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CANADIAN BAR ASSOCIATION

NATIONAL CRIMINAL JUSTICE SECTION

COMMITTEE ON CRIMINAL CODE REFORM

DISCUSSION PAPER NO. 1

Defence of the Person

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1. PRESENT STATUTORY PROVISIONS

The *Criminal Code*, sections 26, and 34 - 37 states:

Excessive Force

26. Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.

Self-Defence Against Unprovoked Assault

34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

- (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
- (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

Self-Defence in Case of Aggression

35. Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault on himself by another, may justify the use of force subsequent to the assault if

- (a) he uses the force
 - (i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he assaulted or provoked, and
 - (ii) in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;
- (b) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and
- (c) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.

Provocation

36. Provocation includes, for the purposes of sections 34 and 35, provocation by blows, words or gestures.

Preventing Assault

37. (1) Every one is justified in using force to defend himself or anyone under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

2. CASELAW INTERPRETING THE PRESENT STATUTORY PROVISIONS

a.) Self-Defence Against Unprovoked Assault - s. 34

i.) Using Force Not Intended to Cause Death or Grievous Bodily Harm - s. 34(1)

Under s. 34(1) the use of force is justified if:

1. the accused was unlawfully assaulted,
2. the accused had not provoked the assault,
3. the accused did not intend to cause death or grievous bodily harm, and
4. the accused did not use more force than was necessary.

Section 34(1) does not import a purely objective test; the doctrine of mistake of fact applies. Thus, if the accused reasonably believed that he was in imminent danger from an attack he was justified in using force in self-defence, even though he may have been mistaken in his belief: *R. v. Baxter* (1975) 27 CCC (2d) 96 (Ont CA).

Section 34(1) is not necessarily excluded, just because the force used by the accused results in death or grievous bodily harm: *R. v. Baxter, supra* and *R. v. Setrum* (1976) 32 CCC (2d) 109 (Sask CA).

In deciding whether the force used was more than necessary, a person defending himself against an attack reasonably apprehended cannot be expected to weigh to a nicety the exact measure of necessary defensive action: *R. v. Baxter, supra*.

Similarly, the accused's conduct must be measured according to the facts and circumstances confronting him at the time. It is wrong for the Court to conclude that, because of the serious injuries sustained by the complainant, the accused must have used excessive force: *R. v. Matson* (1970) 1 CCC (2d) 374 (BCCA), and *R. v. Marky* [1976] 6 WWR 390 (Alta CA).

"Grievous bodily harm" means serious hurt or pain: *R. v. Bottrell* (1981) 60 CCC (2d) 211 (BCCA).

ii.) Using Force Intended to Cause Death or Grievous Bodily Harm - s. 34(2)

Under s. 34(2) the use of force is justified if:

1. the accused was unlawfully assaulted;
2. the accused caused death or grievous bodily harm in repelling the assault;
3. the accused caused death, etc. under reasonable apprehension of death or grievous bodily harm from the assaultor; and
4. the accused reasonably believed that he could not otherwise preserve himself from death or grievous bodily harm.

Section 34(2) should be interpreted to read "Every one who is unlawfully assaulted and who *intends to cause* death or grievous bodily harm" Otherwise, it would leave unprotected the accused who, using no more force than was necessary to protect himself against an unprovoked assault, kills or causes grievous bodily harm to the assaulter without intending to do so: *R. v. Baxter* (1975) 27 CCC (2d) 96 (Ont CA).

The accused's apprehension of death or grievous bodily harm must be a *reasonable* one and his belief must be based on reasonable and probable grounds. Since s. 34(2) places in issue the accused's perception of the attack on him and the response required to meet it, the accused may still be found to have acted in self-defence, even if he was mistaken in his perception. Reasonable and probable grounds must still exist for this mistaken perception in the sense that the mistake must have been one which an ordinary person using ordinary care would have made in the same circumstances: *Reilly v. The Queen* (1984) 15 CCC (3d) 1 (SCC).

In deciding whether the accused's belief was based on reasonable and probable grounds the jury must of necessity draw comparisons with what a *reasonable* person in the accused's situation might believe with respect to the extent and the imminence of the danger by which he was threatened, and the force necessary to defend himself against the apprehended danger: *R. v. Baxter, supra*.

Unlike sections 34(1) and 37, s. 34(2) does not import the principle of proportionate force. Rather, the test is whether the accused reasonably believed that the force used was proportionate. For example, the jury should ask "Did the accused believe on reasonable and probable grounds that it was necessary to stab the assaulter in order to protect himself?", rather than "Was it necessary for the accused to stab the assaulter in order to protect himself?" Whether the amount of force used was disproportionate is proper to be considered by the jury only to the extent that it relates to whether the accused was under a *reasonable* apprehension of death or grievous bodily harm, and whether he had reasonable and probable grounds to believe that he could not otherwise protect himself: *R. v. Bogue* (1976) 30 CCC (2d) 403 (Ont CA). See also *R. v. Mulder (No 1)* (1978) 40 CCC (2d) 1 (Ont CA) and *R. v. Ward* (1978) 4 CR (3d) 190 (Ont CA).

The failure of the accused to retreat is only an element in the considerations of which the reasonableness of an accused's conduct is to be judged; it is simply a factor to be taken into account in deciding whether it was necessary to use force, and whether the force used was reasonable: *R. v. Northwest* (1980) 22 AR 522 (Alta CA), and *R. v. Ward* (1978) 4 CR (3d) 190 (Ont CA).

Evidence of prior violent acts by the assaulter against the accused, against other people and even against property is admissible (if its probative value outweighs its prejudicial effect) to substantiate the accused's apprehension of death or grievous bodily harm and belief that no other reaction would preserve the accused: *R. v. Ryan* (1989) 49 CCC (3d) 490 (Nfld CA).

In a "battered wife syndrome" case, expert evidence was admissible to show that the accused reasonably believed that she was in imminent danger, even though she killed her husband while he was leaving the scene: *Lavallee v. The Queen* (1990) 55 CCC (3d) 97 (SCC).

b.) Self-Defence in Case of Aggression - s. 35

Under s. 35 the use of force is justified if:

1. the accused either:
 - a.) assaulted the other person without justification and without intent to cause death or grievous bodily harm; or
 - b.) provoked the other person without justification to assault the accused;
2. the other person retaliated;
3. the accused did not endeavour to cause death or grievous bodily harm;
4. the accused declined further conflict and quitted or retreated from it as far as it was feasible to do so;
5. the accused used force:
 - a.) under reasonable apprehension of death or grievous bodily harm from the violence of the other person; and
 - b.) reasonably believing that the force was necessary in order to preserve himself from death or grievous bodily harm.

In *R. v. Merson* (1983) 4 CCC (3d) 251 (BCCA) the accused was involved in an intimate relationship with a married woman. One night he decided to go to her home to talk to her, because he was concerned about her relationship with her husband and her drinking problem. He took a gun to protect himself against the husband, who was a larger and stronger man. He entered through a window, and discovered both in bed together. He drew the gun and pointed it at the husband, with whom he talked for 10-20 minutes. At one point he kicked the husband when he attempted to move, and swore at him. The husband tackled the accused and the gun went off, hitting the accused in the leg. A struggle ensued and the accused testified that he was in fear of his life. The gun discharged twice, killing the husband.

The Court ruled that there was evidence which required the trial judge to leave s. 35 to the jury. If the accused did not have any intent to cause death or grievous bodily harm to the combatant, he could justify the use of force subsequent to the initial assault if he met the requirements of the section. "Further conflict" in s. 35(c) can only mean the conflict which is generated by the initial assault or provocation offered by the accused. It is during the "further conflict" that the accused must, if it is feasible to do so, decline further conflict and retreat from it before the necessity of preserving himself from death or grievous bodily harm arises.

If the jury accepted the accused's evidence that he feared the husband but had no intention to kill him or cause him grievous bodily harm and his evidence that he had to resist the efforts of the husband to get the gun in order to preserve himself from death or grievous bodily harm, then the jury could acquit the accused. Section 35 is designed to permit resistance and does not require the accused to surrender himself to the mercy of the combatant.

c.) Preventing Assault - s. 37

Under s. 37 the use of force is justified if:

1. the accused or someone under the accused's protection is assaulted; and
2. the accused uses no more force than is necessary to prevent the assault or its repetition.

The accused must be faced with an actual assault, something which he must defend against, before s. 37 can be invoked. The assault must be life-threatening before the accused can be justified in killing in defence of his person or that of someone under his protection: *R. v. Whynot* (1983) 9 CCC (3d) 449 (NSCA).

d.) Excessive Force - s. 26

There is in Canada no qualified defence of excessive self-defence under s. 26, reducing murder to manslaughter: *Brisson v. The Queen* (1982) 69 CCC (2d) 97 (SCC), *R. v. Faid* (1983) 2 CCC (3d) 573 (SCC) and *R. v. Bayard* (1989) 70 CR (3d) 95 (SCC).

3. SHORTCOMINGS OF THE PRESENT LAW

a.) the legislation is too complex:

- i.) lay citizens cannot hope to understand the law, or their rights and duties; and
- ii.) judges routinely misdirect juries, and even a properly instructed jury will find the charge bewildering;

b.) s. 35 is incomprehensible;

c.) several sections appear to conflict with each other. For example, under s. 37 a person can use only proportionate force to prevent the repetition of an assault, whereas under s. 34(2) a person can cause death if he or she *reasonably believes* that such force was necessary to preserve that person's life;

d.) s. 26 and 37(2) appear to say much the same thing.

e.) it is not necessary to distinguish between assaults on the accused which are provoked and not provoked; and

f.) it is not necessary to distinguish between intending and not intending to cause death or grievous bodily harm, as the accused's conduct will be measured against whether he used reasonable force.

4. PROPOSALS FOR REFORM

a.) Canada

i.) Law Reform Commission of Canada

3(10) Defence of the Person

- (a) General Rule. No one is liable if he acted as he did to protect himself or another person against unlawful force by using such force as was reasonably necessary to avoid the harm or hurt apprehended.
- (b) Exception: Law Enforcement. This clause does not apply to anyone who uses force against a person reasonably identifiable as a peace officer executing a warrant of arrest or anyone present acting under his authority.

3(17) Mistaken Belief as a Defence.

- (a) General Rule. No one is liable if on the facts as he believed them he would have had a defence under clauses 3(1) or 3(8) to 3(16).

ii). Working Group on the General Part

It recommended that "defence of the person" be expanded so as to include acts or omissions which would otherwise be criminal, such as theft, unlawful confinement, damage to property, possession of a weapon and omitting to perform a lawful duty, but which constitute a reasonable means of defence.

iii). Federal-Provincial Working Group on Homicide

It recommended that the following provision be included in the *Criminal Code* regarding homicide:

No one commits an offence of homicide by reason of reasonable conduct including due regard for the safety of innocent persons, that results in death or serious bodily harm, if he or she honestly believed, on reasonable grounds, that the conduct was necessary to prevent imminent serious harm to himself or herself or to any other person.

This provision would take the place of several existing justificatory defences such as compulsion by threats, defence of personal property, defence with claim of right and self-defence in case of aggression. The provision is more general and would clear up the inconsistencies which exist in the present law. A possible disadvantage of such a proposal is that it would eliminate a separate provision concerning the defence of property. This might mean that a person could no longer use force to protect property but only to protect oneself or another.

iv). Canadian Association of Chiefs of Police

The Association believes that a defendant should be permitted to use force in defence, not just when unlawful force is actually applied, but also when the defendant has a reasonable apprehension on *unlawful* force.

The Association also believes that the "law enforcement" exception should apply to *any* arrest, not just arrests pursuant to a warrant. Such an amendment would presume that all arrests are lawful and would, it is argued, have the effect of deterring resistance to arrest regardless of whether the defendant thinks the arrest is lawful.

b.) Foreign Jurisdictions

i.) United Kingdom

The draft *Code* prepared by the Law Commission states in part ...:

44. (1) A person does not commit an offence by using such force as, in the circumstances which exist or which he believes to exist, is immediately necessary and reasonable:

(c) to protect himself or another from unlawful force or unlawful personal harm

(4) Notwithstanding subsection (1), a person who believes circumstances to exist which would justify or excuse the use of force under that subsection has no defence if:

(a) he knows that the force is used against a constable or a person assisting a constable; and

(b) the constable is acting in the execution of his duty,

unless he believes the force to be immediately necessary to prevent personal harm to himself or another.

ii.) Australia

The Review Committee recommended adoption of language almost identical to the United Kingdom proposal: see Draft Bill, s. 3Y(1)(b).

iii.) New Zealand

The draft *Crimes Bill*, s. 41 states:

Every person is justified in using, in self-defence or the defence of another, such force as, in the circumstances as that person believes them to be, it is reasonable to use.

iv.) United States

The Model Penal Code states:

Section 3.04 Use of Force in Self-Protection.

(1) Use of Force Justifiable for Protection of the Person. Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

(2) Limitations on Justifying Necessity for Use of force.

(a) The use of force is not justifiable under this Section:

(i) to resist an arrest that the actor knows is being made by a peace officer, although the arrest is unlawful; ...

(b) The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; ...

(c) Except as required by paragraphs (a) and (b) of this Section, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used, without retreating, surrendering possession, doing any other act that he has no legal duty to do or abstaining from any lawful action.

Section 3.05. Use of force for the Protection of Other Persons.

(1) Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable to protect a third person when:

(a) the actor would be justified under Section 3.04 in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect; and

(b) under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and

(c) the actor believes that his intervention is necessary for the protection of such other person.

5. DISCUSSION

Our society places a premium on the physical security of the person. It abhors personal violence and, in most circumstances when violence against the person is required, vests that power exclusively in the State.

One of the few exceptions to that general principle is the "defence of the person" justification. In developing a doctrine of "defence of the person", one needs to determine the circumstances in which society will find it acceptable for one person to apply force intentionally, and without consent, to another person.

It is submitted that the intentional application of force, without consent, against another person (the "combatant") will be justified if 3 circumstances exist:

1. there is unlawful force by the combatant;
2. the unlawful force is against the defendant or another person; and
3. the force used by the defendant is not excessive.

While there may be general consensus as to these 3 elements, there are several other subordinate issues which arise, which may be the subject of some debate. It is necessary to

make decisions about these subordinate issues, in order to "flesh out" our doctrine of defence of the person.

1. Unlawful force by the combatant:

a. **How immediate must the unlawful force be?**

We are dealing with a spectrum; at one end is the combatant who threatens to use unspecified force against the defendant at some uncertain time in the future. At the other end of the spectrum is the combatant actually applying unlawful force against the defendant. While the former should not justify the defendant in using force and the latter should, is it possible to articulate how imminent or immediate the threat of unlawful force must be, before the defendant is entitled to apply force in defence?

b. **What if the defendant provoked the combatant's attack?**

If the defendant provoked the combatant's attack, then should the defendant be justified in applying force in retaliation? It may be that provocation is an unnecessary concern on the basis that:

- i. if the defendant's provocation did not amount to an assault, then the combatant was not justified in applying force in response, that any force applied was "unlawful force", entitling the defendant to retaliate;
- ii. if the defendant's provocation did amount to an assault, then the combatant was justified in applying force in response and, so long as the force used was not excessive, it was "lawful force" and the defendant has no justification for retaliating.

2. The Defendant's Belief that the Combatant is Applying Unlawful Force:

a. **Is the defendant's belief relevant?**

Should a defendant be required to show that the combatant was applying unlawful force, or is it enough that the defendant shows that he or she believed that the combatant was applying unlawful force? If the latter, then the doctrine of mistake of fact applies and the defendant may retaliate, even if he or she wrongly believed that the combatant was attacking.

b. **If the defendant's belief is relevant, must it be reasonable?**

Does the defendant have to show that a reasonable person, faced with the circumstances confronting the defendant, would have believed that the combatant was applying unlawful force? Or does that defendant merely have to show that he or she subjectively believed that unlawful force was being applied? If the former is the test, then evidence of intoxication would not be relevant, because that is inconsistent with the "reasonable person" test. The general rule in criminal law, since *Pappajohn v. R.* (1980) 14 CR (3d) 243 (SCC) is that a mistake of fact need not be reasonable. Dickson, J. stated, at p. 267:

Although "reasonable grounds" is not a precondition to the availability of a plea of honest belief in consent [in a case of rape], those grounds determine the weight to be given the defence. The reasonableness or otherwise of the accused's belief is only evidence for or against the view that the belief was actually held and the intent was therefore lacking.

However, intoxication-induced mistake of fact is not a defence to a general intent offence: see "Intoxicated Mistakes", by Kenneth L. Campbell (1989-90) 32 Cr. L. Q. 110-134.

3. The Force Used by the Defendant

a. Is force necessary?

Should the defendant be justified, in every case where the combatant uses unlawful force, in using force in retaliation, or should there be some circumstances in which there is a duty on the defendant to withdraw or at least attempt to withdraw?

It could be argued that the issue of withdrawal need not be addressed specifically in the statute, because it is part of the thought process which the trier of fact will engage in, in determining whether the force used by the defendant was reasonable or proportionate.

b. In determining whether force is justified, is the defendant's belief relevant?

Should the defendant be required to show that it was objectively necessary to apply force in defence, or is it enough that the defendant shows that he or she believed that force was necessary? If the latter, then the doctrine of mistake of fact applies, and the defendant's use of force is justified, even if he or she wrongly believed that force was necessary.

c. If the defendant's belief is relevant, must the belief be reasonable?

If the accused can show that he or she honestly believed that force was necessary in defence, is a totally subjective belief enough, or must the belief be one which a reasonable person would have had in the circumstances faced by the defendant? If the former, then evidence of intoxication would be relevant, whereas in the latter it would not.

d. Should the use of excessive force give rise to a partial defence?

Since *Brisson*, *Faid* and *Bayard*, the law in Canada is that excessive self-defence does not reduce murder to manslaughter. Dickson, J.'s judgment includes a very informative discussion of the history of this issue in Australia (where the High Court created such a common law defence in *R. v. Howe* (1958) 100 CLR 448) and in England (where the notion has been judicially rejected). The rationale for the Supreme Court of Canada's decision was that the *Criminal Code* deals comprehensively with self-defence, and that there is no policy justification for the Court introducing a common law defence of excessive self-defence. Since we are dealing with the development of a new *Criminal Code*, the Supreme Court's decision ought not to be seen as determinative.

Enclosed with this Discussion Paper is an article entitled: "Excessive Self-Defence: A Need For Legislation", by Noel C. O'Brien (1982-83) 25 Cr. L. Q. 441-457. O'Brien makes the case that a statutorily-recognized "half-way house" of excessive

self-defence is consistent with general principles of moral culpability and *mens rea*. Adopting excessive self-defence as a partial defence might be more just than adopting a purely subjective test of whether the accused honestly believed (however unreasonably) that the force applied was reasonable, since the latter (if believed by the jury) would result in a total acquittal.

4. Are there some situations in which a defendant should not be permitted to use any force against unlawful force?

The Law Reform Commission of Canada has recommended a "law enforcement" exception, so that a defendant is not justified in using force against a person reasonably identified as a peace officer executing a warrant of arrest.

The U.K. Law Commission and the Australian Review Committee have recommended a similar exception whenever a constable is acting in the execution of his duty. However, force is justified if the defendant believes it to be immediately necessary to prevent personal harm to himself or another.

The U.S. Model Penal Code precludes the use of force to resist an arrest that the actor knows is being made by a peace officer, although the arrest is unlawful.

5. Should a defendant be justified in taking reasonable defensive action other than force, where such action would normally constitute a crime?

The Working Group on the General Part recommended that a defendant be justified in stealing, unlawfully confining, damaging property, possessing a weapon or omitting to perform a lawful duty, when such action is a reasonable means of defence.

6. COMMENTS ON LAW REFORM COMMISSION RECOMMENDATION

a.) Good Features

- i.) it adopts an elegantly simple drafting style, reducing a full page of complex and contradictory provisions into 8 lines of text;
- ii.) it adopts a proportionality test for all cases;
- iii.) it leaves the door open as to how imminent the combatant's threat of unlawful force must be; and
- iv.) it entitles the defendant to protect any other person, not just someone under the defendant's protection.

b.) Bad Features

- i.) it restricts the defendant to using force, when it may be better to commit some other non-violent offence such as stealing a car or confining the combatant (such conduct might be excused under the defence of necessity);

- ii.) use of the expression "apprehended" in (a) appears to establish a pure subjective test;
- iii.) it is not clear if, under s. 3(17), the defendant would have a defence if he or she honestly believed (however unreasonably) that the combatant was applying unlawful force;
- iv.) s. 3(17) appears to adopt the *Pappajohn* test of the defendant's pure subjective belief (however unreasonable) that he or she was applying reasonable force, but it is not clear how that accords with the apparent "reasonable person" test in (a) of using only such force as is "reasonably necessary";
- v.) if the proper interpretation in (iv) above is that the defendant may use only such force as is "reasonably necessary", then the *Criminal Code* should adopt a partial defence of excessive self-defence, reducing murder to manslaughter if the defendant honestly believed, albeit unreasonably, that he or she was applying reasonable force; and
- vi.) the "law enforcement" exception, if warranted at all, is too wide. For example, the defendant ought to be justified in using force in some circumstances, such as where the arresting officer uses excessive force. The recommendation in the United Kingdom and Australia is that the defendant may resist an officer if "he believes the force to be immediately necessary to prevent personal harm to himself or another."