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Editorial

Reforming Self-Defence and Defence of Property: Choices to be Made

Bill C-60, introduced shortly before the last election, was most famous for its attempt in response to Toronto shopkeeper David Chen's assault charges (and subsequent acquittal) to extend the right of private citizens to make arrests.

Little noticed is that the bill proposed to repeal ss. 34 to 42 of the *Criminal Code* and replace these sections with a simplified version of self-defence and defence of property. The complexity of the existing provisions is notorious. They are an unnecessary landmine for judges and likely a source of bafflement to juries. In this sense, any reform effort should be welcomed.

At the same time, it is important carefully to evaluate the new proposed provisions to ensure that they are based on sound values and that they reasonably relate to the existing and voluminous jurisprudence on self-defence.

The new provisions would require an accused claiming self-defence to believe "on reasonable grounds" that force or "a threat of force" was being made against them or another person (Bill C-60, 40th Parliament Third Session, s. 34(1)(a)) and that the act be done for the subjective purpose of self-defence (*ibid.*, s. 34(1)(b)). This provision wisely continues the tradition that self-defence claims have to be both subjectively held and have a reasonable basis in the circumstances. A fully subjective approach to self-defence could encourage hot-headed resorts to self-defence and vigilantism.

The new provision also wisely collapses the separate provisions for self-defence and defence of others. It abandons the requirement in s. 37(1) of the Code that the defence of others should be limited to those under the accused's protection.

The inclusion of a "threat of force" builds on cases such as *R. v. Lavallee*, [1990] 1 S.C.R. 852 and *R. v. Petel*, [1994] 1 S.C.R. 3, which recognize that an assault does not have to be underway and that reasonable mistakes can be made about the existence of an assault. That said, questions can be raised

about whether this provision extends self-defence too far, especially when self-defence can be claimed in relation to the protection of all other people. In addition, the relatively generous air of reality test would be applied. Nevertheless, any claim to the defence of others would have to have a reasonable as well as a subjective basis.

The guts of the new proposed provision is s. 35(1)(c), which requires that actions done in self-defence be “reasonable in the circumstances”. This is a more general standard than the existing s. 34(2), which measures the reasonableness of self-defence through separate requirements of a reasonable apprehension of death or grievous bodily harm, and a reasonable belief that the accused cannot otherwise preserve him- or herself from such harms.

The debate between the relative merits of broad standards and more specific rules is a familiar one. Open-ended standards maximize the ability of judges and juries to do justice on the basis of all the particular facts of the case. At the same time, these standards are less predictable than rules that set more precise parameters for when self-defence is required.

The lack of predictability that would accompany the proposed reforms is underlined by s. 34(2), which sets out a non-exclusive laundry list of factors that may be considered in determining whether the act done in self-defence is reasonable in the circumstances.

The relevant factors would include the following:

- (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 and gender 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;
- (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.

If enacted, these provisions will make it more difficult than before to predict whether a claim of self-defence will be accepted, in part because the existing jurisprudence established in cases such as *Lavallee* and *R. v. Cinous*, [2002] 2 S.C.R. 3 on the present requirements of reasonable apprehension of death or

grievous bodily harm and reasonable belief that the accused could not otherwise preserve him- or herself from such threats will be lost.

Under the existing law, a battered woman who may have a claim of self-defence often does not make the claim and instead accepts a plea agreement to manslaughter or some other offence and pleads *Lavallee* in mitigation of sentence. Will the reference in proposed s. 34(2)(b) to the imminence of the threat and other means available make the recognition of self-defence less likely? If the woman has somehow provoked the attack, will the reference to the accused's "role in the incident" in s. 34(2)(c) also make a claim of self-defence less likely? On the other hand, ss. 34(2)(e) and (f) can benefit battered women by also allowing consideration of the size, age and gender of the parties to the incident and the history of their relationship.

All of these factors are permissive factors, and the exact effect that they will have in any case has been deliberately left open-ended. This approach maximizes the flexibility of trial judges in deciding whether there is an air of reality to the defence and the flexibility of triers of fact in determining whether there is a reasonable doubt that the accused acted in self-defence.

Although the courts have never insisted on exact forms of proportionality between force threatened and force used in the law of self-defence, proportionality has played an important role in all the various permutations of the Canadian law of self-defence. A requirement for some rough form of proportionality speaks to a certain caution about the use of self-defence that befits a nation that has generally not encouraged or celebrated violent self-help.

Under the proposed new self-defence provision, however, the proportionality between the threat faced or reasonably perceived by the accused and the force used becomes one of eight listed and non-inclusive factors to be considered when determining self-defence. As is the nature of open-ended standards, it is difficult to predict the exact effect of this treatment of proportionality, but it does suggest that proportionality and the lack of other reasonable alternatives to the use of force may play less of a role in deciding self-defence.

Proportionality would seem to play even less of a role under the proposed new s. 35, which relates to the defence of property and does not seem to incorporate s. 34(2), which lists proportionality as a factor that may be considered with respect to self-defence. Proportionality is not mentioned in the new defence of property provision, and s. 35(1)(d) would simply require a finding that an act committed in defence of property "is reasonable in the circumstances". Proposals made by the government in 1993 required proportionality in the defence of property. What justifies the change? When introducing the bill, the Minister of Justice used an example a discharge of a weapon to scare away trespassers (Hansard, March 4, 2011, at 1015), but the abandonment of a proportionality requirement would seem to leave the

door open to actually shooting trespassers. Stanley Yeo's lead article in this issue presents the case for a broader approach to defence of property in the context of home invasions while maintaining a more relaxed proportionality requirement.

Although the new s. 35(1)(b) would require a reasonable basis for a belief that one's property was threatened, s. 35(c) only requires a subjective purpose of property protection. Do we really want to authorize people intentionally to kill to defend property, contrary to the Supreme Court's recent decision in *R. v. Gunning*, [2005] 1 S.C.R. 627? Do we really want to remove existing restraints in the admittedly incredibly complex defence of property provisions that generally require the use of "no more than is necessary" to protect property?

Perhaps the best way to evaluate the possible effects of the proposed law is to run it through a recent case decided under the existing s. 34(2). In *Cinous*, the Supreme Court held 6:3 that there was no air of reality when the accused shot a criminal accomplice in the back of the head. The majority concluded that while there was an air of reality that the accused was facing a deadly threat, there was no air of reality that there were no reasonable alternatives.

Under the new provisions, the court might very well find that there was an air of reality to *Cinous*'s claim that self-defence was reasonable in the circumstances especially given the accused's reasonable perceptions that he would be killed by his accomplices. More to the point, we cannot really know what would happen in this case under the new provisions.

A person defending their property could claim that the use of firearms and perhaps killing or wounding was reasonable in the circumstances. For some, this added flexibility will be welcomed, but for others the unpredictability of the claims will be regretted.

Although the reform of Canada's convoluted and complex self-defence and defence of property provisions is to be warmly welcomed, much work still needs to be done. There is a need for a full and open debate about the many value and jurisprudential choices that will have to be made should Canada finally undertake the long-delayed project of recodifying not only self-defence but other parts of the *Criminal Code*.

K.R.