

## **A Preliminary Assessment of the New Self-Defence and Defence of Property Provisions**

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*The new sections 34 and 35 of the Criminal Code replace and simplify the old sections 34–42 of the Criminal Code. The critical but illusive issue under the new self-defence and defence of property provisions will be whether acts are “reasonable in the circumstances.” The new section 34(2) instructs the trier of fact to consider nine enumerated but non-exhaustive factors, while the new section 35 provides no legislative guidance in determining what may be reasonable in defending property. The new defences are less structured than the common law defences of necessity and duress, which clearly require proportionality between the harm inflicted and the harm avoided and that there be no legal alternative to breaking the law. This approach blurs the distinction between justifications and excuses. It recognizes that self-defence in some circumstances may operate more as a concession to human weakness than a justification that always requires that the force used be proportionate and necessary. The new defence of property provision does not mention proportionality and may depart from established jurisprudence by opening up the disturbing possibility that intentional killing in the defence of property could result in an acquittal.*

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*Les nouveaux articles 34 et 35 du Code criminel remplacent et simplifient les anciens articles 34 à 42 de ce code. La question importante, mais imprécise, soulevée par ces nouvelles dispositions en matière de défense de la personne et des biens sera de déterminer si la personne a « agi de façon raisonnable dans les circonstances ». Le nouveau paragraphe 34(2) demande au juge des faits de considérer neuf facteurs non exhaustifs, tandis que le nouvel article 35 ne fournit aucune balise législative pour déterminer ce qui pourrait être raisonnable dans la défense de ses biens. Ces nouvelles défenses sont moins structurées que les défenses de common law de la nécessité et de la contrainte, qui exigent clairement un lien de proportionnalité entre le préjudice infligé et le préjudice évité et le fait qu’il n’y avait d’autre choix que de contrevenir à la loi. Cette approche affaiblit la distinction entre les justifications et les excuses. Il s’agit d’une reconnaissance que, dans certaines circonstances, la légitime défense relève davantage de la faiblesse humaine que d’une justification qui exige toujours que la force employée soit proportionnelle et nécessaire. La nouvelle défense en matière de défense des biens ne*

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*mentionne pas la proportionnalité et s'éloigne peut-être de la jurisprudence établie en permettant de façon troublante que de tuer une personne intentionnellement afin de défendre ses biens puisse potentiellement mener à un acquittement.*

## 1. INTRODUCTION

Buried deep in the government's avalanche of new criminal legislation is an important reform and simplification of the laws governing self-defence and defence of property.<sup>1</sup> The previous statutory provisions were criticized by the Supreme Court as "highly technical," "excessively detailed," and "internally inconsistent." In 1995 the Court stated that "legislative action is required to clarify the *Criminal Code's* self-defence regime."<sup>2</sup> A mere 17 years later, legislative reform has finally come.

It is tempting to conclude that any reform that simplifies the law is better than the old provision which drew complex and artificial distinctions based on the accused's intent, the defence of self or others, and the type of property defended. The controversy over Florida's "stand your ground law"<sup>3</sup> in the shooting of African-American teenage Trayvon Martin, however, is a reminder that self-defence provisions are value-laden and can be controversial.

The new self-defence provisions, as originally introduced in Parliament, drew criticisms that they did not require that the force used be necessary and proportionate to the force threatened.<sup>4</sup> Concerns were also expressed that the new defence of property provisions could be used to justify lethal force in the protection of property and ignore restrictions that the Supreme Court has previously placed on defence of property.<sup>5</sup>

The new self-defence provisions seem to be less demanding of the accused than the defences of necessity<sup>6</sup> and duress,<sup>7</sup> which explicitly require proportionality between the harm inflicted and the harm caused and that there be no legal way out. Attempts to justify this state of affairs on the basis that force authorized as self-

<sup>1</sup> S.C. 2012 c. 9.

<sup>2</sup> *R. v. McIntosh*, [1995] 1 S.C.R. 686, 95 C.C.C. (3d) 481, 36 C.R. (4th) 171, 1995 CarswellOnt 518, 1995 CarswellOnt 4, at p. 18.

<sup>3</sup> The relevant Florida provision provides: "A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty of retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or to prevent the commission of a forcible felony." Florida Statutes Title XLVI s. 776.013(3)

<sup>4</sup> Alan Brudner, "Constitutionalizing Self-Defence" (2011) 61 U.T.L.J. 867 at pp. 894-897.

<sup>5</sup> Kent Roach, "Reforming Self-Defence and Defence of Property: Choices to be Made" (2011) 57 *Crim.L.Q.* 151.

<sup>6</sup> *R. v. Latimer*, [2001] 1 S.C.R. 3, 150 C.C.C. (3d) 129, 39 C.R. (5th) 1, 2001 CarswellSask 5, 2001 CarswellSask 4, 2001 SCC 1.

<sup>7</sup> *R. v. Ruzic*, [2001] 1 S.C.R. 687, 153 C.C.C. (3d) 1, 41 C.R. (5th) 1, 2001 CarswellOnt 1239, 2001 CarswellOnt 1238, 2001 SCC 24.

defence or defence of property is inflicted against aggressors and trespassers<sup>8</sup> are not entirely persuasive. For one, self-defence and defence of property may be used against innocent people if those using the force make reasonable mistakes that people or property are being attacked. Moreover, self-defence has traditionally been seen as a justification of rightful conduct and this seems to demand a proportional relationship between force used and force avoided. In contrast, duress and necessity excuse morally involuntary conduct, and the requirements of proportionality in these defences are not easily justified in theory and seem to be a legacy of judicial reluctance to even recognize defences that now have a constitutional foundation with respect to the principle of fundamental justice that people not be punished for involuntary conduct.<sup>9</sup>

The fact that the new self-defence and defence of property do not seem to require proportionality and that they abandon the language of justification found in the old provisions, coupled with the fact that the common law excuses of duress and necessity do require proportionality between the harm inflicted and the harm avoided, suggests that the theoretical distinction between excuses and justifications has a diminishing significance in Canadian criminal law. Indeed, the abandonment of the language of justification and the relegation of proportionality between harm avoided and harm inflicted as merely a factor that must be considered in determining whether any act of self-defence is reasonable in the circumstances may build on some trends in self-defence law, most notably contextualization to reflect the history and gender of the parties to the incident,<sup>10</sup> that bring some forms of self-defence closer to excuses than justifications.

Any critique of the new provisions should, however, be moderated by the fact that they retain the basic structure of the previous self-defence provisions because they require both that the accused act with the subjective purpose of defending self, others, or property and that they must act reasonably both with respect to the perceptions of the threat and the response to the threat. A fully subjective approach to self-defence, though used in some jurisdictions,<sup>11</sup> would encourage hot-headedness

<sup>8</sup> Professor Stuart argues that “A person who defends his person or property is defending directly against one exerting lawful force. In this case of duress, and . . . necessity, the accused might well harm someone innocent. This suggests that the defence of person or property should be less restrictively defined.” Don Stuart *Canadian Criminal Law* 5<sup>th</sup> ed (Toronto: Carswell 2007) at p. 494.

<sup>9</sup> *R. v. Ruzic*, [2001] 1 S.C.R. 687, 153 C.C.C. (3d) 1, 41 C.R. (5th) 1, 2001 CarswellOnt 1239, 2001 CarswellOnt 1238, 2001 SCC 24.

<sup>10</sup> *R. v. Lavallee*, [1990] 1 S.C.R. 852, 1990 CarswellMan 377, 1990 CarswellMan 198, 55 C.C.C. (3d) 97, 76 C.R. (3d) 329; *R. c. Pétel*, [1994] 1 S.C.R. 3, 1994 CarswellQue 110, 1994 CarswellQue 3, 87 C.C.C. (3d) 97, 26 C.R. (4th) 145.

<sup>11</sup> For a subjective approach to self-defence, see *Beckford v. R.* (1987), [1988] A.C. 130 (P.C.). In *People v. Goetz*, 497 N.E.2d 41 at para. 50 (1986), the New York Court of Appeals stated that to base self-defence solely on the accused’s subjective beliefs “would allow citizens to set their own standards for the permissible use of force” and risk acquitting individuals who use violence “no matter how aberrational or bizarre [their] thought patterns.” At the same time, however, there is some evidence that contrary to the instructions it received from the judge in that case, the jury applied a subjective test in acquitting Goetz, the so-called subway vigilante, for shooting four Afri-

and unnecessary resorts to violent self-help. The defences of necessity, duress, and provocation also similarly blend subjective and objective requirements. At the same time, the need for reasonable grounds and conduct in self-defence and defence of property raises the difficult issue of whether and how objective standards should be contextualized to reflect the accused's circumstances and characteristics.

The heart of the new self-defence and defence of property resides in section 34(1)(c) and section 35(1)(d) which respectively require that acts in defence of self and others and property be "reasonable in the circumstances." These requirements will be the critical and perhaps illusive issue in most cases. The new provisions, however, offer little guidance in determining this issue. In the case of self-defence, the new section 34(2) simply instructs the trier of fact to consider nine enumerated but non-exhaustive factors. In the case of defence of property, no legislative guidance is provided in determining what may be reasonable in the circumstances. One is tempted to suggest that the new section 34(2) offers too much in terms of factors that must be considered in determining whether the act was reasonable while section 35 fails to offer any guidance at all. The result in both cases, however, is the same. The reasonableness of any particular act will be seen as a prototypical question of judgment that is associated with jury determinations, whether or not the trial is one of those rare ones that is conducted with a jury. In other words, any assessment of the new provisions must of necessity be preliminary. The courts will have to flesh out the meaning of reasonableness and its relation to the previous self-defence and defence of property provisions in cases to come.

## 2. THE NEW SELF-DEFENCE AND DEFENCE OF OTHERS PROVISIONS

The new section 34 continues the trend in recent self-defence jurisprudence to allow objective standards to be contextualized to reflect the accused's characteristics and history. It requires judges and juries to consider a variety of factors including the imminence and nature of the threat, whether there were other means to respond, and the proportionality of the force used by the accused to the force threatened against the accused, while at the end of the day simply requiring that any act of self-defence be reasonable in all the circumstances. The new section 34 provides:

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.
- (2) In determining whether the act committed is reasonable in the circum-

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can-American youths who approached him in the New York subway and asked him for \$5. George Fletcher, *A Crime of Self-Defence* (New York: Free Press, 1988) at pp. 186–188.

stances, 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.<sup>12</sup>

Section 34(1) now contains one defence for self-defence and defence of others and thus eliminates the previous complexity caused by having separate provisions. The new section 34(1) provides that accused are not guilty of an offence if: "a) they believe on reasonable grounds that force is being used them or another person or that a threat of force is being made against them or another person; b) the act is committed for the purpose of defending or protecting themselves or the other person from the use or threat of force and c) the act committed is reasonable in the circumstances."<sup>13</sup>

### **(a) Self-Defence Applies to a Broad and Expanded Range of Offences**

The new provision makes clear that self-defence can be claimed not only as a defence to charges of violent crimes such as assault or murder undertaken in self-defence, but to any offence. Thus self-defence could apply if an accused stole a vehicle in order to protect him or herself or others. In such circumstances, the theft could be justified under the new section 34 provided that the accused reasonably believed he or she was threatened and the theft was reasonable in the circumstances. This expansion of self-defence makes sense given that the alternative of-

<sup>12</sup> Section 34(3) addresses self-defence in the context of legally authorized actions and provides: (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.

<sup>13</sup> *Criminal Code* s. 34 as amended by S.C. 2012 c. 9.

fence would often be a more proportionate response to real or threatened violence than the use of actual violence. The existence of less drastic means to respond to the potential use of force and the proportionality of the response are specifically enumerated factors under sections 34(2)(b) and (g) in determining the reasonableness of self-defence. In some cases, the commission of a property or other offences to facilitate escape could be a preferred means of responding to a threat of violence than violent self-defence. The approach taken in Florida and a number of other states of extending the so-called Castle doctrine of no retreat beyond the home is ill-advised and can encourage unnecessary, violent self-help.

There are no restrictions on the offences to which section 34 can apply and as under the old law, self-defence can apply to the most serious crimes including murder. The new law departs from the old law in not making the accused's intent to cause death or grievous bodily harm specifically relevant to the self-defence claim. Such determinations are best left to the determination of whether the accused has the fault required for the offence. Section 34(1)(b) requires that the accused act with the subjective purpose of defending themselves or others. An intent by the accused to cause death or bodily harm may be relevant in determining the reasonableness of the self-defence, but it is not enumerated in the non-exclusive list of factors in section 34(2). At most, such an intent will be one among a range of factors that is relevant in determining the reasonableness of the act of self-defence under section 34(2).

### **(b) No Specific Reference to Self-Defence as a Justification**

The previous law on both self-defence and defence of property specifically incorporated the language of justification. As discussed above, the Canadian courts have recognized a distinction between excuses conceived of as realistic concessions to human weaknesses and justifications which are challenges to the wrongfulness of the act.<sup>14</sup> Self-defence has traditionally been seen as a justification and not an excuse on the basis that accused have rights to defend themselves and their property. Those who act in proportionate self-defence are seen as right in defending themselves and not as persons who must be excused for committing a crime under dire circumstances. At the same time, Canadian criminal law is not entirely consistent in this regard and requires that crimes committed under duress and necessity be proportionate to the harm threatened even though those defences are characterized as excuses and not justifications.

The new defences in both sections 34 and 35 replace the reference that an accused who acts in self-defence or defence of property is justified with a more generic reference to such a person not being guilty of an offence. What effect, if any, will this change have? In most cases, acts of proportionate self-defence can still be seen as a justification, but the new approach recognizes that the theoretical distinction between justification and excuse can become blurred in some contexts. For example, the Supreme Court disapproved in 1990 of a case in which appellate courts had held that a battered woman could not claim self-defence or defence of

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<sup>14</sup> *R. v. Ruzic*, [2001] 1 S.C.R. 687, 153 C.C.C. (3d) 1, 41 C.R. (5th) 1, 2001 CarswellOnt 1239, 2001 CarswellOnt 1238, 2001 SCC 24; *Perka v. R.*, [1984] 2 S.C.R. 232, 42 C.R. (3d) 113, 14 C.C.C. (3d) 385, 1984 CarswellBC 2518, 1984 CarswellBC 823.

others when she shot her sleeping husband.<sup>15</sup> If self-defence was recognized in such a case, it would bear some resemblance to an excuse that accommodated human frailties as opposed to a justification that would apply to rightful conduct. Although the Court has appealed to the concept of an excuse to limit necessity and to some extent duress, it has generally not appealed to the concept of a justification to limit self-defence.<sup>16</sup> In this respect, the omission of the concept of justification in the new section 34 is consistent with recent developments in self-defence especially in the context of battered women.

The omission of the language of justification with respect to the new defence of property may, however, break new ground. Justifications require some proportionality between the threatened harm and that caused by the accused. For example, it is difficult to say that killing someone simply to defend property is justified or rightful given that life is far more important than property. As will be seen below, the new section 35 opens up this possibility both in its refusal to incorporate the concept of justification and by its omission of proportionality as one of the enumerated factors in determining whether any particular defence of property is reasonable in the circumstances.

*(i) First Requirement: Belief on Reasonable Grounds that Force or Threat of Force is Being Used under Section 34(1)(a)*

An accused under section 34(1)(a) must believe on reasonable grounds that force or the threat of force is being used against them or another person. In *R. v. Reilly*,<sup>17</sup> Ritchie J. explained that in applying a similarly dual objective and subjective standard in the old law of self-defence the jury can be guided by the accused's subjective beliefs "so long as there exists an objectively verifiable basis for his perception." A mistake by the accused as to the existence of force or threat of force is not fatal to a self-defence claim, but the mistake must be reasonable.

The old law of self-defence generally referred to unlawful assault or assaults as the triggering factor, whereas section 34(1)(a) now refers to force or the threat of force. This approach should simplify matters by avoiding having to resort to the definitions of assault and the classification of unlawful assaults. The concept of responding to the threat of force may expand self-defence somewhat, but the old law rejected the idea that the accused must wait until an assault was underway in

<sup>15</sup> *R. v. Whynot (Stafford)*, 9 C.C.C. (3d) 449, 1983 CarswellNS 32, 37 C.R. (3d) 198 (C.A.) disapproved of in *R. v. Lavallee* at p. 116.

<sup>16</sup> But, see *R. v. Ryan*, 2011 NSCA 30, 2011 CarswellNS 177, 84 C.R. (6th) 249, 269 C.C.C. (3d) 480 at para. 71 (C.A.); leave to appeal granted 2011 CarswellNS 716, 2011 CarswellNS 717 (S.C.C.) refusing to allow self-defence to go to a jury because a battered woman could not be justified in hiring a hit man to kill her abuser but allowing the excuse of duress to go to the jury. To the extent that this decision relies on the statutory concept of justification in the old self-defence provisions, it should no longer be viewed as valid given that the new s. 34 does not employ the language of justification.

<sup>17</sup> *R. v. Reilly*, 15 C.C.C. (3d) 1 at p. 7, 1984 CarswellOnt 68, 1984 CarswellOnt 808, [1984] 2 S.C.R. 396, 42 C.R. (3d) 154 [emphasis in original] [*Reilly*].

order to respond with self-defence.<sup>18</sup>

The new concept of a threat of force could be applied in a case such as *R. v. Pétel*, in which the Supreme Court held that an accused can qualify for a self-defence claim even though he or she was in fact not being unlawfully assaulted. The case arose when a woman who had been threatened by one of two men shot both of them after one of them had given her his gun. She claimed that she reasonably, but perhaps mistakenly, believed she was being unlawfully assaulted by both men. Lamer C.J. stated:

An honest but reasonable mistake as to the existence of an assault is . . . permitted. The existence of an assault must not be made a kind of prerequisite for the exercise of self-defence to be assessed without regard to the perception of the accused. This would amount in a sense to trying the victim before the accused.<sup>19</sup>

The question for the jury is not “‘was the accused unlawfully assaulted?’ but rather ‘did the accused reasonably believe, in the circumstances, that she was being unlawfully assaulted?’”<sup>20</sup> In determining the reasonableness of the belief, the jury could consider prior threats and violence received by the accused from the victim<sup>21</sup> and expert evidence concerning battered woman syndrome.<sup>22</sup> Under the new section 34(1), the relevant question for the jury would now be whether the accused reasonably believed that she faced force or a threat of force. As before, reasonable mistakes will not defeat a self-defence claim and past acts might be relevant in determining whether the accused reasonably perceived that force or the threat of force was being used.

The new concept of a threat of force is also consistent with the Supreme Court’s landmark decision in *R. v. Lavallee*.<sup>23</sup> In that case, the Court held that there was no legal requirement that the accused wait until she faced an imminent attack from the deceased. In doing so, the Court upheld the acquittal of a woman who had shot her abusive partner in the back of the head after he had threatened that she would be harmed after guests had left their house. Wilson J. stated that expert testimony about the effects of battering on women can cast doubt on the view expressed in a previous case that it was “‘inherently unreasonable to apprehend death or grievous bodily harm unless and until the physical assault is actually in progress.”<sup>24</sup> Expert evidence may suggest “‘it may in fact be possible for a battered spouse to accurately predict the onset of violence before the first blow is struck, even if an

<sup>18</sup> *Lavallee*, *supra* note 10 at p. 116

<sup>19</sup> *R. c. Pétel*, [1994] 1 S.C.R. 3, 1994 CarswellQue 110, 1994 CarswellQue 3, 87 C.C.C. (3d) 97 at para. 104, 26 C.R. (4th) 145.

<sup>20</sup> *R. v. M. (M.A.)*, 121 C.C.C. (3d) 456 at para. 464, 1998 CarswellOnt 419, 1998 CarswellOnt 420, [1998] 1 S.C.R. 123, 12 C.R. (5th) 207. See also *R. v. Currie*, 166 C.C.C. (3d) 190, 2002 CarswellOnt 1841, 3 C.R. (6th) 377 (C.A.); leave to appeal refused 2004 CarswellOnt 439, 2004 CarswellOnt 440 (S.C.C.).

<sup>21</sup> *Pétel*, *supra* note 19.

<sup>22</sup> *R. v. M. (M.A.)*, *supra* note 20.

<sup>23</sup> *Lavallee*, *supra* note 10.

<sup>24</sup> *Ibid.* at p. 116, citing *R. v. Whynot (Stafford)*, 37 C.R. (3d) 198, 1983 CarswellINS 32, 9 C.C.C. (3d) 449 (C.A.) [*Whynot*].



outsider to the relationship cannot.” She stressed:

[t]he issue is not, however, what an outsider would have reasonably perceived but what the accused reasonably perceived, given her situation and her experience . . . I do not think it is an unwarranted generalization to say that due to their size, strength, socialization and lack of training, women are typically no match for men in hand-to-hand combat. The requirement . . . that a battered woman wait until the physical assault is “underway” before her apprehensions can be validated in law would be tantamount to sentencing her to “murder by installment.”<sup>25</sup>

In the context of spousal battering, “the definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical ‘reasonable man.’”<sup>26</sup>

In subsequent cases, the Supreme Court affirmed that evidence of prior threats and beatings would be relevant to the determination of whether the accused could perceive danger from an abuser.<sup>27</sup> The accused’s knowledge of the complainant’s propensity for violence is also relevant.<sup>28</sup> Although the history of the relationship between the parties to the incident is only mentioned explicitly in section 34(2)(f.1) as a factor to be considered in determining whether the act of self-defence was reasonable in the circumstances, it should also be relevant in determining whether the accused believed on reasonable grounds that he or she faced force or a threat of force.

Although the imminence of the force is likewise only mentioned in section 34(2)(b) as a factor in determining the reasonableness of the act and there is no legal requirement of an imminent attack, the presence or absence of an imminent threat is a factor that can be considered in determining whether the accused had a reasonable belief of force or threat of force.<sup>29</sup> The concept of a threat of force extends the law of self-defence, but only so far.

The jury should not be instructed about self-defence if there is no air of reality to the accused’s claim that he or she had a reasonable belief that he or she was subject to force or a threat of force. For example, cases under the old law decided that an adult son could not claim to have reasonably apprehended that his frail, asthmatic seventy-five-year-old father presented a realistic danger of inflicting death or grievous bodily harm.<sup>30</sup> The question under the new section 34(1) would be whether a jury could reasonably conclude that there was a reasonable basis for the accused’s belief that he or she faced force or threat of force from the victim.

Under some provisions of the old law of self-defence, there were requirements that the accused not only reasonably apprehend an assault, but also that the assault

<sup>25</sup> *Lavallee, ibid.* at p. 120.

<sup>26</sup> *Ibid.* at p. 114.

<sup>27</sup> *Pétel, supra* note 19; *Malott, supra* note 20.

<sup>28</sup> *R. v. Pintar*, 110 C.C.C. (3d) 402 at para. 435, 1996 CarswellOnt 3229, 2 C.R. (5th) 151 (C.A.)

<sup>29</sup> *R. c. Cinous*, 162 C.C.C. (3d) 129, 2002 SCC 29, 2002 CarswellQue 261, 2002 CarswellQue 262, [2002] 2 S.C.R. 3, 49 C.R. (5th) 209.

<sup>30</sup> *R. v. Hebert*, 107 C.C.C. (3d) 42, 1996 CarswellBC 1499, 1996 CarswellBC 1500, [1996] 2 S.C.R. 272, 48 C.R. (4th) 204.

would result in a reasonable apprehension of death or grievous bodily harm. Under the new section 34 reasonable apprehensions of death or grievous bodily harm are no longer a pre-requisite, but they may be relevant factors under section 34(2) in determining whether the accused's response was reasonable in the circumstances. Among the non-exhaustive list of factors under section 34(2) are "the nature of the force or threat," the extent to which it is imminent, and the existence of weapons. At the same time, section 34(1)(c) only requires that the accused believe on reasonable grounds that force or the threat of force is being used against him or her or another person.

### **(c) The Protection of Others**

Self-defence has been expanded in section 34(1)(a) not only by reference to threats of force, but also by the inclusion of force or threats of force against "another person." The old provision for the defence of others was limited to the defence of persons under the accused's protection. This term was not defined in the *Code* or the Canadian caselaw, but was commonly thought to include a person's family members and others to whom they owed a duty of care. Now, defence of others could be claimed with respect to unrelated third parties, for example, in circumstances where an accused came across a stranger being beaten or threatened by others and acted in defence of that person. In this way, section 34(1)(a) has broadened self-defence to include the defence of all other persons. As such, it now also supplements the more narrow provisions in section 27 which provide a separate defence for using reasonable force to prevent a commission of offences subject to arrest without warrant and that are likely to cause immediate and serious injury to persons or property.

Good samaritans will be able to act in defence of all others, but they must under section 34(1)(a) believe on reasonable grounds that the other person is faced with force or the threat of force. They must also under section 34(1)(b) act with the subjective purpose of defending the other person. Moreover, the force they use must, under section 34(1)(c), be reasonable in the circumstances. These requirements should exclude violent persons who are "itching for a fight" and who may use real or imagined threats to third parties as an excuse for violence. That said, a mistaken belief that a third party is threatened by force or threat of force may still qualify under section 34(1)(a) if it is a reasonable mistake in the circumstances.

#### *(i) Second Requirement: Subjective Purpose of Defending Oneself or Others under Section 34(1)(b)*

Section 34(1)(b) requires that those claiming self-defence have the subjective purpose of defending themselves or others. In most cases, this subjective inquiry will be the least challenging requirement for the accused of the three requirements of self-defence. It will, however, exclude those accused who do not subjectively intend to defend themselves or others but rather desire to seek vengeance, punishment, or vindicate honour against someone who has used force against them or threatened to do so. The more difficult cases will be those where such improper subjective purposes are combined with the required subjective purposes of defending self or others. In such cases, the accused may satisfy the second requirement and the fate of the self-defence claim may rest on whether the accused's response

was reasonable in the circumstances.

The separation out of the inquiry into the accused's subjective purpose under section 34(1)(b) will make it important that the jury is clearly instructed that the subjective purpose of self-defence is not sufficient. The accused must in addition have both a reasonable belief that they are threatened and they must respond reasonably. A completely subjective approach to self-defence could allow people who act on unreasonable, inaccurate, and even racist perceptions of threats from others to be acquitted.

*(ii) Third Requirement: Acts Done in Self-Defence Must Be Reasonable in the Circumstances under Section 34(1)(c)*

In most self-defence cases, the critical issue will be whether the act done by the accused was reasonable in the circumstances. Section 34(1)(c) provides a more general and open-ended standard than the old law of self-defence which in some contexts specifically required that the accused use no more force than was necessary or use self-defence that was necessary to preserve the accused from death or grievous bodily harm. The new section 34(1) essentially delegates to the judge and the jury the issue of determining whether self-defence is reasonable in the circumstances.

Section 34(2) provides that the "court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to" nine specified factors. As originally introduced in Parliament, section 34(2) simply provided that the court may consider such factors. The mandatory nature of considering the requirements now means that the jury (and a judge sitting alone) should be instructed on all the nine listed factors, but also reminded that they may also consider other relevant factors.

Although all relevant factors including the nine listed factors must be considered, it would be quite onerous to require either an air of reality or a reasonable doubt about all nine listed factors. As suggested above, the three elements of self-defence remain those three factors listed in section 34(1), namely the requirements of: 1) a belief on reasonable grounds of force or threat of force; 2) a subjective purpose of defending self or others; and 3) that the act be reasonable in the circumstances. Section 34(2) merely provides guidance to courts in determining whether the third requirement exists. Judges should read the long list in section 34(2) to the jury and the trier of fact should consider all the listed factors, but they can also consider other relevant factors relating to the accused, the parties and the act. This open-ended approach allows courts and juries to consider new factors that may be relevant. At the same time, however, it also makes self-defence less predictable and less structured and demanding than the necessity and common law duress defence, which require proportionality between the harm threatened and inflicted and that there be no legal alternative.

**(d) Contextual Objective Standard and the History of the Relationship Between the Parties to the Incident**

As under the old law of self-defence, a contextual objective standard should be used in determining whether acts of self-defence are reasonable in the circumstances, and this standard should account for the history of the relationship of the

parties to the incident. *Lavallee* is the landmark case in this regard because it was the Supreme Court's first decision embracing a contextual objective approach that considered the accused's situation and experience. *Lavallee* has, however, sometimes been misunderstood as making the accused's status as a battered woman (or not) determinative of the self-defence claim. This is unfortunate because Wilson J. specifically warned:

the fact that the accused was a battered woman does not entitle her to an acquittal. Battered women may well kill their partners other than in self-defence. The focus is not on who the woman is, but on what she did . . . Ultimately, it is up to the jury to decide whether, in fact, the accused's perceptions and actions were reasonable.<sup>31</sup>

The converse of the above proposition should also be true. A woman may act in self-defence against a threatening partner even if she does not satisfy clinical definitions of being a battered woman.

The contextual objective standard articulated in *Lavallee* was not limited to issues of gender and past battering. In *Nelson*,<sup>32</sup> the Ontario Court of Appeal held that an accused's diminished intelligence should be considered in determining whether he had a self-defence claim. The Court of Appeal stated that an accused with an intellectual impairment relating to his or her ability to perceive and react to an assault "may be in a position similar to that of the accused in *Lavallee* in that his or her apprehension and belief could not be fairly measured against the perceptions of an 'ordinary man.'" In another case, the Nova Scotia Court of Appeal indicated that the jury should have been instructed about past altercations between the accused and the victim and that the accused had Asperger's Syndrome, which may have impaired his social functioning and made him anxious, paranoid, and distrustful.<sup>33</sup> The Supreme Court has approved of a decision that factored in expert evidence about prison environment in determining whether an inmate faced a threat from other inmates.<sup>34</sup> In general, the jury should be instructed to consider a reasonable person with any of the characteristics and experiences that are relevant to the accused's ability to perceive harm and to respond to it. The accused's age, gender, physical capabilities, and past interaction and communication with the person who presents a threat may be relevant to both his or her perception of the harm under section 34(1)(a) and must be considered in determining the reasonableness of the response to threatened harm under section 34(1)(c).<sup>35</sup> This approach allows for contextualization, but there must still be a reasonable basis for the accused's perceptions and actions.

The reference to the reasonableness of the accused's response in section 34(1)(c) should be read in light of the Court's use of the contextual objective stan-

<sup>31</sup> *Lavallee*, *supra* note 10 at p. 126.

<sup>32</sup> *R. v. Nelson*, 1992 CarswellOnt 95, 71 C.C.C. (3d) 449 at para. 467, 13 C.R. (4th) 359 (C.A.).

<sup>33</sup> *R. v. Kagan*, 2004 NSCA 77, 2004 CarswellNS 232, 185 C.C.C. (3d) 417 (C.A.).

<sup>34</sup> *R. v. McConnell*, [1996] 1 S.C.R. 1075, 1996 CarswellAlta 588, 1996 CarswellAlta 589, 48 C.R. (4th) 199.

<sup>35</sup> There is no need for a modified objective standard under s. 34(1)(b) which focuses on whether the accused acts with the subjective purpose of defending oneself or others.

dard since *Lavallee*. In addition, there are some specifically enumerated factors in section 34(2) which must be considered and which support the use of the contextual objective standard. These include the reference in section 34(2)(e) to the “size, age gender and physical capabilities of the parties to the incident”; in section 34(2)(f) to “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” and in section 34(2)(f.1) to “any history of interaction or communication between the parties to the incident.” It could be argued that the specific reference to size, age, physical capabilities, and gender is exhaustive of the modified objective standard, but this would be a mistake given both the specifically non-exhaustive nature of the section 34(2) factors and the development of the contextual objective standard to incorporate other factors that the accused cannot control such as mental disabilities. Indeed, limiting the modified objective standard to size, age, gender, and physical capabilities might even result in a successful equality rights challenge on that basis.

The reference in section 34(2)(f) and (f.1) to the relationship between the parties including the use of force and threats between the parties and the history of their interaction and communication reflects a series of cases involving claims of self-defence by battered women. In *Lavallee*, the Supreme Court held that evidence of battering and expert evidence on the effects of battering was relevant in determining the reasonableness of the response. Such evidence would be particularly relevant in explaining why a woman did not leave an abusive relationship sooner. Wilson J. stressed that what “the jury must ask itself is whether, given the history, circumstances and perceptions of the [accused], her belief that she could not preserve herself from being killed by [the deceased] that night except by killing him first was reasonable.”<sup>36</sup> In *Pétel*, the Supreme Court affirmed that the prior assaults suffered by the accused and her daughter would be relevant to determining the reasonableness of her “belief that she could not extricate herself otherwise than by killing the attacker.”<sup>37</sup> In *R. v. M. (M.A.)*,<sup>38</sup> the Court again affirmed that evidence with respect to past battering may be relevant to determine the reasonableness of the accused’s response. The modified objective standard thus includes not only the size, age, gender, and other non-controllable characteristics of the accused, but also the history of the accused’s relationship with the victim including any prior force or threat of force.

One characteristic of the particular accused that should not be considered is his or her intoxication. In *Reilly*,<sup>39</sup> the Supreme Court held that the accused’s intoxication could not be considered in determining whether he reasonably apprehended harm. The Court concluded:

The perspective of the reasonable man which the language of s. 34(2) places in issue here is the objective standard the law commonly adopts to measure a man’s conduct. A reasonable man is a man in full possession of his facul-

<sup>36</sup> *Lavallee*, *supra* note 10 at p. 125.

<sup>37</sup> *Pétel*, *supra* note 19 at p. 104.

<sup>38</sup> *R. v. M. (M.A.)*, *supra* note 20.

<sup>39</sup> *R. v. Reilly*, 1984 CarswellOnt 68, 1984 CarswellOnt 808, 15 C.C.C. (3d) 1 at para. 8, [1984] 2 S.C.R. 396, 42 C.R. (3d) 154.

ties. In contrast, a drunken man is one whose ability to reason and to perceive are diminished by the alcohol he has consumed.

The Court left open the possibility that an intoxicated accused could have a valid self-defence claim provided that he or she still had reasonable grounds for his or her beliefs. Although section 34(2) allows a non-exhaustive use of factors to be considered, intoxication is simply not relevant to determining whether an act of self-defence is reasonable in the circumstances.

The reference to particular characteristics and past circumstances in sections 34(2)(e) and (f) are not limited to those of the accused but extend to those of all parties to the incident. This recognizes the relevance of the fact in *Lavallee*, that the victim was a larger male with a past history of beating and threatening the female accused. At the same time, sections 34(2)(d) and (e) suggest that the old age or small size of a victim and the victim's use or threats to use a weapon could also be relevant to whether the accused responded reasonably to force or a threat of force. At the end of the day, however, the focus should be on the accused and the accused should be given the benefit of the doubt about whether he or she acted in self-defence.

#### (e) Retreat from Homes and Other Situations

The concept of whether the accused should retreat before using self-defence has been controversial. The Supreme Court in *Lavallee* affirmed that there is no requirement that the accused retreat from his or her home in order to qualify for self-defence. The origins of this concept are in the old common law notion that "a man's home is his castle."<sup>40</sup> Wilson J. argued that a "man's home may be his castle but it is also the woman's home even if it seems to her more like a prison in the circumstances."<sup>41</sup> Courts of Appeal have held that the jury should be instructed that retreat is not a reasonable option for those attacked in their homes.<sup>42</sup> This doctrine is not specifically mentioned in the new section 34 as it was under the old section 35 of the Code which in some situations required the accused to retreat.

Any no-retreat doctrine should, however, be administered cautiously because it could encourage unnecessary and perhaps disproportionate violent self-help. The new section 34(2)(b) suggests that courts may consider "whether there were other means available to respond to the potential use of force." These means, in some situations, could include retreat. The fact that the new defence applies to all offences also means that it could provide a defence in situations where an accused stole a car or trespassed on other property in order to avoid a violent situation.

<sup>40</sup> *Semayne's Case* (1604), 77 E.R. 194 (K.B.). See also *R. v. Antley* (1963), 42 C.R. 384, [1964] 2 C.C.C. 142 at para. 147, 1963 CarswellOnt 26 (C.A.); *Deegan*, 1979 CarswellAlta 236, 49 C.C.C. (2d) 417 (C.A.) affirming the concept in the context of intruders on the accused's property.

<sup>41</sup> *Lavallee*, *supra* note 10 at p. 124.

<sup>42</sup> *R. v. Forde*, 2011 ONCA 592, 2011 CarswellOnt 9190, 87 C.R. (6th) 409, 277 C.C.C. (3d) 1 at para. 56 (C.A.); *R. v. Proulx*, 127 C.C.C. (3d) 511, 1998 CarswellBC 1620 at paras. 45-46 (C.A.); *R. v. Antley* (1963), 42 C.R. 384, [1964] 2 C.C.C. 142 at 147, 1963 CarswellOnt 26 at para. 11 (C.A.); *R. v. Deegan*, 49 C.C.C. (2d) 417, 1979 Carswell-Alta 236 (C.A.).

**(f) The Proportionality of the Act Done in Self-Defence**

In determining the reasonableness of the act done in self-defence, the trier of fact must consider a number of specifically enumerated factors including in section 34(2)(a) “the nature of the force or threat” to be avoided; whether the force “was imminent and whether there were other means available to respond to it (section 34(2)(b)); whether weapons were used or threatened (section 34(2)(d) and “the nature and proportionality of the person’s response to the use or threat of force” (section 34(2)(h)). These factors can all be grouped under the general heading of the proportionality and relative harm of the force resisted or threatened and the force used by the accused. At the same time, the only absolute requirement in section 34(1)(c) is that the act done must be reasonable in the circumstances. There is no requirement that the force or threat faced by the accused must be imminent or even that the accused’s response must be proportionate, though these are factors that must be considered in determining the reasonableness of the act done. Similarly, there is no requirement that the accused must retreat in all cases. This is consistent with the historical tendency of Canadian courts not to demand that all self-defence be strictly proportional or that the accused take all possible routes of retreat.<sup>43</sup>

Section 34(1)(c) is more generous than the old section 34(2) of the Code because it does not require accused individuals to believe on reasonable grounds that the act done in self-defence was the only way to protect themselves from death or grievous bodily harm. In *R. v. Cinous*,<sup>44</sup> the Supreme Court held that there was no air of reality to put self-defence to the jury in a case in which a man shot another man in the back of the head while they were stopped at a service station en route to steal computers together. The accused feared that the deceased and a companion were planning to kill him because they had put on latex gloves. The accused also testified that he believed he had no alternatives. He had tried to avoid the deceased and he did not think of calling the police to help because he had spent his whole life running from the police. McLachlin C.J. and Bastarache J. for the majority of the Court held that while the jury may reasonably have reached a conclusion that the accused reasonably apprehended an assault and death or grievous bodily harm, it could not have reasonably concluded that the accused reasonably believed he had no alternatives but killing the person. Unlike in *Lavallee*, there was no evidence supporting why the accused may have reasonably believed that there were no other alternatives. The fact that the accused may have reasonably believed that the police could not protect him was not enough. He could still have fled the scene: “Section 34(2) does not require than an accused rule out a few courses of action other than killing. The requirement is that the accused has believed on reasonable grounds that there was *no alternative course of action* open to him . . . This defence is intended to cover situations of last resort.”<sup>45</sup> Under the new section 34(1)(c), however, the relevant question is not whether the accused believed on reasonable grounds that

<sup>43</sup> *R. v. Kong*, [2006] 2 S.C.R. 347, 40 C.R. (6th) 221, 2006 SCC 40, 211 C.C.C. (3d) 1, 2006 CarswellAlta 1135, 2006 CarswellAlta 1134.

<sup>44</sup> *Cinous*, *supra* note 20.

<sup>45</sup> *Ibid.* at pp. 123-124 [emphasis in original]. See also *R. v. Pilon*, 243 C.C.C. (3d) 109, 64 C.R. (6th) 356, 2009 ONCA 248, 2009 CarswellOnt 1504 (C.A.) at paras. 73 and 75 rejecting the idea that a criminal subculture of kill or be killed should be considered

there no other course of action, but rather whether the accused's actions were reasonable in the circumstances. It may well be more difficult for a judge to hold that there is no air of reality to a self-defence claim under this new and less structured self-defence provision and the issue would ultimately fall to the jury to decide whether the accused's actions were reasonable in all the circumstances.

### (g) The Accused's Role in the Incident

The old defences drew complex distinctions between assaults that were unprovoked and assaults provoked by the accused. This required complex instructions to the jury on multiple defences. Section 34(2)(c) much more simply allows the jury to consider "the person's role in the incident" in determining whether the act done in self-defence is reasonable in the circumstances. The trier of fact will then apply their own judgment about the relevance and importance of what the accused may have done to provoke force or threats of force. This approach is certainly easier to administer, but underlines how self-defence claims under the general reasonableness standard of section 34(1)(c) may be more difficult to predict than under the old law.

### (h) Excessive Self-Defence

If excessive self-defence leads to a conclusion that the act was not reasonable in the circumstances, the accused will, as under the old law of self-defence, be convicted, at least absent another defence including one that may be based on a constitutional claim of moral involuntariness.<sup>46</sup> Canadian courts have not recognized a partial defence for accused who engage in excessive and unreasonable self-defence, which in some other jurisdictions reduces murder to manslaughter. Dickson J. has concluded in the context of an unsuccessful self-defence claim under section 34(2):

Where a killing has resulted from the excessive use of force in self-defence the accused loses the justification provided under s. 34. There is no partial justification open under the section. Once the jury reaches the conclusion that excessive force has been used, the defence of self-defence has failed.<sup>47</sup>

This decision is also supported by section 26 of the *Criminal Code*, which provides that everyone authorized by law to use force is criminally responsible for any excess of force. The result can make self-defence, especially when the accused has the intent required for murder, an all or nothing proposition. The options are either to acquit on the basis of self-defence or to convict the accused of the most serious offence with its mandatory penalty of life imprisonment. Concern about the

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and that self-defence is a defence of last resort as measured by the standards of the ordinary community as represented by the jury.

<sup>46</sup> Stephen Coughlan, "Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change?" (2002), 7 *Can.Crim.L.Rev.* 146 at pp. 199-200; Eric Colvin and Sanjeev Anand *Principles of Criminal Law* 3<sup>rd</sup> ed (Toronto; Carswell, 2007) at pp. 320-323.

<sup>47</sup> *R. v. Faid*, 2 C.C.C. (3d) 513 at 518, 33 C.R. (3d) 1, 1983 CarswellAlta 317, [1983] 1 S.C.R. 265, 1983 CarswellAlta 35.



ultimate disposition of an accused in cases such as *Lavallee* and *Pétel* may have influenced the development of the law of self-defence. It also places significant pressure on the accused to accept a plea bargain to manslaughter should one be offered.<sup>48</sup>

**(i) Section 34(3): Self-Defence Against Law Enforcement Actions**

Can a person use self-defence in resisting arrest or other law enforcement actions? Section 34(3) prevents such self-defence claims unless the accused “believes on reasonable grounds” that those enforcing the law are “acting unlawfully.” This means that in order to claim self-defence against law enforcement actions the accused must both subjectively and reasonably believe that the law enforcement actions were unlawful. The requirements for both subjective and objective components are consistent with the general tenor of the self-defence provisions.

In many cases, the critical issue under section 34(3) will be whether the accused’s belief that the law enforcement actions were unlawful is reasonable. The requirement of reasonableness is not a standard of perfection. The accused may have a reasonable belief that the police are acting unlawfully even though the police may actually be acting lawfully. The reasonableness standard should be a modified one at least to the extent of considering the history of the parties. The accused should also be given the benefit of the doubt as is the case with all other elements of self-defence. Even if the accused’s belief that the law enforcement actions are unlawful is accepted as reasonable, accused must still under section 34(1)(a) have reasonable grounds to believe that they face force or threats of force; they must under section 34(1)(b) act for the purpose of defending themselves or others and the acts that they do must be reasonable in the circumstances under section 34(1)(c).

**(j) Summary**

The new section 34 is less structured and predictable than the old self-defence provisions or the necessity and duress defences. Nevertheless, the new section 34 retains the basic elements of self-defence in that the accused must subjectively perceive a threat and respond for the purpose of defending themselves or others and there must be a reasonable basis both for the accused’s perceptions of force or threat of force and the accused’s response in the circumstances. The trend towards a contextual application of objective standards also continues with specific reference to the characteristics and history of the parties to the incident. In order for self-defence to be left to the jury there must be evidence upon which a jury acting reasonably could find: 1) a belief on reasonable grounds that force or threat of force is being made against the accused or another; 2) that the act was done for the subjective purpose of defending the accused or the other person; and 3) that the act was reasonable in the circumstances. In order to justify an acquittal, there must be a reasonable doubt about each of those three requirements.

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<sup>48</sup> Martha Shaffer, “The Battered Woman’s Syndrome Revisited” (1997) 47 U.T.L.J. 1.

### 3. DEFENCE OF PROPERTY IN THE NEW SECTION 35

Section 35 now contains one defence for defence of property and makes no distinction between various forms of property and dwelling houses. The new section 35 provides:

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
- (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.<sup>49</sup>

There must be an air of reality on all four requirements of defence of property to put the defence to the jury and there must be a reasonable doubt on all four requirements to justify an acquittal. The first requirement is that the accused under section 35(1)(a) must believe on reasonable grounds that they are in peaceable possession of property (or reasonably believe that they are acting under the authority of or lawfully assisting such a person). The second requirement is that under section 35(1)(b) the accused must believe on reasonable grounds that another person is entering, taking, damaging, or destroying the accused's property. The third requirement is that the offence under section 35(1)(c) must be committed for the subjective purpose of protecting the property. Finally, the fourth and often most critical requirement under section 35(1)(d) is that that the offence committed by the ac-

<sup>49</sup> Section 35(3) addresses the defence of property against law enforcement and provides: (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.

cused must be reasonable in the circumstances.

**(a) Defence of Property Applies to a Broad and Expanded Range of Offences**

As with the new self-defence provision, the new defence of property applies not only to assaults and others acts of force done to protect property, but any other offence. Unlike in self-defence, however, proportionality is not a specifically enumerated factor in defence of property. This omission creates the potential that the section 35 defence might be claimed, not as under section 34 as a defence to less serious crimes such as stealing a vehicle to flee an attacker, but to more serious offences of violence. In any event, an act of defence of property must under section 35(1)(c) be done for the subjective purpose of protecting property and must under section 35(1)(d) be reasonable in the circumstances. This latter requirement should disqualify attacks on people for reasons not related to a the defence of property or violent responses to intrusions on property that are not reasonable.

**(b) No Specific Reference to Defence of Property as a Justification**

As under the new section 34, there is no specific reference in section 35 to the concept that defence of property constitutes a justification of rightful conduct as opposed to an excuse that makes a realistic concession to human frailties. The omission of the concept of justification is more than a theoretical quibble with respect to defence of property because the new section 35 omits the concept of using no more force than necessary that was found in several of the old defence of property provisions relating to defence of dwellings. Section 35 does not specifically require that the proportionality of the response be considered as one of the relevant factors in determining whether an act done to defend property is reasonable in the circumstances. One of the features of a justification is that the harm inflicted is less serious than the harm avoided and this makes the conduct rightful in the circumstances. As will be seen, it is possible that seriously injuring or even killing a person solely to defend property could be considered to be a valid defence of property under section 35. If such an extreme defence was recognized under section 35, it would operate more as an excuse for conduct that would still be wrongful given the value of human life and health and not as a justification of rightful conduct.

**(c) No Deeming of Assault but Continued Overlap between Defence of Property and Self-Defence**

The old defence of property provisions provided that a trespasser who resisted an attempt to protect personal or real property would be deemed to have committed an assault. These complex provisions are not present in the new section 35. Nevertheless, this does not preclude frequent overlap between defence of property and self-defence provisions. For example, a person who is protecting property may also be able to claim self-defence if they have a reasonable belief that force or a threat of force is being used against them.

**(d) The Contextual and Modified Objective Standard**

Several components of defence of property require that there must be a rea-

sonable basis for the accused's belief in peaceable possession of the property (section 35(1)(a)); that the property is being threatened (section 35(1)(b), and that the accused's actions are reasonable in the circumstances (section 35(1)(d)). In principle, the contextual objective standard used with respect to self-defence should also be applied to defence of property. The accused's history and circumstances may be relevant to their belief about the peaceable possession of property and their belief that their property is being threatened. The age, size, gender, physical capabilities, and perhaps other personal characteristics of the parties may also be relevant to determining whether a particular act done in defence of property was reasonable in the circumstances. As always, care must be taken to ensure that the objective standard of reasonable conduct is contextualized, but does not become a subjective standard or one that demands lower standards of restraint from some accused.

(i) *First Requirement: Reasonable Belief in Peaceable Possession and Claim of Right under section 35(1)(a)*

The first requirement for defence of property is a reasonable belief by the accused that they are in peaceable possession of property. The old defence of property provisions also used the concept of peaceable possession and it has been interpreted to include control of property that was peaceable because it was not seriously challenged by others. Aboriginal protesters who have occupied land have previously been held not to be in peaceable possession of the land.<sup>50</sup> The new section 35(1)(a) does not, as did the prior section, actually require peaceable possession of the land. It only requires that those claiming defence of property and those assisting them have a reasonable belief in such peaceable possession. This seems to open the door for a court to hold that a person claiming the defence had a reasonable belief in peaceable possession even if they were mistaken. This may be of particular relevance in cases such as Aboriginal occupations where the actual question of possession may be contested and difficult to determine. The concept of a reasonable belief in peaceable possession may also make relevant the history of the accused's claims to possession and even perhaps legal and other advice received about the possession.

Section 35(2), however, places an additional requirement by requiring that an accused who has a reasonable belief in peaceable possession will not have a defence if they do "not have a claim of right to it and the other person is entitled to its possession by law." A claim of right can include an honest mistake about entitlement even though the mistake is based on both fact and law.<sup>51</sup> In this way, the concepts of both reasonable belief in peaceable possession and claim of right represent some relaxation of the strict principle that ignorance or mistakes of law is not an excuse. At the same time, it is possible to read section 35(2) as denying the defence of property in cases in which the accused is not entitled to possession of

<sup>50</sup> *R. v. George*, 145 C.C.C. (3d) 405, 2000 CarswellOnt 1728 (C.A.); leave to appeal refused 2001 CarswellOnt 161, 2001 CarswellOnt 160, 150 C.C.C. (3d) vi (S.C.C.); *R. v. Born With A Tooth*, 76 C.C.C. (3d) 169, 1992 CarswellAlta 124, 1992 ABCA 244 (C.A.).

<sup>51</sup> *R. v. Lei*, 120 C.C.C. (3d) 441, 1997 CarswellMan 581 (C.A.); leave to appeal refused (1998), 228 N.R. 195 (note) (S.C.C.).

the property. In my view, however, it would be unduly harsh to preclude a defence of property in cases where the accused made a reasonable mistake about their entitlement to the property. The requirement that such mistakes be reasonable should serve legitimate interests in social protection and it seems harsh to deny the defence totally just because the accused is not in law entitled to the property.

*(ii) Second Requirement: Reasonable Belief That Property is Being Threatened under Section 35(1)(b)*

The second requirement for defence of property is that the accused have a reasonable belief that the property in question is being threatened. This section specifies a number of ways in which property can be threatened including when a person is about to enter or enters property without being entitled in law to do so. This section also does not apply in cases where another person may have just entered property, but is no longer on property. In such cases, the harm to the accused's property interest has already occurred and they should call the police rather than rely on self-help.

This provision on its face seems to exclude defence of property as a defence if the accused wrongly, but even reasonably, believes that the person entering the property is not entitled by law to enter the property when in fact the person is so entitled. It would, however, seem to be within the general tenor of the defence provisions to allow an accused to have the benefit of a reasonable mistake that a person was a trespasser on property or in a dwelling house even though section 35(1)(b)(i) seems to require that the person actually have no entitlement to enter the property. In general, the provision should be interpreted as a part of a restrained and humane criminal law and not be dependent on complex and disputed questions of property law.

Section 35(1)(b)(ii) applies in cases where an accused believes on reasonable grounds "that another person is about to take property, is doing so or has just done so." This provision expands defence of property to include acts done when the accused reasonably believes that a person has just taken property. It could apply to a security guard or shopkeeper who restrains a person outside the store on the basis of a reasonable belief that the person has just shoplifted.

Section 35(1)(b)(iii) applies in cases where an accused believes on reasonable grounds that "another person is about to damage or destroy property or make it inoperative, or is doing so." This section clarifies that defence of property applies not only against trespass and theft of property, but also vandalism. Like section 35(1)(b)(i), however, this section seems not to apply in cases where the accused has a reasonable belief that a person has just finished damaging property. On the one hand, it could be argued that in such cases the damage has been done and the proper response is to call the police. On the other hand, it is anomalous that defence applies to those who have just taken property, but not to those who have just entered or damaged property but are no longer doing so.

*(iii) Third Requirement: Subjective Purpose of Protecting Property under Section 35(1)(c)*

The third requirement for the defence of property is that the accused have the subjective purpose of protecting property. Depending on the circumstances, this

will be a purpose in preventing a trespasser from entering property, removing a trespasser, retaking property, or preventing its damage. In many cases, such subjective purposes will be obvious from the circumstances, but this provision would preclude a person who assaults a trespasser, thief, or vandal for the purpose of vengeance or punishment. The specific reference to the accused removing trespassers or retaking property may raise issues about whether such potentially forceful actions by the accused are reasonable in the circumstances. As will be seen, the new section does not incorporate old statutory provisions that frequently required the accused to use no more force than necessary and had been interpreted by the Supreme Court to require a degree of proportionality between the harm inflicted by the accused in defence of property and the harm of the threat to property.<sup>52</sup>

(iv) *Fourth Requirement: Act Must be Reasonable in the Circumstances under Section 35(1)(d)*

As with the new self-defence provision, the most critical issue with respect to defence of property will often be whether the accused's actions were reasonable in the circumstances. Unlike in self-defence, section 35 of the Code provides no enumerated factors that must be considered by judges and juries in determining whether any particular act of defence of property is reasonable in the circumstances. In addition, section 35 does not follow the frequent references in the old defence of property provisions to the need to use no more force than necessary despite the fact that these phrases have been subject to extensive interpretation by the courts who had read them as requiring some proportionality between the force used to protect property and the harm to property interests that were avoided by the use of self-help.

The old jurisprudence on proportionality should inform determinations of the reasonableness of defence of property under section 35(1)(d). In *R. v. Gee*,<sup>53</sup> Dickson J. quoted with approval an authority that stated it "cannot be reasonable to kill another merely to prevent a crime which is directed only against property." The Supreme Court in *R. v. Gunning* held that the force used by a person in peaceable possession of a dwelling house to eject a trespasser "must have been reasonable in all the circumstances . . . Where the defence arises on the facts, the onus is on the Crown to prove beyond a reasonable doubt that Mr. Gunning did *not* act in defence of property." The Court indicated that "the intentional killing of a trespasser could only be justified where the person in possession of the property is able to make out a case of self-defence." Thus the Court has concluded that it will always be unrea-

<sup>52</sup> *R. v. Gunning*, [2005] 1 S.C.R. 627, 196 C.C.C. (3d) 123, 29 C.R. (6th) 17, 2005 CarswellBC 1182, 2005 CarswellBC 1181, 2005 SCC 27 at para. 25; *R. v. Szczerbaniwicz*, [2010] 1 S.C.R. 455, 2010 SCC 15, 2010 CarswellNat 1126, 2010 CarswellNat 1127, 254 C.C.C. (3d) 101, 74 C.R. (6th) 201 at para. 20 See also: *R. v. George*, 2000 CarswellOnt 1728, 145 C.C.C. (3d) 405 at para. 49 (C.A.); leave to appeal refused 2001 CarswellOnt 161, 2001 CarswellOnt 160, 150 C.C.C. (3d) vi (S.C.C.); *R. v. McKay*, 2009 MBCA 53, 2009 CarswellMan 250, 246 C.C.C. (3d) 24 at p. 23.

<sup>53</sup> *R. v. Gee*, 68 C.C.C. (2d) 516 at para. 528, 29 C.R. (3d) 347, 1982 CarswellAlta 556, [1982] 2 S.C.R. 286, 1982 CarswellAlta 544. See also *R. v. Clark*, 5 C.C.C. (3d) 264 at para. 271, 1983 CarswellAlta 53 (C.A.).

sonable to intentionally kill a person in order to remove them as a trespasser.<sup>54</sup> In the subsequent case of *R. v. Mackay*, however, the Court refused to extend such categorical rules when it explicitly stated that it did not endorse the view of the Manitoba Court of Appeal that “defence of property alone will never justify the use of anything more than minor force being used against a trespasser” or that, in all cases, “the defence of property alone will not justify the intentional use of a weapon against a trespasser.”<sup>55</sup> The Court in that case did hold that aggravated assault was not justified by defence of property.

In *R. v. Szczerbaniwicz*<sup>56</sup> the majority of the Supreme Court held that a man had used more force than was necessary when he pushed his estranged wife as she was damaging his diploma. Justice Abella quoted with approval statements by Justice G.A. Martin to the effect that self defence and defence provisions reflected 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 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.<sup>57</sup>

Justice Abella stressed that the “proportionality approach” requires both subjective and objective standards related to the harm caused to property and the harm inflicted in defence of property. Dissenting judges in *Szczerbaniwicz* also accepted that the accused “must have a subjective belief of the necessity, and the belief must be based on reasonable grounds,” but stressed that in “‘quick response’ situations an accused is not expected to ‘weigh to a nicety’ the exact measure of a defensive action or to stop and reflect upon the precise risk of consequences from such action”.<sup>58</sup> The Court was united on the need for proportionate defence of property though they disagreed in how strictly proportionality should be required.

It remains to be seen whether courts will read a proportionality requirement into the bare reference in section 35(1)(d) to the need for the act to be reasonable in the circumstances. It is unfortunate that Parliament was silent on this issue. In my view, courts should read in such a proportionality requirement in the absence of clear legislation displacing the extensive proportionality jurisprudence. Although proportionality is only one of the enumerated factors in section 34(2) relating to self-defence, it has an important role in restraining disproportionately violent defences of property. Although some mechanical approaches to statutory interpretation might find that Parliament’s failure to include proportionality in section 35

<sup>54</sup> *R. v. Gunning*, [2005] 1 S.C.R. 627, 196 C.C.C. (3d) 123, 29 C.R. (6th) 17, 2005 CarswellBC 1182, 2005 CarswellBC 1181, 2005 SCC 27 at pp. 25-26.

<sup>55</sup> *R. v. McKay*, [2007] 1 S.C.R. 793, 45 C.R. (6th) 1, 217 C.C.C. (3d) 481, 2007 SCC 16, 2007 CarswellMan 89, 2007 CarswellMan 88 at p. 2.

<sup>56</sup> *R. v. Szczerbaniwicz*, [2010] 1 S.C.R. 455, 74 C.R. (6th) 201, 254 C.C.C. (3d) 101, 2010 SCC 15, 2010 CarswellNat 1127, 2010 CarswellNat 1126.

<sup>57</sup> *R. v. Baxter*, 27 C.C.C. (2d) 96 at 113, 1975 CarswellOnt 54, 33 C.R.N.S. 22 (C.A.) quoted with approval in *Szczerbaniwicz* at p. 19.

<sup>58</sup> *R. v. Szczerbaniwicz*, [2010] 1 S.C.R. 455, 74 C.R. (6th) 201, 254 C.C.C. (3d) 101, 2010 SCC 15, 2010 CarswellNat 1127, 2010 CarswellNat 1126, at pp. 33 and 35.

when it is mentioned in section 34(2) would suggest that Parliament did not intend proportionality to be a factor in section 35, it would be anomalous to restrain self-defence with proportionality principles, but not to restrain defence of property. That said, it should also be noted that the courts have been relatively cautious about drawing categorical limits on proportionate responses to defence of property, only having suggested in *Gunning* that defence of property alone would not justify an intentional killing.

### **(e) Section 35(3): Defence of Property Against Law Enforcement Actions**

Section 35(3) prevents a defence of property claim against law enforcement actions unless the “accused believes on reasonable grounds that the other person is acting unlawfully.” This follows the same pattern as section 34(3) examined above. Consistent with the general tenor of the defence of property provisions, it has both subjective and objective components that require that a person have both an honest and a reasonable belief that they are resisting unlawful law enforcement efforts. The requirement of reasonableness is not a standard of perfection. In other words, the accused may have a reasonable belief that the police are acting unlawfully even though the police may actually be acting lawfully. The reasonableness standard should be a modified one at least to the extent of considering the history of the parties. The accused should also be given the benefit of the doubt, as is the case with all elements of defence of property.

Even if the accused’s belief that the law enforcement actions are unlawful is accepted as reasonable, the accused must still under section 35(1)(a) have reasonable grounds to believe that they are in peaceable possession and have a legal right to the property; they must under section 35(1)(b) have a reasonable belief about a threat to property; they must under section 35(1)(c) have the subjective purpose of protecting property; and under section 35(1)(d) their acts done in defence of property must be reasonable in the circumstances. These should be adequate restraints against unreasonable attacks on law enforcement officials.

### **(f) Summary**

The new section 35 is less structured and predictable than the old defence of property provisions, but it should be easier to apply. Section 35(1)(a) requires a reasonable belief in peaceable possession of the property defended but section 35(2) may restrict the defence to at least require a claim of right and may even preclude the defence when the accused is not in fact entitled to the property. The accused must under section 35(1)(b) also believe on reasonable grounds that the property is threatened or that the victim has just taken property. In addition, the accused must act for the subjective purpose of protecting the property under section 35(1)(c) and not for other purposes such as vengeance and punishment. Finally and most importantly, the act must be reasonable in the circumstances under section 35(1)(d) and courts may well read established principles of proportionality developed in defence of property cases under the old provisions. There must first be an air of reality on all four elements to justify putting the defence to the jury and there must be a reasonable doubt on all four elements to justify an acquittal.



#### 4. CONCLUSION

The new sections 34 and 35 of the *Code* are overdue. In many respects, they are an improvement over the needlessly complex previous self-defence and defence of property provisions. They will undoubtedly make the lives of judges, jurors, lawyers, and students easier and lead to less appealable errors as judges instruct juries and themselves. That said, the increased simplicity of these defences will come at a price of less certainty. Self-defence and defence of property are now less structured defences than the common law defences of necessity and duress which clearly require proportionality between the harm inflicted and the harm avoided and that there be no legal alternative to breaking the law.

Previous law reform proposals explicitly required that a person use no more force than necessary and/or that the force used be proportionate to the harm avoided. Some law reform proposals explicitly stated that defence of property could not justify intentional causing of death or serious harm.<sup>59</sup> The government has chosen not to follow these proposals, but to use the more flexible requirement that self-defence and defence of property must simply be reasonable in the circumstances. To be sure, this does not go as far as a wholly subjective approach, or the explicit no retreat rule used in Florida and other American states. Nevertheless, it opens up new and perhaps troubling avenues for self-defence and defence of property. For example, cases like *Cinous*<sup>60</sup> where self-defence was held not to have an air of reality because there was no evidence to support a reasonable belief in lack of alternatives could potentially be decided differently under the new section 34 where the question at the air of reality stage will be whether there is evidence that would allow a jury acting reasonably to conclude that the force used was reasonable in the circumstances.

At the same time, courts may be inclined to read requirements of proportionality and necessity back into self-defence and defence of property. Courts especially should do so with respect to defence of property because of the dangers of killing and maiming people simply to protect property interests. Parliament's lack of guidance about what constitutes reasonable force allows for judicial input and creativity. With respect to self-defence, courts will continue to maintain the flexibility of the contextual objective standard embraced in *Lavallee*<sup>61</sup> and clearly endorsed in the new section 34(2). This approach, as well as the omission of hard and fast proportionality and necessity requirements in the new section 34, blurs the distinction between justifications and excuses. It opens up the possibility that self-defence may in some circumstances operate more as an excuse and concession to human weakness than a justification that always requires that the force used be proportionate and necessary.

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<sup>59</sup> These previous proposals were made by the Law Reform Commission of Canada, the Canadian Bar Association and by the government in a 1993 white paper. See Don Stuart *Canadian Criminal Law* 5<sup>th</sup> ed (Toronto: Carswell 2007) at pp. 510-511 and 517.

<sup>60</sup> *R. c. Cinous*, [2002] 2 S.C.R. 3, 162 C.C.C. (3d) 129, 49 C.R. (5th) 209, 2002 CarswellQue 262, 2002 CarswellQue 261, 2002 SCC 29.

<sup>61</sup> *Supra* note 10.

