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Bill C-26 (S.C. 2012 c. 9) Reforms to Self-Defence and Defence of Property:

Technical Guide for Practitioners

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Canada

EXECUTIVE SUMMARY

Bill C-26, the *Citizen's Arrest and Self-defence Act*, S.C. 2012 c. 9, comes into force on March 11, 2013. The legislation replaces the old *Criminal Code* provisions on self-defence and defence of property with new and reformed defences.

Purpose of the Technical Guide

Comprehensive law reform necessarily results in a transitional period of uncertainty. **The overall objective of the Guide is to promote, for legal practitioners, a common understanding of the purpose and effect of the reforms and a common set of arguments as to their application and interpretation, so as to produce meaningful and consistent jurisprudence as rapidly as possible, while avoiding both confusion and uncertainty.**

To accomplish this objective, this guide describes the legislative intent behind the new law, a general overview of changes, and a detailed examination of each clause of the new defences, with references to:

- aspects of the new law that mirror the old defences and explanation of aspects that are different from the old laws;
- key aspects of jurisprudence under the old law that are incorporated into the new law; and
- relevant excerpts from parliamentary consideration of the new law.

Legislative Objective and Overview of New Defences

In passing Bill C-26, **Parliament's primary intent was to simplify the legislative text that sets out the defences**. Self-defence and defence of property span nine sections of the *Criminal Code* (sections 34 to 42). There are multiple distinct versions of each defence, each of which appears to be aimed at slightly different circumstances in which a defence claim might arise. For decades, this legislative approach to the defences has been criticized as being overly complex and detailed, and producing internally inconsistent versions of the same defence. This has caused problems for judges in crafting jury instructions, and errors in jury instructions gave rise to numerous unnecessary appeals. The public was not served by a legislative text which even judges had difficulty understanding and explaining.

Legislative Approach: Replacing Multiple Defences with Single Defence

Despite the problems with the wording of the law, there had been relatively few concerns about the application of the defences in actual cases. Courts and juries were generally perceived to make the right decisions by applying their common sense and experience. Parliament's intention in reforming the defences was to enact defences that express the fundamental principles that animate the laws of self-defence and

defence of property so that the law itself corresponds to the approach taken by juries in deciding these cases. To achieve this objective, **the new defences extract from the old provisions the common core elements of each defence, and codify those core elements in a single simple framework that is capable of assessing a defence claim in any situation**. The new laws give effect to the defences' underlying principles in a more transparent way; they will facilitate jury instructions and allow decision-makers to come to conclusions more easily and simply.

Replacing numerous circumstance-specific defences with a single generally-applicable defence means that some of the former threshold requirements are no longer part of the defence *as threshold requirements*. However, the new laws still allow for consideration of elements which previously served to distinguish the different versions of the defences under the old law. Specifically, **certain defence requirements under the old law (which could have been determinative of whether the defence succeeded or failed) are converted into factors that are not determinative in any case, but which may be taken into account in assessing the core defence elements, where relevant, on a case by case basis**. For instance, under the old self-defence laws, different versions of the defence applied, depending on whether the attack was provoked by the accused or not, whether the accused had a reasonable apprehension of death or not, and where the accused started the confrontation, whether he or she retreated before using deadly force. Under the new generally-applicable defence, these elements are no longer threshold requirements that must be met for the defence to succeed, but they may be relevant considerations to be taken into account depending on the facts of a given case.

Core Defence Elements

The new defences are set out in a single basic rule. For defence of the person, the three core elements are:

- A **reasonable perception of force** or a threat of force against a person (subjective perception of the accused, objectively verified);
- A **defensive purpose** associated with the accused's actions (accused's subjective state of mind); and
- The accused's actions must be **reasonable in the circumstances** (objective assessment).

The new self-defence law includes a **non-exhaustive list of factors applicable to the determination of whether accused's actions were reasonable in the circumstances**. This list is intended to ease the transition to the new law by setting out some relevant factors which are already well-established in jurisprudence or policy, or which were formerly threshold requirements under one of the old law's circumstance-specific defences. The list should help clarify the way in which previous jurisprudence is accommodated under the new law, and should also help guide judges in instructing juries and allow both judges and juries to come to determinations about the success or failure of the defence in any given case more easily.

For the new defence of property, the basic elements are the same as those for self-defence, except that the threat which triggers the defence must be a specified threat of property interference (rather than a threat of force against a person). Additionally, the new defence of property retains from the old law the requirement that the property defender be "in peaceable possession" of property at the time the interference is threatened.

Noteworthy Features of the New Laws

Some of the main features of both new defences are:

- An even balance of subjective and objective considerations (but a different mix from the old law)
- A new express "defensive purpose" requirement
- Actions must be "reasonable in the circumstances"
- The defences encompass any "acts" that are undertaken to defend against the threat, not just "use of force"
- A special rule excluding the defences in the context of law enforcement conduct, unless the accused reasonably believes that the conduct is unlawful

TEXT OF NEW SELF-DEFENCE AND DEFENCE OF PROPERTY PROVISIONS

SELF-DEFENCE

34(1) A person is not guilty of an offence if

(*a*) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
(*b*) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
(*c*) the act committed is reasonable in the circumstances.

34(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

(*a*) the nature of the force or threat;
(*b*) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
(*c*) the person's role in the incident;
(*d*) whether any party to the incident used or threatened to use a weapon;
(*e*) the size, age, gender and physical capabilities of the parties to the incident;
(*f*) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
(*f.1*) any history of interaction or communication between the parties to the incident;
(*g*) the nature and proportionality of the person's response to the use or threat of force; and
(*h*) whether the act committed was in response to a use or threat of force that the person knew was lawful.

34(3) Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

DEFENCE OF PROPERTY

35(1) A person is not guilty of an offence if

(*a*) they either believe on reasonable grounds that they are in peaceable possession of property or are acting under the authority of, or lawfully assisting, a person whom they believe on reasonable grounds is in peaceable possession of property;
(*b*) they believe on reasonable grounds that another person
    (i) is about to enter, is entering or has entered the property without being entitled by law to do so,
    (ii) is about to take the property, is doing so or has just done so, or
    (iii) is about to damage or destroy the property, or make it inoperative, or is doing so;
(*c*) the act that constitutes the offence is committed for the purpose of
    (i) preventing the other person from entering the property, or removing that person from the property, or
    (ii) preventing the other person from taking, damaging or destroying the property or from making it inoperative, or retaking the property from that person; and
(*d*) the act committed is reasonable in the circumstances.

35(2) Subsection (1) does not apply if the person who believes on reasonable grounds that they are, or who is believed on reasonable grounds to be, in peaceable possession of the property does not have a claim of right to it and the other person is entitled to its possession by law.

35(3) Subsection (1) does not apply if the other person is doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

INTRODUCTION

Bill C-26, the *Citizen's Arrest and Self-defence Act* received Royal Assent on June 28, 2012 (2012 S.C. c. 9) and the measures contained therein come into force on March 11, 2013. The legislation replaces the existing *Criminal Code* provisions on self-defence and defence of property with new defences.[1]

It is acknowledged that comprehensive law reform always creates a transitional period of uncertainty, in which arguments must be advanced in court as to the interpretation of the new laws and decisions must be made about how the new law applies to the facts of actual cases..

This guide describes the new laws of self-defence and defence of property in order to aid police and Crown prosecutors in their application of the law. Its objective is to ensure that across all Canadian jurisdictions, prosecutorial authorities and other criminal law practitioners have a common understanding of the legislative intent and content of the new law. The more those applying the new laws have a shared understanding of their purpose and effect, the more easily and quickly there will emerge a judicial interpretation of the new laws that reflects their legislative intent, which in turn will result in their common and effective application across the country.

This guide does not contain a comprehensive analysis of the laws of self-defence and defence of property, and as such does not contain a complete or exhaustive description of relevant jurisprudence and legal issues. This guide is intended to facilitate the transition from the old laws to the new laws, and its contents reflect this purpose. As such, this guide focuses on the key elements of the new defences and other aspects of the law which are now codified, and discusses jurisprudence and specific legal issues only to the degree that they are implicated directly (or indirectly) by the new legislation. Issues that are not affected by the change in legislation – e.g. the admissibility of the victim's reputation for violence and admissibility of expert evidence – are not addressed in this guide.

To facilitate the practical application of the new law, and in particular to facilitate the making of arguments in court as to its proper interpretation, this document will describe the legislative intent behind the new law and provide a general overview of changes, including excerpts from parliamentary consideration of the new measures.

It will also provide a more technical description of each section (including subsections and paragraphs) of the new defences, including:

- Identification of aspects of the new laws that mirror the old laws and aspects that are changed
- Where new laws differs from old laws, an explanation of the reasons for the change

[1] This guide does not address reforms to the law of citizen's arrest which were also contained in Bill C-26.

- Identification of principles from jurisprudence under the old laws that are incorporated into the new laws, including references to key decisions
- Relevant excerpts from parliamentary consideration of the new laws

As the Supreme Court of Canada (SCC) has recognized, the defence of person and defence of property laws contain many of the same key concepts and elements, and accordingly, the interpretation and jurisprudence in relation to one defence can be relevant and authoritative for the other. As a result, cases that deal with both defences may be mentioned below in relation to each other.[2]

Background

It is important to note that the core elements of the legislative reforms to self-defence were initially developed by a joint Federal/Provincial/Territorial (FPT) Working Group, whose recommendations were accepted by FPT Ministers responsible for Justice in 2009. Similarly, this guide was developed jointly between federal Department of Justice officials and officials from a number of provincial Ministries of the Attorneys General. As a result, both the new laws and the interpretations proposed in this guide reflect the common understanding of FPT Justice officials. Therefore, while this guide is not binding on prosecutors or other criminal law practitioners, the use and adoption of its contents is encouraged.

Additional information and assistance can be obtained from the Criminal Law Policy Section of the Department of Justice, Canada (for example, additional information in relation to parliamentary proceedings and relevant foreign jurisprudence and legislation may be available).

A. NEW SELF-DEFENCE OVERVIEW

The old law of self-defence[3] in the *Criminal Code* provided a variety of distinct self-defence provisions, each applicable to a slightly different set of circumstances. For those who work in Canadian criminal law, the old self-defence laws were universally seen to be in drastic need of simplification. The multiplicity of self-defence provisions (old sections 34 to 37 of the *Criminal Code*) were virtually unchanged since their enactment well over a century ago. They were drafted with the laudable aim of customizing the application of self-defence to distinct circumstances that may demonstrate somewhat different moral qualities. For instance, old section 34 provided

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[2] For example, *R.* v. *Szczerbaniwicz*, SCC 2010 para. 18: "Section 39(1) is found in the *Criminal Code* together with other provisions setting out how the use of force in the defence of property and persons can be justified. While s. 39(1) itself has yet to be interpreted by this Court, there is helpful analogous jurisprudence dealing with these other provisions, most of which use similar or identical language to the phrase "no more force than is necessary" found in s. 39(1). Nothing in the language of s. 39(1) suggests that the meaning of the words "no more force than is necessary" is different from these other provisions."

[3] In this guide the terms "self-defence" and "defence of the person" are used interchangeably and include actions taken in defence of oneself or a third party, unless the context indicates otherwise.

a defence for an innocent victim who was suddenly and unlawfully attacked, whereas old section 35 provided a defence with slightly different requirements for a person who attacked another first and then subsequently used force to defend against their victim's response. Over a century of jurisprudence and practical experience with the old provisions clearly revealed that the existence of multiple provisions and their specificity produced complexity and uncertainty that did not serve the ends of justice. Rather, juries were left confused and efforts to make the legislative text of the law understandable were confounded. Unnecessary complication meant that cases in which charges were warranted ended up being protracted and frequently appealed on grounds relating to errors in jury instructions, and possibly also that charges were laid in some cases where they should not have been, further clogging strained court systems.

In contrast, during that time there had not been widespread criticism of the basic principles that underpin self-defence as understood in Canadian criminal law. Indeed, despite the complexity of the old legislative text of self-defence, juries were generally thought to make appropriate findings of fact in self-defence cases. It was in the process of getting to that determination where the problems lay.

The intent of the new law is to **simplify the legislative text itself, in order to facilitate the application of the fundamental principles of self-defence without substantively altering those principles.**

New Approach: Single Rule for Self-Defence

The new law accomplishes this objective by extracting the common core elements from the multiple different versions of the old defence, and codifying those elements in a manner that provides a single simple framework for assessing the defence in any and all situations in which it might be raised. The new approach focuses on what each version of the old law of self-defence had in common with the others, rather than the features that differentiated each provision from the others. The common elements are core to self-defence, regardless of the differences that may occur from one situation to the next. These are now reflected as the three core requirements for self-defence (itemized in new subsection 34(1)).

At the same time, the distinguishing components of the old law are eliminated as threshold elements. The function of these elements and the nature of how they are considered in a self-defence claim have changed, but they remain important considerations nonetheless. Under the new law, they may be considered wherever relevant, on a case by case basis, as contextual factors that help the jury to determine whether the new core defence elements have been satisfied.

In regards to the approach toward simplification and clarity of the law of defence of person, two consequences should be borne in mind:

1. It is acknowledged that the law as it applies to some subset(s) of circumstances could be subtly altered by the elimination of circumstance-specific self-defence

requirements. In developing the new defence, the greatest of care was taken to ensure that any such alterations would be as few in number and as small in scale as possible. Such anticipated changes in the application of the law are discussed in this guide under relevant sections and paragraphs.

2. It is critical to appreciate that the shift away from circumstance-specific mandatory requirements for self-defence is *not* intended to dispense with the considerations that were captured by such requirements in the old law. It is clear that the old laws' "requirements" remain highly relevant to understanding the scope and function of self-defence generally, as well as its application in any given case. What the new approach does is convert some of the factual elements that were "required elements" under the old law (i.e. rigid conditions that had to be satisfied for any particular version of self-defence to succeed) into "factors" or "considerations" that feed into the determination of one or more of the core elements of the new defence of person rules.

   For example, the proportionality between an incoming threat of deadly force and the defensive use of deadly force in response is no longer a threshold requirement that will be determinative of the success of a defence claim (as it had been under old law subsection 34(2)). Now that there is only one defence of self-defence that applies in cases involving force of *any* degree of seriousness, that specific rule (i.e. threat of death is required to justify deadly force) is no longer a legal requirement for the defence to succeed, including in the case of an accused charged with murder. However, proportionality between the threat and the response remains a highly relevant consideration in assessing defence of person claims. Under the new law, it is expressly itemized as a factor to consider in the determination of whether the defensive response was "reasonable in the circumstances" (paragraph 34(1)(c)), as will be set out below. Proportionality between threat and response may be relevant to assessing other defence requirements, such as the subjective "defensive purpose" of the accused (paragraph 34(1)(b)), without being expressly referred to in the new law.

   Other examples of old self-defence elements that have been eliminated as rigid requirements are the requirements under subsection 34(1) and (2) that the incoming attack be an "unlawful assault" (but the accused's knowledge that the force was lawful is listed as a relevant consideration to the reasonableness of the accused's response under paragraph 34(2)(h)) and the requirement under old section 37 that a third person whom the accused sought to defend was "under their protection". As well, the special considerations surrounding the lawfulness of claims of self-defence against police action are expressly addressed in new subsection 34(3).

Overall, it is Parliament's intention to give effect to established self-defence principles in a more transparent and consistent way. The new law should facilitate jury instructions and allow decision-makers to come to conclusions more easily and simply. The shift away from numerous circumstance-specific self-defence requirements provided by

several distinct defences, and toward a single generally applicable defence, allows for the simplification of the law on the one hand, and also for consideration of all relevant factors within the context of individual cases, on the other.

The new law allows former threshold requirements to carry more or less weight depending on the facts of each case, while simultaneously affirming their importance as a matter of policy and simplifying the task of the trier of fact. Of course, any and all relevant factors, including those which were never codified as defence requirements, can be taken into account in accordance with the general laws of evidence. The list of enumerated factors (in new subsection 34(2)) is neither exhaustive nor exclusive. Other considerations may properly apply in a given situation.

Core Self-Defence Elements: Balancing Objective and Subjective Assessments

The new basic rule for self-defence contains three required elements:

- A reasonable perception of force or a threat of force against the accused or other person (accused's subjective perception that is objectively verified);
- A defensive purpose associated with the accused's actions (accused's subjective state of mind); and
- The accused's actions must be reasonable in the circumstances (objectively assessed).

Overall, the new rule seeks to evenly balance objective and subjective considerations. However, it accomplishes the balance in a slightly different way than did the old law.

Briefly, under the new law, the threat perception is assessed on a combined subjective/objective basis, which is essentially the same as the old law. Mistakes as to the nature or existence of the threat are permitted, but only where such mistakes are reasonable ones.

The new law introduces an explicit "defensive purpose" requirement, which is judged on a purely subjective basis: is there some evidence on which a jury could conclude that the accused had a defensive purpose when he or she did the actions that form the subject-matter of the charge? This purpose is not subject to objective confirmation. It is a rough equivalent to the requirement under the old law that the accused believed that they needed to take the action they did. Under the old law, this belief had to be verified objectively.

Taking into account the accused's reasonable threat perception and their subjective defensive purpose (as well as any other considerations that are relevant in those determinations), the actions the accused took must, as a final step, be assessed as objectively reasonable in the circumstances.

Overall, then, the new defence contains objective and subjective elements in equal measure:

- one element (triggering threat) is a combined subjective/objective element;
- one element is purely subjective (purpose); and
- one element is purely objective (the reasonableness of actions).

Although this represents a new structure for self-defence in Canada, the essential elements are familiar, as is the overall approach of blended subjective and objective assessments. This approach allows for both sensitivity to the unique experiences and perceptions of each accused in highly charged and volatile situations, as well as an appropriate degree of societal oversight and boundary-setting in relation to the commission of crimes in self-defence.

Reasonableness of Actions – Listed Factors

To assist with the interpretation and application of the third core element of the new defence, i.e. the reasonableness of the actions taken in self-defence, a non-exhaustive list of factors is included in the new law. One motivation for the list of factors is that it presents a means of codifying certain relevant considerations that derive from jurisprudence. In particular, two aspects of the landmark SCC decision in *Lavallee*[4] are now codified:

- imminence of the attack is not a rigid requirement that must be present for the defence to succeed, but rather is a factor to consider in assessing the reasonableness of the accused's actions; and
- an abusive history between the accused and the victim is a relevant factor in assessing the reasonableness of the accused's actions.

The codification of these (and other factors) signals that the new law is not intended to displace old jurisprudence. Rather, the list helps to indicate that previously recognized self-defence considerations continue to apply wherever relevant. The list of factors was provided to give some guidance to judges and juries, because the new element of actions being "reasonable in the circumstances" does reflect a change in the wording of the law and the enactment of a more flexible standard. All of this is discussed in greater detail throughout the guide.

Defensive Action against Police Conduct

A third and final element of the new self-defence law is found in new subsection 34(3). Briefly, this subsection sets out the rule that must be applied in the special circumstances of a claim of defensive action against police conduct. The reason for this rule and its anticipated application are discussed later in this guide.

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

B. NEW DEFENCE OF PROPERTY OVERVIEW

The old law of defence of property was subject to many of the same criticisms as the old law of self-defence. There were multiple iterations of the defence, each applicable in a slightly different set of circumstances, such as whether the property was movable or immovable, and whether the property defender and the property-taker or trespasser had similar or differing levels of claims to the property in question. There were additional complex and confusing elements of the old law, such as deeming clauses that addressed conditions under which resistance to a property defender amounted to assault, the consequence of which was to trigger the old self-defence laws.

As was the case with the old defence of the person laws, each specific defence of property rule was merely a narrow expression of a more general set of principles. The objective behind Bill C-26's legislative reform was to reduce the number of defences to one single defence that, by virtue of its codification of core defence elements, can be applied in any defence of property situation. In keeping with the common law treatment of defence of property and defence of person as two subspecies of the larger concept of "private defence", the new law of defence of property mirrors the structure of the new law of defence of person.

Defence of property is necessarily more complex than defence of person. This is because there are many more ways of interfering with property than there are of interfering with a person's bodily integrity, and because a single item of property may be subject to multiple claims, of varying legal strengths, by any number of individuals. As well, property claims are generally a matter of provincial laws (a range of provincial laws may govern any particular situation, ranging from general property laws to family laws and laws in relation to wills and estates, for example), and citizens are often unaware of, or mistaken about, aspects of various matters of private law, further complicating the assessment of defence of property claims.

The purpose of the criminal law in this area is not to adjudge property disputes or to enable people to behave violently against each because they are having such a dispute. Rather, the function of the defence of property is to protect against breaches of the peace and promote public order. For this reason, a pre-condition to accessing the defence is that the person invoking it was (or believed themselves to be) in "peaceable possession" of the property when the need to defend or protect the property arose. Only where property comes under an imminent threat of some kind does the criminal law permit otherwise criminal acts to be committed to defend or protect the property.

In developing the new law, great care was taken to ensure that the same degree of authority to defend property under the old law was maintained under the new law. Overall, then, a successful claim of defence of property requires:

- A reasonable perception of a specified type of threat to property in one's "peaceable possession"[5] (accused's subjective perception, objectively verified);
- A defensive purpose associated with the accused's actions (accused's subjective state of mind); and
- The accused's actions must be reasonable in the circumstances (objectively assessed).

The new defence of property contains the same special rule for a claim of defensive action against law enforcement conduct (e.g. the execution of a search warrant or the seizure of property as evidence). It also contains a distinct special rule that addresses the situation where the victim of the defender's action had a better claim to the property than did the defender, which is retained from the old law.

The new defence of property does not contain a list of factors to assist the court in determining whether the accused's actions were reasonable in the circumstances. Of course, many factors will be relevant to this determination, potentially many more factors than arise in defence of person cases, because the nature of property and the interests people have in it are so varied and immense. This makes the creation of a list of factors more difficult than it is for defence of the person. The absence of a list of factors for the new defence of property should not be taken to mean that factors on the list under the new self-defence provision could not be relevant in a defence of property case. On the contrary, some factors listed in new subsection 34(2) are likely to be highly relevant (with necessary contextual modifications). For instance, proportionality between an interference with property and the accused's response will in most cases be relevant, as would be the accused's role in the incident and the presence of any weapons. The absence of a list is not intended to diminish or otherwise interfere with the consideration of any relevant factors or evidence otherwise admissible.

Defence of property is raised far less frequently than defence of person and typically for conduct that causes less serious harm and injury than defence of person situations. Moreover, where actions in defence of property are resisted, the situation almost inevitably transforms into a situation where defence of person becomes a live issue, and the accused's conduct can be assessed in accordance with that defence where appropriate.

C. OVERVIEW OF CHANGES: KEY QUOTES (Parliamentary consideration):

The Honourable Rob Nicholson, Minister of Justice and Attorney General of Canada, House of Commons, Standing Committee on Justice and Human Rights, February 7, 2012:

> In terms of the defences of property and person, the bill replaces the current multitude of provisions, which are largely unchanged from the original text enacted in 1892, and actually they

[5] The notion "peaceable possession" is central to the old law, and remains a distinct precondition for accessing the new defence.

had a pretty extensive history for 1892. These are basically the provisions that were contained in the laws of Upper Canada in or about 1840.

We have replaced those provisions with a simple, easy-to-apply rule for each defence. For decades criminal practitioners, the Canadian Bar Association, the Supreme Court of Canada, academics, and many others have criticized the law of self-defence primarily, but also the law of defence of property, as being written in an unnecessarily complex and confusing way.

The complexity of the law is not without serious consequence. It can lead to charging decisions that fail to take into account the merits of the defences in particular situations. It can confuse juries, and it can give rise to unnecessary grounds of appeal, which cost the justice system valuable time and resources. The law should be clear and clearly understood by the public, the police, prosecutors, and the court.

[*Translation*]

Bill C-26 meets those objectives. It makes the act more specific and simplifies it without sacrificing existing legal protections.

[*English*]

The basic elements of both defences are the same and can be easily stated. Whether a person is defending themselves or another person, or defending property in their possession, the general rule will be that they can undertake any acts for the purposes of protecting or defending property or a person as long as they reasonably perceive a threat, and their acts, including their use of force, are reasonable in the circumstances.

Mr. Robert Goguen, Parliamentary Secretary to the Minister of Justice, House of Commons Debates, December 1, 2011:

The provisions on defence of the person and defence of property, as they are currently written, are complex and ambiguous. Existing laws on self-defence, in particular, have been the subject of decades of criticism by the judiciary, including the Supreme Court of Canada, as well as lawyers, academics, lawyers' associations and law reform organizations. Much of the criticism has to do with the fact that the existing law is vague and hard to enforce. It is fair to say that reform in this area is long overdue.

These kinds of defence were included in the very first Criminal Code. The wording of this part of the legislation has remained very similar since the original Criminal Code was written in 1892. Defence of property was covered in nine separate provisions containing a number of subcategories and other very complex provisions that have become obsolete and unnecessary.

Professor Don Stuart of Queen's University, whose textbooks on criminal law are widely used by first year law students in this country, has written:

> The defences of person and property in Canadian law are bedeviled by excessively complex and sometimes obtuse Code provisions.

It is important to be clear, however, that the criticisms of the law do not pertain to its substance but rather to how it is drafted. Self-defence and defence of property are and have always been robust in Canada. There has been a lot written in newspapers about the right to self-defence and protection of one's property, some of which suggests that these rights have been diminished or are inadequately protected. This is untrue. The law is robust, despite the fact that the rules as

written in the Criminal Code suffer from serious defects, and despite the way the media have portrayed these issues in recent times.

Parliament has a duty to ensure that laws are clear and accessible to Canadians, criminal justice participants and even the media. That is exactly what we are proposing to do in Bill C-26, even though the actual rights of Canadians are robust and upheld in Canadian courts on a daily basis. When the laws which set out these rules are confusing, we fail in our responsibility to adequately inform Canadians of their rights. Obviously, unclear laws can also complicate or frustrate the charging provisions of the police who themselves may have difficulty in reading the Criminal Code and understanding what is and is not permitted. Bill C-26 therefore proposes to replace the existing Criminal Code provisions in this area with clear, simple provisions that would maintain the same level of protection as the existing laws but also meet the needs of Canadians today."

D. SELF-DEFENCE– DETAILED EXAMINATION OF NEW SECTION 34 OF THE *CRIMINAL CODE*

34. (1) A person is not guilty of an offence if **(a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;**

Test for the triggering threat

No change from old law.

Under the old self-defence provisions, the trigger for action in defence of a person was variously framed under the most frequently invoked versions of self-defence as either "every one who is unlawfully assaulted" (old subsection 34(1)) or "under reasonable apprehension of death or grievous bodily harm" (old subsection 34(2)).

The old trigger conditions either expressly required or were interpreted by courts to require the accused to have an honest and reasonable belief as to the existence of an assault or threat of death or grievous bodily harm. The corollary to an honest and reasonable belief is that beliefs that are reasonable but mistaken will still allow the defence to be raised.[6]

The new law retains the test for the self-defence trigger. It expressly requires that the triggering threat be assessed on a combined subjective (i.e. what the accused honestly believed) and objective (i.e. would the "reasonable person" also share the accused's belief) basis, consistent with the various versions of the old defence.

However, as a consequence of collapsing all defences into a single defence, the new law no longer distinguishes between differing levels of threat. Regardless of the nature

[6] See e.g. *R. v. Cinous,* [2002] 2 SCR 3 para. 41; *R. v. Pétel,* [1994] 1 SCR 3 page 12; *R. v. Reilly* [1984] 2 SCR 396 page 404.

or extent of the threat that a person perceives, the same test governs this first element of the defence in all cases.

However, under the new law, the nature and degree of the threat may impact differently upon the determination of whether the accused genuinely responded with a defensive purpose (under paragraph 34(1)(b), and whether the actions taken were reasonable in the circumstances (under paragraph 34(1)(c) and as set out in the list of factors under subsection 34(2)).

The expressions “force is being used” and “threat of force is being made” are intended to be interpreted in accordance with the use of similar expressions and concepts in the assault provisions (section 265).

Elimination of “unlawful” assault requirement

The new law eliminates the notion of “unlawful assault” which was a required element under old subsections 34(1) and(2) (but not under old section 35).

<u>Reasons for change</u>:

- The requirement under the old law that the force threatened was “unlawful” complicated the fact finding process, especially when combined with a mixed subjective/objective assessment of the threat. The accused’s subjective belief (which must be objectively grounded) about the “unlawful” nature of the attack coming from the victim became a live issue. This in turn meant that the accused’s perception of the attacker’s intentions and perceptions also become a live issue. This was especially challenging in cases involving small scuffles that escalated into violent confrontations, where it became critical to determine whose conduct first amounted to an “unlawful assault”, as that in turn governed which person has recourse to which version of the defence.[7]

- The requirement for “unlawful assault” might have also unfairly limited the defence in rare cases, such as cases where a person who unlawfully committed a relatively trivial assault against another was actually in a much weaker position relative to the person assaulted. Where the person assaulted used the initial assault as an excuse to respond with force of their own, the initial aggressor may have subsequently needed to use defensive force to protect him or herself, even though they might be responsible for starting the altercation and thus might be responding to force that is potentially “lawful”because it might technically have been force used in self-defence. A rigid and abstract legal determination that focussed on whether one party was acting “unlawfully” may have failed to take into account relevant subtleties of the particular circumstances. It may also have posed difficulties in relation to attacks by persons below the age of criminal

[7] See *R. v. Paice*, [2005] 1 S.C.R. 339 for an example of some of the challenges associated with determining whether the accused was “unlawfully assaulted” in a consensual fight situation.

responsibility or suffering from delusions or otherwise not responsible for their conduct by reason of mental disorder.

- Notwithstanding its interpretation by the SCC in *McIntosh*[8], the longstanding existence of section 35 signalled Parliament's view that there was at least one type of circumstance in which an initial aggressor may rely on self-defence against an assault that was not unlawful. As a result, unless the new law (which provides one single defence for all circumstances) eliminates the requirement for the attack to be "unlawful", it could potentially deprive an accused of the right to act in self-defence in rare circumstances such as where they instigated the fight but subsequently needed to act defensively, or in other circumstances where the "unlawful" nature of the attack was difficult to determine.

It is crucial to note that removal of the element of "unlawful assault" does **not** reflect Parliament's view that the facts surrounding the instigation of the assault are not relevant or that self-defence may regularly be invoked against lawful touchings. . Rather, the requirement was removed primarily to simplify the fact-finding process, and secondarily to allow for the defence to be raised in rare cases where this it might be appropriate, notwithstanding that the person was responding to force that might have been lawful.

There are very few situations in which an unwanted touching, which is by definition an assault, will not be unlawful. However, since the elimination of "unlawful assault" in principle permits a defensive response to lawful applications of force, a number of other features of the new law were introduced specifically to minimize the situations in which such conduct could be permitted:

- Paragraph 34(1)(b) – the defence now requires some evidence that the accused's purpose was defensive in nature (e.g. resisting an attempt by a shopkeeper to make a citizen's arrest after a theft in order to escape would not satisfy this requirement)
- Paragraph 34(2)(c) allows for consideration of the accused's role in the incident in determining whether their actions were reasonable (e.g. if the accused instigated the confrontation)
- Paragraph 34(2)(h) allows for consideration of the accused's knowledge of the lawful nature of the force they are responding to in determining whether their actions were reasonable (e.g. orderlies in hospitals may have the authority under common law or provincial legislation to use force to restrain patients who pose a danger to themselves or others; the patient's knowledge that orderlies have this authority may be relevant to assessing the reasonableness of their defensive responses to such actions)
- Paragraph 34(3) expressly limits the most likely scenario involving a claim to self defence against lawful conduct, i.e. cases involving the reactions against the use of force by the police.

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[8] *R. v. McIntosh,* [1995] 1 S.C.R. 686.

These provisions are discussed in greater detail later in this Guide.

Key Quotes (Parliamentary Consideration)

House of Commons Standing Committee on Justice and Human Rights, March 6, 2012:

> Joanne Klineberg, Senior Counsel, Department of Justice:
>
> Professor Stewart also testified before you that self-defence should be limited to responses to unlawful assaults. It is certainly true that the overwhelming majority of self-defence cases involve responses to unlawful attacks. These are precisely the situations that lead people to need to react defensively. It's natural to assume that this should be a limiting condition of self-defence.
>
> However, there are rare circumstances in which a person should be entitled to act defensively against an attack that is not necessarily unlawful. Section 35 of the Criminal Code, one of the four sections on self-defence today, speaks directly to one such situation, namely where the initial instigator of an assault subsequently needs to act defensively because of the response of the other person. I would be pleased to provide further examples of such situations if you have additional questions on that.
>
> The unlawful attack element is also removed because it causes a great deal of difficulty under the current law. This element complicates trials unnecessarily by placing the focus on the early stages of a confrontation. In asking the jury to determine who attacked whom first, the jury must look to which actions constituted the first assault. This in turn requires the jury to determine what the accused believed about the intentions of the other party. It's far preferable to focus attention on the thoughts and actions of the defender at the time when they committed the actions they are charged with.
>
> The removal of this element is not a cause for concern for two reasons. First, the new law of self-defence would include an explicit “defensive purpose” requirement. This means that in any case where a person uses force against someone acting lawfully, they will not have the benefit of self-defence unless they were found to be genuinely acting defensively, and not for another purpose.
>
> The second assurance is located in proposed subsection 34(3), which deals with the most common claims of self-defence against lawful conduct, namely against police action such as arrest. The new law would make it clear that in the case of police action, self-defence is only available if the defender reasonably believes the police are acting unlawfully, such as by using excessive force.

Defence of Others

Under the old law, defence of a third person was provided for by section 37, which stated that a person may use force “to defend… anyone under his protection from assault”. The phrase “under his protection” was subject to varying interpretations.

The new law applies not just to acts in defence of oneself, but also where a person acts in defence of a third person, without any special or different qualifications or requirements. The accused must reasonably perceive a threat against the other person, must act with a defensive purpose, and their actions must be reasonable in the circumstances.

Reasons for change: This change reflects the way in which the new law adopts a simplified approach to self-defence. The new framework of the defence is one that can be applied to cases where actions were taken in defence of third party.

34(1)(b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force;

Under the old laws, there was no express "defensive purpose" requirement. Rather, a defensive purpose was implied by combination of the physical and mental elements of the applicable defence. Under the new law, only force which is actually used for the purpose of self-defence (or defence of another) is permitted.

Reasons for the change: An express purpose requirement is intended to ensure that the defence succeeds only where the actions were taken for a genuinely defensive purpose. It ensures that where triggering circumstances are present (i.e. a reasonably based belief in a threat or application of force) but the primary purpose of resistance is something other than defence of a person's bodily integrity, the defence will not succeed. For instance, if a petite woman commences shoving her much larger boyfriend, but due to her small size she presents no real threat to his bodily integrity and there is no risk of harm or injury, and the boyfriend responds to her force by punching her repeatedly, he would need to introduce some evidence that he was acting for the purpose of defending himself (rather than simply using the shoves as a pretext to respond violently) for his claim of "defensive purpose" to be found credible.

The use of the definite article "the" before "purpose" is intended to be interpreted such that in order for the defence to succeed, the accused's sole purpose is, or, where there is more than one purpose, the accused's dominant or controlling purpose, is to defend themselves or another person from the perceived threat.[9]

34(1)(c) the act committed is reasonable in the circumstances.

"*Reasonable in the circumstances*"

Under the old laws, the measure for acceptable defensive force was articulated in various ways. In some versions of the defence it was framed as "no more force than

[9] See for example *R.* v. *Shuparski,* 2003 SKCA 22: In relation to the evidentiary presumption that a person who occupied the driver's seat of a vehicle had the care or control of the vehicle unless they establish that they "did not occupy that seat or position for the purpose of setting the vehicle…in motion", which called upon the Sask CA to interpret the phrase "the purpose", the Court said: "The statute speaks to "the" purpose. That connotes either one purpose and if there should be more than one, the controlling or dominant purpose. In other words, a person occupying the driver's seat could have a dominant or controlling purpose and also one or more incidental, inchoate or contingent purposes. Those latter purposes, by definition, are neither dominant nor controlling and do not qualify for "the" purpose. Any one of them may qualify as "a" purpose, but that is not the way the statute is worded."

necessary" or "as much force as is necessary". In others, it was framed in terms of conditions indicating a blend of necessity and proportionality (i.e. between a reasonably perceived threat of death or grievous bodily harm and the belief that the person cannot preserve himself from death or grievous bodily harm other than by killing).

In recognition of the difficulties involved in accurately assessing the precise amount of necessary or proportionate force in the heat of a confrontation – i.e. not so little so as to make defensive action unsuccessful, but not any more than is required to enable the person to defend themselves successfully – courts were compelled to soften the tests with the adoption of the principle that a person in a threatening situation need not "weigh to a nicety" precisely how much force is necessary.[10] As a result, despite what appeared to be clear language in the Code, proportionality between the threat and the response or the necessity of the response given the threat were not in actuality to be strictly measured. Rather, some degree of flexibility had to be accorded to the accused in these assessments.

Reasons for the change: Under the new law, "reasonable in the circumstances" replaces the various combinations and expressions of "necessary" and "proportionate" force.

There are two reasons for this change. First, the concept of "reasonableness" is both slightly broader than the concepts of necessity and proportionality, and it is also more flexible. In effect, reasonableness is a larger concept that would logically include considerations of necessity and proportionality, as well as other relevant factors. The test asks whether the "reasonable person", if placed in the accused's situation, would have acted in a similar manner. The less a defensive response is proportionate to the threat or necessary to enable the person to defend themselves in those circumstances, the less likely it is to be characterized by the trier of fact as "reasonable" in the circumstances.

Secondly, the SCC in recent years appears to have already begun to equate "proportionality/necessity" in the defences with "reasonableness". It may be that the Court headed in this direction in recognition of the fact that the added "flexibility" that *Baxter* and other cases demand dilutes the notions of proportionality and necessity to such a degree that they become essentially analogous to reasonableness. The relevant SCC jurisprudence is set out below and may be helpful in explaining to courts that the new law is intended to be interpreted and applied in manner that closely matches the old law.

In the unanimous decision of the SCC in *Gunning*[11], the Court first suggested that reasonableness could be substituted for the concept of "no more force than is necessary" in the context of the defence of property (dwelling house) under section 41 of the Code.

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[10] *R.* v. *Baxter* (1975), 27 C.C.C. (3d) 96 (Ont. CA); *Brisson* v. *The Queen,* [1982] 2 S.C.R. 227.
[11] *R.* v. *Gunning*, [2005] 1 S.C.R. 627.

> **41.** (1) Every one who is in peaceable possession of a dwelling-house or real property, and every one lawfully assisting him or acting under his authority, is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or to remove a trespasser therefrom, if he uses no more force than is necessary.

Despite the clear wording of the legislative text, the Court set out the elements of the defence in the following words at para. 25:

> There are four elements to the defence raised by Mr. Gunning: (1) he must have been in possession of the dwelling-house; (2) his possession must have been peaceable; (3) Mr. Charlie must have been a trespasser; and (4) *the force used to eject the trespasser must have been reasonable in all the circumstances.* Only the fourth element was really contentious in this case — *the reasonableness of the force used.* (emphasis added).

Later in the decision, when the Court is applying the law to the facts before it, the unanimous Court says again: "The fourth element, *the reasonableness of the force used*, was more contentious" (at para 37), and again at para 38: "However, all of the events preceding the shooting had to be taken into account in determining whether Mr. Gunning had used *reasonable force* in his attempt to eject Mr. Charlie. In the end result, in determining whether there was any air of reality to this fourth element of the defence of property (i.e., *the reasonableness of the force used to eject the trespasser*), it becomes clear that the trial judge overstepped his role…."(emphasis added).

Five years later, in *Szczerbaniwicz*[12]*,* a case dealing with another version of the defence of property (section 39, which also uses the phrase "no more force than is necessary"), a majority of the SCC takes the approach one step further by expressly recognizing a shift toward "reasonableness" (emphasis added):

> [18] Section 39(1) is found in the *Criminal Code* together with other provisions setting out how the use of force in the defence of property and persons can be justified. While s. 39(1) itself has yet to be interpreted by this Court, there is helpful analogous jurisprudence dealing with these other provisions, most of which use similar or identical language to the phrase "no more force than is necessary" found in s. 39(1). Nothing in the language of s. 39(1) suggests that the meaning of the words "no more force than is necessary" is different from these other provisions.
>
> [19] One of the early — and cogent — examinations of the meaning of the phrase is found in *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (Ont. C.A.). In *Baxter*, several of the *Criminal Code*'s defence of property and person provisions were at issue, including s. 34(1) (dealing with self-defence against unprovoked assault) and s. 41(1) (dealing with defence of house or real property). In interpreting these provisions, Martin J.A. observed:
>
> > The sections of the *Code* authorizing the use of force in defence of a person or property, to prevent crime, and to apprehend offenders, in general, express in greater detail the great principle of the common law that the use of force in such circumstances is subject to the restriction that the force used is necessary; that

[12] *R.* v. *Szczerbaniwicz,* [2010] 1 S.C.R. 455.

> is, that the harm sought to be prevented could not be prevented by less violent means and that the injury or harm done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or harm it is intended to prevent . . . . [p. 113]

> [20] *The "proportionality" approach has more recently been characterized as an inquiry into whether the force used was "reasonable in all the circumstances",* as Charron J. confirmed in *R. v. Gunning*, 2005 SCC 27 (CanLII), 2005 SCC 27, [2005] 1 S.C.R. 627, at para. 25, a case involving s. 41(1). (See also: *R. v. George* 2000 CanLII 5727 (ON CA), (2000), 145 C.C.C. (3d) 405 (Ont. C.A.), at para. 49; *R. v. McKay*, 2009 MBCA 53 (CanLII), 2009 MBCA 53, 246 C.C.C. (3d) 24, at para. 23.)

> [21] The reasonableness of "all the circumstances" necessarily includes the accused's subjective belief as to the nature of the danger or harm, but the objective component of the defence is also required: the subjective belief must be based on reasonable grounds. (See: *McKay*, at paras. 23-24; *George*, at paras. 49-50; *R. v. Born with a Tooth* 1992 ABCA 244 (CanLII), (1992), 76 C.C.C. (3d) 169 (Alta. C.A.), at p. 180; *R. v. Kong*, 2005 ABCA 255 (CanLII), 2005 ABCA 255, 200 C.C.C. (3d) 19, at paras. 95-100, appeal allowed on other grounds, 2006 SCC 40 (CanLII), 2006 SCC 40, [2006] 2 S.C.R. 347.)

An important feature of the shift toward "reasonable in the circumstances" in the new law is the removal of the accused's subjective beliefs as a required element. It is clear that "reasonable" is an objective test. However, in paragraph 21 above from *Szczerbaniwicz*, the SCC makes clear that even where the test is objective, the subjective perceptions of the accused (so long as they are also objectively reasonable perceptions) remain relevant to the assessment of whether their actions were reasonable in the circumstances. The new law codifies this approach, which is consistent with the general approach of the new law to treat as many factors as possible as "relevant considerations" rather than rigid requirements for the defence.[13]

Acts vs. force

The old laws explicitly authorized defensive "use of force", as expressed in various ways, such as "no more force than is necessary" and "causes death or grievous bodily harm". The concept of "force" is generally understood in criminal law terms to refer to direct or indirect (i.e. through the use of a weapon) touchings of the body.

The new law modifies this aspect of the defence and authorizes defensive action of any type – "the **act** committed is reasonable in the circumstances". The defensive response need not be characterized as "use of force". In the overwhelming majority of cases, a defensive response to a threat will manifest as force against the attacker, but this may not always be the case. For example, when facing a threat of force, a person may be in a position to steal a car to flee or break into a house to seek refuge.

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[13] See also *R*, v, *Kong*, 2005 ABCA 255, dissent cited with approval by the SCC in *Szczerbaniwicz*.

Reasons for change: Courts already appear to accept varieties of defensive conduct, at least in the context of defence of property. In *Gunning*, the defence of property was held to be available to charge of careless use of a firearm. The handling of the firearm was never characterized as amounting to "force" against the trespasser in accordance with the requirements set out in the legislative text. This demonstrates that the SCC appears to have been willing to show some flexibility in interpreting and applying the wording of the old laws, and allowing the defences to be raised in defence to a broader category of offences than the wording of the law seemed to permit. The new law incorporates this more flexible approach to defences.

It could be that the common law defence of necessity would otherwise provide a defence for non-force responses to threats to bodily integrity emanating from other people. However, the new law seeks to incorporate such conduct into the defence of person provision. This avoids the possible complications associated with having to argue different defences, which set out different elements and thresholds, for different forms of conduct in response to the same threat (e.g. if a person threatened uses force and also commits breaks into a house to seek refuge where the force did not stop the attack).

34(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

The new law includes a list of factors that could be taken into account in determining whether the act committed was reasonable in the circumstances. The list is expressly non-exhaustive, meaning that factors not on the list are still able to be put in evidence wherever relevant and otherwise admissible in accordance with general rules of evidence. Items on the list are not intended to be treated as "more significant" or otherwise as having elevated relevance or weight relative to factors not on the list, or to each other.

Some items on the list reflect existing Canadian jurisprudence on considerations that are frequently present in conflict situations, while others reflect factors that are less frequent but which, when they do arise, are highly relevant.

Reasons for change: As noted above, a "reasonableness" test for the defensive response appears to reflect an approach consistent with that taken by the SCC. However, because it does represent a change to the text of the law, consideration was given to including a mechanism to facilitate the transition to the new law.

In this respect, the new law includes a list of factors that could be taken into account to assess "reasonableness". The list serves several purposes. It aims to make clear that certain jurisprudence applicable to the determination of a successful defence is intended to continue, as appropriate, under the new law. It also serves to provide some guidance about how the new law is intended to be applied by clarifying that some of the

elements of the old law that have been eliminated as determinative requirements nonetheless continue to be relevant. It may also serve as a useful reference for jury instructions.

34(2)(a) the nature of the force or threat;

The nature of the threat to which the accused responds is clearly relevant to assessing the reasonableness of their reaction. The accused's subjective perception (objectively verified) of the existence of a threat is already a required element under new paragraph 34(1)(a). Including the "nature of the force or threat" in the list of factors, a slightly more nuanced consideration, further ensures that this element is part of the overall assessment of the reasonableness of the defensive response.

34(2)(b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;

Imminence of an attack was long thought to be a required element of self-defence until the SCC ruled in *Lavallee* that it was only a factor to be considered, as opposed to a requirement that could be determinative of the success of a self-defence claim.[14] The first portion of paragraph (b) – *"the extent to which the use of force was imminent"* – codifies this aspect of *Lavallee*. Codifying that imminence is a factor to consider is intended to ensure that the courts do not treat it as a rigid requirement under subsection 34(1), as they did under the old law before the *Lavallee* decision.[15]

The second portion of this paragraph – "*whether there were other means available to respond"* – could refer to a person's ability to retreat from the threat. Ability to retreat was a necessary condition for invoking the defence under section 35 of the old law, but not for other versions of the defence under the old law (specifically old section 34). Ability to retreat or to respond by means other than the commission of an offence has been held by Canadian courts to be a relevant factor to a self-defence claim, but not a determinative requirement. Paragraph (b) of the list of considerations codifies the understanding that "other options" and "retreat" may be relevant to a defence of person claim, but are not determinative.

The two elements – i.e. imminence and ability to retreat or other options – are grammatically specified as separate and distinct factors, but are linked together in paragraph (b) because factually they are often intertwined and logically, the less imminent the threat is, the more likely there are to be other possible responses. However, as these are factors to consider and not rigid requirements, the relationship they have to each other in any given case is a flexible matter that depends entirely on their relevance to the facts of that case.

[14] *R.* v. *Lavallee*, [1990] 1 S.C.R. 852.
[15] See also *R.* v. *Pétel*, [1994] 1 S.C.R. 3; *R.* v. *McConnell,* 1995 ABCA 291.

Key quotes (Parliamentary Consideration)

Senator Joan Fraser, Senate Debates, June 12, 2012:
(Note: This passage is also relevant to paragraph 34(2)(f))

> I was particularly anxious to have clarity on the impact of the proposed new self-defence provisions on what are often known as battered women defences, basically concerning spousal assault and to some extent dating violence, but mostly spousal assault.
>
> This is a serious problem in this country, honourable senators. In 2010, police reported approximately 48,700 victims of spousal violence in this country and, if you hear people talk about the battered women defence, it is not because men are immune from spousal violence. Some men do suffer violence at the hands of their spouses, but women aged 15 and older in 2010 accounted for 81 per cent of all those police-reported victims.
>
> Now, in the *Lavallee* case, to which Senator Di Nino and I think others have made reference, back in 1990 the Supreme Court addressed many of the myths about spousal abuse, spousal violence and self-defence arguments that could be brought in those cases by the abused spouse. Ms. Lavallee was a woman who had been repeatedly and severely abused, and one night her partner told her that later that night he was going to kill her, and she believed him, so she shot him, dead. This case went all the way to the Supreme Court, and it was a landmark judgment instructing courts to take into account expert testimony about the effect of being an abused spouse, a feeling of having nowhere to go, nowhere to turn, no escape, and sometimes being driven to commit very serious violence in order, one believes, to defend oneself, even if that defence is not specifically necessary because one is not being abused at that precise moment.
>
> I was quite concerned about the impact of two of the factors that judges are told to take into consideration, because I wondered if they might be contradictory, and Senator Jaffer referred to these. In proposed section 34(2)(*b*), the judges are asked to take into account if the circumstances are appropriate, the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force. That was clearly the one that made me wonder if we were weakening the grounds of defence for battered women.
>
> I was only partly assuaged by the existence of proposed section 34(2)(*f*) which says the judge should take into account the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat.
>
> Therefore, I asked about how these two possibly apparently contradictory elements might play out. I asked officials from the Justice Department when they appeared before us how we should understand the interplay between these two things, and I think the answer that was given is worth reading into the record. It comes from Ms. Joanne Klineberg, Senior Counsel, Criminal Law Policy Section, Department of Justice Canada, who said:
>
>> Both of those factors are derived almost directly from the *Lavallee* case, which was the leading case from the Supreme Court.
>>
>> For the first time, the Supreme Court gave an interpretation to the existing self-defence laws such that the situation of the battered woman could be taken into account. Essentially the court said that where battered women's cases had previously not resulted in a successful self-defence plea was because the jury could not appreciate how a reasonable person in that woman's situation would not have left the relationship sooner, or how they might have perceived they were at risk. The most important thing the Supreme Court determined in that case was that whenever there is an aspect of

> reasonableness in the law of self-defence, it is important to consider the particular circumstances of an abused person — and the nature of their relationship — and attribute that to the reasonable person.
>
> That is essentially what 34(2)(*f*) is trying to get at; in determining what is reasonable you would have to consider the history of the relationship. Another thing the Supreme Court decided in that case was it had previously been assumed — although it was never in the wording of the *Criminal Code* — that the imminence of the assault was a necessary precondition for self-defence to be successful. The court in that case said that is an assumption; the paradigm self-defence case is one where it is eminent (sic).
>
> However, a battered spouse situation is exactly one where the assault might not be imminent, but nonetheless the person would not reasonably feel themselves taking into account the history to have any option but to do what they did.
>
> The factor that is enumerated as (*b*) was also specifically designed to reflect that aspect of the *Lavallee* case, by saying it is a factor to consider, the extent to which the attack was imminent, which in and of itself is meant to signal that imminence is not a requirement. If imminence were a requirement, it would be in 34(1) —

This is what Senator Di Nino referred to yesterday when he was setting out the act's absolute requirements for a self-defence.

> — but because it is in 34(2) as a factor to consider, as opposed to a requirement of self-defence, it signals that imminence is a factor to consider and the person's perceptions about other options they might have had is also a factor to consider. I think our view would be that both of those factors are entirely consistent with the reasons of the Supreme Court in *Lavallee*.

Honourable senators, given that, as Senator Baker has so regularly instructed us, we know reference is sometimes made to debates in this chamber when thorny issues of law are being considered, I did think that was worth putting into the formal record of the Senate.

34(2)(c) the person's role in the incident;

This factor in part serves to bring into play considerations surrounding the accused's own role in instigating or escalating the incident. Under the old law, the distinction between section 34 and 35 was based on the defender's role in commencing the incident, creating higher thresholds for accessing the defence where the accused was the provoker of the incident, as opposed to an innocent victim. As the new law contains only one defence that does not distinguish between conflicts commenced by the accused and those commenced by the victim, this paragraph signals that, where the facts suggest the accused played a role in bringing the conflict about, that fact should be taken into account in deliberations about whether his or her ultimate response was reasonable in the circumstances.

34(2)(d) whether any party to the incident used or threatened to use a weapon;

The presence of weapons by any party to a conflict will likely be relevant to the determination of what would be an acceptable defensive response.

34(2)(e) the size, age, gender and physical capabilities of the parties to the incident;

The relative physical characteristics of the parties are obvious relevant considerations.

Note: The element “physical capabilities” was added through an amendment the House of Commons Standing Committee on Justice and Human Rights, March 8, 2012, between 1200 and 1205:

> **Mr. Jack Harris:**
> Thank you, Mr. Chair.
>
> We've added this at the suggestion of the CBA. We did have some discussion about gender, and you can't just assume, because someone's one gender or another, that they're bigger or smaller or more or less capable. Size doesn't necessarily matter either. You could be a big character with disabilities or an inability to respond. The addition of physical capability seems to me to be aiming at what the section was trying to achieve by saying that it has to take into account the person's circumstances. If size, age, and gender are important, then the physical capabilities certainly would be too.
> I'll leave it at that.
>
> **The Chair:**
> Thank you.
> Go ahead, Madam Findlay.
>
> **Ms. Kerry-Lynne D. Findlay:**
> We agree with this. I think the wording of it is good: “physical capabilities.” As you have mentioned, Mr. Harris, you could be a small person with a black belt in karate or something.
>
> **Mr. Jack Harris:**
> Absolutely.
>
> **Ms. Kerry-Lynne D. Findlay:**
> You may have a physical capability that the other person doesn't have, one that isn't necessarily covered just by the wording of “size”, for instance. It adds to a non-exhaustive list of the circumstances for the court to take into account. That seems reasonable, and when you put it together with the other factors that are enunciated and the nature and proportionality of the person's response to that threat, it makes a lot of sense.
> We're supportive of this amendment.

34(2)(f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;

Generally speaking, the courts recognize that evidence about the relationship and history between the parties is crucial for putting the conflict in its proper context.

The specific reference to “any prior use or threat of force and the nature of that force” in this paragraph also serves to signal that Parliament was aware of the relevance of the history between the parties in the context of abusive relationships. In the *Lavallee* case, the SCC made clear that evidence of an abusive history between the parties, and expert evidence about the dynamics of domestic abuse on the victim, contextualize the accused’s experience so as to allow their actions to be viewed and understood as objectively “reasonable” in the circumstances.

Paragraph 34(2)(f) makes clear that the history of the relationship, and any abuse within it, are relevant to assessing the reasonableness of the accused’s defensive actions, and thereby signals that courts should continue to apply the principles from *Lavallee* under the framework of the new law. (Of course, this evidence may also be relevant to assessing the reasonable belief about an incoming threat under paragraph 34(1)(a) and the subjective defensive purpose under paragraph 34(1)(b)). While the new law does not expressly address the admissibility of expert evidence, the normal rules of evidence should ensure that such evidence is admissible where it otherwise meets the requirements of expert evidence in any given case.

Please see paragraph 34(2)(b) above for the relevant Parliamentary excerpt.

34(2)(f.1) any history of interaction or communication between the parties to the incident;

While paragraph 34(2)(f) speaks to the relationship between the parties, paragraph 34(2)(f.1) refers to the potential for the parties to have a more peripheral connection to each other than that which would be implied by the word “relationship”.

This factor was added through an amendment by the House of Commons Standing Committee on Justice and Human Rights during its study of the legislation. See discussion on March 8, 2012 between 1205 and 1235.

34(2)(g) the nature and proportionality of the person’s response to the use or threat of force; and

Please see discussion above under paragraph 34(1)(c) – “reasonable in the circumstances”.

This paragraph is intended to clearly signal that proportionality between threat and response remains a vital consideration in the new law.

Whereas proportionality between the threat and the response appeared to be a requirement under most versions of the old law, the core defence requirement under the new law is simply that the defensive actions be “reasonable in the circumstances”.

Proportionality is almost surely going to be a highly relevant consideration in every self-defence case. Indeed, proportionality between threat and response is a critical lens through which to assess whether the response itself was a reasonable one. It is difficult to conceive of a defensive action being reasonable if it is disproportionate to the threat, absent exceptional circumstances. Although not explicitly addressed in the new law, proportionality may also be relevant to assessing the accused's assertion that their actions were motivated by a defensive purpose; the more disproportionate the response relative to the threat, the more difficult it will be for the trier of fact to find that the purpose behind the response was defensive.

34(2)(h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

This paragraph is in part responsive to the fact that the new law does not require that the incoming force be "unlawful", as does the old section 34 (but not section 35). This paragraph is not intended to overlap with the special rule for defensive action against police conduct (subsection 34(3)) below), as that special rule provides a complete test for those circumstances. Rather paragraph (h) may apply to other circumstances, which are sure to be rare, in which non-law enforcement personnel may have the lawful authority to touch others without their consent.

One possible situation could be the authority (under the common law or provincial statutes) of hospital personnel to use force to restrain patients. Other situations in which this factor may be applicable are where a person uses force against someone who themselves may be acting to defend property (under new section 35) or who is attempting to make a citizen's arrest.

34(3) Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

The elimination of the "unlawful assault" requirement as part of the triggering threat element creates potential unwanted consequences in relation to resistance to police actions, because it could leave the impression that the new law will allow defensive reactions to lawful police conduct such as the making of an arrest. More specifically, if a person does not willingly submit to an arrest, they may have a reasonable perception that they are being threatened with force that is against their wishes and consequently meet the first requirement for the new defence under paragraph 34(1)(a).

While the requirement under paragraph 34(1)(a) may be met in these cases, the express "defensive purpose" requirement (paragraph 34(1)(b) may effectively rule out the defence in cases where the accused used force against the police in an effort to

escape arrest or to otherwise evade or frustrate whatever action the police are undertaking. This is because the defensive purpose element requires the accused to present some evidence that their dominant purpose was to protect their bodily integrity from the incoming force, as opposed to the purpose of escaping capture, for instance.

Even though the defensive purpose requirement may be enough to ensure that the defence fails in cases where force is used to escape or impede law enforcement activity, subsection 34(3) provides an additional layer of protection against inappropriate uses of self-defence in these cases by directing the inquiry to the unique considerations such cases raise. On the one hand, the law must permit a person to defend against any unwanted touchings, even of a trivial nature, because the application of any force without a person's consent is an assault and every person is entitled to govern their bodily integrity. On the other hand, the police must use force for certain purposes, such as when making an arrest.

This use of force by police is authorized by law, but is not unfettered. The use of force must be lawful both in the sense that the use of force in the circumstances must be a valid exercise of authority and that the manner and extent of force used must be reasonable to those circumstances. Police conduct that does not meet these requirements is unlawful, and citizens are legally entitled to resist such applications of force by the police where they reasonably believe such force to be unlawful in the circumstances.

The new rule provided by subsection 34(3) is consistent with the way the old law applied to these circumstances, but it accomplishes its objective in a different way.

E. DEFENCE OF PROPERTY – DETAILED EXAMINATION OF NEW SECTION 35 OF THE *CRIMINAL CODE*

35. (1) A person is not guilty of an offence if

(a) they either believe on reasonable grounds that they are in peaceable possession of property or are acting under the authority of, or lawfully assisting, a person whom they believe on reasonable grounds is in peaceable possession of property;

Pre-condition of "peaceable possession"

No change from the old law.

The defence of property can arise when a person's "peaceable possession" of property is threatened or challenged by another, such as by a person who is trying to take or damage the property or trespass on it. Peaceable possession was a fundamental concept in the old law and is retained in the new defence of property provision.

The concept of “peaceable possession” has been interpreted to mean that the possession of the property must not be seriously challenged by others. The seriousness of the challenge is not assessed by looking at the relative strengths of legal title or other legal claims, but rather, whether any challenge is likely to result in a breach of the peace.[16]

The criminal law is concerned about maintaining public order and, accordingly, the requirement of peaceable possession reflects this objective by limiting the defence, which exonerates otherwise criminal conduct, to circumstances where it is appropriate. For instance, it ensures that a person who is not in peaceable possession of property – such as a thief in possession of stolen property or a protester occupying a government building – will not have access to the defence if they resist efforts of others to enter or re-take property. It also functions to prevent the defence from being invoked by a property owner who commits an offence in order to recover or re-take property that is not in their possession. For instance, a person is not entitled to invoke the defence against a charge that they broke into their friend’s parking garage to retrieve their car where the friend has refused to return it. Rather, a person who is not actually in possession of property they have a claim to must have resort to the civil law, or seek assistance from other authorities such as the police, to resolve a conflict over their entitlement to the property. A person must not resort to the commission of a crime in such non-urgent situations.

It should also be noted that the defence is expressly available to anyone acting under the authority of, or lawfully assisting a property possessor, so long as the assistor reasonably believes that the other person actually has peaceable possession.

35(1)(b) they believe on reasonable grounds that another person

(i) is about to enter, is entering or has entered the property without being entitled by law to do so,
(ii) is about to take the property, is doing so or has just done so, or
(iii) is about to damage or destroy the property, or make it inoperative, or is doing so;

Test for triggering threat

Unlike an unwanted interference with bodily integrity, which is a straightforward concept that can be expressed simply, interferences with property can take many different forms. The types of interferences that can trigger a defensive response are itemized in new subparagraphs 35(1)(b)(i) through (iii).

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[16] See *R.* v. *Born With a Tooth* (1992), 76 CCC (3d) 169 (Alta CA); *R.* v. *George* (2000), 145 CCC (3d) 405 (Ont CA).

Under the old law, the various forms of interference were addressed in distinct defences. The new law provides one single defence applicable regardless of the nature of the property interference.

Like the new law of self-defence, the new law of defence of property expressly requires that the triggering threat to be assessed on a combined subjective (i.e. what the accused honestly believed) and objective (i.e. would the "reasonable person" also share the accused's belief) basis. This approach appears to be generally consistent with the interpretation given to various versions of the old defence of property. This interpretation allows for reasonable mistakes as to the factual circumstances that give rise to the defence.

35(1)(c) the act that constitutes the offence is committed for the purpose of

(i) preventing the other person from entering the property, or removing that person from the property, or
(ii) preventing the other person from taking, damaging or destroying the property or from making it inoperative, or retaking the property from that person; and

Defensive purpose

Just as the new law of defence of person contains an express "defensive purpose" requirement, so does the new law of defence of property. The new paragraph 35(1)(c) must of necessity be more precise in relating the defensive purpose to the nature of the property interference that triggers the defence in any particular case. It is to be assessed on a purely subjective basis.

35(1)(d) the act committed is reasonable in the circumstances.

As with the new defence of person:

- A response in defence of property must be assessed as "reasonable in the circumstances", namely on an objective basis; and
- A response in defence of property may involve any "act", not necessarily the "use of force" as was required by the text of the old law.

Although there is no express limitation on the amount of force that may be used to defend property from interference, Canadian courts have unambiguously held that it is not reasonable to use deadly force in defence of property alone (i.e. where there is not a simultaneous threat to human life or safety).[17] A dwelling-house is a special kind of

[17] See *Gunning*, supra note 11 and *Baxter*, supra note 10.

property – threats in relation to a dwelling house typically also create an element of personal danger which likely is enough to trigger defence of the person, which does allow for deadly force to be used. Many other types of property disputes may escalate and give rise to threats to personal safety, thereby potentially allowing use of force (or other defensive acts) in self-defence.

35(2) Subsection (1) does not apply if the person who believes on reasonable grounds that they are, or who is believed on reasonable grounds to be, in peaceable possession of the property does not have a claim of right to it and the other person is entitled to its possession by law.

New subsection 35(2) provides a special rule excluding application of the defence where the initial property possessor has a weak claim to the property (i.e. "does not have a claim of right") and the person who interfered with the property is "entitled to its possession by law". In essence, this is a scenario where the person who interferes with another's possession has a better legal claim to the property. The person who interferes is not entitled to claim the defence against any criminal offences committed to obtain or otherwise deal with the property (i.e. as they did not begin the encounter in "peaceable possession" of the property, the defence is not available to them as a means of re-acquiring it). However, at the same time, the possessor of the property (and anyone acting to assist them or under their authority) is also not entitled to invoke the defence to justify any criminal acts committed in these circumstances for the purpose of retaining the property or resisting the interference. This rule is consistent with the level of protection provided to property possessors under the old law.

35(3) Subsection (1) does not apply if the other person is doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

See discussion above under new subsection 34(3). In the case of defence of property, law enforcement action that could trigger a defence claim could involve the execution of a search warrant and/or seizure of property during the course of an investigation.

ANNEX: COMPLETE PARLIAMENTARY RECORD (with hyperlinks)

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