcation of social relations into public and private spheres has been attacked by feminists in a number of ways. First, the delineation of what constitutes public and private is not constant historically or geographically: it is socially constructed.136 Also, the definition of public and private varies with the perspective from which it is viewed: the cotton field may have been viewed as private from the slave-owner's perspective, but public from the slave's. Similarly, the man may view


135. See Greatbatch, *supra*, note 64, which explains as well as critiques this position in part.

his home as his sanctuary; the woman may view it as her place of work, the place where her work and worth are on view, and where she is most in danger.  

Further, the notion that there is a sphere which is unregulated by the state has been challenged. The state’s omission of direct regulation is not non-regulation, it is delegation. The regulation is left to those who already possess the power. In a patriarchal society, this means men.

The state’s regulation of the private sphere and, in particular, the relations between men and women, can be most clearly seen in three areas: family law, social assistance law and criminal law. The right to consent to marriage, the legality of divorce, whether or not both men and women have a right to obtain a divorce or have custody of the children, the grounds for divorce, the availability of support and the conditions under which it may be obtained, and the division of assets all affect the position of women vis-a-vis men in the private sphere. The availability of social assistance, including health care, crisis care and affordable housing, also affects the options women have upon entering into or leaving a marriage and therefore their bargaining position in the home. Similarly, the existence and enforcement of laws governing abortion, wife assault and marital rape all affect women’s position in the home.  

From this view, the state is clearly and directly implicated in the lack of protection of women who are endangered in their homes.


The division of society into public and private has also been used descriptively to mean 'outside the home', in relation to other people, and 'in the home', among the family. This division does not rely on the presence or absence of state regulation, and therefore is analytically meaningless in a discussion of the state's responsibility or activity within the private sphere. However, this conception of public and private does illuminate an important division between what is and is not visible. Visibility has several significant consequences for assaulted migrant women claiming refugee status.

The dominant (and most visible) group in a society plays a major role in setting the publicly acknowledged agenda for that society. The further a group is from the sources of power, the less likely it is that their concerns will be noticed by politicians or the producers and reproducers of culture. In a market economy, those with money, traditionally men, ensure that what they read about and what receives political action reflects their concerns and, further, does not threaten their power base. For example, violence against women, including wife assault, although a recognized political issue in the 19th century women's movement, has effectively 'disappeared' from public view until the second wave of feminism rediscovered it, despite the fact that there is no evidence that the incidence of violence against women

The list of areas of state regulation is not exhaustive: inheritance laws, pension laws, tax laws, employment laws, constitutional laws and many others also all have an impact on social relations.

Note also that the notion of state regulation through law is not as unproblematic as implied in the discussion herein. Law itself cannot be seen as a direct 'arm of the state' or the interests of the dominant class, but rather the relationship is complicated by ideological considerations, resistance of non-dominant groups and the internal constraints of the legal system itself: for further discussion, see S.A.M. Gavigan, "Law, Gender and Ideology" in A.F. Bayefsky, ed., Legal Theory Meets Legal Practice (Edmonton: Academic Printing and Publishing, 1988) 283, and C. Smart, Feminism and the Power of Law (London: Routledge, 1989).

139. "The political nature of oppression rests upon its relation to the state, rather than the realm of human endeavour affected.": Greatbatch, supra, note 64 at 523.

140. E.S. Herman & N. Chomsky, Manufacturing Consent (New York: Pantheon, 1988), in particular c. I. Note that, at least in North America, government funding and taxation of community groups, political parties, the media and so on contribute to the notion that the state also has a role in regulating what issues and people become visible to the public.
Assaulted Migrant Women's Claims to Refugee Status

decreased during the intervening period. The first wave of feminism challenged not only the sexual and economic rights of men within the family, but also identified liquor as a major contributing factor and attacked the liquor trade.  

Along with determining what is in the public's eye, how an issue is presented when it can no longer remain invisible is also influenced greatly by those in the dominant group. Although wife assault came to the public's attention in the early 1970's, the radical feminist view that it was a political issue, with its genesis in the unequal power relations between men and women, was subverted. The political analysis gave way in part to psychological and therapeutic models of 'sick' men and 'masochistic' women. Sociological analyses were also developed, including resource theory, systems theory, exchange theory, structural analyses and sociocultural analyses. While not arguing that these other theories have no useful insights, they all allow the basic fact that it is men that beat women to remain more or less unexamined. Wife assault is thus not seen as a political issue (except by some feminists), and can be relegated to the sidelines as a 'social' or 'mental health' issue. As such, the characterization of wife assault as persecution, with its inherently political connotation is rendered even more difficult.

Degendering wife assault has the further consequence of making it appear random, whereas persecution is seen as a non-random event, perpetrated by repressive governments against identifiable groups or people for political reasons. In fact, 'spousal abuse' is not random, but highly gendered in virtually every country.

An examination of the public/private dichotomy reveals that the reluctance to view wife assault as persecution invoking international protection is in large part ideological. Most of us in Canada have families or


142. For a recent review article on radical feminist thought on this issue, see A. Edwards, "Male Violence in Feminist Theory: an Analysis of the Changing Conceptions of Sex/Gender Violence and Male Dominance" in Hanmer & Maynard, eds., supra, note 30.

143. For reviews, see M. Bograd, "Feminist Perspectives on Wife Abuse: An Introduction" in Yllo & Bograd, supra, note 14 at 11, and Gelles, supra, note 29, c. 1.

144. Supra, note 64 at 524.
come from families; most of us believe that what happens within our families, in our homes, is private, and, further, the particularities of that home could not be understood or known by outside observers. If one starts from this view, that there is something inherently different about what occurs in the home which should not be subject to public scrutiny or sanction, then torture by close relations will seem qualitatively distinct from torture by army officers.

From the perspective of those who hold power in the family, the qualitative difference holds up: the difference lies in the proximal agents of persecution. To believe otherwise would be to subject the husband's acts in the family to scrutiny and sanction and comparison to official agents of persecution, and our dominant culture, including law and the media, has been formed in large part by men who are husbands. Most men reject an analogy between themselves in their positions of power within their families and army officers and their positions of power in an army dictatorship. 145

From the perspective of the victim, the difference is not as apparent. The woman's body will still be raped, mutilated and/or dead, regardless of whether the perpetrator is the husband or a stranger army officer.

In addition to unmasking the ideological component, breaking down the public/private dichotomy also illuminates the role of the state in setting the scene in which wife assault occurs and in directing and limiting the roles of the actors. Wife assault does not occur in a vacuum; 146 the positions and relative strengths of the parties are greatly influenced by laws, enforcement of those laws and social mores resulting in part from those laws or their lack. Understanding conceptually how the state can be seen to condone or even promulgate activities within the home both justifies and lays the basis for the establishment of state connection to persecution that takes the form of wife assault.

Even having overcome the ideological and conceptual hurdles, however, the fact that wife assault occurs in the home still presents grave evidentiary problems. Independent corroboration of a woman's story is

145. This is not to suggest that all men are persecutors, but only that they are accountable, as any other human being, for the harm which they perpetrate through an abuse of power. Women who abuse their children are likewise accountable.

146. Lavallee, supra, note 11 at 343-4.
often very difficult: there are usually no witnesses and no newspaper reports of the event. The lack of press and media coverage of wife assault, particularly in the international context, means that amassing documentation on a country's record with respect to wife assault is very difficult, if not impossible. Again, understanding that the lack of evidence for wife assault claims is not because the persecution is unimportant or non-existent, but because the nature of the persecution itself and the socially constructed meaning of it, will not in itself produce the necessary evidence. However, such an understanding can inform arguments with respect to the unavailability of evidence and the Board's responsibility for using its powers to obtain it.

THE REQUIREMENT OF STATE CONNECTION

The U.N.H.C.R. Handbook discusses the issue of the source of persecution:

"Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection." This echoes Grahl-Madsen's position that "behaviour tolerated by the government in such a way as to leave the victims virtually unprotected by the agencies of the State" constitutes persecution for the purpose of refugee determination. He goes on to state:

"There is actually valid reasons for contending that even if a government has the best of wills to prevent atrocities on the part of the public (or certain elements of the population), but for some reason or other is unable to do this, so that the treatened persons must leave the country in order to escape injury, such persons shall be considered true refugees."

This issue has also been considered by Guy Goodwin-Gill:

147. Occasionally there may be police records, but the client may be reluctant to access them for fear of alerting her abuser to her whereabouts.

148. See also the section on "Refugee Determination Procedures", infra.

149. Supra, note 65 at paragraph 65.

150. Supra, note 72 at 189.

151. Ibid. at 191.
“Governments may be unable to suppress such [violent] activities, they may be unwilling or reluctant to do so, or they may even be colluding with those responsible. In such cases, where the protection is in fact unavailable, persecution within the Convention can result, for it does not follow that the concept is limited to the actions of governments or their agents.”\textsuperscript{152}

Goodwin-Gill goes on to note that the source of the persecution may depend on the reason behind it. He notes that persecution on the ground of “immutable” characteristics such as race or religion often emanates from members of the general population while persecution because of political opinion is usually the result of “direct, official action”.\textsuperscript{153} This suggests that persecution on account of membership in the social group ‘women’ is likely to arise from private individuals rather than directly from the state.

In Ward, the majority rejected the presumption employed by the Immigration Appeal Board that evidence of the lack of state protection creates a likelihood of persecution and the well-foundedness of the claimant’s fear, and held that the Board should have assessed the evidence regarding the claimant’s fear of persecution.\textsuperscript{154} The majority’s treatment of the issue of the state’s inability to protect a claimant was unclear: at one point it seems to have stated that state involvement in the persecution feared is required,\textsuperscript{155} while at another point it stated that the Board erred only in applying the presumption, and made the following statement about state involvement in persecution:

“If a claimant is “unwilling” to avail himself of the protection of his country of nationality, it is implicit from that fact that his unwillingness stems from his belief that the state and its authorities, cannot protect him from those he fears will persecute him. That inability may arise because the state and its authorities are either themselves the direct perpetrators of the feared acts of persecution, assist actively those who do them or simply turn a blind eye to the activities which the claimant fears...[T]here may well be other manifestations of it...”\textsuperscript{156}

\textsuperscript{152} Supra, note 74 at 42.

\textsuperscript{153} Ibid.

\textsuperscript{154} Supra note 88 at 67.

\textsuperscript{155} Ibid.

\textsuperscript{156} Ibid.
In a much clearer discussion of the issue of state involvement in persecution, MacGuigan J. A. adopted the passage from the U.N.H.C.R. Handbook quoted above.\textsuperscript{157} (It is worth noting that, although he did not refer to the same quotation in his judgement, Urie J.A. did refer with approval to the Handbook.\textsuperscript{158}) MacGuigan also held that being "unwilling", within the meaning of the Convention definition, to avail oneself of the protection of one's country of origin included situations in which the unwillingness arose because of the state's inability to provide protection.\textsuperscript{159} He noted that while this would broaden the eligibility for admission to Canada, such a result would be consistent with the objectives of Canadian immigration policy, namely the need to fulfill "Canada's international obligations with respect to refugees and [to uphold] its humanitarian tradition with respect to the displaced and persecuted".\textsuperscript{160}

Given the apparent contradictions in the majority judgement, the clarity of the minority judgement, and the subsequent decision of the Federal Court of Appeal in \textit{Salibian} that a state of civil war (in which a state is unable to protect its citizens) is not a barrier to a refugee claim, it appears that the inability of a state to protect a claimant should be grounds for a positive determination. This position finds support in other Federal Court of Appeal jurisprudence as well as in the caselaw of both the Immigration Appeal Board and the Immigration and Refugee Board.

In \textit{Rajudeen} the claimant, a Tamil from Sri Lanka, had been threatened and assaulted on several occasions by members of the Sinhalese community. During the communal riots the police, who were of the Sinhalese majority, would arrive after the violence had occurred. Their failure to provide protection only aggravated the situation, according to the claimant. The claimant had not approached the police for protection with regard to the assaults by private citizens. "[B]ecause the police were of the Sinhalese majority, he had no confidence that they would protect him."\textsuperscript{161} The Court concluded that:

\textsuperscript{157} \textit{Ibid.} at 77.
\textsuperscript{158} \textit{Ibid.} at 64.
\textsuperscript{159} \textit{Ibid.} at 76-77.
\textsuperscript{160} Section 3(g) of the \textit{Immigration Act}, quoted in \textit{Ward, ibid.} at 78.
\textsuperscript{161} \textit{Rajudeen, supra,} note 116 at 131, Heald J.A.
"[I]n order to satisfy the [Convention] definition the persecution complained of must have been committed or been condoned by the state itself and consist either of conduct directed by the state toward the individual or in it knowingly tolerating the behaviour of private citizens, or refusing or being unable to protect the individual from such behaviour."162 [emphasis added.]

This Federal Court of Appeal case clearly includes those whose state of origin is unwilling or unable to protect them from serious harm within the Convention definition. Further, the Court in this case accepted that the claimant’s reasons for not approaching the police (because the police were of a different race and religion, he had no confidence that they would protect him) were valid. These two points have a direct parallel in the cases of most battered women. First, the state connection to the violence in such cases is an indirect one, as in Rajudeen. While the agents of the state are not the immediate source of persecution, by failing to investigate or charge the assailant in wife battering cases, the state is showing its unwillingness or inability to protect the claimant. Second, the decision legitimizes a claimant’s failure to approach the authorities in refugee claim cases in which it is reasonable to believe that the authorities cannot or will not protect the claimant. In Rajudeen the claimant’s identification of the police as members of the racial group from whom he feared further threats and assaults was a reasonable basis for this belief. Surely the decision of a battered woman not to approach a predominantly male police force which she believes, based on her own or others’ experience, will not take any effective action against the batterer is as reasonable as the decision of Mr. Rajudeen, especially given the likelihood of another beating from her batterer to ‘punish’ her for her ineffective attempt to obtain protection.

In Surujpal v. Minister of Employment and Immigration163 the Federal Court of Appeal applied Rajudeen to a situation in which the claimants had requested assistance from the police on two occasions but had been refused. The Court held that, having attempted to avail themselves of the state’s protection and failed, the claimants had brought themselves within the refugee definition. In quoting from the Rajudeen decision in the context of his discussion of the meaning of

162. Ibid. at 133, Stone J.A.

"state complicity in the broader sense",164 MacGuigan J.A., writing for the Court, implied that both unwillingness and inability to act are forms of state complicity.165 In his dissenting judgement in Ward, MacGuigan J.A. stated that Surujpal had not narrowed the definition of state complicity, but had merely applied the definition to a factual situation in which state complicity had taken a more obvious form.166

The Immigration Appeal Board incorporated the broad meaning of state complicity into its decision-making. In Lucien v. Minister of Employment and Immigration167 the Board held that the actions taken against former tontons macoutes, in Haiti, by private citizens after the fall of the Duvalier regime constituted persecution to the extent that the state was unable to protect the claimant. In Sevilla v. Minister of Employment and Immigration168 the Board stated that the state must provide adequate protection to persons whose physical integrity has been threatened, and recognized as a refugee the Costa Rican claimant, who had received threatening telephone calls from Nicaraguans because of his assistance to Nicaraguan contras. In Ajodhia v. Ministry of Employment and Immigration169 the Board held that the claimant, who feared persecution from the other major racial group in her coun-

164. Ibid. at 75.
165. Ibid. at 75-76. MacGuigan J.A. considered both the Rajudeen and Surujpal decisions in Satiacum v. Minister of Employment and Immigration (1989), 99 N.R. 171 (F.C.A.D.), a case in which the refugee claimant was a hereditary chief of the Puyallup people claiming asylum from the United States. He distinguished the two earlier cases on the basis that neither dealt with a claim against a federal state and that both involved police acquiescence rather than a judicial process, as in Satiacum, and held that they had been wrongly applied in that case. The situation of battered immigrant women is distinguishable from that of Robert Satiacum in that battered women do not allege that they are being prosecuted and jailed through an unjust judicial process, but that they are denied the protection of their state because of the indifference or ineffectiveness of the police and the judiciary. In this they resemble the claimants in Rajudeen and Surujpal, who suffered "illegal and violent harassment...by intolerant majorities, with police acquiescence or indifference which amounted to State complicity in the persecution", (Satiacum at 175).
166. Ward supra, note 88 at 76.
167. Supra, note 72.
try of origin, could not be faulted for not approaching the police for protection, since the majority of police officers were of the racial group she feared. The Immigration and Refugee Board has also followed Rajudeen in a recent case involving former citizens of Chile who had moved to Venezuela following the military coup in 1973. One claimant’s verbal opposition to the Chilean government at a gathering of Chilean exiles was followed soon after by anonymous threatening telephone calls, assaults on the claimant, the abduction of his son, and the destruction of his property. While the Venezuelan police initially provided special security for the claimants’ family, they were subsequently told by the police “in an indirect way” (emphasis that of the claimant) that nothing could be done, that it was difficult for the police because it was a political affair involving nationals of other countries. The Board concluded that the resources of the Venezuelan police were inadequate to prevent further violence against the claimants and their family and determined them to be refugees.

The caselaw outlined above establishes that, to be successful, a claimant must establish a state connection to the feared persecution which takes one of the following forms: active involvement in the persecution, active assistance of the persecution, turning a blind eye to the persecution or unwillingness to offer protection, and inability to protect the persecuted. The last three forms of state connection listed are particularly applicable to the claims of battered women.

170. Immigration and Refugee Board Decision T89-03176, T89-03177; 3 January 1990, at 3, A. Ker Q.C.

171. Ibid. at 6.

172. Lazo-Majano v. Immigration and Naturalization Service 813 F. 2d 1432 (9th Cir. 1987) is an example of a refugee claim by an assaulted woman which the Court analysed as involving the state’s active participation in the persecution. In that case the claimant had been forced into a continuing relationship of abuse by a low-ranking member of the Salvadoran military in which he had tortured her by means of rape, threats, beatings and psychological torture such as holding two grenades against her head. This torture was not part of the man’s “official duties”. One of the threats the man used against the claimant, however, was that he could do whatever he wanted to her with impunity because no one would “get involved” with a member of the armed forces and, in any case, he could avoid punishment for killing her by saying that she was a subversive. The majority stated that the claimant faced persecution as a result of an imputed political opinion, namely that she was a subversive, and that her reasons for not approaching the authorities for protection also constituted a political opinion, a belief that there is no political control over the excesses of the military. (The dissenting judge appears to believe that torture is justified if the torturer wants to take the victim to meet his parents [at 1433].)
gory of the state's active assistance would include those situations in which the police charge both the batterer and the victim.\textsuperscript{173} Examples of turning a blind eye or being unwilling to provide protection include the police not charging the batterer when they attend at the scene of an assault or not responding to a report of assault. Inability to protect the person would encompass situations such as that in the Immigration and Refugee Board case cited above in which the Venezuelan police implied to the claimant that they could not provide his family with effective protection.

The decision of the Supreme Court of Canada in \textit{R. v. Lavallee} is instructive with regard to the development of a standard of review for refugee claims based on wife assault that recognizes the reality of assaulted women's experience.\textsuperscript{174a} In that case the Court held that what was reasonable for an assaulted woman to do to prevent injury to herself was different than the reasonableness standard that applied to two men who are strangers and pick a fight in a bar.\textsuperscript{174} The Court accepted that the cyclical nature of wife assault means that it may be possible for a woman to accurately predict not only when she will be beaten by her husband, but also whether or not this beating is potentially life-threatening\textsuperscript{175} and that this could justify a defence of self-defence in situations that might otherwise appear not to warrant such a finding. Similarly, information about wife assault reveals that police

\textsuperscript{173} This has happened to our clients at Parkdale Community Legal Services and is confirmed by research: see E.A. Stanko "Missing the Mark? Policing Battering" in J. Hamner, J. Radford and E.A. Stanko, eds., \textit{Women, Policing, and Male Violence: International Perspectives} (London: Routledge, 1989) 46 at 54; K.J. Ferraro, "The Legal Response in the United States" in Hamner, \textit{ibid.} 155 at 169-170.

\textsuperscript{174a} \textit{Supra, note 11.}

\textsuperscript{174} \textit{Ibid.} at 348, 353-354.

\textsuperscript{175} \textit{Ibid.} at 354-356.
response is often ineffective and that men continue to batter women even after the relationship is over and the women have moved away. Decision-makers considering the refugee claim of an assaulted woman should weigh the claimant's sworn testimony as to her reasons for not relocating within her country of origin or appealing to the police for protection against a standard of reasonable behaviour outlined by the literature on the topic of wife assault. As recognized by the Supreme Court of Canada, this will not be the traditional standard of the 'reasonable man'.

“If it strains credulity to imagine what the 'ordinary man' would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man'.”

Applying the refugee definition to the situation of an assaulted woman in a way that recognizes the different standard by which her claim must be measured means, among other things, accepting the reasonableness of her choice to flee rather than to contact the police force since going to the police will be at best a temporary reprieve for which she is likely to be punished by her husband.

176. MacLeod, supra, note 18 at 38-39; Pressman, supra, note 23 at 20; Freedman, supra, note 29 at 55.


178. This approach would be an appropriate application of the position expressed in the U.N.H.C.R. Handbook that "a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so": Greatbatch, supra, note 65 at paragraph 91.

179. Lavallee, supra, note 11 at 346.

180. Another way of applying an appropriate standard in wife assault refugee claims would be to recognize that the cyclical nature of wife assault means that, absent evidence of the successful rehabilitation of the assailant, past persecution is a clear indicator of at least the “reasonable possibility” of future persecution required by the Federal Court of Appeal in Adjei v. Minister of Employment and Immigration, [1989] 2 F.C. 680 (F.C.A.D.) at 683 and restated in Salibian, supra, note 93 at 9.
In at least one case, decision-makers applied the wrong test and, as a result, denied the claim of a woman who had faced life-long abuse at the hands of a fellow citizen. In Noble the Board was not actually dealing with a claim based on wife assault so the Board’s conclusions regarding “social group” are not applicable to wife assault claims; the case is nonetheless relevant to an examination of refugee claims based on wife assault in terms of the Board’s approach to the issue of state connection to the feared persecution. The claimant had been beaten and injured by the same brutal man on many occasions throughout her life. This man had also assaulted her friends and relatives because of their connection to her. She had gone to the police for protection in 1948 as a result the man had been fined. Throughout her adult life she moved from community to community up to three times annually in order to escape from her assailant. In 1966 she again approached the police for protection, after a beating in which this man had broken her arm. The police officer initially discouraged her from proceeding but subsequently instituted proceedings against her assailant. In 1969 the man was sentenced to three months’ imprisonment. The claimant left her country and came to Canada, where she lived without status for several years. After learning that her assailant had been sentenced to life imprisonment for murder, she returned to her country of origin. After his release as a result of an amnesty, she encountered him again. As a result she moved to another community and subsequently returned to Canada. After leaving the country she learned that her assailant seriously assaulted her former business partner.

The Board gave a number of reasons for refusing the refugee claim. Two of their reasons concerned the definition of “social group” as “poor aging single women”. The Board’s objections to the claim on these grounds are not applicable to the claims of battered women.

181. Supra, note 13.

182. The Board said that since the claimant had not always been “a poor single aging woman” she could not base her claim on membership in that social group. The Board erred in not taking a forward-looking approach, which is the essence of the Convention. As the claimant aged, she would be less able to escape her assailant by moving to a different community. She would also be even less able to defend herself or escape from him, so that there would be much more than a reasonable possibility of him seriously injuring or even killing her. The Board also denied that her persecution was related to her social group. Again, her membership in the specified social group made her more vulnerable to attack and less able to protect herself (for example, if she had been rich she could have hired a bodyguard) and this should have been sufficient to bring her within the refugee definition.
The Board also stated that there was no evidence beyond the claimant's dealings with the police that they refused or failed to protect the claimant, members of the same social group, or anyone else. It was clear that the Board found the claimant to be credible and that the Board members believed her testimony, so the real issue was whether or not what the claimant had described was a refusal or failure to provide protection. In approximately forty years of beatings the claimant's assailant was fined once and imprisoned for three months. This result cannot be sufficient to constitute protection. The claimant's few contacts with the police strengthen her position that the state could not offer her adequate protection: the question is why she did not report the assaults to the police more often. Why would anyone move her residence several times a year for many years rather than make a request for police protection? The Board itself gives the only logical answer when it states that the ability of anyone to protect the claimant from her assailant is a "doubtful matter". (In fact, the claimant evaluated her own situation well enough to realize that the only thing that could protect her in her country of origin was distance; she moved frequently in her country of origin and was safe from assault during the periods in which she lived in Canada). Refugee determination is concerned with the future prospects of persecution, and the Board is very clear in its belief that the claimant cannot expect to be protected by the police in her country of origin. As discussed earlier, the inability of the state to protect its citizens is justification for the positive determination of a refugee claim and the Board erred in not applying Rajudeen in this case.

The Board quoted from another Immigration Appeal Board case which stated that a desire to escape an environment of "criminality" could not be the basis for a refugee claim. In that case the claimant had based her claim on having had her handbag stolen. She reported the robbery to the police, who attempted unsuccessfully to apprehend the robbers. On its facts, this case is quite different from Noble and its use in the latter case obscures the important issues around state connection to persecution.

183. Noble, supra, note 13 at 5.

The Board also quoted from the Federal Court case of *Williams v. Minister of Employment and Immigration*\(^{185}\) in which Strayer J.A. "assumed" that the protection of section 7 of the *Charter* against the fear of physical persecution by the state as defined in *Singh* did not extend to the fear of physical persecution by a private individual. The use of this quotation is also inappropriate, and possibly misleading. Not only did Wilson J. specifically refuse to make a pronouncement on the full scope of section 7 rights in her decision in *Singh*\(^{186}\) but *Williams* was not a refugee case. The applicant in *Williams* had invoked section 7 in an attempt to stay an outstanding deportation order. This case is thus of no application to *Noble*.\(^{187}\)

An alternative approach by the Board would have been to recognize that as a poor, aging, single woman the claimant would be even more vulnerable to her assailant in the future. The serious abuse which she had good reason to fear was a violation of her basic human right to physical integrity and therefore constituted persecution. The claimant's practice of moving from place to place to avoid her assailant and the past and prospective ineffectiveness of the police established a reasonable possibility that the state could not protect the claimant. She thus had a well-founded fear of persecution and was unwilling or unable to avail herself of the protection of her state and should therefore have been recognized as a refugee.

**REFUGEE DETERMINATION PROCEDURES**

The process of refugee determination poses particular difficulties for claimants who are assaulted women.\(^{188}\) The nature of the proceedings and the decision-makers' expectations regarding the production of documentary evidence should be adapted to meet the needs of assaulted women claimants.

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187. See note 110 above; *Noble, supra* note 13.
188. In recognition of the fact that women who have suffered persecution because of their sex are often dealt with inappropriately through the refugee determination procedures of asylum countries, the November 1988 International Consultation on Refugee Women "called upon all States party to international and regional instruments ... to develop standards and criteria for the adjudication of asylum claims ... presented by refugee women": *Kelly, supra*, note 83 at 235-236.
The refugee determination procedure is a two-stage hearing process. The first level or "credible basis" hearing was intended to screen out claims that were manifestly unfounded. The original amendments to the Immigration Act provided that the only evidence to be adduced at these hearings was that related to the human rights record of the claimant's country of origin and the disposition of refugee claims by other nationals of that country. Upon the expression of concern from a variety of sources\(^\text{189}\) that such an approach would result in the unjustified denial of claimants from countries in which there had been a significant change of circumstances, the amendment was modified such that the inclusion of other evidence (such as the claimant's own history) was permitted.\(^\text{190}\) The hearing is adversarial in nature; a case presenting officer can examine any evidence presented and question any witnesses. If either the adjudicator or the Board member who make up the panel for the credible basis hearing find there to be "any credible or trustworthy evidence on which the Refugee Division might determine the claimant to be a Convention refugee, the adjudicator or member shall determine that the claimant has a credible basis for the claim".\(^\text{191}\) (emphasis added)

In Noor v. Minister of Employment and Immigration\(^\text{192}\) (hereinafter Noor) the Quebec Superior Court considered the purpose for which the credible basis hearing had been created and held that 'no credible basis' meant that the claim lacked any evidentiary basis.\(^\text{193}\) The Federal Court of Appeal recently considered the Noor decision in Sheikh v.

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189. It is worth noting that both the Y.W.C.A. and the National Action Committee on the Status of Women submitted briefs to the government in which they proposed that the credible basis screen be dropped. Both organizations stated that because of the relatively recent international consideration of women asylum seekers it would be more likely that women would be screened out at this stage because their claims would not fit the traditional (i.e. male-oriented) definition of what constituted a refugee. See N.A.C. Canadian Foreign Policy Committee, Refugee Women and Bill C-55: Brief prepared for Commons and Senate Committee Hearings on Bill C-55, National Office (Ottawa), September 1987; Y.W.C.A. of Metropolitan Toronto, Brief on Bill C-55: Submitted to Senate Standing Committee on Legal and Constitutional Affairs, February 1988.

190. Immigration Act, supra, note 2, s. 46.01 (6).

191. Ibid.

192. (1989), 8 Imm. L.R.(2d) 134 (Q.S.C.)

193. Ibid. at 157.
Minister of Employment and Immigration\textsuperscript{194} in which it concluded that, for the words "credible and trustworthy" in Section 46.01(6) (quoted above) to have any meaning, the first level panel should make its own assessment of the credibility of the evidence before the panel.\textsuperscript{195} The Court cautioned that the concept of "credible evidence" is not the same as the credibility of the claimant.\textsuperscript{196} The Court went on to state, however, that where the only evidence regarding the claim is the claimant's testimony (with the possible addition of reports of general conditions in the country of origin), a finding that the claimant is not credible is, effectively, a finding that there is no credible basis to the claim.\textsuperscript{197} While the Court noted that the claimant must establish all elements of the refugee definition at the credible basis hearing, the decision is nonetheless clear that the threshold for the first level hearing is lower than that to be met at the full Board hearing.\textsuperscript{198}

This new statement of the credible basis test imposes a higher standard on claimants at the first hearing than did Noor. An advocate appearing at the credible basis hearing will have to provide information about wife assault to the case presenting officer and the panel in order to give them a context within which to judge the claimant's cred-

\textsuperscript{194} (4 July 1990), Toronto A-521-89 (F.C.A.D.) [unreported].

\textsuperscript{195} Ibid at 5.

\textsuperscript{196} Ibid.

\textsuperscript{197} Ibid. at 6. This decision appears to uphold Lee v. Minister of Employment and Immigration (22 February 1990) Toronto A-401-89 (F.C.A.D.) [unreported] while limiting somewhat Sloley v. Minister of Employment and Immigration (22 February 1990) Toronto A-364-89 (F.C.A.D.) [unreported].

\textsuperscript{198} Ibid. This position is strengthened by the subsequent decision of the Federal Court of Appeal in Leung v. Minister of Employment and Immigration (4 October 1990), Toronto A-480-89 (F.C.A.D.) [unreported] in which the Court held that the primary role of the panel at the credible basis hearing is to test the credibility of the evidence before it rather than to draw inferences or arrive at conclusions on the existence of the essential elements of the claim. The panel is to consider whether or not there is sufficient evidence on the basis of which the Refugee Division "might reasonably conclude" that the applicant is a Convention refugee [at page 2]. The Court noted that the panel revealed its error in its conclusions that there was no evidence on which the Refugee Division would find the claimants to be refugees and that the proper test was whether or not there was evidence on which the Refugee Division might so find [at pages 2-3].
ibility. As noted by Wilson J. in *R v. Lavallee*, expert evidence on the subject of wife battering is essential for an appropriate evaluation of the evidence in cases in which a woman’s history of being battered is central to the legal issues. Without knowledge of wife assault, for example, the panel may find the fact that the claimant stayed with her husband for many years to be inconsistent with a history and fear of persecution and therefore doubt her credibility. Because the nature of the claim is somewhat unusual, advocates will likely need to make more extensive submissions on the elements of the refugee definition than would otherwise be necessary, particularly regarding the state connection to persecution. Familiarity with caselaw relating to the subject and the ability to distinguish cases with a negative result will also be essential; the panel should be encouraged to find that the claimant is credible and that there is at least “any” trustworthy evidence on which the Board could base a positive decision.

A Trinidadian woman who testified that she and her daughters had been the victims of crimes such as rape, theft, break and enter and threats was recently found to have a credible basis to her claim to refugee status. The panel stated that the lack of state protection was

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200. In addition to the *Noble* (*supra*, note 13) and *Williams* (*supra*, note 185) cases regarding violence against women, there is also Immigration and Refugee Board Decision T89-00956/T89-00957, 5 July 1989. The claimant in that case was a dual citizen of Colombia and Venezuela who feared returning to either country as a result of the abuse she suffered at the hands of her then common-law partner, a member of a guerilla group. The claimant fled from the house she shared with her assailant in Colombia to her aunt’s home in Venezuela. She learned that the man had tried to track her down through her grandmother in Colombia. He had beaten the grandmother, destroyed some of her belongings and threatened her with death if she reported him to the police. The claimant therefore left her aunt’s home and hid until she was financially able to leave the country. Rather than taking the “attributed political opinion” approach used in *Lazo-Majano* (*supra*, note 172) the Board characterized the case as “purely domestic”[at 6]. It failed entirely to consider the meaning of “persecution” or whether or not the man’s status as a guerilla had any implications to the issue of the state’s ability or unwillingness to provide protection. The Board also failed to examine the claimant’s reasons that she would not be safe in Venezuela.
sufficient to establish the credible basis to the claim in terms of the requirement of state connection. The panel stated:

"These acts of violence were tolerated by the authorities and if not tolerated, then at least you were not protected adequately by the authorities and that these acts of violence might have been committed against you because you are of...an East Indian background. And also perhaps, because you are a woman who is unprotected in Trinidad by a male or family members and this might be evidence to suggest that you belong to a particular social group."

At the full Board hearing the proceedings are somewhat different in that they are nominally non-adversarial. Section 69.1(5) of the Immigration Act provides that the claimant and her counsel are entitled to present evidence, cross-examine witnesses, and make representations while the Minister of Employment and Immigration is limited to presenting evidence in all cases other than those involving the cessation and exclusion clauses. The Act does not specifically mention the role of the refugee hearing officer although his/her role is outlined in section 13 of the Convention Refugee Determination Division Rules (hereinafter the Rules).

13. The Refugee Division may be assisted with a claim or application by a refugee hearing officer who may, subject to the direction of the Refugee Division,

(a) file documentary evidence;
(b) call and question witnesses; and
(c) make oral and written submissions.201a [emphasis added.]

The refugee hearing officer is supposed to be a neutral party202 who, as suggested by section 13 of the Rules, assists the Board and is subject to its direction. It appears that refugee hearing officers are actually being given the message that a more adversarial approach to the full

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201. Immigration File Number 9545-90-2301, last page of transcript, transcribed March 7, 1990 (leave to appeal to the Federal Court of Canada granted). While this hearing took place before the Sheikh supra, note 194 decision, the fact that the panel found the claimant to be a credible witness means that the Sheikh decision should not affect the meaning.

201a. SOR/88-1026.

Board hearings is acceptable. In an article about the role of the refugee hearing officer, members of the Immigration and Refugee Board expressed their support for the cross-examination of claimants. Candidates for the refugee hearing officers positions for which the Board interviewed in the summer of 1990 were given an interview at which their major task was to prepare and deliver a cross-examination and closing submissions from a transcript provided by the Board. The acceptability of cross-examination being routinely taken on by the refugee hearing officer is beyond the scope of this paper; the point is made only to alert advocates to the practice in order to enable them to prepare their clients appropriately.

Advocates should also be aware of potential constraints on the claimant's ability to tell her full story. In addition to feeling at least uncomfortable and probably also guilty about revealing the intimate details of her life, a woman may face more sinister limitations on her testimony. In Kaur v. Minister of Employment and Immigration for example, the applicant requested a reopening of her inquiry because the presence of her son at her first inquiry, acting as her ex-husband's "enforcer", had prevented her from speaking freely. The Board should also be sensitive to the fact that women whose children are attached to their claim may also be reticent to describe the details of their persecution in front of their children. Further, if the claimant's culture dictates that she should suffer battering silently, the use of an interpreter from her community may also intimidate her.

The need for evidence regarding the persecution faced by the claimant and the state connection to the persecution through the failure of the state to provide protection will be particularly crucial to refugee claims based on wife assault. The difficulty, of course, is that not a great deal of country-specific material is available through the traditional sources

203. Ibid.
204. Personal communication with interviewed candidate.
205. It is worth noting however that while the Act specifically gives claimants the right to cross-examine witnesses, the Rules state merely that refugee hearing officers may "call and question" witnesses. Not only are the refugee hearing officers not given the specific power to cross-examine, but the wording could suggest that the witnesses they are to question are the ones they call.
of information for refugee claims. This is in large part because of the failure of many states to consider violence against women to be a serious problem, or one worth an assignment of resources sufficient to provide for the wide dissemination of research. Development organizations understandably tend to engage in direct service delivery rather than extensive collection and wide distribution of data. It may therefore be necessary for advocates to build their own pool of resources through direct contacts with members of government departments, social services, and academia.

The U.N.C.H.R. *Handbook*, recognizes that the circumstances of flight make it difficult for a refugee claimant to provide proof of all of her statements. It is also difficult for claimants to provide documentary proof of a non-event, for example, that the police refused to respond to their request for protection. Decision-makers should adopt this passage from the *Handbook*:

> "While the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his [or her] disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he [or she] should, unless there are good reasons to the contrary, be given the benefit of the doubt."

The Immigration and Refugee Board has the general power to “take whatever measures are necessary to provide the parties with a full and proper hearing”. That this includes the provision of country-specific

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207. MATCH International is a nongovernmental organization that funds women-specific projects. Their funding priorities are to provide needed services, such as shelters, rather than to do research to ascertain the extent of the need for such services. (Personal communication with Tracy Heffernan of MATCH; Ottawa, 25 April 1990.)

208. Sending copies of any material so obtained to the Immigration and Refugee Board Documentation Centre and the I.R.B. Working Group on Refugee Women would assist other advocates.

209. *Supra*, note 65 at paragraph 196.

210. *Rules, supra*, note 201a, s. 6.
materials is supported by the Board's creation of a documentation centre open to the public. Given the difficulties of acquiring information relevant to wife assault refugee claims, the Board's general power, and the statement from the U.N.H.C.R. Handbook, the centre has a responsibility to collect information about the treatment of women in other countries.

Where there is no country-specific information about wife assault available, advocates should use general information about the nature of wife battering to support, by extension, their client's claim. For example, the literature on wife assault from many different countries frequently makes reference to the inadequacy of police response. In the absence of reliable material to the contrary (and this does not include general information about police response which fails to deal specifically with wife assault) the Board should accept the confirmation of inadequate state protection in the general literature as the best evidence available next to the client's own sworn testimony.211

The Federal Court of Appeal has, on a number of occasions, found the Immigration Appeal Board's doubt of the credibility of a claimant's uncontradicted sworn testimony to be invalid.212 As stated by the Court, "[w]hen an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness".213 As noted by the Federal Court of Appeal in the trilogy of cases of Ghanaian claimants originally refused refugee status by the Immigration Appeal Board,214 decisionmakers should not be over-vigilant in their examination of the

211. Another possibility would be to submit affidavits regarding wife assault in the country of origin from people who are familiar with the issue. See Kassa v. Minister of Employment and Immigration (1989), 105 N.R. 33 (F.C.A.D.) at 34, Mahoney J.A. which states that such evidence is "obviously highly relevant".


213. Maldonado, ibid. at 305.

claimant's story. For example, the Court stated in *Attakora v. Minister of Employment and Immigration* that, in the absence of medical evidence, it was not open to the Board to find that the claimant's knee fracture made it impossible for him to walk when he had testified that he had done so.\(^\text{215}\) Similarly, as noted above, decision-makers should not conclude that a battered woman is not credible when she relates that she was seriously injured on many occasions before she left.

Recently some Board members have been applying the case of *Faryna v. Chorny*\(^\text{216}\) in their consideration of the claimant's testimony. A frequently quoted passage is:

> "The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as *reasonable in that place and in those conditions*.\(^\text{217}\)

This case should be applied with caution given that its facts are very different from those of a refugee claim. *Faryna v. Chorny* was a libel case decided in 1951, brought by a woman who had found a letter from the defendant to the witness which implied that the woman was unchaste, and possibly pregnant by the witness. The letter had been written in Ukrainian, the first language of the defendant and the witness. The issue was whether or not the witness understood the common Ukrainian word for "confinement" as it applied to pregnant women and whether or not he knew the woman to whom the letter referred was the plaintiff. Clearly the facts of this case are very different from those of a refugee claim and the case should therefore be applied with great restraint in refugee claims. While it may be reasonable for a judge to disbelieve testimony which seeks to establish that the witness did not understand a letter written in his first language, its

\(^{215}\) Ibid. at 169.

\(^{216}\) (1951), [1952] 2 D.L.R. 354 (B.C.C.A).

\(^{217}\) Ibid. at 357.
application in refugee claims may tempt Board members to measure the credibility of the claimant by a cultural and socially-bound definition of what is reasonable, that is, in fact, unreasonable. Board members have reached unreasonable decisions such as those (noted above) criticized by the Federal Court of Appeal for their faulty assumptions of what constitutes reasonable behaviour.

Where the Faryna v. Chorny case may be useful, however, is in the statement that the “probabilities” to which the testimony must be compared are to be reasonable in the appropriate context. In the case of refugee claims based on wife assault this context, discussed at length above, is one which recognizes the violence and cyclical nature of battering and the inadequacy of protection offered to battered women.

Decision-makers should not automatically discount testimony which appears to conflict with written information about the country of origin. Where such a conflict arose on one occasion, the Immigration Appeal Board gave “more weight to the applicant’s version of the racial situation in Guyana than to that described in the Country Report coming as it does from someone [sic] who lived in Guyana as part of a minority group”.

Advocates can support their clients’ testimony through documentation such as reports from counsellors and doctors. If the abuse has affected the claimant’s memory, as in the case of a Parkdale Community Legal Services’ client whose husband repeatedly beat her on the head, a medical report would be particularly useful. There may also be relatives or friends in Canada who would be able to testify as to the nature of the persecution suffered by the claimant and whether or not state protection was available to her.

218. For example, the common assumption that a person telling the truth will look the questioner in the eye may not be true for people of a certain culture or those who are embarrassed to talk about the form their persecution took.

SUBMISSIONS

A one page summary outlining the argument to be made is a useful guide to provide to the panel at the opening of the hearing of a refugee claim based on wife assault. Because such claims are somewhat novel, an outline may help the panel to follow the presentation more easily.

In the full submissions to the panel, advocates should first provide the members with the necessary background about wife assault, then go on to establish their client’s experience and fear of persecution. The violence and cyclical nature of wife assault must be brought home to the Board as must the inadequacy of the state’s response to this form of persecution at the hands of other citizens. In reviewing the facts, it may be useful to refer to Federal Court of Appeal jurisprudence regarding the value of uncontradicted sworn testimony in immigration hearings as well as the caselaw cautioning against drawing unsubstantiated inferences of lack of credibility because of the decision-makers’ overscrutiny of the claimant’s testimony. Supporting affidavits from relatives or others aware of the claimant’s history and reports from professionals can also be referred to, if available, to further support the claim. Once the background on wife assault has been established and the facts set out, the submissions should show the panel a way to apply the refugee definition to the facts so as to arrive at a positive decision.

The panel should be reminded of its obligation to ensure that the Act, specifically the refugee definition, is interpreted and applied in a manner consistent with the equality guarantees in the Charter. Caselaw, the U.N.H.C.R. Handbook, and international instruments should be referred to in order to define “social group” and “persecution” in a way that includes the claimant and her experience. One of the key points in this regard is to show that her fear of persecution arises out of her membership in a social group; the submissions must make this connection clear.

Finally, the submissions must address the issue of the state’s connection to the persecution. Country-specific information about allocation of resources to fight wife assault and information about police response to calls for protection for battered women will be helpful if they are available. Otherwise it will be necessary to refer to the general literature on the topic, note the pangeographic nature of wife assault, and argue that this supports the claimant’s testimony regarding the
“reasonable possibility” that she will not be protected from persecution if she returns to her country of origin. Submissions on the lack of state protection should anticipate that the *Ward* decision will be used against a claimant who did not actually go to the police for protection or whose state is unable to provide protection. Advocates should distinguish *Ward* on the facts as much as possible and note that there is precedent for decision-makers to accept the claimant’s unwillingness to avail herself of state protection because of a reasonable belief that the state would be ineffective.

**LANDINGS ON HUMANITARIAN AND COMPASSIONATE GROUNDS**

**GENERAL**

Section 3(g) of the *Immigration Act* recognizes one of its purposes as the upholding of Canada’s humanitarian tradition. This section provides potential relief for those people who do not fit the Convention refugee definition as well as others who are inadmissible but whose situations warrant special consideration. Section 114(2) of the *Act* gives the Governor in Council authority to exempt anyone from the requirements of the *Act* or *Regulations* “for reasons of public policy” or for “humanitarian and compassionate considerations”.

Humanitarian and compassionate landings arise in a number of circumstances. The exemption from the *Regulations* may be to allow an otherwise admissible person to make an application from within Canada, rather than from a visa office abroad as required by section 9(1) of the *Act*. A further exemption may also be requested to allow a person who does not meet the admission criteria to be landed anyway.

The authority to exempt an applicant from the *Act* or *Regulations* and to facilitate their landing is a discretionary power, and therefore not subject to mandamus. However, there is a duty to consider every application, which may be enforced by way of declaration. Further, the exercise of the discretion must accord with principles of administrative law. It must be exercised fairly, with full consideration of all relevant factors, and

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without taking irrelevant factors into account. Of particular concern in
the immigration law context is the fettering of discretion.

In practice, an immigration officer assesses an applicant's application
and makes a recommendation. If the recommendation is positive, the
Federal Court has said that it may not be overturned by a senior offi-
cer unless the applicant has had an opportunity to make further sub-
missions.222 If the applicant is given a negative recommendation,
further submissions may be made to the area office manager with a
request for reconsideration. Judicial review is available but limited to
erors in the use of discretion and fairness.223 The applicant may not
be allowed to remain in Canada while the application for reconsidera-
tion is being processed or the judicial review is adjudicated.224

The words “humanitarian” and “compassionate” are not defined any-
where in the Act or Regulations, and therefore must be given their ordi-
nary meaning.225 The Commission developed a number of policies, or
case categories with a checklist of criteria for each, to be used by
immigration officers in the exercise of their discretion.226 These were
contained in Chapter 9 of the Immigration Manual: Examination and
Enforcement (IE 9). The types of cases covered in the policy guidelines
were:227

1) inadmissibility on security grounds,

2) spousal sponsorship from within Canada,

222. Johl v. Minister of Employment and Immigration (14 October 1987), Doc. No. T-
837-87 (F.C.T.D.) [unreported], as summarized in F. Marrocco & H. Goslett,
The Annotated Immigration Act of Canada (Toronto: Carswell, 1989) at 318.

12; “[It is not up to this Court to review the merits by way of examining the
evidence but merely to consider whether the applicants were treated with
administrative fairness and to determine whether there existed any bias, bad
faith, lack of jurisdiction or error of law on the part of the official concerned”:

D.L.R. (4th) 663; Williams, supra, note 185.


226. For a discussion of how these are used, see Rotenberg, ibid. at 296.

3) situations of family dependancy,
4) illegal de facto residents,
5) those on employment authorizations with a long term commitment to Canada,
6) public policy (cultural, scientific, social contribution to Canada, and business people who would provide jobs for Canadians),
7) situations involving marriage breakdown and sponsorship withdrawal,
8) and the foreign domestic program.

THE REFUGEE DETERMINATION SYSTEM
The current refugee determination system and the Backlog regulations provide that a humanitarian and compassionate review will be held before the credible basis hearing. A second one is scheduled if the claimant fails to meet the credible basis test or is determined not to be a Convention refugee at the final hearing.

Prior to the Federal Court decision in Yhap v. Minister of Employment and Immigration (hereinafter Yhap) the first humanitarian and compassionate review was limited to a consideration of factors which came to be known as 'ballet dancers and family class'. If neither applied, the investigation stopped and a negative recommendation was given. In Yhap, the court held that the limitation of the consideration to these two factors unfairly fettered the immigration officers' discretion so as to constitute a jurisdictional error. Although guidelines and "rough

230. The officers were to investigate whether or not the claimant's return to the country of origin would so embarrass that country's government that they could be expected to punish the claimant, that is, was the claimant a member of an official delegation or a famous ballet star? Further, they were to consider whether or not the claimant was in a position to be sponsored as a member of the family class, and had a sponsor willing to assume financial responsibility for him or her.
rules of thumb" could be used to assist officers in the exercise of their discretion, the guidelines as stated were rigid and inflexible.\textsuperscript{231}

Following \textit{Yhap}, the Minister hastily cancelled the previous guidelines, as well as all of Chapter 9. New guidelines were substituted, much broader than the original Backlog guidelines.\textsuperscript{232} The new guidelines affirm that:

\begin{quote}
"Humanitarian and compassionate grounds exist when unusual, undeserved or disproportionate hardship would be caused to a person seeking consideration. A humanitarian and compassionate review is a case by case response whereby officers are expected to consider carefully all aspects of a situation, use their best judgment and make an informed recommendation."\textsuperscript{233}
\end{quote}

The new guidelines also set out a series of case categories under which to make the assessments.\textsuperscript{234} These are essentially the same as the previous ones, with three exceptions. There are no guidelines which cover situations of inadmissibility on security grounds. Marriage breakdown cases are also not considered. The third difference is the addition of a guideline specifically directed at refugee-like situations: "severe sanctions or inhumane treatment in country of origin."\textsuperscript{234a}

This guideline is of particular interest to assaulted women who have sought refuge in Canada. The relevant parts are:

\begin{quote}
"Consideration should be given where there exists a special situation in the person's home country, and undue hardship would likely result from removal... Others may warrant consideration
\end{quote}

\begin{itemize}
\item\textsuperscript{231} \textit{Yhap, supra}, note 229 at 261. The Court approved the guidelines in Chapter 9.
\item\textsuperscript{232} Practically, there appears to be little difference in the interpretation of the new or old guidelines for refugee claimants: cases which appear to obviously meet the new criteria are still receiving negative recommendations.
\item\textsuperscript{233} \textit{Guidelines for Immigration Officers on the Exercise of Discretion, Prepared Pursuant to the Judgment Rendered by Justice Jerome in the Case of Ken Yung Yhap}, attached to T.B. Sheehan, Memorandum on the Exercise of Discretion—H & C, to Directors of Immigration, March 20, 1990 at 2.
\item\textsuperscript{234} \textit{Ibid.} at 3-5. It should be noted that, as of the date of writing this, these guidelines are contained only in an Operations Memorandum, not in the Policy and Procedures Manual. A final version of these can be expected sometime in the future.
\item\textsuperscript{234a} \textit{Ibid.}
\end{itemize}
because of their personal circumstances in relation to current laws and practices in their country of origin. Such persons could reasonably expect unduly harsh or inhumane treatment in their country should they be removed. In these cases there should be strong reasons to believe that the person will face a life threatening situation in his or her homeland as a direct result of the political or social situation in that country. Such situations are more likely to occur in countries with repressive governments or those experiencing civil strife or war.

The onus is on the applicants to satisfy officers that a) a particular situation exists in their country and that, b) their personal circumstances in relation to that situation warrant positive discretion."235

The inclusion of “social situation” is promising for assaulted women who have sought refuge in Canada, as it potentially includes a consideration of gender-specific social situations.236 However, the direction that situations will most likely arise when there is a repressive government, civil war or strife obviates the consideration that a government may be democratic; yet, still not provide women with protection against wife assault. The requirement that the expected treatment be “unduly harsh or inhumane” may be interpreted to mean harsh in relation to other women in her situation: if many women can expect to be beaten in the home country, then the expectation that she will also be beaten may not seem “unduly harsh”.237

Further, the requirement that it be a demonstrable “life threatening situation” may be difficult to meet. If the woman has survived the assaults so far, there may be a presumption that it is not actually “life threatening”. Evidence as to the escalation of violence and spousal

235. Ibid. at 3-4.

236. The wording of the second sentence quoted above from this guideline bears a strong resemblance to Executive Committee Conclusion No. 39, supra note 59. It can be argued that assaulted women who take active steps to stop the abuse are transgressing the social mores of their society, and that the guideline, because of the similarity to the Conclusion, should be interpreted to include these women.

237. Immigration officers, for example, when interviewing Sri Lankans, appear to apply a 'compared to other Sri Lankans' test when told that the applicant fears bombing if returned to the homeland (Parkdale Community Legal Services' caseworker's report on interview).
homicide may be necessary unless there is clear evidence of attempted murder in the past.

The onus is on the applicant to “satisfy the officer” that a particular situation exists in her country, and further, that her personal circumstances warrant consideration. As discussed above, data on wife assault and lack of protection for women is still very difficult to obtain. Further, if the officer is ignorant of or trivializes wife assault, it may be very difficult to satisfy him or her that it is life threatening, or relates to political or social conditions in that country.

Despite the difficulties with the guidelines, there are ways to use them. More and more evidence of wife assault in other countries, or the treatment of women in the family, is becoming available. In addition, in Toronto in particular, there are women from other countries who possess the necessary expertise to provide confirmation of the applicant’s statements regarding the condition of women. Further, submissions should assume that officers are ignorant of wife assault, and contain a brief discussion of the issue so that they may make an informed decision.

The requirement that the applicant “should” face a life threatening situation is effectively mandatory. Although caselaw has interpreted “should” to mean “may”, thus making judicial review on this issue difficult, our experience at Parkdale Community Legal Services is that immigration officers routinely interpret this type of language as mandatory. Thus, an applicant who satisfied an officer that she faced forcible confinement and physical abuse, but not death, would not be assessed positively under the guideline. Submissions should address this issue directly.


239. Judicial review would still be available if there were a number of cases which could be brought together, as was done for Yhap, supra, note 229, to show that immigration officers were fettering their discretion in fact.
SPONSORSHIP WITHDRAWAL

Humanitarian and compassionate review is also important to abused women who have been sponsored by their husbands. Over 50% of women immigrants are here as members of the family class, most sponsored by their husbands.\(^{240}\) Most of these women obtain immigrant visas abroad and obtain their permanent resident status when they arrive in Canada. If they are then abused and choose to leave their spouses, they may do so without being subject to possible deportation.\(^{241}\) The main problem working with this group, especially those who do not speak fluent English, is apprising them of their rights. They have usually been told by their husbands that, if they leave or even call the police, he will have them deported. He may also tell them they have no rights to children, property, welfare, etc. These problems, however, are usually approached through public legal education and working with shelters and women’s community groups.

Women who arrive in Canada without permanent resident status and then are sponsored while remaining in Canada are a much more vulnerable group. They are almost always granted an exemption from the requirement that they apply abroad on humanitarian and compassionate grounds upon proof that the marriage is genuine and not just for immigration purposes. They are also automatically eligible for permanent resident status as a member of the family class, provided they are admissible on medical and security grounds. However, processing of the application for an Order in Council allowing them to become landed from within Canada and the completion of the paperwork takes at least a year, and often up to two years. During this period, if they leave their husbands, they are potentially subject to deportation. As noted above, this threat is often used as part of the abuse, and to keep the woman from leaving or calling the police.


\(^{241}\) They may have problems obtaining social assistance however, because of the sponsorship agreement. They will be required to have a form signed by Immigration that the sponsorship has been withdrawn. Welfare’s current policy is that if there is evidence of abuse, an emergency cheque may be issued before the form is signed.
The immigration office will discover the marriage breakdown either through her contact with them, or through the husband contacting immigration to withdraw sponsorship. Subsequently, both of them will be called in for an interview separately, to tell their side of the story. In Parkdale’s experience, the husband usually tells the immigration officer any or all of the following: she married him for immigration purposes, she is having affairs, she was a spy in her home country, she was married back home and therefore the whole application was invalid, and so on. These are not fatal, but the officer will want at least an affidavit from the woman denying the more serious allegations. The woman may not be aware of these allegations until the interview; accompanying the client to the interview is therefore imperative.242

Until the Yhap decision, there was a special policy in the humanitarian and compassionate guidelines set out in IE 9 to cover the situation of marriage breakdown. The new guidelines issued by the Minister following Yhap have omitted these guidelines.243 In our view, this should be rectified, as sponsorship withdrawal on marriage breakdown is a special situation, and applicants merit consideration on grounds which reflect their experience.

Assuming this omission was not intentional, immigration lawyers are continuing to make submissions in these cases based on the old guidelines.243a Since they are no longer in operation, the old guidelines do not need to be strictly adhered to or met, as decisions must be made on a case by case basis. However, it is likely that they still carry some weight, and therefore are offered as guidance for submissions.

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242. Because immigration interviews are not part of the traditional litigation model, lawyers often do not see the need for representation at them and, being time-constrained, let the client go alone. Interviews should be seen as the first step in the litigation process which, if properly handled, can save lawyers and their clients time in the long run. In our experience, representation may avert inappropriate questions, and also guides the legal worker in preparing further submissions when necessary to meet the Officer’s concerns.


243a. Mary Marrone, Immigration staff lawyer at Community and Legal Aid Services Programme, Osgoode Hall Law School, formerly in private practice.
The old guidelines directed an officer to stop processing a woman's application upon being apprised of a withdrawal of sponsorship prior to landing, and to begin removal proceedings. In *Dawson v. Minister of Employment and Immigration*, it was determined that the time of landing was when the Order in Council was issued. If the applicant was eligible for landing as a member of the family class at the time the Order in Council was issued, that is, if sponsorship had not yet been withdrawn, then she must be processed for landing. The old *Immigration Manual* did not reflect the decision in *Dawson*, but continued to assume that an application for landing did not take effect until a further assessment had been made, some time after the Order in Council had been received. This is clearly wrong in law.

If the Order in Council has not yet been granted, then submissions must be made as to why she should be landed despite the withdrawal. If submissions regarding life threatening situation can be made, these should be included. Otherwise, the officer may look at her establishment potential and any humanitarian and compassionate factors.

Although the landing application is based on humanitarian and compassionate factors, the first thing the officers were directed to under the old guidelines contained in *IE* 9.31 was establishment potential. This was directed at ensuring that the woman and any dependent children would not become public charges, rendering her potentially inad-


245. (1988) 6 Imm. L.R. 27 (F.C.T.D.). Teitelbaum J. said at 50: "If I accepted [the Minister's] submission, any sponsored applicant would be compelled to act in a way dictated by the sponsor for fear that the sponsorship would be withdrawn." Although in that case the Immigration Officer had written "meets all other requirements" on the file, Teitelbaum J. anticipates the case where no such statement appears: "Surely before [the date when the application for exemption was sent in] the Minister's representative must have completed... his examination of Dawson's file to see if Dawson had all the necessary criteria to become a permanent resident in accordance with his application" (at 50-51).

246. Orders in Council are published in the Canada Gazette, and often take several months to reach the applicant's file at Immigration.

247. This has arisen when the husband for some reason is returning to the home country, or when, as a result of the marriage breakdown, she will be considered to have transgressed social mores in the home country so that returning as a divorced woman would itself be life threatening.
Assaulted Migrant Women's Claims to Refugee Status

missible under section 19(1)(b) of the Act. Immigration looked at economic factors such as the independent selection criteria, her previous training, education and employment history, and whether or not there was a relative willing and able to assist. They also looked at the composition of sponsorable family members here and abroad. The last factor in this section was whether or not they were de facto residents of Canada, i.e. were their ties with Canada, had they severed ties with the home country, and were they well-integrated into Canadian society.

These criteria were systemically discriminatory, especially against women in abusive relationships. Many women who come here do not obtain work permits, even though they may be eligible, often because their husband has not wanted them to work, or because they felt it unnecessary as they intended to stay at home to care for their children. When the marriage breaks down, and they attempt to obtain a work permit they are often denied. Thus, they cannot show their ability to establish themselves. Where possible, women may rely on their work history in their home country, however many of our clients come from countries where women either do not usually do waged work, or are ghettoized in low-paying, low-skill jobs. We encourage clients in these situations to begin upgrading courses or join sole-support mothers' programs through social assistance at the earliest possible opportunity. Lack of child care often makes the job almost impossible, but, while sensitivity to her situation is essential, she must be fully apprised of the consequences of not pursuing waged employment or upgrading.

248. If this is used as a threshold question, the decision may be subject to judicial review on the grounds that the Immigration Officer failed to consider all the relevant factors.

249. Note that no attention was given to whether or not the woman intends to bring these family members here, or whether they want to come.

250. If they are on a Minister's Permit, they are eligible to apply for an employment authorization (s.20(4)(e) of the Regulations), supra, note 2, though they are subject to the "Canadians First" policy (s.20(1)): they need a validated job offer. The mere fact that Immigration intends to make a negative recommendation is not enough to deny an employment authorization: likelihood of having to obtain social assistance is one factor which must be considered: Mitchell v. Minister of Employment and Immigration (15 July 1983), Doc. No. T-1563-83 (F.C.T.D.) [unreported] summarized in Marrocco, supra, note 222 at 326.
The "de facto resident" requirement may also be difficult to establish in wife abuse cases, because of the isolation which is often part of the abuse. For immigrant women, isolation is often particularly easy to effect, as the husband uses his longer residence in Canada to prove that he knows Canadian society: one client was told by her husband that she should not speak to anyone, or go out alone, or she would be mugged and raped on the streets. A language barrier may also contribute to isolation.

The client may thus have great difficulty showing that she is integrated into Canadian society. A lack of knowledge of the dominant official language in the area in which she lives will also work against a positive recommendation. Sponsored immigrants are not eligible for government-subsidized language programs, and thus have to add the job of taking language programs to their other family duties of housework, childcare and often waged work. Even if she decides to make this effort, her husband may actively discourage her from so doing in an attempt to keep her isolated.

Aside from encouragement and facilitation of the client's attempts to meet the establishment criteria, submissions should also include a discussion of why the client has not been able to meet these criteria as of the interview date, based on the above arguments and others as relevant. Any efforts she has been able to make or is planning to make in the future should be detailed, with as many supporting documents as possible. While the application may not be accepted, it may be possible to obtain a Minister's Permit and/or a work permit to give her time to show establishment potential. Reference to her resourcefulness, past or present, in any area of her life may also help. A court support order will also assist in her showing her ability to be independent.

The second set of criteria the officer looked at under the former guidelines were humanitarian and compassionate factors. The first humanitarian and compassionate factors considered in marriage breakdown cases related to fraud. The officer must first be satisfied that the marriage itself was genuine, and not merely for immigration purposes.

251. Seward & McDade, supra, note 240 at 19-21. Where there is a large ethnic population, we have argued that there has been insufficient opportunity to learn English, and that the client is integrated into an ethnic community which forms a part of Canadian multicultural society.
Arguably, this point is determined at the initial marriage and sponsorship interviews, and should not be open to further investigation without new and compelling evidence. The assertions of an angry husband should not be considered sufficient grounds to reopen the investigation without further evidence.

The second area of potential fraud was whether or not the client acted in bad faith, that is, did she come to the attention of Canada Immigration through someone else's report, or did she report voluntarily? The woman is under a duty to inform the immigration office of a change in her circumstances as soon as possible after she has left her husband. Otherwise, she may be seen as guilty of misrepresentation. This is an onerous requirement for the following reasons. First, the longer she waits, the greater the probability that her application for landing will be processed to completion. Second, she may not know whether the separation is permanent or whether she will return to him. Third, she may not be able to face the immigration bureaucracy at a time when her life situation is so uncertain and she herself is traumatized. A report from a shelter worker or the leader of a group whom she has worked with may be of assistance to support submissions on this.

The third criterion was whether or not the applicant suffered physical and mental abuse, including threats of sponsorship withdrawal. Officers often ask for independent documentation of the abuse: police reports and medical evidence. If the woman has no supporting evidence, submissions should give reasons for this as well as explain why she should not be expected to have any (fear of calling the police and why, injuries not serious enough for hospitalization or the use of home remedies, etc.).

Under the old guidelines, it was stated that abuse “should not itself be a reason for landing someone”. One of the reasons given for not allowing abuse to be determinative was that the applicant may be better off in her home country where her family can give her support. This should be addressed in submissions regarding her expected treatment by her family, the treatment of divorced women in her home

252. In Siviclar v. Minister of Employment and Immigration (1984), 57 N.R. 57 (F.C.A.), the Court held that Immigration could not reopen an inquiry regarding working without authorization following sponsorship withdrawal.
country, and the lack of support she will face. Another criterion in the guidelines addressed this latter explicitly, by asking whether resettlement assistance was available in the home country.

Two other factors considered were whether the applicant is pregnant, and whether she had any Canadian-born children. Pregnancy may delay removal, but Immigration's attitude has been that the presence of Canadian-born children is almost immaterial. Their position is that the Canadian child may stay in Canada, albeit without his or her mother, or that the child may go with the mother and then return to Canada at a later date and sponsor his or her mother then. We usually stress the detrimental effects on the child's future in Canada if educated in a non-Canadian educational system, as well as the trauma to the child of separation from the mother. A custody order can be helpful in this argument.

The final criterion was whether or not returning to the home country to apply for landing would be a matter of "mere inconvenience": economic and educational disruption must be severe to warrant consideration. This criterion again was discriminatory: middle class people are more likely to be able to prove educational and career disruption than lower income people. A final argument may be based on the "public policy" factor in section 114(2) of the Act. The new guidelines state that public policy exceptions are those which Immigration determines are in the national interest. There is no authority for this assertion, as surely the determination of what is public policy goes beyond Immigration's purview. An officer is therefore not bound to consider only those public policies set out in the guidelines. Canada has made many initiatives to combat wife assault in the last twenty years, and it thus can be said that combatting wife assault is a public policy.

Having stringent criteria which women in marriage breakdown situations must meet in order to be landed encourages women to stay in abusive situations and thus is directly contrary to public policy.

253. This position is potentially challengeable in Court, using arguments based on the rights of a Canadian citizen.


255. We estimate that 1/2 the women we work with in these situations return to their abusive partners to await their Records of Landing.
The interview following notification of the marriage breakdown may not take place for a number of months. We begin the advocacy early, by ensuring that the client understands what will be expected of her. We assist her to meet these criteria by contacting community agencies or other sources of support. We also try to ensure that Immigration is aware of her new address, or at least that she will receive any call-in notices they may send her. Estranged husbands often tell their wives that they will not withdraw sponsorship, and then do so immediately. They also often tell her they will give her any letters she receives from Immigration, and then don’t. She must be fully aware of the possible consequences of not informing Immigration immediately of her change in circumstances.

SUBMISSIONS
In practice, landings on humanitarian and compassionate are an easier route to landing than refugee claims have been to date. It is also potentially faster than the refugee determination system. It is therefore critical that submissions for landing on humanitarian and compassionate grounds be carefully prepared, and that the client be represented at the interviews, both in the refugee stream and in sponsorship withdrawal cases.

In preparing submissions, we have found it useful to put in as much detail as necessary to make the client’s story real to the officer. Merely putting down dates or brief details seldom leads the officer to form a sympathetic opinion for several reasons. Most people seem to have a reluctance to investigate the personal and often degrading circumstances of a woman’s life. This may be due to natural respect for privacy, or to a desire to remain ignorant of horrific details because of a sense of helplessness. However, without a sense of the terror of the individual experience of wife assault, the officer may view the case abstractly, without having his or her emotions engaged. Even if flat submissions may be redressed in part by the client telling her story at the interview, the officer’s supervisor will have only the written submissions and officer’s notes on which to base a recommendation.

Second, a brief discussion of the issue of wife assault is necessary to educate the officer and contextualize the case. What should be included in this section will be informed by the facts of each case. For example, if the client did not call the police, then a discussion of why some women don’t call the police should be included. If she was abused in the home country, but still came to Canada to join her hus-
band at a later date, then a discussion of the cycle of violence is appropriate to rebut assumptions that she only rejoined him in Canada for immigration purposes. Information on country conditions regarding the position of women in society and if possible, protection and support for abused women and the treatment of separated or divorced women, should be included in submissions for women in refugee situations. As noted earlier, Executive Committee Conclusion No. 39 may be used to lend strength to the argument that the client should be favourably considered, even if she cannot prove a life threatening situation.256

Finally, submissions based on the old guidelines should be included, particularly those relating to establishment potential. Equality arguments based on the systemic discrimination inherent within the establishment potential criteria may usefully be made, especially to provide a context for submissions on the attempts the client has made to meet them, and future plans. For example, submissions may be made on her resourcefulness and motivation to become self-supporting, given the hurdles which she has to overcome. Without those or similar submissions, however, equality arguments are not likely to win, given the strong mandate of the Immigration Act to exclude those who are likely to become a public charge.

STRATEGIES FOR REFORM
Our work with assaulted migrant women developed out of Parkdale Community Legal Services' ongoing work with and on behalf of assaulted women in general. From outreach and public education with community groups and shelters, we learned that assaulted migrant women faced particular problems requiring particular solutions. This paper has concentrated on possible legal solutions for two categories of migrant women: women fleeing persecution and those whose sponsorship has been withdrawn. There is further work to be done in this

256. Supra, note 59.
area. In addition, the problems of women who do not fit into these categories still need to be addressed.\textsuperscript{257}

Clearly, a solution to these problems cannot be achieved by legal action alone. The laws and policies and their interpretation have not recognized the reality of women's experience, and this imbalance must be addressed through other means. What follows is an outline of some of the initiatives to date.

\textit{Intra-clinic education:} Assaulted women often come into our clinic for assistance with matters other than wife assault. Accordingly, we place great importance on developing the sensitivity to recognize such situations in all our workers, to allow us to offer appropriate assistance.\textsuperscript{258}

\textit{Public legal education:} We have targeted community groups and English Second Language classes attended by migrant women for our outreach and public legal education program. Many of our clients come to us as a result of discussions with these groups about immigration, family law and wife assault. We have also given training sessions to crisis line and shelter workers, and community college students training to work with assaulted women and children. People who work in this area need to be informed of the legal consequences to migrant women of their work.\textsuperscript{259} They are also an important source of referrals.

\textsuperscript{257} For example, discussions with Sophie Nbaio-Yeboah of the Canadian African Newcomers Aid Centre of Toronto reveal that there is a significant problem arising out of Canadian visa offices' refusal to recognize most traditional African marriages. Women in this situation must be sponsored as fiancées by their husbands, and are granted admission on the condition that they 'marry' their husbands within 90 days of their arrival. If they are rejected by their husbands within this period, or leave because of abuse, they have failed to meet the conditions of their visa and are subject to deportation. Rejection may be related to the long separation of spouses caused by current Immigration practices.

\textsuperscript{258} For example, a woman may approach us with what she characterizes as a landlord and tenant problem. Further investigation may reveal that she is being evicted because of the actions of an abusive husband.

\textsuperscript{259} For example, shelter workers may believe they have an obligation to report a resident to Immigration. In fact, they have no such obligation, and are often under a duty of confidentiality which precludes such action. Another danger is shelter workers' advising clients on how to proceed with Immigration without obtaining legal advice, thus potentially complicating the client's situation.
Given the importance of understanding wife assault to ensure an appropriate determination of assaulted women's cases, we hope to pursue training sessions for immigration officers.

Support groups: At the initiative of one of our community legal workers, a support group of Spanish-speaking women has formed. "Women of Courage" meets regularly to provide its members with mutual support and entertainment. Support groups for women of other ethnic and linguistic communities are in the process of forming.

Law reform on sponsorship withdrawal: We are participating in a lobbying effort against the systemic discrimination inherent in the establishment potential criteria for landings on humanitarian and compassionate grounds. It is our position that women whose sponsorship has been withdrawn should be given Minister's Permits, including employment authorizations, for a period of up to three years. This would allow women to upgrade their skills and/or obtain employment to meet the establishment criteria, in recognition that, given the circumstances of their lives, this may take some time. This strategy was initiated by Jacqueline Greatbatch, staff lawyer at Parkdale Community Legal Services in submissions to the Minister of Employment and Immigration. To date, this has only produced a response from the Minister expressing sympathy but no commitment to change. In conjunction with a group of community workers, we are gathering information and will be making further submissions in the near future.

Research: A key element in the representation of assaulted migrant women is acquiring information about gender-specific country conditions. This takes several forms. We include gender-specific materials in

260. The Spanish translation of "courage" includes the concept of outrage.

261. While this does not address the systemic discrimination of the criteria themselves, we believe that anything more far-reaching will be politically impossible to achieve at this time. Giving clients a work permit and time to show establishment would meet the needs of many of our clients. Alternatively, any new guidelines issued by the Minister with regard to criteria for landing in sponsorship withdrawal cases should reflect the difficulties abused women have in showing establishment potential, and redress the systemic discrimination inherent in the criteria discussed in this paper and elsewhere.
our country profile files, and are developing our awareness of currently available resources. Because so little is available in Canada, we have begun to contact agencies in other countries for information they may be able to provide. One response we received suggested the possibility of a research project to be funded by a development agency. We hope to pursue this in the future. Finally, we should not forget that, particularly in the case of refugee claimants, Immigration has an obligation to provide information about gender-specific persecution. Advocates should not hesitate to request such information from the Immigration and Refugee Board Documentation Centre and from refugee hearings officers.

At Parkdale Community Legal Services, we have met many women whose horrific stories of violence at the hands of their husbands and boyfriends have moved and inspired us to seek protection for them by making it possible for them to remain in Canada. In the course of our efforts it has been made clear to us that the playing field of international protection is anything but level. That can be changed. Change will come through long term strategies for reform. It will also come through advocates refining the arguments in this paper, developing and sharing new arguments, and making these arguments on behalf of our clients despite the difficulties. Advocates must show immigration officers and members of the Immigration and Refugee Board ways to apply law and policy so as to make international protection available to assaulted migrant women. These women deserve protection from violence. They deserve to live in a place where they can feel and be safe. They deserve a home.