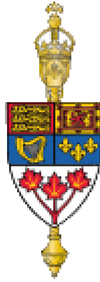

Standing Committee on Justice and Human Rights

Comité permanent de la justice et des droits de la personne

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(1105)

[*English*]

The Chair (Mr. Dave MacKenzie (Oxford, CPC)): I will call this meeting to order. This is the 24th meeting of the Standing Committee on Justice and Human Rights dealing with C-26, An Act to amend the Criminal Code (citizen's arrest and the defences of property and persons).

Today we have two officials at the table with us from the Department of Justice to help us get through the bill, and there are other officials in the room if there are questions that need to be answered. We have Joanne Klineberg and Catherine Kane.

If you have some statements that you wish to make to begin the meeting, please go ahead.

Ms. Joanne Klineberg (Senior Counsel, Criminal Law Policy Section, Department of Justice): Thank you for the opportunity to provide some additional information on just a few specific issues that were raised during the testimony of witnesses that you heard over the last few weeks.

In relation to the use of technology and the citizen's arrest power, questions have been asked about whether the concept of "finds committing" can apply where technology is used in observing the crime, such as closed-circuit TV cameras.

As several witnesses have noted before you, the courts make every effort to interpret "finds committing" in a very flexible manner. For instance, the courts have held that it is not required for the arrester to see the entire transaction of the crime. It is sufficient to witness enough acts that give rise to a reasonable belief that a crime is in progress. The courts have also held that an arresting person may rely on reasonable inferences drawn from what he or she has seen transpire in their presence, and that it's not necessary that the arrester have personal knowledge of all the factors that lead them to conclude that a crime is in progress.

Specifically in relation to the use of technology, court cases have indeed held that observations of crime through closed-circuit television or other types of new technology are equivalent to observations through physical proximity and therefore don't detract from the "finds committing" requirement. Therefore, it appears that it would not be necessary to explicitly refer to technology in the citizen's arrest provisions.

In relation to self-defence, both Professor Stewart and Mr. Russomanno expressed concern over the new self-defence provision that would treat proportionality between the incoming threat and the defensive response as a factor to consider in determining whether the accused should be acquitted.

By contrast, the current law treats proportionality between the threat and the response as a necessary criterion for the defence to succeed. We do not consider this change to be a matter of concern.

One reason for this shift is that the proportionality requirement is not actually applied literally in the courts. You've heard Professor Stewart refer to the principle that the accused need not weigh to a nicety the exact measure of defensive force that they may use.

The courts recognize that in the heat of physical confrontation, a person who perceives himself or herself at risk of harm is going to be frightened and agitated. Under these circumstances, the law does not expect that a person engage in "detached reflection", or to precisely calculate the amount of force that is just right to deflect the attack, but no more than that.

In other words, the courts recognize that actual proportionality between the threat and the response is too much to expect of a person caught up in a violent confrontation. The requirement of proportionality is, by virtue of the common law, interpreted more flexibly than the its definition implies.

In simplifying the law of self-defence, the decision was made to avoid proportionality as a strict requirement, in part because it's not really a strict requirement under the law today. Instead, the ultimate measure of acceptable force would be reasonableness.

Reasonableness is preferable because, by its very definition, it is flexible and slightly broader. It also certainly includes proportionality as a matter of logic. For even greater clarity, proportionality is set out in the list of factors that the court can consider. So, there is really no possibility of the courts losing sight of its importance.

Logically and practically, something that is disproportionate cannot also be reasonable. For instance, if I shoot someone who is threatening to break my finger, my actions are completely disproportionate and it is not conceivable that a court or a jury could find such actions to be reasonable in the circumstances.

Professor Stewart also testified before you that self-defence should be limited to responses to unlawful assaults. It is certainly true that the overwhelming majority of self-defence cases involve responses to unlawful attacks. These are precisely the situations that lead people to need to react defensively. It's natural to assume that this should be a limiting condition of self-defence.

However, there are rare circumstances in which a person should be entitled to act defensively against an attack that is not necessarily unlawful. Section 35 of the Code, one of the four sections on self-defence today, speaks directly to one such situation, namely where the initial instigator of an assault subsequently needs to act defensively because of the response of the other person. I would be pleased to provide further examples of such situations, if you have additional questions on that.

The unlawful attack element is also removed because it causes a great deal of difficult under the current law. This element complicates trials unnecessarily by placing the focus on the early stages of a confrontation.

In asking the jury to determine who attacked whom first, the jury must look to which actions constituted the first assault, and this in turn requires the jury to determine what the accused believed about the intentions of the other party. It's far preferable to focus attention on the thoughts and actions of the defender at the time when they committed the actions they are charged with.

The removal of this element is not a cause for concern for two reasons. First, the new law of self-defence would include an explicit "defensive purpose" requirement. This means that in any case where a person uses force against someone acting lawfully, they will not have the benefit of self-defence unless they were found to be genuinely acting defensively, and not for another purpose.

The second assurance is located in the proposed new subsection 34(3), which deals with the most common claims of self-defence against lawful conduct, namely against police action such as arrest. The new law would make it clear that in the case of police action, self-defence is only

available if the defender reasonably believes the police are acting unlawfully, such as by using excessive force.

Those are my opening remarks.

Thank you.

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The Chair: Thank you.

Ms. Findlay.

Ms. Kerry-Lynne D. Findlay (Delta—Richmond East, CPC): Thank you. Thank you to both of you for bringing some clarity, hopefully, here today.

I was particularly interested in your comments, Mr. Klineberg, on fines committing because that was an area that was causing some of the witnesses and I think some of us some concern and understanding. I am not concerned about the use of the term “reasonableness” because the courts do deal with this every day and we have such a history of jurisprudence in that area I think that it's pretty clear where we're going there.

You mentioned in dealing with fines committing that the case laws talked about reasonable belief and reasonable inference. I was wondering if you would just comment on how that is a different test from reasonable and probable grounds which is something law enforcement deals with all the time but is not in this legislation in those words at least.

(1120)

Ms. Joanne Klineberg: That's a good question. I don't think there's very much of a difference between those concepts. In fact I think much of the jurisprudence that deals with citizen’s arrest when it comes to the core issues of fines committing and the nature of the offences and so on the jurisprudence that deals with arrest by peace officers is looked to when a court's dealing with an arrest by a citizen. In other words, when we are talking about arrest without a warrant which the police also have the power to do in certain circumstances the elements would be interpreted in much the same way so there would be consistency there.

Ms. Kerry-Lynne D. Findlay: Thank you.

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The Chair: Thank you.

Ms. Findlay.

Ms. Kerry-Lynne D. Findlay: Thank you. This issue has arisen when we're looking at this bill as to the informing of someone arrested as to their charter rights, and it's my understanding that in the law presently there is a requirement to turn over this person to law enforcement at the earliest possible opportunity, as is reasonable within the circumstances, and I don't think this bill is changing that requirement, but perhaps you can confirm that.

Also, am I correct in saying that as soon as that person is turned over to law enforcement, then of course there is a requirement by law enforcement to advise them of their rights?

(1150)

Ms. Catherine Kane: That's correct. We're only amending subsection 2 of section 494 of the code. Subsection 3 remains which requires delivery to the peace officer. So this provision will remain in the law. Anyone other than a peace officer who arrests a person without warrant shall forthwith deliver the person to a peace officer.

So “forthwith” has that element of “ASAP”. In the scenario that I described earlier in response to Monsieur Jacob, if the person arresting calls the police and says he or she has arrested so-and-so for a theft, the police officer would either tell the caller to release that person now and a summons to appear will be sent, or the police would come and take over. At that point, the person would be subject to all the provisions and safeguards and notice requirements that police would otherwise provide to somebody they arrest.

Ms. Kerry-Lynne D. Findlay: So the requirement isn't on the citizen making the arrest to somehow know how to provide notice of charter rights. It's still with law enforcement who are trained in that and would be brought in as soon as possible.

Ms. Catherine Kane: Yes.

The Chair: Thank you.