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Chair

Mr. Dave MacKenzie

Standing Committee on Justice and Human Rights

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● (1105)

[*English*]

The Chair (Mr. Dave MacKenzie (Oxford, CPC)): I call the meeting to order.

This is meeting 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.

Before we start, we'll have 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 happen, just for planning....

Mr. Jack Harris (St. John's East, NDP): Do we need a motion to that effect?

The Chair: I don't think so, no.

Mr. Jack Harris: Would it just be on consensus? I think we'd accept that if that were the case. I believe that's the intention, but I haven't heard it officially.

The Chair: I don't know whether it's happened.

Mr. Jack Harris: Chair, I think everybody has a package of amendments, but I want to let people know that two of our amendments will be withdrawn.

One is NDP-10, on page 15. It will be replaced by NDP-10.1. NDP-11 is being withdrawn as well. Those are on pages 15 and 16, and they're replaced by page 15.1. That covers the concepts in both of those, so we need not worry about these as we go through.

The Chair: Okay, I think we're ready to proceed.

We'll postpone clause 1, the short title, until we get through here.

(On clause 2)

The Chair: The first amendment is Mr. Cotler's.

Would you like to move it, Mr. Cotler?

Hon. Irwin Cotler (Mount Royal, Lib.): Yes, thank you, Mr. Chairman.

On the amendment, I just want to state this is a technical matter regarding the language. It should read “34(1)” because the amendment is only with respect to subsection 34(1), not 34(2). Right now it just says “34”. That's just a technical change.

As well, where the amendment reads “That Bill C-26, in clause 2, be amended by replacing line 8 on page 1”, it should read thereafter “to line 18” in English, and in the French it should say:

[*Translation*]

“à la ligne 20”.

[*English*]

That's just for technical clarification.

I repeat, it should say “replacing line 8 on page 1 to line 18” in English, and with respect to the French,

[*Translation*]

“se terminant à la ligne 20”.

[*English*]

Now, if I may, I'll explain the reason for the amendment, Mr. Chairman, now that I've made that technical clarification.

This amendment comes from the Barreau du Québec's submission to the minister, and I concur with their opinion as expressed here, that it is preferable to legislate in the positive rather than in the negative. I would suggest the government might want to be supportive of this change because it better reflects the very objective of the government's legislation, which is to clarify the right of self-defence. All I'm seeking to do here is to do so rather than frame it as an exception to otherwise unlawful conduct.

I realize, Mr. Chairman, that some of my colleagues may be introducing or have introduced amendments to this section that procedurally may not be able to be adopted if my amendment is accepted, but I want to assure my colleagues that if that is the case, at report stage I'll be happy to support any of their amendments in whatever language they put them forward in this regard.

That's my amendment, Mr. Chairman.

The Chair: Go ahead, Mr. Goguen.

Mr. Robert Goguen (Moncton—Riverview—Dieppe, CPC): We're starting well. We'll have to agree to disagree.

We think the wording is proper. I think I understand what you're trying to do. It may be a matter of semantics, but within the framework of the act we feel that this wording is the best.

As you've characterized it there, it would characterize the defences of a justification to having acted. Basically, if you meet the criteria of proposed paragraphs 34(1)(a), (b) and (c), it's not an offence.

We're happy with the wording, and I think you said you're not striking out proposed subsections 34(1)(2) and 34(1)(3). That's what you were referring to at the start.

● (1110)

Hon. Irwin Cotler: Correct.

Mr. Robert Goguen: That was more objectionable than the wording, obviously, but we're happy with the wording as it is. We'd be going with it as it stands.

The Chair: Mr. Cotler is correct. If we adopt LIB-1, then NDP-1.1 and NDP-2 cannot be moved.

Mr. Jack Harris: I don't know why NDP-1 would be out, but I think we're going to....

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: Now we have NDP-1.

Hon. Irwin Cotler: It was a friendly clarifying amendment to the government's own objective, Mr. Chair.

The Chair: Go ahead, Mr. Harris.

Mr. Jack Harris: We're proposing that clause 2 in line 9 would state:

(a) they believe that

The reason is that we have had representations from the Canadian Bar Association concerned about ensuring that the subjective element be retained there. This would take out the words "on reasonable grounds".

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

I think my colleague may have some other comments.

The Chair: Go ahead, Ms. Findlay.

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

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

This new defence, as I read it, has been drafted to maintain the current approach to the perception of a threat that is both subjective and objective. I think it's important to keep both of 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.

The Chair: Go ahead, Madame Boivin.

[*Translation*]

Ms. Françoise Boivin (Gatineau, NDP): I understand what my colleague is saying, but I think we need to consider clause 34 in its entirety. Clause 34(1) reads " [a] person is not guilty of an offence if [...]".

Then comes a series of provisions: 34(1)(*a*), 34(1)(*b*) and 34(1)(*c*). Our proposed amendment to clause 34(1)(*a*) would establish that the person "believe [...]". Department officials were very clear about the fact that it was as perceived by the person in question. It is important to strike the right balance between the objective and subjective criteria. The element of reasonableness is already set out in clause 34 (1)(*c*).

The person must believe. How can reasonable grounds be established from a person's perception? They may have a certain perception of the situation, but they still have to act on it. What does it boil down to? The person must act reasonably. Therefore, clause 34(1)(*c*) stays as is. I don't see why you are so concerned; the clause has to be understood as a whole.

Although some witnesses preferred to see no change, that approach would not address what the courts were asking for. Judges told us that a change was warranted. That is the very purpose of Bill C-26, for that matter.

At the same time, it is important to find the right balance between the subjective and objective criteria. To my mind, the reasonableness component is contained in clause 34(1)(*c*) of the bill. Clause 34(1)(*a*) addresses the perception of the person in question. By adding another requirement, whereby the perception must be reasonable, we may be imposing a heavier burden than the circumstances warrant.

● (1115)

[*English*]

The Chair: Thank you.

Mr. Jean is next.

Mr. Brian Jean (Fort McMurray—Athabasca, CPC): Thank you, Mr. Chair.

Objectively, I would like to hear the subjective opinion of the people from the department and whether it fits in the norm of what the Criminal Code currently reads.

Ms. Joanne Klineberg (Senior Counsel, Criminal Law Policy Section, Department of Justice): Our view 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. The perception must be subjectively held and that perception must be reasonable.

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

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

My concern would be that if you make the perception purely subjective, 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 feel as 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 forgot to introduce the two officials at the table with us: Ms. Klineberg and Ms. Kane.

May I have Mr. Woodworth?

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

I listened with interest to Madame Boivin's comment and I would 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 mistaken fact.

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

Apart from that, I would 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 take out the qualification "unreasonable belief". As a result, I have to oppose this motion.

● (1120)

The Chair: Thank you, Mr. Woodworth.

Go ahead, Ms. Findlay.

Ms. Kerry-Lynne D. Findlay: I just wanted to add, in echoing Mr. Woodworth somewhat, that this has been a matter of a great deal of interpretation in our jurisprudence. The courts have considered reasonableness many times.

It may be that this is coming from some testimony that the perception of persons defending themselves should be paramount, but I think it would be very dangerous and not consistent with jurisprudence so far if the "reasonable belief" portion were 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 is next.

Mr. Jack Harris: Thank you, Chair.

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

The approach we're taking here, as I think is evident from the speeches we're giving in the House, is that we want to ensure as best we can as a committee, in my point of view, that the changes being made are adequate. This is a form of collegial discussion; 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: Okay. Does the committee agree with the withdrawal of NDP-1?

Some hon. members: Agreed.

(Amendment withdrawn)

The Chair: Now we'll move to amendment NDP-1.1.

Go ahead, 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", etc., and the confusion there, at least in the mind of the ordinary person reading that. If you're saying that 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.

I think there has been a movement—not necessarily followed very well—to plain language in statutes, and it seems to me that at least the notion of plain language would be supported by adding the words "would otherwise" prior to "constitute". It would be "the act that would otherwise constitute the offence"; in other words, in the absence of the defences that are set out there. It would read "the act that would otherwise constitute the offence is committed for the purpose of...".

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

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. This seems to me to be a useful amendment along those lines.

The Chair: Thank you.

Go ahead, Mr. Goguen.

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

Go ahead, Mr. Jean.

Mr. Brian Jean: I was just going to ask for the opinion of the officials who are here today. Quite frankly, I agree with Mr. Goguen. 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, but that if those factors weren't established, the act 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's not going to be an offence. It's 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.

Go ahead, Mr. Cotler.

Hon. Irwin Cotler: Mr. Chair, I have just a short comment. This exchange, for me, supports what I thought was the initial clarifying language 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 now on amendment 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 that "the act that constitutes the offence is committed" for a certain purpose and then state in proposed paragraph 34(1)(c) that "the act committed is reasonable", it's pretty hard to call it 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 comes from the fact that the words "constitutes the offence" are there, not otherwise, so we maintain our position.

The Chair: Go ahead, Ms. Boivin.

Mme Françoise Boivin: Just to be on the record, for me, it's really just clarifying it. It's just being logical. I fail to see where it changes the essence of what we're trying to say.

[*Translation*]

Changing the current wording of the bill—"the act that constitutes the offence is committed"—to "the act that would otherwise constitute the offence is", as proposed in the amendment, means that an offence has not yet occurred. I don't see what the problem is here; we are just proposing a clarification in the wording. This expression may not be as precise or as positive as that proposed by Mr. Cotler. But his amendment may necessitate that the clauses be changed too much. Our expression, however, would have a very minor effect on the rest of the text.

I am not sure I understand. Like my colleague Brian Jean, I would like you to explain it again. It may have to do with the fact that I am reading it in French, while the English is not the same. I don't know. As I see it, this is simply a matter of logic.

[*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 that 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 if, for instance, 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: If I assault somebody, if I actually hit someone, I'm not guilty of assault if I'm acting in self-defence, so I'm not guilty of the offence.

Ms. Joanne Klineberg: Right, but you have committed an assault.

Mr. Jack Harris: I haven't committed the offence.

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

Ms. Françoise Boivin: Then it 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 that I think is inherent in the language, no matter how it is drafted. 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 various levels that have to do with the finding that the elements of the offence have been proved 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 is next.

[*Translation*]

Mr. Robert Goguen: I won't repeat what Ms. Klineberg said. The starting point is that assault is an offence. Next, if certain factors are established, the assailant's actions may be defensible.

The premise whereby the assault is an offence is used to deter people, to preserve a certain degree of public order. In no way do you assault anyone, unless it is absolutely necessary. The basic principle is that assaulting anyone must be avoided. If, however, it is necessary, your actions may be defensible, in which case, the circumstances exonerate the assailant.

[*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 consensual—it is not a...? I don't know what it is. That's what I'm saying.

Mr. Robert Goguen: That question is not relevant.

Ms. Françoise Boivin: I understand the logic. I really do. 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: This is not consistent with the Criminal Code, and it's outside the scope of what we're doing.

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

Go ahead, Ms. Klineberg.

Ms. Joanne Klineberg: 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'm sure that's the way the courts will understand it. I don't really see how a Canadian who picks up the law and reads it would be confused by what he's permitted to do or not permitted to do. The same goes for police officers applying this legislation to a particular situation.

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

The Chair: Go ahead, Mr. Harris.

Mr. Jack Harris: Madame Boivin raised the point of a boxing match, which we're about to witness a couple of weeks from now. It may be outside the scope of our discussion, but if we're talking about an offence, 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 before us.

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 "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 proposed 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? Fine.

Ms. Findlay is next.

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: Go ahead, Mr. Jean.

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

The Chair: We have heard the interventions on amendment NDP-1.1.

(Amendment negatived)

The Chair: We are now on amendment NDP-2.

Go ahead, Mr. Harris.

Mr. Jack Harris: I'd move the amendment. My colleague also wishes to speak.

● (1135)

[*Translation*]

Ms. Françoise Boivin: Thank you, Mr. Chair.

This is further to the discussions we had on Tuesday with the witnesses who are here today. I want to clarify that the reasonableness of the act committed in the circumstances is perceived by the accused. We are simply making a clarification. I believe that addresses what the witnesses told us before. It removes any confusion.

Let us not forget something. There is an aspect of Bill C-26 that I like. I was not here when that incident occurred in the Toronto convenience store, the incident that may have led to the introduction of Bill C-26. I have been here since the new Parliament began, so after May 2, 2011. And I am very pleased to see that Parliament is finally reviewing certain sections of the Criminal Code that had not been subject to review for some time. Courts and judges have long been saying that certain components of the Criminal Code needed to be clarified.

I think that those who drafted these provisions did an exceptional job, which is not always easy under the circumstances. That is clear from the level of our debate. This is just one example of what could happen in court, with defence counsel. Anyone who has practised criminal law—our colleague Brian Jean has considerable experience in that area and will no doubt agree with me—knows that this is the kind of thing that happens in these situations. Commas get moved around, a few minor words get moved over to the right or left.

That is not what I want to do. I want to make sure that things are so clear that these types of questions do not come up. I simply want to repeat the comments that were made and the gist of the discussion we began on Tuesday.

[*English*]

The Chair: Thank you.

Go ahead, Ms. Findlay.

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

My objection to this is the same, really, as I voiced on the earlier amendment. This one is very similar 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.

Go ahead, 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, namely the 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.

Go ahead, Madame Boivin.

[*Translation*]

Ms. Françoise Boivin: I will be even more specific. As far as reasonableness and the whole subjective versus objective debate go, I want to pick up on the last question I asked you on Tuesday. It appears in the blues and reads as follows:

> Last question, further to the first point I raised with you, about reasonableness and the subjective-objective distinction, would it not behoove us to specify that the perception of reasonableness is precisely on the part of the person who used the force. Would that give rise to a problem or, on the contrary, eliminate a problem by sending a clearly defined message, one that is more or less already being delivered by the courts, at least to settle the matter once and for all.

Ms. Klineberg gave the following response: Generally speaking, that is how the courts deal with it. It is a matter of taking the perception of the accused into account, but insofar as that perception is reasonable.

In her opinion, it is acting reasonably in the circumstances. We attempted to bear in mind what various groups and department officials told us and then clarify certain points. If you don't want us to make any amendments, tell us at the start, instead of letting us waste our time bringing in witnesses and discussing the issues with them. Unless the answer is no longer the same today, this amendment is entirely in keeping with current case law. If we do not include it, the case law will once again serve as the sole basis for analysis.

I can tell you that, as a lawyer, when I argue a case, I much prefer basing my argument on a law rather than on decisional law that is easily distinguishable in terms of the facts. If a law stipulates the test to be used, I do not challenge it.

● (1140)

[*English*]

The Chair: I think you're a little early. We've only dealt with—what, two amendments?

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

The Chair: Madam Findlay is next.

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, but 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 test.

The point here is to keep it open for both to be looked at, because as far as I am aware, the jurisprudence, over my years of practice, is that both elements are looked at in the analysis. There's how that person perceives it at the time, and all the other factors that are still here in the legislation and that in fact have been identified as we go through this; there's also the idea of an objective look at it, because there are people who might perceive a threat, while any of us sitting here would think that it was unreasonable to perceive a threat in those circumstances.

We're trying to keep that balance there.

The Chair: Go ahead, Mr. Harris.

Mr. Jack Harris: 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 we received from the Canadian Bar Association. The CBA recognizes that there needs to be a balance, as has been suggested, between the subjective and objective tests that we use there. They were concerned that the balance was not even enough and 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 is next.

Hon. Irwin Cotler: I think the amendment is both well intentioned and 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 in the shoes of those exercising the act of self-defence. I'm thinking in particular of the situation of a battered woman; in this situation, this kind of balance would facilitate the court's interpretation and appreciation of what has happened.

The Chair: Thank you, Mr. Cotler.

Go ahead, Mr. Jean.

Mr. Brian Jean: I was just wondering if the officials could give us an estimate of what they think the ramifications of inserting this change would be.

Ms. Joanne Klineberg: I can respond with my own words from Tuesday.

This is not quite the same as what I was suggesting that the current approach is. If I look at the English version of what you've proposed, the act 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.

This is different from what I was suggesting on Tuesday, which was that the reasonable perceptions of the accused are a factor to be taken into account, along with all of the other factors, in determining whether the action itself was reasonable from an objective viewpoint.

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

The Chair: Go ahead, Madame Boivin.

[*Translation*]

Ms. Françoise Boivin: Once again, I repeat that the clause cannot be read in isolation. Clause 34 contains provisions (*a*), (*b*) and (*c*). Adding this provides some information, but immediately after, clause (2) says the following:

[*English*]

"in determining whether the act committed is reasonable". I'm referring to subsection 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. What are we trying to do here?

● (1145)

[*Translation*]

Do we want to support the notion of self-defence to make things clearer for the courts or do we want to complicate it to make it less accessible? If we knew what the intention was, that would help. In my view, we need to opt for clarity.

The example Ms. Findlay gave earlier comes to mind, as does a report you might hear on the radio of a woman killing her husband. From the outside, it may come off as a cold-blooded crime and appear to be completely unreasonable, but it may have been completely reasonable from her perspective. Clause 34(2) sets out the criteria that the court must assess, the nature of the force or threat, the size of the parties and so forth. Say the woman is six foot seven and her husband is four foot eight; that will be taken into account.

I don't understand the government's concern over this clarification. The perception of the accused has to be mentioned somewhere, even though it must not be the sole or most important consideration. The goal is not to create a free-for-all and allow profiling, for instance, where someone assaults a person simply because they don't like them and feels it is reasonable. That is not all what I am trying to do. I am trying to make it logical. I thought that was the gist of our conversation on Tuesday. That is why we are proposing this clarification, with the full knowledge that clause (2) specifies

[*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 that.

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 act of the accused, who reasonably and subjectively perceived a threat and acted solely for a defensive purpose, was reasonable. 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?

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. Along with the list of 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.

Go ahead, Mr. Jean.

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

In a way it reminds me of the argument in relation to finally limiting the “evidence to the contrary” defence in impaired driving offences. That's my perspective, anyway. I think it's a much better balance than how it is currently.

The Chair: Thank you.

Go ahead, Mr. Harris.

Mr. Jack Harris: We still have “reasonable” there. We still have the “reasonable grounds”. We still have the subjective intention in 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 with whether we have a full offence.

I go back to what Mr. Cotler and Madame Boivin raised. If we're dealing with what's been called battered wife syndrome, then 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 that they are going to decide what the perception of this person was and put themselves in that person's shoes when they haven't actually been there.

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

● (1150)

The Chair: Thank you.

Go ahead, Mr. Woodworth.

Mr. Stephen Woodworth: Thank you.

Mr. Harris's comments carry some weight, but they are really satisfied by proposed paragraph 34(1)(a). If we're talking about battered woman syndrome, proposed paragraph 34(1)(a) deals with the question of belief on reasonable grounds that force is being used against them. That does, in fact, combine an objective and a subjective test in a manner that addresses the issue of battered woman syndrome.

On the other hand, if one believes on reasonable 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 proposed paragraph 34(1)(c).

Thank you.

The Chair: Thank you, Mr. Woodworth.

Mr. Seeback is next.

Mr. Kyle Seeback (Brampton West, CPC): I would just pick up from where Mr. Woodworth was.

Proposed paragraph 34(2)(f) outlines exactly the circumstances: “the nature, duration and 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 woman who might be suffering from battered wife syndrome, so I don't think the amendment is helpful in clarifying anything for the court.

The Chair: Seeing no further interventions, shall amendment NDP-2 carry?

Mr. Jack Harris: Mr. Chairman, I'm caught up in this debate here, because we are talking about a particular type of concern in the criminal law that has been rather excruciating for courts and juries to deal with.

On the battered wife syndrome, yes, Mr. Seeback's right in saying that's a factor that's taken into account, but when we look at all of the factors as set out there, including “the nature, duration and history of the relationship”, and the concern that Mr. Seeback just pointed out.... There's also proposed paragraph 34(2)(g) on “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 that we have these types of incidents 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 to the threats that were there, the perception of the person involved is key. It's key, and I think we need to ensure that it's there. I don't know if it's there.

Obviously the reasonable grounds are that force is being used against them or there's a threat. Yes, fine, there's a threat, and the act constitutes the purpose of defending oneself. That's not a problem, but then whether the act committed is reasonable in the circumstances is a purely objective test. It's purely objective.

Then they're saying, “Why didn't you leave?” Well, 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: Go ahead, 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 far too often, and I certainly would never jeopardize the ability of someone to raise the issue of self-defence in those very difficult circumstances, but 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 an 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, in which an unreasonable perception—one that anyone would see as unreasonable—could be taken as the norm or the standard.

We need to allow the courts the discretion to look at all the circumstances. I have no doubt that the individual perceptions of a person in such a situation—more often a woman than a man—are taken into account and need to be.

● (1155)

The Chair: Mr. Woodworth is next.

Mr. Stephen Woodworth: 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 the current wording changes any of that.

Thank you.

The Chair: Thank you.

Madame Boivin is next.

[*Translation*]

Ms. Françoise Boivin: I will be brief.

I would be remiss if I did not try once again, especially today, International Women's Day. This evening, I will be speaking at a shelter for abused women.

It is easy for us to make these kinds of remarks. I am familiar with your career path, and I respect you very much. I know these are not easy cases. But, speaking seriously, this is the first opportunity we have as lawmakers to amend the Criminal Code in this regard; do we wish to make it clearer or to assert the importance of the case law? My colleagues, you know as well as I do— However, the Conservatives are usually the first ones to say that we should not leave the business of law-making up to the courts.

The fact that it has been interpreted that battered woman syndrome could be used by some courts does not mean that it will happen every time. Nowhere in clause 34(1), as written, or even in clause 34 (2), does it suggest that this is in relation to the person themselves. Technically speaking, if I were hearing a case, as the judge I could decide to believe something "on reasonable grounds". I could determine that the accused's perception was not reasonable. I could view that perception differently and disregard that line of thinking.

Let's consider the following passages: "(*b*) the act that constitutes the offence is committed for the purpose of defending [...] themselves"; "(*c*) the act committed is reasonable in the circumstances." There again, the person's perception is not considered.

In clause 34(2), the bill goes on to say that "[i]n determining whether the act committed is reasonable in the circumstances, the court may consider [...] factors". A list of criteria follows, and the person again does not come into play.

I am worried about what lawyers could use the amendments to mean; at the first opportunity, lawmakers codified battered woman syndrome to some degree, and yet it does not appear anywhere. What's worse, if they read our proceedings, they will find out that, on the contrary, the current government objected to the consideration of the person's perception as a.... The argument is that it is probably in there and the courts will probably use that criterion in administering the law.

If I were a judge, I would in no way feel obliged to apply this criterion. Either you believe in the criterion or you don't. That is what I think.

[*English*]

The Chair: Thank you.

Go ahead, Mr. Jean.

Mr. Brian Jean: I think we've heard from everybody about six or eight times, but for the record, we're not objecting to its 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, and I think it's clearly there. We've heard from the officials that it's clearly there. We've heard from a number of lawyers on both sides, 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.

(Amendment negatived)

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

Mr. Jack Harris: Yes, lines 23 and 24.

The Chair: Go ahead, Mr. Harris.

Mr. Jack Harris: There were suggestions from some of our witnesses that the open-ended "may consider" did not require the consideration of any of those factors. The suggestion is to replace line 21 with: court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

It is designed to make it a little more clear, but not limit it to the "shall consider" and not limit it to just those factors. It's an alternate wording that we consider more appropriate.

The Chair: Thank you.

Go ahead, Mr. Goguen.

[*Translation*]

Mr. Robert Goguen: In light of the previous amendments, at least in your view, we need to put more emphasis on the perception of the accused. The law clearly requires a balance between perception and subjectivity. I think this amendment favours the individual's perception. Frankly, we have no objection to including it.

[*English*]

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

As 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.

(Amendment agreed to [See *Minutes of Proceedings*])

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 now on NDP-4.

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

We've added this 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. Size doesn't necessarily matter either. You could be a big character with disabilities or an inability to respond. The addition of physical capability seems to me to be aiming at 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.

Go ahead, 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, one that isn't necessarily covered just by the wording of "size", for instance. It adds to a non-exhaustive list of the 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 suspicions 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 [See *Minutes of Proceedings*])

The Chair: We are now on NDP-5.

Mr. Jack Harris: We're looking at clause 2, line 11, page 2. Proposed paragraph 34(2)(f) 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 word 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.

Go ahead, 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 that broad, might detract from the focus. It's difficult to predict if it would have any effect in drawing the courts' attention to the battered woman situation, which is really the primary reason for this part. I'd actually like to toss this to the 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 that 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 take account situations that bear no relation at all to the battered spouse situation, the greater the risk that you may undermine that signal from Parliament to the courts.

The Chair: Go ahead, Madame Boivin.

[*Translation*]

Ms. Françoise Boivin: I find the two comments I just heard fascinating. But if you read the French text, you will see that it talks about “rapports” between the parties. That may be the source of the confusion. The French word “rapports” and the English word “relationship” do not in fact mean the same thing. The French word “rapport” is broader in meaning. I am glad to see that it was designed with the idea in mind of....

I will apply this to another situation that concerns us all, bullying. Imagine a little boy who is picked on every day in the schoolyard. There is no true “relationship”. That is why I think the Canadian Bar Association took both meanings into account when making its recommendation. I am telling you that “rapport” in French refers to interaction between people. That is why they made the recommendation to us. That was my understanding.

When they made their presentation, I understood that it affected not only battered woman syndrome, but also bullying, which are specific cases referred to in clause 34(2)(*f*). We must consider the type of connection that existed between the accused who is trying to argue self-defence and the person who was battered, struck or whatever.

We are not trying to weaken self-defence, far from it. That is not what we are trying to do; we want to be sure we are targeting the same thing, that is all.

● (1210)

[*English*]

The Chair: Thank you, Madame.

Do the officials have something they wish to add there?

Ms. Françoise Boivin: It makes sense. Just admit it.

Ms. Joanne Klineberg: I only want to say that the committee may wish to add other types of relationships, interactions, or knowledge that the parties have with each other, but 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 they should continue to bear in mind this one particular situation.

The Chair: Thank you.

Go ahead, 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”. Because the legislation is using words to broadly describe relationships and saying “any relationship”, courts are going to very broadly construe what the term “relationship” means. When a person 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 that will be constituted as some form of a relationship under the section.

The Chair: Go ahead, Mr. Harris.

Mr. Jack Harris: I thank the members opposite for packaging this notion of a type of relationship that constitutes the circumstances of a battered spouse syndrome. I don't see it as an either-or matter, though.

I'm wondering, Ms. Klineberg, if you could help us here. I'm not married to this particular substitute. I've been persuaded that keeping “relationship” there.... We may have to change the French to accommodate it. Do you have any suggestions on how we could ensure the purpose behind this amendment on “interaction or communication between the parties”?

I don't see where else it's covered, other than among other factors. I would like to see that notion there somewhere. I'm not convinced by Mr. Seeback's argument that any relationship is broad enough to cover the bullying. There may be a history of one or two incidents of somebody making threats, and this 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, it should be formulated as a new subparagraph and not attached to this one. This would keep this idea distinct and undiluted.

The Canadian Bar Association mentioned situations in which there was no interaction between the parties, but one had knowledge of the other—for instance, one party knew of a reputation for violence. My understanding from their submissions was that this was a situation they were also interested in, so you might want to consider that as well.

It might be something that could be used to formulate a separate factor, if it were linked with the ideas you have proposed here.

The Chair: Go ahead, Ms. Kane.

Ms. Catherine Kane: I would remind the committee 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. At the same time, we're quite confident that when those factors are relevant, they will be presented to the court and taken into consideration. For instance, bullying would be covered by the nature of the unhealthy relationship.

Mr. Seeback summed it up quite well. It says the “nature...of any relationship”, so even if it was a relationship that we wouldn't consider to be an ongoing one—say, a schoolyard relationship, an unhealthy relationship, an acquaintance type of relationship—it would still constitute a relationship. It's a broad concept that would not take away from the wording we've seen time and again in case law about the nature and history of a relationship and the spouse acting in self-defence knowing exactly what she is going to face if she doesn't take action.

● (1215)

The Chair: Thank you.

Go ahea, 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. It doesn't even have to mean they have a relationship, just a reputation of a relationship or an expectation of one. I think to add something in this case might run counter to what we actually want to do. I think being too specific might be restrictive in the future and might cause problems for the court.

"Relationship" is good; the courts have interpreted it time and time again. I remember a case I had of a battered wife killing her husband. I defended her, and the court went through a litany of examples of what the expectation was and what "relationship" actually meant. I think it's already trite law. It's already there.

The Chair: Thank you.

Go ahead, Mr. Harris.

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

I would like the officials to address the French version and the term "*des rapports*" as opposed to "relationship".

I'm not familiar with the nuances of the French language, but Madame Boivin has raised that point. Are you able to comment on it now?

Ms. Catherine Kane: We would want to consult with the drafters to make sure that they had strong reasons for using the word *rapports*. If you had other suggestions, we could take that back to them for their reaction, but this would not permit you to deal with the issue now.

Mr. Jack Harris: Well, do you have any suggestions, Chair? 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 amendment at this time rather than have it voted on.

The Chair: How about 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. We have 45 minutes. If we don't get through it today—

Mr. Jack Harris: It'll be another time.

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

An hon. member: Could it be a report stage amendment?

The Chair: No, it has to be done here.

An hon. member: Then it's withdrawn and—

The Chair: It could be done when we come back, right?

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

The Chair: You mean back here.

Mr. Jack Harris: I think we should fix it now. We're at clause-by-clause study for a reason. If we don't have an adequate understanding at this stage, then we have to deal with it here. We've seen some unhappy experiences in the last short while regarding amendments at report stage.

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

Mr. Jack Harris: I have another suggestion.

The Chair: Okay.

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

Ms. Françoise Boivin: Francophones.

Mr. Jack Harris: —francophone group here. Mr. Seeback's suggestion as to how "any relationship" might be interpreted and Mr. Jean's comments that the word "*rapports*" is a little broader than the way "relationship" might be understood lead to the conclusion that in fact the wording is acceptable.

An hon. member: Perfect.

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

The Chair: Go ahead, Mr. Cotler.

Hon. Irwin Cotler: Mr. Chairman, listening to the discussion about wanting to keep the word "relationship" and hearing some of the other comments, I was going to say that one might want to consider a new paragraph, 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 proposed paragraph 34(2)(f), and you would just add a new proposed subparagraph, 34(2)(g)(i), which would provide a 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?

A voice: You'd have to withdraw—

Mr. Jack Harris: I'd suggest withdraw, but nobody would consent to it.

An hon. member: I would consent.

The Chair: Just a minute. Whoa. Let's do this through the chair.

The legislative clerk tells me that, properly, 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. You can't do what you're trying to do.

If you wish to withdraw it, we'll ask for consent to withdraw it, and then—

An hon. member: We consent.

The Chair: You give consent to withdraw?

Some hon. members: Agreed.

(Amendment withdrawn [See *Minutes of Proceedings*])

The Chair: Okay.

Go ahead, Irwin.

Hon. Irwin Cotler: In light of that, Mr. Chair, I would propose a new proposed subparagraph, 34(2)(g)(i), 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.

[*Translation*]

Mr. Stephen Woodworth: Is there a French text as well?

[*English*]

The Chair: Voices: Oh, oh!

The Chair: Mr. Cotler, we have a couple of questions.

Are you replacing what's there, proposed paragraph 34(2)(g), with...?

Hon. Irwin Cotler: No. Proposed paragraph 34(2)(g) would become proposed paragraph 34(2)(h), proposed paragraph 34(2)(h) would become proposed paragraph 34(2)(i), and I would be recommending the insertion of a new proposed paragraph 34(2)(g) as I stated it.

Ms. Lucie Tardif-Carpentier (Legislative Clerk): Could it be proposed paragraph 34(2)(f.1)? Would it come before?

Hon. Irwin Cotler: A proposed paragraph 34(2)(f.1) is fine too.

Yes, that's fine.

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

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

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

Please read it slowly so that we'll be sure that we have it exactly.

● (1225)

Hon. Irwin Cotler: Okay.

As amendment LIB-1.1, it would be added as proposed paragraph 34(2)(f.1). It would read in English:

> (f.1) any history of interaction or communication between the parties to the incident;

In French, it would read:

[*Translation*]

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

[*English*]

The Chair: Go ahead, Ms. Boivin.

Ms. Françoise Boivin: Maybe for my colleagues who are better in English than I am, would somebody sending harassing e-mail, really scary ones, be considered inside of a relationship? Could we see it as written in proposed paragraph 34(2)(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—maybe it's my bad understanding of the language—meant something more personal between two people. Let's say an MP, or whoever, keeps receiving really threatening e-mails and doesn't consider there's a relationship with the person whatsoever.

That's my question.

The Chair: Okay.

Go ahead, Ms. 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.

You might call that relationship a distant relationship—

Ms. Françoise Boivin: Interaction or communication-—

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

The Chair: Go ahead, Mr. Jean.

Mr. Brian Jean: The definition in the dictionary is "the state of being connected or related", and there are others. In English "relationship" can mean anything. That's why I oppose Mr. Cotler's suggestion. If I were a judge and it said "relationship", and then proposed paragraph 34(2)(f.1) said whatever it says, it would indicate to me that you couldn't go past the history of the parties.

We've already heard courts that have interpreted not just the history of the parties as a relationship, but also the reputation, as they understand it, of a certain individual forming part of that relationship, because it's past history. It goes beyond just the history between the two parties.

That's why I oppose that amendment. I think it restricts 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: Go ahead, 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. I don't see it as something that would take away from that broader word.

The Chair: Go ahead, Mr. Harris.

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

On the idea of expecting "relationship" to be stretched, especially when the clear intention here is to have a clause aimed at what we're calling the battered spouse syndrome, I think having interaction and communication as a separate item really ensures that we don't confuse the two. It's a non-exhaustive list, but I don't think it hurts to mention that, because people increasingly use the Internet to threaten or harass or do 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.

Go ahead, Mr. Cotler.

Hon. Irwin Cotler: It has 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.

Go ahead, Mr. Jean.

Mr. Brian Jean: 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 comment on that.

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

Mr. Brian Jean: Yes.

Ms. Catherine Kane: Do you mean "for greater certainty"? I don't really think that's—

Hon. Irwin Cotler: As I said, that wasn't meant to be added. I was just explaining why I added it.

Ms. Catherine Kane: 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 offering greater certainty to anything in particular. We're planting some guidelines in terms of what the factors are, but leaving it open to the courts to consider any that are relevant.

It's entirely up to the committee whether they want to add in the additional factor of the interaction or communication or leave it to be considered when it happens to be relevant in the circumstances that are presented.

The Chair: Thank you.

Go ahead, 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 syndrome. Where the elements are non-exhaustive, I don't think it detracts from it. If anything, it perhaps complements it.

The Chair: Shall Liberal amendment LIB-1.1 carry?

(Amendment agreed to)

The Chair: We're now on amendment NDP-6.

Go ahead, Mr. Harris.

Mr. Jack Harris: This amendment is to delete lines 14 to 16 on page 2, which essentially is proposed paragraph 34(2)(g).

I raise this because it has been raised by one of our witnesses who was concerned that including this wording here 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 lethal force in certain circumstances that were specified in the old act.

It was urged upon us that putting this here would potentially limit or remove the protection that was in the existing Criminal Code. I was persuaded by that argument enough to put this forward.

I do want to hear what the officials have to say about it, because we're talking about lethal force and very extreme circumstances, clearly, when someone has lost their life, and we wouldn't want the inclusion of this clause to remove a defence that already existed in the law.

I know it's a somewhat rare circumstance and 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—I forget exactly which witness raised it; I don't think it was the CBA—that the 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 harm or death. That's the reason for it.

I think that the nature of the response to the use of threat or 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.

Go ahead, 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 Stewart, and also Mr. Russomanno, who pointed out the proportionality question. My understanding of what they were concerned about was the replacing of the idea of proportionality with the idea of reasonableness as the last factor in self-defence. In other words, proposed paragraph 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 reasons the new self-defence law is suggesting the concept of reasonableness as opposed to proportionality is that proportionality is not actually applied in a literal manner by the courts. The courts understand that in high-pressure self-defence situations, 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 understanding that an act that is disproportionate to the threat can never be found to be reasonable. Reasonableness carries with it the flexibility 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 that you want the proportionality between the threat averted and the harm caused 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 a factor to consider in determining reasonableness.

The Chair: Thank you.

Go ahead, 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 no longer be the determinative factor, but as it is, it certainly would remain and ought 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 me, so I would not support this amendment.

The Chair: Thank you.

Go ahead, Madame Boivin.

Ms. Françoise Boivin: It makes sense, what I am hearing right now. My sole question on proposed paragraph 34(2)(g) right now is this: how come in English there's an "and" at the end?

When I read proposed paragraph 34(2)(g), it's as if you are putting it in conjunction with 34(2)(h), unless it's me who's wrong.

Mr. Jack Harris: It's because it's the second-last one. There may be a drafting error there.

Ms. Joanne Klineberg: In—

Ms. Françoise Boivin: But there's none in French. When I read it in English, I'm asking if I have to.... Those are criteria for the court. They are all stand-alone criteria, and we could add

[*Translation*]

ad vitam aeternam

[*English*]

if we wanted. You have that "and" between proposed paragraph 34(2)(g) and proposed paragraph 34(2)(h) in English, but we don't have the same. Am I supposed to read them together?

Ms. Joanne Klineberg: I think the drafting convention in English is to have the "and" between the last two items in a list, but not to have it in French.

I think if you look in all the other areas of the bill, it is consistent —

Ms. Françoise Boivin: It's consistent.

Ms. Joanne Klineberg: The "and" is there in English, but it is not there in French. I couldn't explain to you why that is, but I do think that is a firm drafting convention.

● (1240)

Ms. Françoise Boivin: It's going to be on record that it's not two clauses that read together.

Ms. Joanne Klineberg: That's right.

Ms. Françoise Boivin: Okay, excellent. Thank you.

The Chair: Thank you.

Go ahead, Mr. Harris.

Mr. Jack Harris: Mr. Chairman, in light of the discussion, I would withdraw NDP-6 with the consensus available at the other side.

The Chair: Is there consent to withdraw?

Some hon. members: Agreed.

(Amendment withdrawn)

The Chair: Thank you.

We're on amendment NDP-6.1.

Mr. Jack Harris: In light of the previous vote, I don't see any point in having the debate and another vote on this, so I will withdraw it.

The Chair: It wasn't moved, so we don't have to withdraw it.

Mr. Jack Harris: I won't move it then.

The Chair: Okay.

Mr. Cotler, amendment LIB-2 is identical to NDP-7.

Hon. Irwin Cotler: Mr. Chairman, this amendment is intended simply to clarify the French version of the legislation. As we heard from the Barreau du Québec, the word "lawfully" in the English version is not appropriately translated by the expression

[*Translation*]

"de façon légitime".

[*English*]

in the French, so I would encourage members to accept the change in French to

[*Translation*]

"façon autorisée par la loi",

[*English*]

to ensure that the bill has the highest quality translation and there's no discrepancy between the meanings of the English and the French translation. You are correct to have noted the NDP has a similar amendment.

The Chair: Go ahead, Mr. Harris.

Mr. Jack Harris: We have a similar amendment, but I would like some assistance, being an ignorant Anglo here, with the nuances. I discussed it with my colleague yesterday and I asked—

Ms. Françoise Boivin: I didn't make you more smart with that?

Mr. Jack Harris: Is the word "unlawful" in English the same as what we have here, saying something is not authorized by law?

[*Translation*]

Ms. Françoise Boivin: Yes, "légitime".

[*English*]

Mr. Jack Harris: Being authorized by law seems to me to be a positive requirement that there be an authorization. This is not to denigrate the Barreau's suggestion here, but they aren't the legislative drafters.

Could you give us some enlightenment as to whether this wording has been considered by you since the Barreau made the suggestion? Maybe you could enlighten us.

Ms. Joanne Klineberg: Yes, subsequent to the Barreau's submissions, I did discuss this issue with our drafters. One thing I can relay that they mentioned was that in their view the existing language

[*Translation*]

"de façon légitime" in French

[*English*]

is more consistent with similar types of provisions in the Criminal Code, but more importantly, I do think it's true to say that

[*Translation*]

"autorisé par la loi" in French

[*English*]

is not exactly the same as *de façon légitime* in the same way that "authorized by law" in English is not exactly the same thing as "lawful". Authorized by law and

[*Translation*]

"autorisé par la loi" in French

[*English*]

would require basically a statutory grant of authority—

Mr. Jack Harris: Yes.

Ms. Joanne Klineberg: —whereas

[*Translation*]

"de façon légitime" in French

[*English*]

or "lawful", can also incorporate the common law. Here I think the idea was to incorporate a broader notion of what the conduct might include.

I'll end there.

Mr. Jack Harris: My ignorant nuance is perhaps right.

Ms. Joanne Klineberg: Yes.

The Chair: Go ahead, Mr. Goguen.

Mr. Robert Goguen: I don't think I can add to that. In essence, basically, I understand the spirit of what's intended, but for the sake of consistency, the word *légitime* is used throughout the Criminal Code. The consistency is what requires that it remain as such. It's called *la légitime défense*, self-defence. That's what we're talking about here today.

The Chair: Go ahead, Mr. Cotler.

Hon. Irwin Cotler: Chair, having heard the officials and much of the exchange, I will withdraw the amendment.

The Chair: Does Mr. Cotler have consent to withdraw the amendment?

Some hon. members: Agreed.

(Amendment withdrawn)

Mr. Jack Harris: We don't propose to move NDP-7.

Do you have a question?

Ms. Françoise Boivin: I just want to make sure that I understand. I think everything I heard makes sense. "Unlawful" in English means it doesn't need a legal text or anything.

[*Translation*]

The French word "légitime" has the following meaning. If I commit an act that is "légitme", it can mean that the act is acceptable. You don't need the idea of legality with that word. That may be the reason for the question about the words "unlawful" and "légitime". I find it satisfactory; the French word "légitime" is so much broader. I will not object if we want to let someone use that defence.

However, is the word "unlawful" a term that has nothing to do with the law?

● (1245)

[*English*]

Ms. Joanne Klineberg: It would have to do with the law, but it would not be limited to statutory law.

Ms. Françoise Boivin: So it could be jurisprudence, it could be whatever, but "*légitime*" doesn't have that full extent. Let's all agree that it is a bit different, so if I were to go in front of a court, I would argue the French text on behalf of the accused anytime, if I'm not a crown attorney.

Ms. Joanne Klineberg: In response to that, I would only just relay again that it's my understanding that the drafters, when they received the Barreau's submissions, looked quite closely at this issue and looked at terminology throughout the Criminal Code—

Ms. Françoise Boivin: And they were satisfied....

Ms. Joanne Klineberg: —and they were satisfied that this was a term that's consistent with other areas of the code.

Ms. Françoise Boivin: Perfect.

Mr. Jack Harris: I think the point, as I understand it, is that for "authorized by law", you might have to look to a particular law that makes the authorization, whereas in English, if you say "lawful", it just means "not unlawful". That's all it really means.

Ms. Françoise Boivin: I want it so much to be a bit tougher on crime.

Mr. Jack Harris: In any case, we won't be moving NDP-7.

The Chair: If Liberal amendment L-3 is adopted, NDP-7.1, NDP-8, NDP-8.1, NDP-9, and LIB-4 cannot be moved.

Hon. Irwin Cotler: Mr. Chairman, this amendment is similar to the amendment that I proposed outside of the meeting today, except that we're talking here in terms of the defence of property. The view here is that, again, it's preferable to legislate in the positive rather than the negative in regard to these defences. In this instance, I said in relation to the defence of property.

The current bill begins in section 35 by noting, "A person is not guilty of an offence if", and then it goes on to discuss something which denotes a misconduct from which they are being excused. The amendment that I'm proposing just puts it in positive language: "Everyone is justified in acting to protect their property if". It's just an amendment to restate the same principle in the positive rather than the negative.

The Chair: Thank you.

Ms. Findlay—

Hon. Irwin Cotler: I just want to say technically that the line numbers are wrong. It should read that the clause "...be amended by replacing line 28 on page 2 to line 14 on page 3...". Also, "35" should be changed to "35(1)".

In the French, it should say

[*Translation*]

"et se terminant à la ligne 16".

[*English*]

The Chair: Okay. Thank you.

Go ahead, Ms. Findlay.

Ms. Kerry-Lynne D. Findlay: In our view, the current wording as proposed is clear and is the best approach. The new defence of property provision in Bill C-26 is intended to clearly establish that the person is not guilty of an offence when the person acts to defend the property in accordance with the law.

Mr. Cotler's proposed amendment would characterize the defence as a justification, for the same reasons as given in relation to the same proposed changes to section 34.

We don't agree with this. There is nothing special about a justification defence relative to an excuse or other types of defence. We feel that a modern criminal law need not continue to use this terminology. It's clear that if the elements of the defence are present, a person then is not guilty of the offence.

The Chair: Thank you.

Hon. Irwin Cotler: Mr. Chairman, it's basically reframing and restating the same arguments we made earlier, so I think we know where we're going.

The Chair: Thank you.

Seeing no further interventions, I shall put the question on amendment LIB-3.

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: We are on amendment NDP-7.1.

● (1250)

Mr. Jack Harris: Amendment NDP-7.1 is similar to the other two amendments, the first of which was defeated, so we will not be moving this one for obvious reasons.

The Chair: Next is amendment NDP-8.

Mr. Jack Harris: Amendment NDP-8 is similar to the previous one: "circumstances as perceived by the person".

We will move this, but we won't debate it any further.

The Chair: The question is on amendment NDP-8.

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: Next is amendment NDP-8.1.

Mr. Jack Harris: We are not moving amendment NDP-8.1, for obvious reasons.

Ms. Kerry-Lynne D. Findlay: You are not moving it?

Mr. Jack Harris: We are not moving it.

The Chair: Next is amendment Liberal-4. Mr. Cotler, are you not moving it?

Hon. Irwin Cotler: It has been overtaken.

The Chair: Thank you.

Next comes amendment NDP-9.

Mr. Jack Harris: We're not moving it.

The Chair: You're not moving it?

Mr. Jack Harris: You're doing a great job there, Mr. Chairman.

The Chair: Shall clause 2 carry as amended?

Mr. Jack Harris: Well, no, we're not finished yet.

The Chair: We're just finishing clause 2.

Mr. Jack Harris: Oh, clause 2? I see. I'm sorry, sir.

Ms. Françoise Boivin: Oh yes, that's true.

The Chair: The clerk has the chair in order—

Ms. Françoise Boivin: You're well ahead of us, Chair.

The Chair: —so trust the clerk.

Mr. Jack Harris: I'm glad the chair is under control.

The Chair: Shall clause 2 as amended carry?

(Clause 2 as amended agreed to)

(On clause 3—*Arrest by owner, etc., of property*)

The Chair: We are on clause 3 and amendment NDP-10.1.

Go ahead, Mr. Harris.

Mr. Jack Harris: NDP-10.1 is on the issue of citizen's arrest.

We had a fair amount of discussion from the witnesses. I know some of it has been discussed with the officials already. We are mindful of the suggestions made by the three panellists last week.

I move that clause 3 be amended by replacing line 38 with the following:

(b) they make the arrest at the first reasonable opportunity within a reasonable

This is to try to put a framework of time and place around an open-ended "reasonable time". I think we've been persuaded by the arguments and the views proposed by the officials. What if 50 hours turned out to be reasonable, instead of 48? What if somebody showed up at the 47th hour with three buddies when there was nobody around? I'm not able to make the arrest, but I might be in 52 hours. That's an undue constraint.

We thought that we'd change that to this proposal, which is that the arrest will be made at the "first reasonable opportunity within a reasonable time". We had three or four scenarios put forth at our committee. We are mindful of trying not to empower unintentionally the activities of third parties or private security groups or others who might want to turn themselves into special investigators and go beyond what this is intended to do.

The "first reasonable opportunity" seemed to be the best way to constrain the time so that it's not open-ended. You can't just wait around. You can't spend two weeks doing a big investigation and then show up at somebody's door and arrest him. It has to be as soon as it's reasonable, and the "first reasonable opportunity" is a good wording. That would be a further constraint on the "reasonable time" factor. That's the rationale.

I'd be interested in any other comments that you or the officials may have on this proposed wording.

● (1255)

The Chair: Go ahead, Madame Boivin.

[*Translation*]

Ms. Françoise Boivin: I will keep it brief, as Mr. Harris has covered everything.

We are indeed worried about this aspect, and we are not the only ones concerned about adding the idea of a reasonable time. We know it opens the door to many situations that are very difficult to define.

Initially, we agreed with including a time frame, but what it does is undermine the logic behind the new concept that we are trying to introduce. However, nothing is being taken away from the idea of making an arrest within a reasonable time. We simply need to specify that the person making the arrest must do so as soon as possible, in other words, at the first opportunity. That has to be clear in people's minds, when it comes to everything that will come after the passage of the bill.

In my view, this does not take anything away from what is there. It is a necessary clarification for those who will make these kinds of arrests.

[*English*]

The Chair: Thank you.

Mr. Woodworth is next.

Mr. Stephen Woodworth: Before I ask my question, may I have some clarification? I'm not sure whether we're speaking of NDP-10 or NDP-10.1.

Ms. Françoise Boivin: NDP-10 is off the table. NDP-11 is also off the table.

Mr. Jack Harris: The next one is off the table as well.

Mr. Stephen Woodworth: Thank you. I think I'm going to stop there, then, and think about my comments before I proceed.

The Chair: Good idea.

Go ahead, Mr. Goguen.

Mr. Robert Goguen: I understand what's attempting to be done here, perhaps for the sake of clear wording for the average citizen. However, the wording potentially puts a constraint on the concept of reasonableness.

It may well be in any one given situation that the first opportunity is what's reasonable, but the judges are highly qualified. They're able to assess every situation. I think it's best left in their hands to leave a wider breadth of possibilities in interpreting this aspect.

I understand what you're trying to do, but I think the wording is perhaps best left as is, if only to give a wider breadth of discretion to the judges on a case-by-case situation.

The Chair: Mr. Harris, go ahead.

Mr. Jack Harris: I think we'd have to respond by saying that we don't really want to see another whole series of cases before the courts to come to the conclusion that you can't hang around and arrest somebody. A reasonable time might be decided. Well, for a reasonable timeframe, the courts could decide 10 days, or they could decide 30 days.

What we're concerned about is what goes on in the meantime. When we had the scenarios laid out by the three witnesses last Thursday—a law professor, an adjunct professor, and another practitioner—they were laying out scenarios that they were convinced were within the provisions set forward. I didn't hear any real objection to that, and I sensed a concern by members on both sides of this committee to have some sort of constraint going forward, before we have to wait for the series of case law. I think it's up to us to try to limit the amount of case law that might come forward.

Reasonable is fairly...I won't say it's "elastic", but it's uncertain in terms of interpretation, and you do have to have a series of cases to do that. To suggest that there has to be some constraint on the time.... The first suggestion was 48 hours; I think we've been persuaded that to have a particular number of hours might unduly constrain a judge, but I think the expectation that if we're talking about....

Let's face it: we're talking about a citizen's arrest that was regarded, first of all, as specifically contemporaneous with the event. We're broadening that to say "within a reasonable time". We can't broaden it so much that time could be very elastic. They have to take action when the opportunity arises and not wait for sometime down the road. They can't say, "I'm going to get my posse together, and I'm going to do it at another time."

I don't think that's right. I don't think that's the intention here. When we're expanding this right of citizen's arrest, I think we have to be careful that we don't make room for other types of unintended consequences, and I think this amendment will act to prevent that.

● (1300)

The Chair: Go ahead, Mr. Woodworth.

Mr. Stephen Woodworth: Thank you, Mr. Chair.

Often I hear opposition members, and witnesses called by them, pleading for greater judicial discretion in order to protect offenders. In this particular case, the existing section provides greater judicial discretion in order to protect victims. I see no reason to limit judicial discretion to protect victims in the manner that Mr. Harris is suggesting.

Thank you.

The Chair: We have a point of order.

Go ahead, Mr. Jean.

Mr. Brian Jean: My point of order is that it's one o'clock. Is it the plan to keep going? I have House duty and I don't want to get in trouble one way or the other. If we're going to keep going, I'd like to be able to get somebody over here to....

The Chair: We can very easily keep going. It would take....

Mr. Robert Goguen: I would ask that we keep going.

Mr. Jack Harris: For how long?

Mr. Robert Goguen: It's clause-by-clause consideration. We should be able to get through this. The last clause is.... We're just going to vote on them.

The Chair: The chair is in your hands. I suspect it wouldn't take long. We may be able to finish this bill. We are the most collegial group in the House.

Mr. Stephen Woodworth: Maybe we should call it quits.

Ms. Françoise Boivin: I have to leave also at 1:30 at the latest, because I have House duties also.

Mr. Robert Goguen: We have one more amendment. How much time would it take?

Ms. Françoise Boivin: We should proceed, please.

Mr. Robert Goguen: We have lots of time before 1:30 p.m.

Ms. Françoise Boivin: Exactly.

[*Translation*]

Ms. Charmaine Borg (Terrebonne—Blainville, NDP): I won't talk for too long. I just wanted to add the fact that, in English, it is "first reasonable opportunity". It has to be reasonable to make the arrest. If you are surrounded by ten very strong people, obviously it is not reasonable to arrest those individuals in the circumstances. The way it is written and proposed, it is reasonable. Everyone should support that.

[*English*]

The Chair: Thank you.

Go ahead, Mr. Jean.

Mr. Brian Jean: I was going to say that I agree with Mr. Woodworth. I was surprised at all the different case law, when you actually practice law and get into the courts, and at all the different circumstances that can arise to suggest one thing would be reasonable in one particular circumstance but another would be reasonable in another. If you're on a trapline in the northern Yukon, it's going to be a totally different circumstance that would be reasonable.

As for first opportunity, if it's one guy against four, that's not very reasonable in relation to citizen's arrest when you can't have a police officer up there for three months.

Mr. Jack Harris: That's right.

Ms. Charmaine Borg: It's not the first opportunity; it's the first reasonable opportunity.

Mr. Brian Jean: That's what I think is the best thing to do: leave it with judges to decide what is reasonable in the circumstances and not be prescriptive in relation to it.

[*Translation*]

Ms. Françoise Boivin: What matters here is not only the reasonable time, but also the situation in which it is reasonable to act. That is what we are adding. It is not just us. The vast majority of the witnesses who appeared found this provision problematic.

I always take exception when I hear comments like yours, Mr. Woodworth. I am not trying to single you out necessarily. But when I try to define the notion of reasonableness, it is not with a criminal or a victim in mind. I do it with our goal in mind.

If we are establishing lines of defence, there is a reason for it. I am always in pursuit of justice and truth, regardless of which side they are found on. I will always take exception to that kind of comment.

Seriously, we proposed this because it was a concern. The government must be aware of the fact that almost all the witnesses told us there were problems. Some told us not to touch it.

We are willing to touch it and to introduce our amendments. It may be possible to move forward with the proposed amendment, which in no way detracts from the notion of a reasonable time, by clarifying things with the words:

● (1305)

[*English*]

"at the first reasonable opportunity".

[*Translation*]

If we go back to the example given by my colleague Brian Jean. If it's me up against four tough guys, I might wait until my three brothers get there to feel a bit more comfortable in making the arrest. The proposed amendment would cover that very scenario.

[*English*]

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

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

We have the provision in this citizen's arrest that it's only when you're not able to engage the police to make the arrests, so I don't think we would be in the scenario 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 in which 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.

Therefore, 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 whether the person's action was 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 idea of finding someone committing an offense and arresting them at that time to some extension.... Obviously we don't want it to be in perpetuity or in an unreasonable timeframe, but the thinking is that by saying “reasonable”, there is sufficient guidance to the courts. The circumstances will govern it, as many members have noted, depending on where you are and what the case is.

The Chair: Thank you.

Seeing no further intervention, shall amendment NDP-10.1 carry?

(Amendment negatived)

The Chair: NDP-12 is next.

Mr. Jack Harris: NDP-12 is changing line 39 on page 3, after the word “time”. The effect would be that it would be within a reasonable time after the offence was committed at a place that was within reasonable proximity of the place where the offence was committed.

Again, this is to avoid the scenario in which either you would have the posse chasing somebody over days, or, as was suggested quite forcefully, one in which the private investigation groups would see an opportunity to turn themselves into investigative arms of the owner and potentially offer a service that would include going after somebody and finding them.

Phrasing it as “reasonable proximity” avoids the consequence and dangers associated with grabbing somebody at a shopping mall because you see them the next day there, or at a bus stop, when the person doesn't know who you are, why you're grabbing them, or what you're doing. The problem can be avoided by saying that the citizen's arrest is designed to deal with situations such as in the David Chen case, when a guy comes back to the store, whether it's within an hour or within a day—or two days, for that matter.

Again, “reasonable proximity” uses the word “reasonable”, but it indicates that there's some constraint as to place.

● (1310)

The Chair: Thank you.

Go ahead, Mr. Goguen.

Mr. Robert Goguen: Thank you, Mr. Chair.

I understand the spirit of what's attempted; however, this puts another constraint on what is an attempt to expand the power of arrest.

What's important to remember is that the power of arrest is in relation to the property. Maybe if there's a shoplifting theft in a convenience store like Mr. Chen's, that might work, but what do you do when there's a break-in in a parking lot? Somebody smashes the window and grabs objects from your car. You don't own the parking lot, obviously. Maybe you do, but it would be certainly an unusual circumstance. What do you do if this person flees with the stuff or if you find the person perhaps a day later because you've somehow stumbled across them? Better yet, the vehicle is stolen, and they take off. If they cross town or cross the county line as they would do to avoid the revenuers in the rum-running days....

It just constrains the power of arrest and I think it could add some confusion to interpretation before the courts. For that reason, we're not favourable to this amendment.

The Chair: Are there comments from the officials?

Ms. Joanne Klineberg: I don't think there's anything to add.

The Chair: Thank you.

Mr. Stephen Woodworth: Let's call the question.

The Chair: Seeing no further intervenors, all those in favour of NDP-12, please signify.

(Amendment negatived)

The Chair: Shall clause 3 carry? There are no amendments.

(Clause 3 agreed to)

Ms. Françoise Boivin: Sorry, we were discussing other things.

Mr. Brian Jean: Was that unanimous?

Ms. Françoise Boivin: Yes, it was.

The Chair: Shall clause 4 carry?

(Clause 4 agreed to)

The Chair: It's unanimous again.

Mr. Brian Jean: It seems there was another unanimous....

The Chair: Shall clause 1 carry?

(Clause 1 agreed to)

The Chair: Shall the title carry?

Some hon. members: Agreed.

The Chair: Shall the bill, as amended, carry?

Some hon. members: Agreed.

The Chair: Shall the chair report the bill, as amended, to the House?

Some hon. members: Agreed.

The Chair: Shall the committee order a reprint of the bill, as amended?

Some hon. members: Agreed.

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 finished this bill. It was going to throw the rest of the schedule out.

Those who have other meetings, go to it.

That said, the meeting is adjourned.

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