

Marine Barjol

Ottawa Internship

Writing Assignment #3

June 20<sup>th</sup> 2016

Policy Report: Self Defense and defense of Property

“You do not have the right to take another human's life, unless it's in strict self-defense.” – Michael Moore

Self-defense and defense of property have recently been on the front page of the news in various countries. It is always a controversial topic when a trial is on going and someone claims self-defense or defense of property. In fact, if self-defense/defense of property is defined in the same way by almost all countries in the world, though the way it is applied in real life can be much harder to define and put limits too. A generally accepted definition of self-defense is a countermeasure that involves defending the health and well-being of oneself, or of another, from harm. A person claiming self-defense must prove at trial that the self-defense was justified. Generally a person may use reasonable force when it appears reasonably necessary to prevent an impending injury. A person using force in self-defense should use only so much force as is required to repel the attack. Courts and tribunals have historically accepted self-defense as a defense to a legal action. As a matter of public policy, the physical force or violence associated with self-defense is considered an acceptable response to aggression. However, if this seems as a simple

and clear explanation of self-defense, Canada always had a Criminal Code that made self-defense and property defense very hard to understand and to know when it is possible to use it as a defense against a crime. Therefore, on November 22<sup>nd</sup> of 2011, the Honorable Rob Nicholson, who was at the time the Minister of Justice, decided to introduce to Parliament a new bill called Bill C-26: An act to amend the Criminal Code (citizen's arrest and the defences of property and persons.) This bill amends the Criminal Code to enable persons who own or have lawful possession of property, or persons authorized by them, to arrest a person they find committing a criminal offence on or in relation to that property, within a reasonable time. The bill also amends the Code to simplify the provisions relating to the defences of property and persons.<sup>1</sup> According to Mr. Robert Goguen (Parliamentary Secretary to the Minister of Justice, CPC) in his speech in front of the house of common on December 1, 2011: "Bill C-26 was first introduced in the last Parliament as Bill C-60. [...] Prior to the introduction of former Bill C-60, the issue of citizen's arrest had been subject to two private member's bills and numerous discussions in parliaments, newspaper and, no doubt, in coffee shops across the country. So the straightforward reform proposed for the law of citizen's arrest in the bill is well understood and well supported by all parties."

It is hard for a country to make a policy on a subject such as self-defense/defense of property as it is sometimes hard to draw the line between self-defense/defense of property and unjustified actions, especially when the public opinion get involve on

---

<sup>1</sup> Legislative Summary, Bill C-26: The Citizen's Arrest and Self defence Act.

self-defense cases and judges have to make a verdict based on the law and not what the public opinion might think is seen as self-defense or not.

The Criminal Code in Canada was very long and complicated before the new bill C-26 was given the royal Assent. In fact, the law on self-defense was codified in section 34 to 37 of the Criminal Code. These sections set out the different circumstances in which a private citizen may defend himself, herself, or another person against unlawful attack. Section 34 of the Code used to define the extent to which force is justified in repelling an unprovoked assault. Section 35 of the Criminal Code used to outline the application of self-defense to those instances where the person seeking to rely on self-defense initiated or provoked the assault. Section 36 of the Code used to establish that provocation includes, for the purpose of sections 34 and 35, provocation by blows, words and gestures. Finally, section 37 used to apply to both self-defense and defense of another with a requirement of proportionality. Therefore, the Criminal code sets out four possible types of self-defense, but the basic principle can be simply stated – an individual who is unlawfully threatened or attacked must be accorded the right to respond.<sup>2</sup> But this right of response is not an unlimited one. In fact, a defense such as self-defense is treated no differently than substantive elements of an offence. Once a defence is properly presented before the court, in that it has been shown to have an “air of reality”, the burden of disproving it beyond a reasonable doubt falls to the Crown.<sup>3</sup> The “air of reality” test means that in order for self-defense to be left to the judge or

---

<sup>2</sup> Morris Manning and Peter Sankoff, *Manning, Mewett and Sankoff: Criminal Law*, 4<sup>th</sup> ed., LexisNexis, Markham, Ont., 2009, p.532.

<sup>3</sup> R. v. Lieberman, [1970] 3 )R. 407 (Ont. C.A.), paras. 411-412.

jury, there has to be evidence capable of supporting every element of the defense upon which a properly instructed jury could acquit, in that the jury could be left with a reasonable doubt.<sup>4</sup> The claim of self-defense can be based upon a mistaken perception, but the apprehension of death or grievous bodily harm must be reasonable. Therefore, this mistake must be one which an ordinary person using ordinary care could have made in the same circumstances.<sup>5</sup> A person claiming the right of self-defense cannot be expected to measure exactly the defensive action he or she takes. Nor can he or she be expected to stop and reflect upon the risk of deadly consequences, which might result from taking justifiable defensive action.<sup>6</sup> The complexity and various types of self-defense defined in the Canadian Criminal Code were criticized by many judges in Canada. Chief Justice Lamer, in *R. v. McIntosh*<sup>7</sup>, stated that sections 34 and 35 are “highly technical, excessively detailed provisions deserving of much criticism. These provision overlap, and are internally inconsistent in certain respects.”<sup>8</sup>

In a similar way the criminal code was hard to understand on defense the of property. As is for self-defense the criminal code for defense of property was composed of four sections: Sections 38 to 42, which codified the legal power of people to use force to protect their property against theft or damage. Sections 38 and 39 deal with movable property, while sections 40 to 42 apply to the defense of real property and dwelling-houses. In general, more force is permitted in the

---

<sup>4</sup> *R. v. Cinous*, [2002] 2 S.C.R. 3.

<sup>5</sup> *R. v. Reilly*, [1984] 2 S.C.R. 396.

<sup>6</sup> *R. v. Kandola* (1993), 80 C.C.C. (3d) 481 (B.C.C.A.).

<sup>7</sup> *R. v. McIntosh*, [1995] 1 S.C.R. 686.

<sup>8</sup> *Ibid.*, para. 16.

protection of dwelling-houses or real property than can be used to defend movable property. The Code also recognizes that it is often difficult to distinguish between the defense of self and the defense of one's property. The Code, therefore, specifically states that certain defenses of property will amount to self-defense as well, at least where the trespasser refuses to leave the premises. However, in the case of *R. v. Gunning*<sup>9</sup> the Supreme Court of Canada established that section 41 of the Code does not allow a person to kill an intruder in defense of property solely of his or her property; the intentional killing of a trespasser can only be justified where the person in possession of the property is able to make a case of self-defense. This section that used to set out the amount of defensive force that is justifiable in dealing with trespassers on real property or in a dwelling-house. This led to even more confusions on the application of this part of the Criminal Code.

Finally, the last part that was changed in the criminal code concerned the citizen's arrest. Since at least the 1100s, the criminal law in England recognized the duty of all citizens to assist on the capture and arrest of all persons suspected of having committed a crime.<sup>10</sup> In Canada, the powers on private citizens to arrest without a warrant have been codified in section 494 of the Criminal Code. The most prominent case relating to the power of citizens to make arrests is that concerning Toronto grocery store owner David Chen.<sup>11</sup> Like for the other part of the Criminal

---

<sup>9</sup> *R. v. Gunning*, [2005] 1 S.C.R. 627, para. 25.

<sup>10</sup> R.E. Salhany, *Canadian Criminal Procedure*, 6<sup>th</sup> ed., Thomson Reuters, Aurora, Ont., 2010, para. 3.220. The Assize of Clarendon issued by Henry II in 1166 is one of the earliest records of the recognition of this duty. The common law on this issue is expressed in the maxim *Necessitas Indicit Privilegium Quoad Jura Privata* ("From necessity spring privileges upon private rights").

<sup>11</sup> *R. v. Chen et al.*, 2010 ONCJ 641.

Code, the citizen arrest was easier to understand in theory than in real life. Mr Chen was charged with assault and forcible confinement after tying up a man that had robbed his store an hour earlier. The judge acquitted him on the basis that since the man came back to the store after he stole something, this was a continuing theft. Even though the original theft had taken place one hour before, it was found that the thief, by returning to commit another theft, was “found committing” an indictable offence within the meaning of section 494 of the Criminal Code. While considering, and rejecting, the issue of the use of excessive force, the judge warned of the “pitfall of taking the law into one’s hand. One can never predict the outcome.”

Therefore, after many complaints of judges, law-related professionals but also the population that could not understand much of this part of the criminal code, and after various attempt in parliament to amend the Criminal Code, the minister of Justice of the 41<sup>st</sup> Parliament, the Honorable Rob Nicholson started the process to amend the Criminal Code on November 22<sup>nd</sup>, 2011. The legislative approach for this amendment of the Criminal code was to replace multiple defenses with single defenses. During the second reading on December 15<sup>th</sup>, 2011 many MP’s from various parties asked questions about this new bill and proposed many different things to review in committee and also delivered speeches to support or oppose bill C-26. Mr. Robert Goguen, Parliamentary Secretary to the Minister of Justice, House of Commons debates, December 1, 2011 delivered the opening speech to support this bill explaining the necessity of this bill:

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

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

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

“The defenses of person and property in Canadian law are bedeviled by excessively complex and sometimes obtuse Code provisions.”

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

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

Parliament has a duty to ensure that laws are clear and accessible to Canadians, criminal justice participants and even the media. That is exactly what we are proposing to do in Bill C-26, even though the actual rights of Canadians are robust and upheld in Canadian courts on a daily basis. When the laws which set out these rules are confusing, we fail in our responsibility to adequately inform Canadians of their rights. Obviously, unclear laws can also complicate or frustrate the charging provisions of the police who themselves may have difficulty in reading the Criminal Code and understanding what is and is not permitted. Bill C-26 therefore proposes to replace the existing Criminal Code provisions in this area with clear, simple provisions that would maintain the same level of protection as the existing laws but also meet the needs of Canadians today.”<sup>12</sup>

Political Parties were mostly all agreeing with the necessity to amend the Criminal Code, they only had some issues with some of the way the bill was written or some of the proposition, all of which was reviewed and worked on in the committee on Justice and Human rights. The committee reported back with the new bill with amendments on March 12<sup>th</sup>, 2012. The bill was voted on during third reading on May first 2012. It then went to the Senate and finally received the Royal Assent on June 28<sup>th</sup>, 2012

---

<sup>12</sup> Parliament of Canada website



Bill C-26 amends the Criminal Code to enable a person who owns or has lawful possession of property, or persons authorized by them, to arrest within a reasonable time a person whom they find committing a criminal offence on or in relation to that property. It also amends the Criminal code to simplify the provisions relating to the defenses of property and persons. In order to do so Bill C-26 contains four clauses. Sections 34 to 42 were replaced by Two sections: 34 that define the self-defense – Use or threat of force and the factors to take into account and then states what is not considered as self-defense. And 35 that define the defense of property and what is not considered the defense of property. In addition, there is a modification of the Subsection 494(2) the arrest by owner of property. Finally, Section 494 of the Act is amended by adding a subsection(3).

In order to answer the many complaints of judges and law professional that implied that the Criminal Code was complicated and not possible to understand the department of Justice came up with a Technical Guide for practitioners in March 2013. This guide of about 34 pages as for objective to promote, for legal practitioners, a common understanding of the purpose and effect of the reforms and a common set of arguments as to their application and interpretation. So as to produce meaningful and consistent jurisprudence as rapidly as possible, while avoiding both confusion and uncertainty.<sup>13</sup> This guide provide for law practitioners a more technical description of each section (including subsections and paragraphs) of the new defenses, including Identifying the aspect of the new laws that mirror the

---

<sup>13</sup> Bill C-26, Technical Guide for practitioners.

old laws and aspects that are changed, and also where new laws differs from old laws, an explanation of the reason for that change. This Guide is really important in the after of this policy making as it permit to really implement the change that can sometimes take time when changes are made in Legal texts. Moreover it uniforms the way practitioners are going to view and approach these new texts and how jurisprudence is going to be created.

We can compare the Canadian law on self-defense, property defense and citizen's arrest to similar laws in many different countries. In fact, self-defense and defense of property is always controversial in many countries when a big case comes to the attention of the public eyes. Recently in France a case concerning self-defense became a big subject of conversation and many association and personality as well as the population became involve and signed petition when they disagreed with the judge. This led to a lot of attention and to the president taking action and giving grace to a person that was claiming self-defense when the judges at every level did not accepted this line of defense. This is obviously a rare case of huge involvement of the public opinion in the legal system and is really different from Canadian legal system. Therefore, for the purpose of this paper I will only compare it to U.S. Law and U.K. Law.

The legal situation in the United States is complex as each state has its own criminal code and therefore its own law regarding those issues. To just choose one,

the Penal Code of Texas<sup>14</sup> deals with Self-defense in its Chapter 9, “Justification Excluding Criminal Responsibilities.” It states that “a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other’s use or attempted use of unlawful force.” The Penal Code then goes on and gives all the situations in which the use of force is to be considered “reasonable.” The Penal Code also states the situation in which the use of force is not justified. Of note in the Texas provisions is that they do not allow self-defense to be used as an excuse or justification as a response to verbal provocation alone. In addition, there is an emphasis in Texas on the defense of one’s home, with deadly force permitted in such circumstances. As for the power of citizens to make arrests in Texas is set out in the Code of Criminal Procedure.<sup>15</sup> Article 14.01 of this statute states that any person may, without a warrant, arrest an offender when the offence is committed in his or her presence within his or her view, if the offence is one classed as a felony or as an offence against the public peace.

In the United Kingdom, the Crown Prosecution Service has issued a guide called “Self-Defense and the Prevention of Crime.”<sup>16</sup> In this guide, it is stated that defense of the person is governed by the common law, while arrest and the prevention of crime are governed by the *Criminal Law Act 1967*. When presented with a case involving assertions of self-defense or action in the prevention of crime

---

<sup>14</sup> Texas, Penal Code.

<sup>15</sup> Texas, Chapter 14, “Arrest Without Warrant,” in Code of Criminal Procedure.

<sup>16</sup> United Kingdom, “Civilian Power of Arrest,” in *Self-Defense and the Prevention of Crime*, 7 July 2009.

and the preservation of property, prosecutors in the UK are urged to be aware of the balance to be struck between: the public interest in promoting a responsible contribution on the part of citizens in preserving law and order; and vigilantism and the use of violence generally. As in Canada, the prosecution, in rebutting the defense of self-defense, must meet the criminal standard of proof; the burden of proof remains with the prosecution when the issue of self-defense is raised. The prosecution must have sufficient evidence to satisfy a jury beyond a reasonable doubt. Self-defense is available as a defense to crimes committed by use of force. The basic principles of self-defense are set out in *Palmer v. R.*<sup>17</sup> “It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but only do, what is reasonably necessary.” There is no law in the U.K. to say that people must wait to be struck first before they may defend themselves.<sup>18</sup> Failure to retreat when attacked and when it is possible and safe to do so is not considered conclusive evidence that a person was not acting in self-defense. It is simply a factor to take into account. An important difference from Canadian law is in the case where the accused initially sought the confrontation. In the case of *R. v. Balogun*,<sup>19</sup> it was held that “[a] man who is attacked or believes that he is about to be attacked may use such force as is both necessary and reasonable in order to defend himself. If that is what he does then he acts lawfully.” According to the Crown Prosecution Service guide, it follows that a person who starts the violence cannot rely upon self-defense to render his or her action lawful. Even when

---

<sup>17</sup> *Palmer v. R.*, [1971] A.C. 814 (United Kingdom).

<sup>18</sup> *R. v. Deana*, 2 Cr. App. R. 75 (United Kingdom).

<sup>19</sup> *R. v. Balogun*, [2000] 1 Archbold News 3 (United Kingdom).

warding off attacks, if the person defending himself or herself volunteered for the fight, such actions are not lawful, they are unlawful acts of violence. As for the power of a citizen to make an arrest applies only for indictable offences.<sup>20</sup> A citizen may arrest anyone who is in the act of committing an offence, or whom the arrestor has reasonable grounds for suspecting to be in the act of committing an offence.

Therefore, in the international context, There are many laws that are all similar in some ways but can also have differences depending on their own other criminal laws.

In conclusion, after many complaints by many professionals of the Law but also the public opinion The Minister of Justice of the 41<sup>st</sup> Parliament decided to present a Bill to amend the Criminal Code. This bill was mostly supported in every political party represented in Parliament and also by professional working in the legal industry. The Bill was supposed to make the Criminal Code simpler when it comes to self-defense, defense of property and citizen's arrest. This objective was met and was even exceed as the department of justice created a guide to help in the transition to the new Criminal Code and to explain in more details the change in the law for a perfect understanding from professional and a unification of the way professional such as lawyers and judges will deal with cases in relation with self-defenses, defense of property and citizen's arrest. Moreover, the amendment of the Criminal Code also permitted a better understanding of it by the general population as people had a hard time understanding the old laws as they were specifics but

---

<sup>20</sup> United Kingdom, *Police and Criminal Evidence Act 1984*, s. 24A.

with many exceptions and complex vocabulary. In my opinion, this amending of the Criminal Code was necessary as the law is always evolving with time and this had not been changed for years. Moreover, in case such as self-defense and defense of property that always have cases presented in front of the judge that are all different and complex a lot can be changed with the jurisprudence that a judge set but it cannot always be applied to different cases. Therefore, the fact that the law has been made more simple and general makes it easier for the Legal profession to go to trial more prepared and have a better way to make their case. It is also easier now for judges across the country to have judgments that are similar and easier to make because of the law being simpler.

## **Bibliography**

Bill C-26, Technical Guide for practitioners.

Legislative Summary, Bill C-26: The Citizen's Arrest and Self defence Act.

Morris Manning and Peter Sankoff, *Manning, Mewett and Sankoff: Criminal Law*, 4<sup>th</sup> ed., LexisNexis, Markham, Ont., 2009, p.532.

Palmer v. R., [1971] A.C. 814 (United Kingdom).

Parliament of Canada website.

R. v. Balogun, [2000] 1 Archbold News 3 (United Kingdom).

R. v. Chen et al., 2010 ONCJ 641.

R. v. Cinous, [2002] 2 S.C.R. 3.

R. v. Deana, 2 Cr. App. R. 75 (United Kingdom).

R.E. Salhany, *Canadian Criminal Procedure*, 6<sup>th</sup> ed., Thomson Reuters, Aurora, Ont., 2010, para. 3.220. The Assize of Clarendon issued by Henry II in 1166 is one of the earliest records of the recognition of this duty. The common law on this issue is expressed in the maxim *Necessitas Indicit Privilegium Quoad Jura Privata* ("From necessity spring privileges upon private rights").

R. v. Gunning, [2005] 1 S.C.R. 627, para. 25.

R. v. Kandola (1993), 80 C.C.C. (3d) 481 (B.C.C.A.).

R. v. Lieberman, [1970] 3 J.R. 407 (Ont. C.A.), paras. 411-412.

R. v. Reilly, [1984] 2 S.C.R. 396.

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

Texas, Chapter 14, "Arrest Without Warrant," in Code of Criminal Procedure.

Texas, Penal Code.

United Kingdom, “Civilian Power of Arrest,” in *Self-Defense and the Prevention of Crime*, 7 July 2009.

United Kingdom, *Police and Criminal Evidence Act 1984*, s. 24A.