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 call the meeting to order. This is meeting number 25 of the Standing Committee on Justice and Human Rights. Pursuant to the order of reference of Thursday, December 15, Bill C-26, An Act to amend the Criminal Code (citizen's arrest and the defences of property and persons). Today we are at clause-by-clause consideration. I understand there are a number of amendments being proposed.

Perhaps before we start, just a little housekeeping, I understand that if the House decides to treat the Thursday before Good Friday as a Friday, we will not have a committee meeting on that date. I'm not sure that decision has been made, but if it does, just for planning--

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The Chair: NDP-1.

Mr. Harris?

Mr. Jack Harris: We're proposing here in clause 2... I don't have the text following line 9 here. Can you give me a text?

So line 9(a) would be they believe that, and the reason for that is that we have representations as you know from the Canadian Bar Association concerned about ensuring that the subjective element be retained there. So that's taking out the words "on reasonable grounds."

Essentially we're saying that they believe on reasonable grounds that force is being used against them, and I think it's important to emphasize this objective here because that's what we're trying to do. You obviously don't have if you don't have the beliefs. We suggest that this be change.

I think my colleague may have some other comments.

The Chair: Ms. Findlay, I think.

Ms. Kerry-Lynne D. Findlay (Delta—Richmond East, CPC): Thank you, Mr. Chair.

My problem with this is that this motion seeks to delete, in my view, one of the key elements in the defence of self-defence, and that is that the person believes on reasonable grounds that force is being used against them. The deletion of "reasonable grounds" as a criteria would result in, for want of a better expression, the bald belief that no matter unreasonable it may be as a basis for committing an act in perceived defence.

So in other words, this new defence as I read it has been drafted to maintain the current approach to the perception of a threat, which is both subjective and objective. I think that's important to keep both those elements. Adopting this proposal would depart from the current approach to self-defence in relation to this core element. I cannot support it for those reasons.

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Ms. Joanne Klineberg (Senior Counsel, Criminal Law Policy Section, Department of Justice): What our view would be is it's absolutely correct you have to look at all the elements as a whole. Essentially the way self-defence works now is there's the question of the perception of the threat which must be both subjectively held, the perception, and that perception must be reasonably.

With respect to the question of whether the force used can justify the act the question is both did that person think what he was doing was the right thing to do, and was it the right thing to do from a reasonable perspective.

With respect to the front-end the perceptions and the back-end the response presently there's both a subjective and an objective component of both of those. What we tried to do was to maintain the combined subjective objective in terms of the perspective of the threat, and when it comes to the response we separate it in to two distinct elements. The subjective intention to act for a defensive purpose, and the objective reasonableness of the acts that were ultimately committed. But as you say they all do work together.

My concern would be if you make the perception purely subjective and then there's a purely subjective intention to act defensively if the perception was unreasonable then the need to act in self-defence was also unreasonable I just feel asa though one side is purely subjective and the back-end will be purely objective, whereas I think it's preferable to maintain a combination of both throughout the analysis.

The Chair: Thank you.

I was remiss I forget to introduce two officials at the table with us Ms. Klineberg and Ms. Kane to help. Thank you very much.

Mr. Woodworth.

Mr. Stephen Woodworth (Kitchener Centre, CPC): Thank you very much, Mr. Chair.

I listened with interest to Madam Boivin's comment and I would just like to remind the committee that the question of reasonableness has always been a part of our law when it comes to issues of mistake, or mistake in fact. So for example if I embrace someone under the mistaken apprehension that they are consenting and it turns out they were not consenting the court would most definitely wish to examine whether or not my belief was reasonable.

This is in fact a long tradition in Canadian law and it is reflected in the existing versions of this provisions as the official mentioned, and I think that if we were to depart from it we would be creating a new perspective on things which would in fact increase the confusion that we are trying to avoid.

Apart from that I would want to point out that as a matter of interpretation when we qualify the words in this way “belief on reasonable grounds” we are admitting only of that one kind of belief. If we remove that qualification then we are admitting the possibility that other forms would be operative. So you might just as well amend it to say “they believe reasonably or unreasonably” as you would to take out the qualification “unreasonable belief”. So I have to oppose this motion.

(1120)

The Chair: Thank you, Mr. Woodworth.

Ms. Findlay.

Ms. Kerry-Lynne D. Findlay: I just wanted to add and echo somewhat Mr. Woodworth that this has been a matter of a great deal of interpretation in our jurisprudence and the courts have considered reasonableness many times. It may be that this is coming from some testimony of the perception of persons defending themselves that should be paramount.

I think it would be very dangerous and not consistent with jurisprudence so far if the reasonable belief portion was restricted in that way. We want to, as Ms. Klineberg said, keep both the subjective and objective elements throughout the analysis. I think it's important to do so.

The Chair: Thank you.

Mr. Harris.

Mr. Jack Harris: Thank you, Chair.

I would like to say that some of these amendments that we put forth are for probing and discussion purposes and I acknowledge that we've been persuaded by the arguments that we're heard from both the government and the officials here. So we withdraw that.

The approach that we're taking here, and I think this is evident from the speeches that we're giving in the House that we want to ensure as best we can as a committee from my point of view that the changes that are being made are adequate and this is a form of collegial discussion and we accept the arguments that have been put forth. So we withdraw that particular amendment.

The Chair: Thank you.

Ms. Françoise Boivin: That's okay.

The Chair: Does the committee agree with the withdrawal of NDP-1?

(Motion agreed to)

The Chair: Now we move to NDP-1.1.

Mr. Harris.

Mr. Jack Harris: Thank you, Chair.

Members of the committee will recall that I raised this question of the use of the wording “the act that constitutes the offence is committed for the purpose of ... ” and the confusion, at least in the ordinary minds of the person reading that, if you are saying you are not guilty of the offence and then you talk about the act that constitutes the offence then there's a little bit of a contradiction in terms.

I was somewhat reassured by Ms. Klineberg that the judges would understand. I'm not so worried about the judges I have to say and I think there has been a movement, not necessarily

followed very well, or in plain language in statutes, and it seems to me that at least the notion of plain language would be supported by adding the words prior to “constitute” the words “would otherwise”. So “the act that would otherwise constitute the offence”.

In other words, in the absence of the defences that are set out there. So it would read: “The act that would otherwise constitute the offence is committed for the purpose of”.

That is the proposal here. I think it doesn't interfere with any other aspects of it but that same phrase is repeated a couple of other times. I think there are four amendments that use the same suggestion.

The last time there was a discussion about legislative drafting but I think those of us who have practised law are certainly aware of the movement and the effort to try to make the law more understandable to ordinary folks. So this seems to me to be a useful amendment along those lines.

The Chair: Thank you.

Mr. Goguen.

Mr. Robert Goguen: I certainly understand and respect the spirit of the intent. But for the purposes of the court and of course the Criminal Code and criminal statutes are always very, very restrictively interpreted and I think the wording makes it very clear that but for the elements that make this an offence, if they are not there it is an offence. So I don't really see any need to add the words “but would otherwise” and it would maybe confuse the court.

I understand the spirit but I think the clear and simple wording that's there would be adequate for the court to understand. Again, the with penal codes being restrictively looked upon and scrutinized I think the wording is probably better left as is.

(1125)

The Chair: Thank you.

Mr. Jean.

Mr. Brian Jean: I was just going to ask for the opinion of the officials that are here today. I quite frankly agree with Mr. Goguen and I think it changes the meaning of the clause.

I would like to hear what they have to say.

Ms. Catherine Kane (Director General and Senior General Counsel, Criminal Law Policy Section, Department of Justice): Mr. Goguen's comments would be our view as well. It was drafted to take into account that we start off from the premise that you're not guilty of an offence if these things are established. If those factors weren't established the act that you have

committed may well be an offence. So to add in “would otherwise be an offence” adds a bit of an element of confusion.

That said, we know that at the end of the day when the judge comes to the determination that your otherwise offensive act was done in defence of property or in other cases in defence of self it is not going to be an offence. So it is true that at the end of the day it would have otherwise been an offence but as the law is drafted it is preferable to refer to the act that constitutes the offence because the starting point is that your act is an offence except that it was done in self-defence or in defence of property.

The Chair: Thank you.

Mr. Cotler.

Hon. Irwin Cotler: Mr. Chair, I have just a short comment that this exchange for me supports what I thought was the initial clarifying language that I proposed so that we wouldn't have to get into this kind of discussion.

Thank you, Mr. Chair.

The Chair: Thank you. We're on now NDP 1.1.

Mr. Jack Harris: I have just one final comment.

I hear what you're saying, but when you have legislation that says in (c) that “the act that constitutes the offence is committed for” certain purposes while stating in (d) that ”the act committed is reasonable,” it's pretty hard to call that an offence if in fact what you're laying out here is that someone is not guilty of an offence. It seems to me that the confusion has given rise to, by the fact that the words “constituting an offence” are there, not otherwise.

We so maintain that position.

The Chair: Ms. Boivin.

Mme Françoise Boivin: For me, it's really just clarifying. It's just been logical. I fail to see where it changes the essence of what we're trying to say.

[*Français*]

On parle de « commet l'acte constituant l'infraction », donc, en disant « qui constituerait » parce qu'il n'y en n'a pas d'infraction encore. Je ne vois pas quelle est la problématique avec cette clarification en terme de texte qui ne rejoint peut-être pas aussi précisément que les modifications de M. Cotler de remettre à la forme positive, mais qui changeait peut-être un peu trop d'articles à ce niveau là. Par contre, celui-là me semble très mineur. Je ne suis pas certaine d'avoir compris, comme mon collègue Brian Jean. Si vous pourriez me l'expliquer à nouveau,

c'est peut-être parce que je le lis en français et qu'en anglais ce n'est pas pareil. Je ne le sais pas, mais cela me semble être seulement une précision de logique.

[*English*]

The Chair: I think the officials have--

Ms. Joanne Klineberg: I can just add that one way to look at it is to keep in mind the way defences operate is that you can only claim a defence if in fact you are found to have committed an offence.

You don't need to claim self-defence, for instance, if you didn't have the mens rea to commit the assault. It's only if you have committed an offence that these affirmative defences--If you haven't committed the offence, you're not guilty on the basis of the offence not being proved.

Mr. Jack Harris: No. As far as I assault somebody—I actually hit them—I'm not guilty of assault if I'm acting in self-defence. I'm not guilty of the offence.

Ms. Joanne Klineberg: You have committed an assault--

Mr. Jack Harris: I'm guilty (inaudible) of this.

Ms. Joanne Klineberg: You're acquitted on the basis of a defence that exonerates you from an offence that you have committed.

Ms. Françoise Boivin: Then this is not an assault. You're not guilty of assault.

Ms. Joanne Klineberg: I'm simply trying to illustrate that there is a bit of a paradox in the language that I think is inherent no matter how it would be drafted. The paradox is--If you take murder as the best example, you can claim self defence to a murder charge and be acquitted, but it's quite clear that you have committed murder; you're just not guilty of the murder.

There are the various levels that have to do with the findings that the elements of the offence have been proven beyond a reasonable doubt. Separate and apart from that is the question of whether you should be convicted. That's where the defence comes into play.

There is still an offence there. If there were not an offence, there would be no need for a defence.

(1130)

The Chair: Mr. Goguen.

[*Français*]

M. Robert Goguen: Le point de départ est que l'assaut est une infraction et si les facteurs sont établis, il y a une défense, mais le fait que c'est une infraction au tout début est pour dissuader les gens, c'est qu'il y a un certain ordre public. On ne s'engage pas dans une altercation, dans un assaut à moins que ce soit absolument nécessaire. Le point de départ est qu'on évite les assauts, si c'est nécessaire, on se défend, il y a des circonstances [*inaudible*].

[*English*]

Ms. Françoise Boivin: Is a boxing match, like the one we're going to see soon, considered an assault, but because it is in a certain context, it's a consensual I-don't-know-what? That's what I'm saying--

Mr. Robert Goguen: That question is not relevant.

Ms. Françoise Boivin: I understand the logic. I really do, and I think it's just semantics. It's not meant to--

Mr. Jack Harris: It's meant as a defence.

The Chair: Just a minute, you have to go through the chair.

Mr. Robert Goguen: Obviously, he's not (inaudible) with the Criminal Code, and this is outside the scope of what we're doing.

The Chair: Please go through the chair so that we can have a record.

Ms. Klineberg.

Ms. Joanne Klineberg: I have just one more brief comment. Where the words “the act that constitutes the offence” are employed, I think what the drafters were getting at was that it's the act that forms the subject matter of the charge.

Mr. Jack Harris: I get that.

Ms. Joanne Klineberg: Right.

I really have no doubt whatsoever that's the way the courts will view it and understand it.

I don't really see how a Canadian who picks up the law and reads it, how a citizen would, likewise, be confused by what they're permitted to do or not permitted to do, or the police if they were to pick up this legislation and try to apply it to a particular (inaudible) situation.

It is just a little wording problem that's inherent in these types of situations where you have a defence for conduct. That is an offence, but the defence allows the person to be exonerated for it.

The Chair: Mr. Harris.

Mr. Jack Harris: Madame Boivin raised the point of a boxing match, which we're about to witness next week sometime or a couple of weeks from now. It may be outside the scope, but if we're talking about an offence, well, what's a boxing match if not an assault with the defence of consent. In that context, the offence of assault is being committed. The act that constitutes the offence is the assault that occurs in the boxing match. The defence is one of consent, so it's not an offence. That's the paradox you were talking about, Ms. Klineberg, and it's inherent in the concept that we're talking about. And you said it right.

The act that forms the subject matter of the charge is what we're talking about. If the defence is present--and the assumption here in the clause is that the defence is present if the conditions are met--then why not call it “the act that would otherwise constitute the...”, or you could change it to “the act that constitutes the subject matter of the charge”.

I find it confusing. I have no doubt the courts will interpret it properly. But I propose this amendment to try to clarify things and to avoid the paradox that you're talking about. I don't want to engage in an argument with you over it. I just wanted to make my points.

The Chair: Ms. Klineberg, did you have a...?

Ms. Joanne Klineberg: No.

The Chair: Are you okay now? Okay.

Ms. Findlay.

Ms. Kerry-Lynne D. Findlay: I just wanted to say that I think the wording, as is, is clear and simple. It's the end of the analysis, not the beginning of the analysis, that we're focusing on.

The Chair: Mr. Jean.

Mr. Brian Jean: I agree with Ms. Findlay. Quite frankly, it's like a cart pulling the horse--and frankly, I think the horse has been beaten to death and we should get on with it.

The Chair: Having heard the interventions on amendment NDP-1.1, those in favour?

(Amendment negatived)

The Chair: On amendment NDP-2.

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Ms. Kerry-Lynne D. Findlay: Thank you, Mr. Chair.

My objection to this is the same as, really, I voiced earlier on the earlier amendment. This is very similar here in that it focuses only on the perceptions of the person being attacked, and not on the more objective assessments of all the circumstances.

Under the existing law, the court is only able to take into account the reasonable perceptions of the accused, and to me what this opens up is that unreasonable perceptions would be discarded, which I don't think meets what we're trying to do here.

This proposal, to me, raises some serious concerns because on its face, it would allow a court to consider those unreasonable perceptions in determining what is reasonable. Again, we need to have both the subjective and the objective elements in my view as the analysis is done and as the courts use their discretion to decide in all the circumstances what was reasonable.

The Chair: Thank you.

Mr. Woodworth.

Mr. Stephen Woodworth: Thank you very much.

The problem I have with this amendment is that it takes a requirement for a completely objective test, that is what is reasonable in the circumstances, and converts it to a completely subjective test, that is, circumstances as perceived by the individual.

I think that we definitely need, as a safeguard, the requirement of a completely objective test for whether the act is reasonable.

Thank you.

The Chair: Thank you.

Madame Boivin.

[*Français*]

Mme Françoise Boivin: Je répète et je vais être encore plus précise.

Si vous allez dans les « bleus » de mardi, voici la dernière question que je posais pour continuer ce que j'avais soulevé en premier lieu avec vous, au niveau de la raisonnabilité et de la distinction entre le subjectif et l'objet.

N'aurions-nous pas intérêt à préciser que, quand on parle de raisonnabilité, c'est justement au point de vue de la personne qui a utilisé la force? Cela créerait-il un problème ou, au contraire, on en enlèverait un, pour bien cerner et donner le message déjà sensiblement fait par les tribunaux, mais au moins pour vider et évacuer?

La réponse de Mme Klineberg était: « en général, c'est la façon dont les tribunaux l'approche. La question est de prendre en considération les perceptions de l'accusé, mais quand les perceptions sont raisonnables ».

C'est exactement un acte fait de façon raisonnable, de son point de vue et dans les circonstances. Alors, si vous ne voulez aucun de nos amendements, dites-le nous d'avance, tout simplement. On a essayé de prendre les témoignages des différents groupes qui sont venus ici, dont les officiels du département, et on a tenté de préciser.

Dites-nous le et on ne perdra pas notre temps à essayer d'avoir des discussions et des réponses des officiels. À moins que la réponse change aujourd'hui, cela me semblait tout à fait représentatif de ce qu'est exactement la jurisprudence, au moment où l'on se parle. Sauf que, en ne le mettant pas, on va encore se baser strictement sur la jurisprudence.

Comme avocate, je peux vous dire que, quand je vais plaider, j'aime mieux avoir une loi qu'une cause de jurisprudence qui est très facile à distinguer au niveau des faits. Alors, si une loi me dit que c'est ça le test, c'est le test.

(1140)

[*English*]

The Chair: Thank you.

A little early, we've only dealt with, what, two amendments?

Ms. Françoise Boivin: So far, so not good.

The Chair: Madam Findlay.

Ms. Kerry-Lynne D. Findlay: With respect, I think we all believe that these are well intentioned amendments that are being brought forward for discussion, and we're receiving them in that vein.

On this particular one, there is a concern about focusing in on, or making paramount the perceptions of the individual, because they may in fact be unreasonable in the objective tests. The point here is to keep it open for both to be looked at because the jurisprudence as far as I am aware, over my years of practice, is that both elements are looked at in the analysis, how that person perceives it at the time. All the other factors that are still here in the legislation, in fact, have been—as we go through this—have been also identified, and also the idea of an objective look at it. There are people who might perceive a threat, but to any of us sitting here we would think that is unreasonable in those circumstances.

We're trying to keep that balance there.

The Chair: Mr. Harris.

Mr. Jack Harris: Yes.

I think it needs to be said that this amendment, and a couple of the others, are brought forward on the basis of the submissions that we received from the Canadian Bar Association, who will recognize that there needs to be a balance, as had been suggested, between the subjective and objective tests that we use there, and they were concerned that the balance was not even enough and they made this recommendation for a more even balance of the objective and subjective wording, so that's why it's here. That's why we support it.

The Chair: Thank you.

Mr. Cotler.

Hon. Irwin Cotler: Mr. Chair, I think the amendment is not only well-intentioned, I also thing it's well-founded. I think it's well-founded for the reasons my colleague gave. Having listened to witness testimony, I think we need to have a balance between the objective and subjective considerations and put ourselves into the shoes of those exercising that act of self-defence. I'm thinking in particular, in a situation of not limiting to that of a battered woman, where putting in this kind of balance would facilitate the courts' interpretation and appreciation of what has happened.

The Chair: Thank you, Mr. Cotler.

Mr. Jean.

Mr. Brian Jean: I was just wondering if the officials could give us an estimate of what they thing the ramifications of inserting this would be and in changing it.

Ms. Joanne Klineberg: I can respond to my own words from Tuesday. This is not quite the same as what I was suggesting the current approach is. In other words, if I just look at the English version of what you've proposed, the act itself that is committed has to be found to be reasonable. If we say, “From the circumstances as perceived by the accused,” and we don't say, “the reasonable perceptions of the accused,” we are permitting the analysis of the reasonableness of the actions to be framed according to the purely subjective and potentially unreasonable viewpoint of the accused, which is different from what I was suggesting on Tuesday, which is that the reasonable perceptions of the accused are a factor that is taken into account, along with all of the other factors, to determine whether the action itself was reasonable from an objective viewpoint at the end of the day.

I see what this motion is trying to accomplish. It's just slightly different from the discussion that we had on Tuesday. It's a bit problematic because it's confusing whether or not the unreasonable perceptions of the accused guide the determination of what's reasonable in the circumstances.

The Chair: Madam Boivin.

[*Français*]

Mme Françoise Boivin: Par ailleurs, je répète qu'on ne peut pas lire l'article uniquement. Alors, il y a l'article 34.1 a), b) et c). En ajoutant ce qu'on met présentement, cela donne une indication, mais immédiatement au numéro 2, on dit:

[*English*]

...in determining whether the act committed is reasonable. Referring to 34(1), I guess, if I'm following the Criminal Code. Yes, it's a perception of the person, but it still needs to follow after that, too, which is kind of--what are we trying to do here? Help the self...

(1145)

[*Français*]

La défense de légitime défense pour clarifier pour les tribunaux ou la compliquer pour la rendre moins accessible. Peut-être que si on comprenait l'intention ce serait plus facile, mais je me dis que c'est dans le sens de la clarification. Je reprends l'exemple que Mme Findlay donnait tout à l'heure. Ce qui m'inquiète c'est d'être à une émission de radio et d'entendre qu'une femme à tuer son mari. On regarde cela froidement, vu de l'extérieur. Alors, peut-être que cela me semble totalement déraisonnable, mais de son point de vue à elle, c'était raisonnable. On arrive à 34.2 où on embarque les critères que la cour va quand même devoir évaluer tels que la nature, la force, la menace, le gabarit etc. La dame mesure peut-être six pieds et sept pouces et son mari mesure peut-être quatre pieds et huit pouces. Ce sont des choses qu'ils vont regarder.

Je ne comprends pas l'inquiétude du côté gouvernemental en ce qui a trait à une précision. Il faut qu'on voit quelque part cet élément de perception de l'accusé, même si cela ne doit pas être le seul et le plus important. En fait, comme société on doit s'assurer que ce n'est pas du *free for all* pour tout le monde parce qu'on n'aime pas la face d'un tel ou qu'on fait du profilage personnel en décidant que selon moi cela est raisonnable. Ce n'est pas ce que je vise, mais c'est d'avoir quelque chose de logique. Je pensais que c'était l'essence de la conversation qu'on avait eue mardi et c'est comme cela que je l'interprétais. Donc, c'est la raison pour laquelle on présentait la précision tout en sachant très bien que le numéro 2 venait justement expliquer

[*English*]

...whether the act committed is reasonable. It's not just one test. It's two tests.

The Chair: Did you have something else, Ms. Klineberg?

Ms. Joanne Klineberg: I can try to clarify.

The first element of self-defence is the reasonable perception of the accused that there is a threat. The second element is the accused's subjective intention to act for a defensive purpose and not another purpose. Both of those requirements are certainly factors in the third requirement, along with all the other relevant factors, in determining whether--from the objective man's perspective--the accused, who reasonably and subjectively perceived a threat; the accused who

acted solely for a defensive purpose, and given everything else we know of the circumstances, do we the jury consider that action to be reasonable, given the reasonable perception, and given the subjective defensive purpose?

So I think when one looks at all of the elements together, there is still quite a lot of emphasis on the subjective perceptions and intentions of the accused. As well, with the list of factors and all other factors that may be relevant, it's through that door that the courts will also consider any other reasonable perceptions of the accused that factor into the determination.

Overall, our view would be that the balance is appropriate.

The Chair: Thank you.

Mr. Jean.

Mr. Brian Jean: Actually, I was going to say that as well. I thought by making this amendment, that in fact it would give too much emphasis to the subjective opinion of the person instead of the reasonable person test.

It sort of reminds me of the argument in relation to evidence to the contrary on impaired driving offences and finally taking that away. That's just from my perspective, anyway, but I think it's a much better use to be able to let it be balanced on how it is currently.

The Chair: Thank you.

Mr. Harris.

Mr. Jack Harris: We still have “reasonable” there. We still have the “reasonable grounds”. We still have the subjective intention of the purpose of it.

But if we're talking about the circumstances, the accused's understanding of those circumstances really has an awful lot to do as to whether or not we do have a full offence.

I go back to what Mr. Cotler and Madam Boivin raised, that if we're dealing with what's been called “the battered wife syndrome”, the circumstances as perceived by the accused, the perception of the accused in these circumstances is extremely important because we have normally a pattern of behaviour that goes on and on. It's very difficult for a court or a jury to say, “I'm going to decide what the perception of this person was”, and to put themselves in that person's shoes when they haven't actually been there.

So I think it's important that the perception of the accused in that particular situation is rather important and ought to be given weight.

(1150)

The Chair: Thank you.

Mr. Woodworth.

Mr. Stephen Woodworth: Thank you.

Mr. Harris' comments carry some weight but they are really satisfied by paragraph 34(a). If we're talking about battered woman syndrome, paragraph 34(a) deals with the question of belief on reasonable grounds that force is being used against someone. That does, in fact, combine an objective and subjective test in a manner which addresses the issue of battered women's syndrome.

On the other hand, if one believes unreasonable grounds that force is being used against one, it doesn't necessarily mean that one can respond with any level of violence whatsoever. The level of response must still be reasonable in the circumstances and that is the qualifier in paragraph 34(c).

Thank you.

The Chair: Thank you, Mr. Woodworth.

Mr. Seeback.

Mr. Kyle Seeback (Brampton West, CPC): I would just pick up on where Mr. Woodworth was. If you look at paragraph 2(f) it outlines exactly the circumstances, the nature and duration, the history of any relationship between the parties to the incident, including any prior use of threat of force. That's giving that test directly with respect to a women who might be suffering from a battered wife syndrome. So I don't think the amendment is helpful in clarifying anything for the court.

The Chair: Seeing no further interventions, those in favour of amendment NDP 2?

Mr. Jack Harris: Mr. Chairman, I'm caught up in this debate. We are talking about a particular type of concern in the criminal law. It's been rather excruciating for courts and juries to deal with. The battered wife syndrome, yes, Mr. Seeback's right. That's a factor that's taken into account.

But when we look at all of the factors as set out, including the nature, duration, and history of the relationship, and the concern that Mr. Seeback just pointed out—There's also G, the nature and proportionality of the response. We're back then to why didn't you just leave as the answer to what we're talking about here, that I am convinced will now be the new approach if someone is attacking a person's perception.

The reality is the reason that we do have these types of incidents is because in the perception of the circumstances of the individual who's subjected to constant and ongoing abuse over a long period of time and threats, the perception of the person involved is key. I think we need to ensure that it's there. I don't know if it's there. Obviously the reasonable grounds is forced to being used against them where there's a threat. Yes, fine, there's a threat. The act that counts for the purpose

of defending oneself, that's not a problem. But then the act committed as reasonable to circumstances, that's a purely objective test. Then they're saying, why didn't you leave? Where do we get the defence? Where do we get any other defence unless the perception of the individual involved is going to be key.

I'm very concerned that if we don't pass this amendment we'll be doing great damage to that particular type of offence.

The Chair: Ms. Findlay.

Ms. Kerry-Lynne D. Findlay: I have a great deal of sympathy, particularly in the circumstances you're talking about, for women or spouses who find themselves in that situation. Having practised family law for 30 years, I dealt with those situations on a far too often basis. I certainly would never jeopardize the ability of someone to raise the issue of self defence in those very difficult circumstances. I don't think your amendment is necessary to achieve that.

You do need the reasonable in all the circumstances. You do need both a subjective and objective test. In the history of our jurisprudence in this area I think that balance has been achieved. You don't want to tip it into a situation, in my view, where an unreasonable perception that anyone would see is unreasonable is taken as the norm or the standard. We need to allow the courts that discretion to look at all the circumstances. I have no doubt that the individual perceptions of a person in such a situation, which is more often a woman than a man, are taken into account and need to be.

(1155)

The Chair: Mr. Woodworth.

Mr. Stephen Woodworth: Yes, thank you.

My impression is that our existing law has allowed the courts to develop a defence that satisfies the situation of a person suffering from battered woman syndrome. If I'm wrong I'm sure somebody can tell me, but I think we have such a defence in our law, at this time, based on the perception of a woman who is suffering from that syndrome. It was developed on the basis of our existing provisions, which do, in fact, talk about an individual using no more force than necessary and having a reasonable apprehension of death or grievous bodily harm, and so on and so forth.

I don't think that the current wording changes any of that.

Thank you.

The Chair: Thank you.

Madam Boivin.

[*Français*]

Mme Françoise Boivin: Brièvement, je m'en voudrais de ne pas m'essayer encore une fois, surtout une journée comme aujourd'hui, la Journée internationale de la femme. Je m'en vais donner une conférence ce soir au Centre d'hébergement pour femmes violentées. C'est facile pour nous de passer ce genre de commentaire, mais quand on a passé du temps — je connais votre *background*, je le respecte beaucoup, je sais que ne sont pas des dossiers faciles —, mais sérieusement, de voir qu'à la première opportunité qu'ont les législateurs de changer le Code criminel à ce niveau-là, soit le modifier pour le rendre plus clair, pour faire valoir ce qui se dit en jurisprudence. Les collègues, vous savez comme moi, que de le laisser... Pourtant, d'habitude, les conservateurs, vous êtes les premiers à nous dire qu'il ne faut pas laisser aux tribunaux le soin de faire la loi, alors que cela ait été interprété que le syndrome de la femme battue a pu être utilisé par certains tribunaux ne signifie pas que cela va passer nécessairement dans tous les cas. Quand je regarde le paragraphe 34(1) tel qu'on l'a écrit et même le paragraphe 34(2), si je vais jusqu'à la fin du paragraphe, rien n'est par rapport réellement à la personne elle-même. Techniquement, je pourrais être juge dans une cause et dire: « croit, pour des motifs raisonnables ». Ta croyance à toi n'est pas raisonnable, si je la prends d'un autre bord et que je ne me préoccupe pas de sa façon de penser. « Commet l'acte constituant une infraction dans le but de se défendre, agit de façon raisonnable dans les circonstances ». Encore une fois, on ressort la personne. Pour décider si la personne agit de façon raisonnable dans les circonstances, il « peut tenir compte des facteurs » — et là on nous en donne une liste — qui, encore une fois, ne concernent pas la personne elle-même. Ce qui m'inquiète, c'est que quand les avocats vont utiliser les modifications et vont dire, à la première opportunité, que le législateur de, si on veut, codifier la défense du syndrome de la femme battue, on ne le voit nulle part. Et même plus que ça, s'ils vont dans nos discussions, ils vont voir comment, au contraire, le gouvernement de l'heure s'est objecté à ce qu'on y voie la perception de la personne comme étant un... Parce qu'on prétend que ce serait probablement là et que les tribunaux vont probablement l'appliquer. Alors si j'étais un juge, je ne me sentirais pas, mais comme pas pantoute, obligé d'appliquer ce critère-là. Alors on y croit au critère ou on n'y croit pas. C'est ce que je pense.

[*English*]

The Chair: Thank you.

Mr. Jean.

Mr. Brian Jean: I think we've heard from everybody about six or eight times, but I think for the record we're not objecting to it being there. In fact I think it's already covered there. Clearly Ms. Boivin knows I have experience in criminal law with this particular section. I think it's clearly there. We've heard from the officials it's clearly there. We've heard from a number of lawyers on both sides that either pro or not. Why don't we get to the question, Mr. Chair?

(1200)

The Chair: Seeing no further interventions we can get to the question.

Those in favour of NDP-2?

Opposed?

(NDP-2 negatived)

The Chair: On NDP-3 my note says that it should include line 24 in the French version.

Mr. Jack Harris: Yes 23 and 24.

The Chair: Mr. Harris.

Mr. Jack Harris: These are suggestions from some of our witnesses that the open-ended "may consider" did not require the consideration of any of these factors. So the suggestion is

> the court shall consider the relevant circumstances of the person, and the other parties to the act including, but not limited to, the following

That was just designed to I guess make it a little more clear, "but not limited to, though shall consider that these factors, but not limited to those factors". So it's an alternate wording which is there which we consider more appropriate.

The Chair: Thank you.

Mr. Goguen.

[*Français*]

M. Robert Goguen: Ce n'est pas en apprenant les amendements précédents, du moins de votre perception, que vous voulez mettre plus d'emphase sur la perception de l'accusé. Évidemment, la loi c'est un équilibre entre la perception et la subjectivité, puis je pense que cet amendement mise plus sur la perception de l'individu. On n'a franchement pas d'objection que ce soit inséré.

[*English*]

We're agreeable to that going in. It puts more focus on the perception of the accused, which I think is what you're seeking to do in previous amendments.

For that reason, we'll be supporting it. It strikes a balance.

The Chair: Oh. We just had to wait for a little bit.

Some hon. members: Oh, oh!

Ms. Françoise Boivin: I won't even say anything. I'll take it.

Like my dad used to say, quit while you're ahead. I'll do just that.

The Chair: Okay.

Ms. Françoise Boivin: I'd ask that the question be put right now before they change their mind.

The Chair: We're on NDP-3. Those in favour. Opposed?

(Amendment agreed to)

Mr. Stephen Woodworth: I have a point of order, Mr. Chair.

I was more worried that the opposition might change their minds when they found out we were supporting it.

The Chair: Well, I'd--

Mr. Jack Harris: I have to say that sometimes it does cause us to second-guess ourselves, but I do thank Mr. Goguen for his comments, and taking into account the relevant circumstances of the person does go into the elements of the person's state of mind and other things, including something to do with perception.

The Chair: We're on NDP-4.

Mr. Jack Harris: Thank you, Mr. Chair.

We've added, at the suggestion of the CBA--We did have some discussion about gender and you can't just assume because someone's one gender or another that they're bigger or smaller or more or less capable and size doesn't necessarily matter either.

You could be a big character with disabilities or inability to respond. The addition of physical capability seems to me to be aiming what the section was trying to achieve by saying that it has to take into account the person's circumstances. If size, age and gender are important, then the physical capabilities certainly would be too.

I'll leave it at that.

The Chair: Thank you.

Madam Findlay.

Ms. Kerry-Lynne D. Findlay: We agree with this. I think the wording of it is good: “physical capabilities.” As you have mentioned, Mr. Harris, you could be a small person with a black belt in karate or something.

Mr. Jack Harris: Absolutely.

Ms. Kerry-Lynne D. Findlay: You may have a physical capability that the other person doesn't have, which isn't necessarily covered just by the wording of "size" for instance. It adds to a non-exhaustive circumstances for the court to take into account. That seems reasonable, and when you put it together with the other factors that are enunciated and the nature and proportionality of the person's response to that threat, it makes a lot of sense.

We're supportive of this amendment.

(1205)

The Chair: You want to withdraw?

Some hon. members: Oh, oh!

Mr. Jack Harris: No. Our suspicious are lowering as time goes on.

Ms. Kerry-Lynne D. Findlay: I should add that Ms. Boivin's father is a very wise man.

Ms. Françoise Boivin: May he rest in peace then.

The Chair: Thank you. Seeing no other interventions, shall the amendment NDP-4 pass?

(Amendment agreed to)

The Chair: We are now on NDP-5.

Mr. Jack Harris: Again, if we're looking at Clause 2, line 11 on page 2, it states

> 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...

The Canadian Bar Association suggested that "relationship" is potentially narrow, because it could be something that is not a relationship but in fact is an encounter of once or twice that gives rise to the perception of a threat or prior use of a threat. They suggested that "relationship" is a bit too specific, and they suggested replacing that with "interaction or communication between the parties to the..." Interaction would obviously include a relationship, but a relationship might not include a minor interaction.

That's the best way of putting it succinctly. I'm prepared to hear what others might have to say about that.

The Chair: Thank you.

Mr. Goguen.

Mr. Robert Goguen: The wording of the proposed amendment seems to broaden the effect, I guess. This was intended to rectify and take into account the battered woman situation, which is something we're very mindful of.

We're wondering if the wording, if it's at “broad,” might detract from the focus on this. It's difficult to predict if it would have any effect in drawing the court's attention to the battered woman situation, which is really the primary reason for this. I'd actually like to toss this to experts and get their comments on it.

We did want to focus on the battered woman syndrome in this situation.

The Chair: Do the officials have any comment?

Ms. Joanne Klineberg: Yes. I think I would agree with Mr. Goguen's comments. This particular factor was deliberately drafted to focus attention on--it doesn't use the terminology “battered spouse” and so on and so forth, but the concept that emerges from jurisprudence in relation to those issues definitely speaks to the relationship between the parties. This factor is there to draw the courts' attention to that jurisprudence, to that history, and to that factor. I think the concern would be that if you brought in the language somewhat, it's absolutely true, it won't mean that it won't apply or won't refer to the battered spouse situation, but it won't as clearly speak to that situation.

I think our concern would be that you might actually be undermining what I think everyone agrees the objective is, which is to ensure the court--this is in fact a signal to the courts that they should continue to apply the jurisprudence that already exists. The more you sort of try to take account of situations which bear no relation at all to the battered spouse situation, I think the risk is that you undermine the signal that Parliament can send to the courts that that's what this is trying to do.

The Chair: Madam Boivin.

[*Français*]

Mme Françoise Boivin: En fait, je suis très intéressée par les deux commentaires que je viens d'entendre. Par contre, si vous lisez en français, on parle des rapports entre les partis et c'est peut-être de là où vient la confusion parce que « rapport » et « *relationship* » n'est pas la même chose. Dans le contexte de « rapport », c'est plus vaste. Je suis heureuse de savoir que cela a été conçu dans l'optique du...

Je vais l'étendre à une autre situation qui nous préoccupe tous, la situation de l'intimidation. Tu as un jeune dans une cour d'école qui se fait martyriser jour après jour. Il n'y a pas vraiment de « *relationship* », c'est pour cette raison que je pense que lorsque l'Association du Barreau canadien a fait sa recommandation de le modifier, il a pris les deux en considération. Je vous le dis, quand on parle de « rapport », c'est vraiment dans le sens d'interaction entre les gens et c'est pour cela qu'il nous faisait la recommandation. C'est comme cela que je l'ai compris.

J'ai compris au moment où il faisait leur présentation que cela touchait le cas du syndrome de la femme battue, mais aussi le cas de l'intimidation, qui sont des cas particuliers auxquels l'article f) réfère, où on doit regarder quelle sorte de connection il y avait entre l'accusé qui veut se défendre avec la défense de légitime défense et la personne qui a été battue, frappée, assaut ou peu importe. Alors, de notre côté, ce n'est pas d'essayer de diminuer la défense, loin de là. Ce n'est définitivement pas ce qu'on vise à faire, mais c'est d'être certain qu'on vise la même chose. C'est tout.

(1210)

[*English*]

The Chair: Thank you, Madam.

The officials have something they wish to add there.

Mme Françoise Boivin: That makes sense. Just admit it.

Ms. Joanne Klineberg: Only to say that the committee may wish to add other types of relationships, interactions, or knowledge that the parties have with each other. I would urge the committee to be cautious about changing the language that's presently there just because I think it was deliberately formulated to signal to the courts that this one particular situation they should continue to bear in mind.

The Chair: Thank you.

Mr. Seeback.

Mr. Kyle Seeback: It certainly points a direction to the court about the issue of spousal abuse. The actual section says “any relationship.” I think the legislation using words to broadly describe relationships--you're saying any relationship. I think courts are going to very broadly construe what the term relationship means. A person who is being bullied by somebody else in school—that is some form of a relationship. It's obviously not a healthy one, and one that we would not want to encourage. I think the section is fine the way it is because it sends the signal, and it can be construed broadly enough to realistically encompass any type of interaction between people will be constituted as some form of a relationship under the section.

The Chair: Mr. Harris.

Mr. Jack Harris: Thank you.

I'm very mindful and thank the members opposite for pointing out the importance of saying, packaging if you will this notion of a type of relationship that constitutes the circumstances of battered spouse syndrome. I don't see it as an either or one though.

I'm wondering, Ms. Klineberg, if you could help us here. I'm not married to this particular substitute and this for that, I've been persuaded that the notion of keeping the relationship there, we may have to change the French to accommodate that frankly. Do you have any suggestions as to how we would ensure that the purpose behind this amendment, interaction or communication between the parties I don't see where else it's covered other than amongst other factors. I would like to see that notion there somewhere and I'm not convinced by Mr. Seeback's argument that any relationship is really broad enough to cover the bullying but there may also be the history of one or two incidents where somebody either made threats or whatever and it could be important in someone's reaction at a later time. Can you help us with that? Do you have any suggestions?

Ms. Joanne Klineberg: My first suggestion would be that if it was something the committee wanted to do that it should be formulated as a new subparagraph and not attached to this one so as to keep this idea distinct and undiluted, if you will.

I also do recall that one of the things the Canadian Barr Association mentioned was even situations were there was no interaction between the parties but one had knowledge of the other. For instance they knew of their reputation for violence. So my understand from their submissions was that was a situation they were also interested in. So you might want to consider that as well. That might be something that could be linked with the sorts of ideas that you have proposed here to formulate a separate factor.

The Chair: Ms. Kane.

Ms. Catherine Kane: I would only add to remind the committee of what you're already aware of that this is a non-exhaustive list of factors. I'm sure that everybody can conceive of countless situations that they'd like to see covered in the factors but were quite confident that when those factors are relevant they will be presented to the court and the court will take them into consideration. So if you had the bullying context it would be covered by the nature of the unhealthy relationship.

I would also like to reiterate that Mr. Seeback summed it up quite well that it says the “nature of any relationship”. So even if it was a relationship that we wouldn't consider to be an ongoing on that had a history and the fact that there wasn't any history that it was just a school-yard type of unhealthy relationship or acquaintance type relationship it is still covered by a relationship but it's a very broad concept, without taking from the wording that we've seen time and again in the case law about the nature and history of the relationship when we are talking about the fact that the spouse acting in self-defence knows exactly what that person is going to face if they don't take action now.

(1215)

The Chair: Thank you.

Mr. Jean.

Mr. Brian Jean: I was going to say the same. The courts have already interpreted the issue of relationships and what it means. They've taken into consideration that it doesn't even have to mean they have a relationship just a reputation of a relationship or reputation of expectation. I think to add something in this particular case might be counter to what you actually want to do. I think being too specific might be restrictive in the future and might cause problems for the court.

The relationship is good, the courts have interpreted it. Time and time again I remember one particular case that I had where a battered wife did kill her husband. I defended her and the court went through a litany of examples of what the expectation was and what the relationship actually meant. So I think it's already trite law and it's already there.

The Chair: Thank you.

Mr. Harris.

Mr. Jack Harris: I'm prepared to look at withdrawing this in light of our discussion.

I would like if the officials could address the French version and the word *des rapports*

as opposed to “relationship”. I'm not familiar with the nuances of the French language portion but Madam Boivin has raised that. Are you able to comment on that now?

Ms. Catherine Kane: We would likely want to consult with the drafters to make sure that they had strong reasons for using the word *rapports*

and if you had other suggestions we could take that back to them for their reaction as well but that would not permit you to deal with the issue at the very moment.

Mr. Jack Harris: Well, do you have any suggestions? I'd obviously like to hear back from the officials on that point and consider whether we would want to have another point. I'm prepared to withdraw this at this time rather than have it voted on.

The Chair: How would it be if we deal with the committee if there is consent to withdraw it. I don't think we're going to get through this today. You have 45 minutes.

So if we don't get through this today--

Mr. Jack Harris: Another time.

The Chair: --and it's withdrawn, then when it comes back....

A Voice: At report stage.

The Chair: No, it's actually done here. But I think it could be done when we come back.

Mr. Brian Jean: If the interpretation is different from acceptance--we're dealing with the English version-- and if the interpretation if not satisfactory to Ms. Boivin, later it can be dealt with.

Mr. Jack Harris: Fix it now.

I think we can do this. We're at clause-by-clause for a reason and if we haven't got an adequate understanding at this stage, then we have to deal with it here.

Making amendments at report stage we've seen some unhappy experiences in the last short while regarding those.

Ms. Catherine Kane: Alternatively, we could attempt to make contact with our drafters now if this is stood down and see if we could reply shortly.

Mr. Jack Harris: I have another suggestion then.

The Chair: Okay.

Mr. Jack Harris: There's been some discussion among the--

Ms. Françoise Boivin: The francophone--

Mr. Jack Harris: --francophone group here and I think the conclusion is that Mr. Seeback's suggestion as to how relationships, any relationship, might be interpreted.

And Mr. Jean's comments that the word “rapport” in accordance with...thus, is a little broader than relationship might be understood with a capital R. So that, in fact, the wording is acceptable.

Ms. Françoise Boivin: The explanation we heard, it's pretty all right.

The Chair: Mr. Cotler.

Hon. Irwin Cotler: Just listening to the discussion, wanting to keep the word “relationship” and hearing some of the other comments, I was going to say one might want to consider a new sub(g) which would read “any history of interaction or communication between the parties to the incident”. That way you would keep what you have now with respect to relationship in (f) and you would just add a new sub(g) which would provide a kind of broadening element for that which one might want to include.

(1220)

Mr. Jack Harris: Can we take that as an amendment to the amendment, chair? Is that possible? I'd suggest to withdraw, but nobody'd consent to withdraw--

The Chair: Just a minute. If we can just get it through the chair.

The legislative clerk tells me that, properly, that if you wish to withdraw it, we can have consent to withdraw it. Then you need to move a new amendment.

Mr. Jack Harris: A new amendment.

The Chair: It has to be, yes. But you can't do what you're trying to do. So if you wish to withdraw it, we'll ask for consent to withdraw it and then....

Consent to withdraw?

Mr. Jack Harris: Yes.

The Chair: Okay.

Mr. Brian Jean: Unanimous consent.

Hon. Irwin Cotler: In light of that, Mr. Chair, I would propose a new sub(g) which would read:

> Any history of interaction or communication between the parties to the incident.

The Chair: Do you have that in writing for the legislative clerk?

Hon. Irwin Cotler: Yes.

[*Français*]

M. Stephen Woodworth: Y a-t-il aussi un texte français?

[*English*]

The Chair: And where would you....

Mr. Jack Harris: In (g). Or maybe

(f)(1) and then it'll be fixed afterwards.

Ms. Françoise Boivin: That little “i” there.

Mr. Jack Harris: That'll be fixed afterwards I think.

The Chair: Mr. Cotler, we have a couple of questions. Are you replacing (g)?

Hon. Irwin Cotler: G would become H, H would be I, and I would be recommending the insertion of a G as I stated it, as a new sub-G.

Mrs. Lucie Tardif-Carpentier (Procedural Clerk): F.1, would it come before?

Hon. Irwin Cotler: F.1 is fine, too.

Yes, that's fine.

Mrs. Lucie Tardif-Carpentier: They'll change it.

Hon. Irwin Cotler: That's fine. That's okay.

The Chair: Ms. Findlay.

Ms. Kerry-Lynne D. Findlay: I have it clear in my mind, thanks.

The Chair: We're going to ask Mr. Cotler to read his amendment, here.

Please read it slowly so we'll try and make sure that we have it exact.

(1225)

Hon. Irwin Cotler: Okay.

It would be added as F.1. It would read in English:

> Any history of interaction or communication between the parties to the incident

In French, it would read:

[*Français*]

L'historique des interactions ou communications entre les parties en cause.

[*English*]

The Chair: Ms. Boivin.

Ms. Françoise Boivin: Maybe for my colleagues who are better in English than I am, would somebody sending harassing e-mail to somebody, like really scary ones, be considered inside of a relationship, could we see it as written in F already without adding the amendment that my colleague, Mr. Cotler, is suggesting.

That's the only thing we were trying to cover because relationship—for me, but maybe it's my bad understanding of the language—meant something more personal between two people. Let's say an MP keeps receiving threatening—like real threatening something, or whoever? I don't consider I'm in a relationship with the person whatsoever.

That's my question.

The Chair: Okay.

Madame Findlay.

Ms. Kerry-Lynne D. Findlay: Relationship, in the English context, means really any interaction. It does have that very broad meaning. It doesn't mean an intimate relationship. It does mean any connection.

That relationship, you might call it a distant relationship—

Ms. Françoise Boivin: A direction or communication.

Ms. Kerry-Lynne D. Findlay: --or a one-off relationship, but there still is something that is bringing these two elements together, these two people together.

The Chair: Mr. Jean.

Mr. Brian Jean: Yes, the definition in the dictionary is “the state of being connected or related”, and it goes on to having others. In English, “relationship” can mean anything. That's why I oppose this particular suggestion of Mr. Cotler's. If I were a judge and I read it, and it said “relationship”, and then proposed subparagraph 34(2)(f)(i) said whatever it is, it indicates to me that you can't go past the history of the parties.

We've already heard courts have interpreted not just history of the parties as a relationship, but also reputation, as they understand it, of a certain individual forming part of that relationship because it's past history beyond just the history between the two parties. That's why I oppose that, because I think it's actually restricting what we want “relationship” to reflect, which is interaction between two individuals beyond just their immediate interaction or history. It goes to the understanding of that person and who they are.

The Chair: Ms. Findlay.

Ms. Kerry-Lynne D. Findlay: With respect, I don't agree with my colleague Mr. Jean.

This is a non-exhaustive list. It's a list of factors. I don't think putting it where it's being discussed is limiting the definition of “relationship”; it's just adding factors in a non-exhaustive list. So I don't see it as something that would take away from that broader word.

The Chair: Mr. Harris.

Mr. Jack Harris: I agree with my colleague Ms. Findlay.

The idea of expecting “relationship” to be stretched, especially when the clear intention here is to have a clause that is aimed at what we're calling the battered spouse syndrome, I think the

interaction and communication as a separate item really ensures that we're not confusing the two. As I say, it's a non-exhaustive list, but I don't think it hurts to mention that because we will have, and we're having people increasingly using the Internet as a form of threatening, or harassing, or doing that sort of thing. That's a communication. You'd hardly call it a relationship, but it is obviously important. I think adding that doesn't do any harm and it certainly can't take away from what, generally speaking, we're intending in the previous clause.

(1230)

The Chair: Thank you.

Mr. Cotler.

Hon. Irwin Cotler: Mr. Chairman, it's just been proposed to use that statutory language for greater certainty but not so as to restrict the generality of the foregoing.

An hon. member: Well said.

The Chair: Thank you.

Mr. Jean.

Mr. Brian Jean: Actually, that's what I was going to suggest as well, Mr. Cotler. Just so judges don't interpret it restrictively, I think that would be fair if it's a non-exhaustive list.

I'm wondering if the officials could actually comment on that.

Ms. Catherine Kane: Is the question related to Mr. Cotler's suggestion?

Mr. Brian Jean: Yes.

Ms. Catherine Kane: The “for greater certainty”? I don't really think that's--

Hon. Irwin Cotler: As I say, that would not be added, it was just as a matter of explaining why I added it.

Ms. Catherine Kane: Right. Certainly I think it would be understood that way, but we wouldn't want to add those words into the factor because it's a non-exhaustive list of factors and we're not adding greater certainty to anything in particular. We're planting some guidelines in terms of what factors are, but leaving it open to the courts to consider any that are relevant. So it's entirely up to the committee whether they want to add in the additional factor of the interaction or communication, or leave that to be considered where it happens to be relevant in the circumstances that are presented.

The Chair: Thank you.

Mr. Goguen.

Mr. Robert Goguen: Not to reiterate what's been said, but the essential part of this section is focusing on the battered women's syndrome. Where the elements are non-exhaustive, I don't think it detracts from it; if anything, it perhaps complements.

The Chair: Okay.

(Amendment agreed to)

The Chair: So now we're at amendment NDP-6.

Mr. Harris.

Mr. Jack Harris: This amendment is to delete lines 14 to 16, which essentially is clause G. I raise this because it has been raised by one of our witnesses who was concerned that by including this here, it may take away from the notion that proportionality may detract from the previous provisions of the existing self-defence provisions, which are provided specifically for the use of the lethal force in certain circumstances that were specified in the old act. It was urged upon us that by putting this here, that you would potentially limit or remove the protection that was in the existing Criminal Code. I was persuaded by that enough to put this forward. I do want to hear what the officials have to say about that because I think because we're talking about lethal force and very extreme circumstances, clearly when someone has lost their life, we wouldn't want the inclusion of this clause to remove a defence that already existed in the law. I know it's somewhat rare circumstance.

I'm not suggesting that we want to do anything that would give licence to people to use extreme force in the wrong circumstances, but I do want to see addressed the concern that was raised by—I forget exactly which witness it was, and I don't think it was the CBA—that this inclusion of this as a specific factor would detract from the previous section that dealt with the use of lethal force and the response to grievous bodily harm, or the threat of grievous bodily hard, or death. That's the reason for it.

I think that the nature of the response to the user of threat of force is obviously going to be considered in any event. Obviously, that has to be considered because we are looking at the reasonableness of the act that was committed. In every circumstance, especially when we've now included the words “shall consider that”, it seems this could cause problems for certain types of cases.

(1235)

The Chair: Thank you.

Ms. Findlay.

Ms. Kerry-Lynne D. Findlay: Thank you. I do have comments, but Mr. Harris said he would like to hear from the analyst on it. I would like to defer my comment to hear their comments first.

Ms. Joanne Klineberg: I believe it was Professor Stuart, and also Mr. Russomanno who pointed out the proportionality question. My understanding of what they were concerned about was the replacing of the idea proportionality with the idea of reasonableness as the last factor in self-defence. In other words, 34(1)(c) of the bill says,

> the act committed is reasonable in the circumstances.

Whereas, under the current law, that last element is typically formulated as a notion of proportionality between the threat you are trying to avert and the harm that you actually cause. They were suggesting that the ultimate determinant be proportionality as opposed to reasonableness. I think they would say that it's certainly--I'll backtrack for a second.

On Tuesday, we did discuss this issue. I had suggested that one of the the reasons why the new self-defence law is suggesting the concept of reasonableness as opposed to proportionality is because proportionality is not actually applied in a literal manner by the courts. The courts understand in high-pressure self-defence situations that a person is not going to be able to exactly calculate how much force is the right amount, but not one ounce more. They give it a very broad and tolerant—they call it the tolerant approach to proportionality.

The bill proposes to replace that with reasonableness on the understand that an act that is disproportionate to the threat can never be found to be reasonable. Reasonableness carries with it the flexibility that the courts have had to give the notion of proportionality because it's not built into the idea of proportionality. We think it's preferable to stick with reasonableness as opposed to proportionality as the requirement. When you get to the factors to consider, it's there where we would say of course you want the proportionality between the threat averted and the harm cause to be looked at as a factor to consider in determining reasonableness. There would be a great concern with removing that because it is in all cases going to be one of the most important factors. It's just not framed as the requirement itself. It's more so as a factor to consider in determining reasonableness.

The Chair: Thank you.

Ms. Findlay.

Ms. Kerry-Lynne D. Findlay: I would not support this amendment. I think proportionality is and should remain an essential element of self-defence. Again we're talking about this list of factors and this amendment would take the nature and proportionality of the person's response right out.

It may not longer be the determinative factor but it certainly as it is would remain and not to be considered in every case. To me it just makes common sense that you would look at the proportional reaction to the threat and how that was dealt with by the person. If it's deleted from

the factors it really removes it right out of consideration. I don't think that makes sense to make so I would not support this amendment.

The Chair: Thank you.

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[*English*]

The Chair: I wonder if the officials would like to comment.

Ms. Catherine Kane: I just point out a few things for your added consideration.

We have the provision in this citizen's arrest that it's only where you're not able to engage the police to make the arrests. So I don't think we would be in the scenarios of somebody waiting around to get their buddies together to go and effect an arrest, because if that were the circumstance, then clearly that person could have made an attempt to engage the police to arrest the person. The extension of time in these amendments is designed for the situation where the person can't effect the arrest at that very moment because the person runs off or whatever, and then they encounter them at some other opportunity and they can't get the police to effect the arrest.

So we would prefer that the wording be left “reasonable”. The courts will interpret that appropriately, and if we added in “at the first reasonable opportunity”, the discussion could be around when was the first reasonable opportunity rather than was the person's action reasonable in effecting the citizen's arrest at that time, looking at all the circumstances and whether they had any ability to engage the police and so on.

When you're changing the law, you look at a variety of considerations and in this one, moving from the precise “finds committing and arresting at that time” to some extension, obviously we don't want it to be in perpetuity or in an unreasonable time frame but the thinking is that by saying “reasonable”, there is sufficient guidance to the courts and the circumstances will govern, as many members have noted, depending on where you are and what the case is.

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The Chair: I want to thank everybody, particularly the officials. I think you brought a lot of clarity to issues that were important. I do want to thank the committee for staying an extra 11 minutes. I think it's important that we've finished this bill. It was going to throw the rest of the schedule out.

Having said that, meeting adjourned. Those that have other meetings, go to it.