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Chair

Mr. Dave MacKenzie

Standing Committee on Justice and Human Rights

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● (1140)

[*English*]

The Chair (Mr. Dave MacKenzie (Oxford, CPC)): We'll call the meeting to order, this being the 20th meeting of the Standing Committee on Justice and Human Rights.

Today we're continuing our study on Bill C-26, an act to amend the Criminal Code. We have some witnesses before us today.

Just before we start, I'll just remind the committee that on Thursday we're going to deal with Mr. Comartin's Bill C-290. He has one witness. I believe that we'll be able to deal with that witness and do the clause-by-clause on Thursday. Hopefully we can finish that bill off. Then we're going to deal with a couple of groups that are going to come before us. And hopefully we can finalize the organized crime study.

Today we have three witnesses before us: Mr. Stewart, Mr. Preston, and Mr. Scholten. You're each given ten minutes, if you wish, for introductory statements, and then the questioning goes back and forth. It's a total of five minutes for questions and answers.

Whoever would like to go first, please feel free to do so.

Mr. Hamish Stewart (Professor, Faculty of Law, University of Toronto, As an Individual): All right, then. We'll just go in the order we were listed. I'll start.

The aspect of Bill C-26 I'm going to focus on is proposed section 34, the proposed amendments to the self-defence provisions. I'm focusing on this because this is the most significant proposed changed to the law of self-defence in Canada since the Criminal Code first came into force in 1892. This bill potentially has a very significant impact on the law of self-defence.

What I'd like to do first is say a few words about the role of self-defence, generally speaking, in the criminal law. Second, I'm going to outline what I think is the essence of a self-defence claim and the elements a self-defence claim should have. And finally, I'm going to say something about proposed section 34 in light of those first two points.

First, I'll make a few general comments about self-defence.

In a society that's governed by law and institutions, as Canada is, we generally rely on those institutions to protect our most basic interests. We rely on the police. We rely on the courts to settle disputes. We typically don't exert force ourselves to solve our problems, but there are times when it's not possible for the institutions to protect us. In an emergency situation, the problem arises suddenly, and it's not possible to call the police or it's not possible to wait for a court to decide the dispute. In those situations, criminal law recognizes that private individuals can do things that otherwise would be crimes—sometimes quite serious crimes. The law of self-defence, in particular, permits individuals to commit acts that would otherwise be assaults, or even murders, when it is not possible to obtain protection from wrongful threats through the usual method of calling the police or other means.

Provisions governing defence of property function in a similar way, but I'm going to focus mainly on defence of person—proposed section 34.

On the one hand, we hope that self-defence is exceptional, in the sense that we hope that most of the time individuals will be able to rely on the police and other institutions to protect them. On the other hand, when self-defence is required, it's there to protect our most basic interests and bodily integrity. I think the law of self-defence needs to take both of these aspects into account. It needs to take into account the need to protect everyone's most fundamental interests and to also recognize that this should not be the first resort but the last resort, in a way, for citizens who face wrongful threats.

I would suggest that in a successful self-defence claim, there should be three elements. When these three elements are present a self-defence claim should succeed, but when any one of them is lacking a self-defence claim should fail.

First, the person who is defending himself or herself—I'll just call that person the defender, for short—is faced with a wrongful application of force, or the threat of a wrongful application of force, to his or her person. So a wrongful threat is the first element.

The second element is that whatever force the defender uses in response—the defensive response—is necessary to repel the wrongful force or the threat of force.

Third, the force the defender uses is proportionate to the threat posed to him or her in the first place.

Typically, the law of self-defence requires the defender to have a reasonable belief that these three elements are present. They don't actually have to be present, but there should be at least a reasonable belief that they are.

Many criminal codes, many systems of criminal law, require if not these exact three elements, then something like them. The existing provisions of the Criminal Code—the existing subsection 34(2) of the Criminal Code—doesn't track them exactly, but it's often been interpreted to require something along these three elements of self-defence. In my written notes I give a few examples from other legal systems, and you can find something similar in English law.

● (1145)

I want to suggest to you that these three requirements make perfect sense. Take the first one, the requirement that there be a wrongful threat. If someone is faced with an application of force that's not wrongful, then the person should submit to that. They should not resist it. The clearest example of this would be a lawful arrest. You're not supposed to resist a lawful arrest. In fact, it's a separate offence to resist a lawful arrest, because the threat of force that you face is lawful. It's not wrongful.

Second is the requirement of necessity. If there's some way you can avert the threat without using force—particularly deadly force—against your attacker, then you should do that instead of committing what would otherwise be an offence.

Finally, if the response is disproportionate, then there's a sense in which the defender has gone too far in protecting his or her own interest and has upset the balance that the law of self-defence tries to create between everyone's interests in bodily integrity.

Now, if those are the three elements that a self-defence claim should have, how does proposed section 34 affect that? What would proposed section 34 do to the law of self-defence?

Well, the first thing I'd like to say about proposed section 34 is that in one respect it's extremely welcome. The existing provisions of the Criminal Code have often been criticized for being unclear, for overlapping in ways that are not always clear, and for being difficult to explain to juries. There has been a long stream of criticism from lawyers, judges, and academics about the difficulty of interpreting and applying the existing provisions. So the attempt to take all these ideas of self-defence and put them into one section that would be clear and that would apply to all potential crimes I think is very welcome.

Having said that, though, I'm concerned that proposed section 34 in its current form does not adequately reflect the principles governing self-defence that I have laid out. I'm concerned that there's a structural problem in the way the proposed section is set up.

The section does require “a threat of force”. It then says that the defence is available if the response is for the purpose of self-defence—that part is fine—and if the act is “reasonable in the circumstances”.

Proposed subsection 34(2) then goes on to list a number of factors that are relevant to assessing whether the response is reasonable in the circumstances. Now, my discomfort about this is not the list of factors as such; it's that the key elements of self-defence—namely, necessity and proportionality—have been placed in as mere factors to be considered, which means that they potentially could be outweighed by other factors.

In my view, the requirements of the wrongful threat, the necessity of the response, and the proportionality of the response should be the required elements of self-defence. The factors listed in proposed subsection 34(2) are relevant to those elements of self-defence. They shouldn't be allowed to outweigh them.

Since my time is running short, let me just give you one example that I'm particularly concerned about. Proposed paragraph 34(2)(h) says that one of the factors to be considered is “whether the act committed was in response to a use or threat of force that the person” defending himself or herself “knew was lawful”. This is listed as a factor to be considered.

In my view, this factor should always defeat a self-defence claim. If the defender is facing a threat of force that he or she knows to be lawful, then he or she ought to submit to that threat of force. It shouldn't be considered a factor that could potentially be outweighed by other factors, such as the size, age, and gender of the parties to the incident. That's an example, I think, of how self-defence under proposed section 34 could lead to an acquittal in a situation where it ought not to.

The reverse is also possible. Because necessity and proportionality are listed only as factors, it's conceivable under this proposed section that a person could use necessary and proportionate force to defend himself or herself against a wrongful threat and nonetheless be convicted because, in the eyes of the judge or the jury, some of these other factors might outweigh the necessity and the proportionality of the response. So a person might be convicted even though his or her conduct satisfies what I take to be the core elements of the self-defence claim.

My suggestion for proposed subsection 34(2) is not that these factors are irrelevant, but that they should be subordinated to the elements of self-defence claim: the wrongful threat, the necessity of the response, and the proportionality of the response.

● (1150)

Thank you.

The Chair: Thank you, Mr. Stewart.

Mr. Preston.

Superintendent Greg Preston (Edmonton Police Service, Legislative Amendments Committee of CACP, Canadian Association of Chiefs of Police): Good morning. By way of introduction, really quick, I'm Acting Superintendent Greg Preston of the Edmonton Police Service, but I'm here representing the Canadian Association of Chiefs of Police, the CACP, and its law amendments committee.

I'd like to say at the outset that CACP does support the passage of Bill C-26. We think it's important that citizens be recognized, that when they do act, they have self-defence available to them. We believe that this will assist the police in understanding, to be able to better determine whether or not somebody who does act does so lawfully. The streamlined process that's proposed here will do that, and that will assist us.

The other area we'd like to comment on is that while we would prefer that trained and equipped police officers engage in the actual arrest, we do realize that the reality is that there will be certain situations where citizens do respond, whether that's as a good citizen to the neighbour or just to any other person they see. So the reality is that people will act. As I said at the outset, we'd prefer if we were on every street corner, but that's not the reality of the world. It is inevitable, and as such we certainly support the idea that they would be recognized for that.

There is one area I would like to comment on that's open for some discussion, possibly, by the committee in considering whether maybe an amendment might be necessary. That has to do with the way that subsection 494(2) is currently worded, as well as the proposed amendments, in that the bill still speaks of "if they find them committing". That's the current wording of the section, “finds committing”, as well as the proposed piece to it. As the backgrounder, the bill speaks to being caught in the act.

I just want to highlight that there's been a change in technology, obviously, over the last number of years, and that's through CCTV—closed-circuit television. Quite often we're finding that many department stores, for example—and it's not just department stores, but we are called to many of these—utilize CCTV in their loss prevention. The LPOs, or loss prevention officers, will be monitoring their store and looking for thefts through CCTV, so you'll have somebody in a monitor room, and they'll be watching the CCTV. They might observe somebody who appears to be committing an offence. What they then do is they'll call down to the floor LPO. They'll do that normally through radio or through a cellphone. They'll be relaying their observations of what is going on and why they believe that somebody's committing a crime. They relay that to the floor LPO. That particular floor LPO will then, at some point, generally speaking, be the one that will then move in to make the arrest.

I would submit to you that in a certain situation like that, and in many cases, they have never observed any aspect of the commission of the offence. In fact, quite often they will stay out of the area so as not to heat the individual up, not to spook them. So they want to see if the person really is committing an offence or if they're just going about their business. When the offence is committed, and it's been relayed to them that the person did select the item, did conceal the item, and now they're walking towards the exit, that's when the floor LPO will move in.

I would submit that at that point in time, when they move in to make the arrest, it's not "finds committing". In essence what they are relying on is reasonable and probable grounds. I know that some might debate and say that the offence is still an ongoing crime at that point in time, and therefore it's still "finds committing". I would suggest that it's not the case, that it really is reasonable and probable grounds they're operating under.

I would submit to you the case of the Queen v. Biron. It's a 1976 Supreme Court decision. It's cited in the materials I provided, but for ease of reference, it's [1976] 2 S.C.R. 56 - page 72. I believe that supports my position that what you have here really is an RPG, not a "finds committing".

If that is the case, and I know that this is not an issue where it's directly the police being involved, I still speak to it because the police are called to these incidents where we are required under subsection 494(3) to be called forthwith, to have this person delivered to us, so we still have to be satisfied that the arrest was lawful. Otherwise, we arguably are taking on an unlawful arrest, unless we can form some other grounds to continue the arrest. On occasion, we'll be called to investigate that loss prevention officer for the unlawful arrest, an assault.

We do have an interest in this, and we do believe that some consideration should be had to that particular element. Beyond that basis, we do support the passing of the bill.

I want to thank you for the time and giving the opportunity for the police community to have some input. Obviously I'll be willing to answer any questions you may have.

● (1155)

The Chair: Thank you.

Mr. Scholten.

Mr. Alex Scholten (President, Canadian Convenience Stores Association): Good afternoon.

My name is Alex Scholten. I'm the president of the Canadian Convenience Stores Association. The Canadian Convenience Stores Association, or CCSA, represents the economic interests of the 25,000 convenience stores located in communities across Canada.

My discussion today will focus more on practical aspects of what our retail members experience in terms of shoplifting and the existing criminal laws regarding citizen's arrest. The CCSA is pleased to offer its views on these provisions and to provide background supporting our perspective.

I'll briefly review the following three topics. The first is the convenience store industry's environment and the impact shoplifting has on our profitability. The second is the issues facing convenience store owners under the current citizen's arrest provisions of the Criminal Code. Third is the case of David Chen, a store owner who was charged under the current citizen's arrest provisions of the Criminal Code for detaining a shoplifter.

I'll conclude this brief by making specific recommendations on the provisions of Bill C-26, specifically proposed subsection 494(2), dealing with amendments to the Criminal Code provisions on citizen's arrest.

For ordinary Canadians, the likelihood of having their property stolen is fortunately not an everyday occurrence. For convenience store owners, however, it's a constant preoccupation. By virtue of the nature of the convenience store industry, where stores operate for long hours, in many cases 24 hours a day, in both rural and urban areas, the issues of shoplifting and theft arise constantly. In addition, as many as 10 million Canadians frequent our association's 25,000 stores every day. The openness of our industry increases our exposure to theft and robbery on a daily basis.

Therefore our perspective on the proposed citizen's arrest legislation is quite relevant, since unlike the average Canadian, the typical convenience store owner is faced with theft issues that challenge property rights on a regular basis. In addition, losses and inventory shrinkage resulting from this type of crime have a direct impact on a store owner's ability to survive in today's competitive environment.

In 2007 a member survey conducted by the Retail Council of Canada identified the mean retail shrink rate, or the measurement of losses due to store theft and fraud, reported by their respondents as 1.54% of net sales. With total convenience store industry sales of $33.8 billion in 2010, this would equate to losses of more than $500 million for Canadian convenience stores.

Through member surveys we have conducted, we have found that pre-tax net profits for our industry members do not surpass 1% to 1.5% of net sales, which is a very small profit margin. I point out that this is almost equivalent to the losses due to theft and fraud, using the Retail Council of Canada figures.

While the CCSA recognizes the importance of police work and the enforcement of criminal laws, we're very concerned that the pursuit of shoplifters is not a high priority for police. We understand why this is the case, as enforcement around this type of criminal activity and its sheer volume can be overwhelmingly taxing on our police forces. As a result, though, convenience store owners are left with very limited recourse in the face of this type of crime.

How do convenience store owners behave in terms of shoplifting? When convenience store owners or one of their employees choose to react to theft in the store, they're left with very little room to manoeuvre. Not only must they make a quick decision on whether or not a crime has been committed; they must also determine what action to take. Typically this will involve reviewing security recordings and confirming actions with management.

Unlike what Mr. Preston talked about with large department stores, this is not done with multiple levels of staff. Typically in our stores we have one or two people working at one time. So this takes more time. It's more of a process for those two people to do these things.

But typically, in reviewing the tapes and actually determining whether to apprehend someone, time is of the essence. Shoplifters are in and out of the stores very quickly.

● (1200)

Within the current Criminal Code provisions, the ability to make a citizen's arrest is very restrictive. It's only allowed in situations where an individual is caught actively engaged in a criminal offence. This means that the offender must be caught in the act, and the store owners therefore must react on the spur of the moment to make their decision.

The CCSA does not encourage its members to take law enforcement matters into their own hands. However, we must recognize that interactions of this nature are unavoidable. Due to the extremely low profitability inherent in our industry, theft of even very small amounts can present very challenging situations for our members. The fact that C-store owners are protecting their property in such instances, and could be prosecuted under current legislation if they detain a shoplifter after they've had property stolen, goes beyond most people's common sense. That a victim can suddenly be accused goes against our shared principles of justice and fairness. Due to these factors, we believe there is a need for less restrictive citizen's arrest provisions in the Criminal Code, and clear guidelines to ensure the victims of crime do not become targeted by the justice system.

To illustrate that, I'll give you the recent case involving a convenience store retailer in the city of Toronto. On May 23, 2009, David Chen, the owner of the Lucky Moose Food Mart on Dundas Street West in Toronto, and his two employees apprehended and detained a man who had been stealing plants from his store. The man who was detained had a long history of shoplifting convictions. At trial, it was indicated that he had over 40 previous convictions for shoplifting. He had previously been banned from Chinatown and the nearby Kensington Market area in Toronto for three years because of his repeated pilfering of area businesses. In August 2009 he pleaded guilty to the shoplifting charges that stemmed from this incident, and he was sentenced to 30 days in jail.

The offender was initially caught on security footage stealing from the store, but he managed to leave the store without being caught. He then returned to the store an hour later, at which time Mr. Chen recognized him from surveillance footage. Mr. Chen and his two employees confronted the man, apprehended him, and then detained him by locking him in the back of a store delivery van to await arrival of police. The reason he was put in a store delivery van was that it was a small store and they didn't have any other space to put this gentleman in.

When the police arrived, they arrested the shoplifter, and he was subsequently charged with two counts of theft under $5,000. Mr. Chen and his two employees were also arrested and charged with forceable confinement, carrying a concealed weapon—which was a box cutter that Mr. Chen had been using to cut cardboard boxes in his store—and also assault. These charges were far more serious than the charges the shoplifter had faced in this case.

What was Mr. Chen's offence in this case? He was charged because he detained a shoplifter who had already successfully stolen goods from his store. Since the thief had already left his store and was successful in his illegal activity, Mr. Chen had no right under present Criminal Code provisions to apprehend him when the thief re-entered the store an hour later.

Crown prosecutors eventually withdrew the concealed weapon charges against Mr. Chen, but proceeded with the charges of forceable confinement and assault. To add insult to injury, the shoplifter was the crown's key witness in their case against Mr. Chen and his two employees. Fortunately, 18 months after the accusations, the charges against Mr. Chen and his two employees were dismissed. The judge trying the case concluded that Mr. Chen tried to fill the void where the justice system failed.

Mr. Chen has been called both a vigilante and a people's champion. We believe he's simply an honest, hard-working business owner trying to survive in a very difficult business environment.

The citizen's arrest provisions found in subsection 494(2) of the Criminal Code are too narrow to allow people to protect their property. Instead of allowing a citizen's arrest only when a person is found committing a criminal offence, these provisions must be amended to also allow private citizens, within a reasonable time after an offence has been committed, to arrest people they suspect have committed a crime, and they believe on reasonable grounds it is not feasible in the circumstances for a peace officer to make such an arrest. The proposed changes noted in C-26 allow for such flexibility.

● (1205)

The CCSA supports the provisions of Bill C-26 dealing with citizen's arrests and the expansion of circumstances under which law-abiding Canadians can make a citizen's arrest, when appropriate, as it provides more clarity and guidelines to our small-business members about their rights and acceptable level of involvement in law enforcement.

Even if the proposed changes to the Criminal Code are made, we would still not encourage convenience store owners to take the law into their own hands, as that should be a policing responsibility. However, given that shoplifting is not a high-priority offence for police, victims of crime in the convenience store industry should not be re-victimized by the criminal justice system when they attempt to protect their property in the absence of police support.

In conclusion, we thank the standing committee for giving us an opportunity to express our views.

The Chair: Thank you, Mr. Scholten.

Now we'll begin the questions from the committee.

Madame Boivin is first.

[*Translation*]

Ms. Françoise Boivin (Gatineau, NDP): Thank you, Mr. Chairman. I also thank the three witnesses, who made very interesting presentations.

I would like to go back to some statements made by Professor Stewart. If I understood the brief you submitted correctly, the current provisions of the Criminal Code that concern self-defence and the defence of property have been in effect since around 1892. This will be one of the most important changes ever made with regard to the matter of self-defence and the defence of property. That is one more reason to do things right.

I'll address my first comment to Mr. Preston, who represents the Association of Chiefs of Police. Last week, we heard from Mr. McLeod, who is the president of an association of professional security agencies. I understand that you support the proposed amendments and that does not concern me. That said, I still am under the impression, based on the statements we've heard, that security agencies would like to do the work that police officers cannot do because of a lack of resources, such as deal with shoplifting, for instance.

Would you be favourable to allowing security agencies greater powers of arrest in the context of Bill C-26 and other amendments that may be submitted to deal with those aspects which should normally be your responsibility?

[*English*]

Supt Greg Preston: Thank you.

I apologize, I don't speak French, so I'll have to respond in English.

The CACP does support the amendments. We recognize that we cannot be in all places at all times. As I said, we certainly would prefer if the police were able to make the arrest. We are trained. We are equipped. Obviously it would make the most sense if we were to do that, but we recognize the reality that this is not going to happen.

While shoplifting is certainly not a high priority, it is something the police will still investigate if we have the resources. It all depends on the time of the call. As has been identified, these are typically quick occurrences. The vast majority of these crimes involve people going in and coming out very quickly, so that the shop owner or one of his lawful employees, as an agent of the shop owner, really are the only people who, practically, can make the arrest at that point in time.

They have really two options. The first is to let them go and then call the police and see if we are able to track them down and to recognize that the resources are such that this will be investigated, but it's not going to be investigated with the same resources that one would get if there were a break-in to a home, for example. The second option is that they intervene.

Ms. Françoise Boivin: Do you have a problem with the expression "reasonable delay"?

[*Translation*]

You talked about this a little. One thing worries me. The expression “within a reasonable time” is rather vague and could be interpreted different ways. As a police officer, are you not worried to see investigators who would like to do the work of police officers, and generate more business? What is “a reasonable time”? Is that precise enough for police forces?

● (1210)

[*English*]

Supt Greg Preston: I would say that it is as specific as you're going to get. Our situation is that the inevitable does happen. People do flee. The individual trying to make the arrest does lose sight, and arguably under the current version you've now lost that arrest power.

It's trying to address what is going on in reality, the fact that people need to have the ability to arrest somebody who has committed a crime—in a timely fashion.

When we go to the proposed amendments to the act, we're talking about a situation where they have to find them a reasonable time after. Again, “reasonable” is used throughout all of our laws. I think we have to look at it and say that if we have that in every other area of our Criminal Code, we have to assume that people, and most importantly the police, will understand what that means. So when it comes time to apply that situation, the facts dictate in all cases what is reasonable.

The idea here, though, is that it's meant to be relatively contemporaneous with the event. That's our view of it. That's how it would be instructed to our members, that it has to be somewhat contemporaneous with it. Days after the event I suspect would not be the situation. We can't pull out a stopwatch and say "If you get him within the first hour, that's good. Anything beyond that is not reasonable." I don't believe that the law has ever tried to put any aspect of use of force or of lawful authority into a box like that.

Is there room for debate? There will always be room for debate whenever you bring in the concept of reasonableness. I would submit that we are comfortable with this, and that we will let the facts dictate and guide us. Really, this is the reality of what's currently going on, and as it has been pointed out, I think we need the protections for those individuals who are going to act. Whether we want them to or not, they're going to. Let's recognize that and give them reasonable powers. I would say that what we have here is a balance of what is reasonable, so we're comfortable.

The Chair: Thank you, Madame Boivin.

Mr. Rathgeber.

Mr. Brent Rathgeber (Edmonton—St. Albert, CPC): Thank you, Mr. Chair.

Thank you to all the witnesses for your attendance. It's especially great to see one of Edmonton's finest officers with us here today.

My questions are for Professor Stewart. I listened to your opening comments quite carefully, and I made some notes. I'm still confused. Do you support this legislation, Bill C-26? Do you support it with reservations, or are you opposed to it? You seem to see some good and some not-so-good in it.

Mr. Hamish Stewart: I'd say "support with reservations" would be the most accurate description of my position. I support the idea. The existing provisions in sections 34 through 37 are widely recognized to be confusing and difficult to explain to juries. They don't cover the territory in a very neat way, and this has been pointed out over the years.

Justice Moldaver, when he was a trial judge, tried to sort some of this out in the McIntosh case in the early 1990s. The Supreme Court disagreed with him and said that the provisions were a bit messy, but Parliament had made them that way and he should just leave them as they were.

The problems with the existing provisions have been recognized for a long time. The aspect I support is bringing one concept of self-defence into one section that is potentially applicable to all offences. What I'm uncomfortable with is the structure of the proposed section.

Mr. Brent Rathgeber: Perhaps Justice Moldaver will have the opportunity to revisit his former theory.

Mr. Hamish Stewart: He may indeed.

Mr. Brent Rathgeber: You set out a threefold test for when repelling force would be justified and therefore provide a defence. I tried to make notes, and I think I captured it. I'll try to paraphrase it: first, the defendant faced a wrongful application of force; second, the defendant's response was necessary; and third, it was proportionate to the unlawful force that was being applied.

If I look at the proposed subsection 34(1) in Bill C-26, it also sets out proposed paragraphs (a), (b), and (c), where a person's not guilty of an offence if (a) "they believe on reasonable grounds that force is being used", which is more or less that the defendant faced wrongful application of force; and (b) that "the act that constitutes the offence is committed for the purpose of defending or protecting themselves", which is roughly your number two, "the response was necessary".

Really, the only thing we're quibbling about is the third prong, where it says "the act committed is reasonable in the circumstances". That's the proposed legislation, but you would prefer it if "reasonable" said "proportionate".

Did I capture your theory correctly?

Mr. Hamish Stewart: I think my concern about this section is a little more serious than the way you described it in your summary of my remarks. So the first one, proposed paragraph 34.(1)(a), the person has to "believe on reasonable grounds that force is being used against them", does sound a bit like the first element. I think it's important that it's wrongful force that's being used against the person that is the first element.

One might have thought that a court would be ready to read that in, except for the fact that the court is specifically directed by proposed paragraph 34.(2)(h) to treat the defender's knowledge of the lawfulness of the force as a mere factor, which seems to open up the possibility that this section could justify resistance to a lawful application of force. I don't think this can possibly be the correct way to think about self-defence.

On the first one, that would be my comment. On the second one, the proposed section says that the act has to be committed for the purpose of defending oneself. I agree with that, but I think it should also be necessary not just for the purpose of, but also necessary to that purpose. So one might commit force for the purpose of protecting oneself when one had other alternatives, such as calling the police, or closing the car door, perhaps, or using some means of protecting oneself that was less intrusive—

● (1215)

Mr. Brent Rathgeber: That goes to the reasonableness, which is in paragraph 34.(1)(c).

Mr. Hamish Stewart: That's right. One way to deal with my concern would be to say these are all aspects of reasonableness and we have a list of factors. Certainly Canadian courts are no stranger to long, non-exhaustive lists of factors in guiding the application of a legal concept. That's certainly something we're quite familiar with.

My concern is that I would prefer to see the concepts of necessity and proportionality highlighted and the other factors subordinated to them, rather than it all just being put into the question of reasonableness.

Mr. Brent Rathgeber: Thank you for that, Professor. I think that's very instructive, and this committee will certainly consider it.

Thank you.

The Chair: Thank you, Mr. Rathgeber.

Now, ordinarily we would go to Mr. Cotler, but he's not present.

Mr. Jean.

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

Thank you, witnesses, for coming today.

This reminds me of my law school days. Criminal law, I have to tell you, was my worst class. I didn't understand most of the words that were spoken to me. Then when I got out of law school I actually attended a university in Australia, and when I got back to Canada I had to attend another Canadian university. Again I took criminal law. I did understand a lot more of it. But I have to say that in my original law school, most of my criminal law classes were taught by one professor. After practising criminal law for 12 years, I got back to actually listen to my criminal law professor and found out that, bluntly, he didn't know a lot about what he was talking about.

I'm sure that's not the case in relation to you, Mr. Stewart.

I see that you graduated from law at the University of Toronto in 1992.

Mr. Hamish Stewart: Yes, that's correct.

Mr. Brian Jean: And you clerked at the court in 1992 and 1993?

Mr. Hamish Stewart: Yes, at the Ontario Court of Appeal; that's correct.

Mr. Brian Jean: How long did you practise criminal law?

Mr. Hamish Stewart: I have never practised criminal law except in the restricted setting of doing student legal aid work when I was a law student—where many of my clients were alleged shoplifters, I might add. But that's a long time ago.

Mr. Brian Jean: And you passed the bar in 1998?

Mr. Hamish Stewart: 1998.

Mr. Brian Jean: So you practised law after that for legal aid students.

Mr. Hamish Stewart: No, I have never practised law as a lawyer.

Mr. Brian Jean: Okay.

Mr. Hamish Stewart: I have been teaching full-time at the University of Toronto since 1993.

Mr. Brian Jean: Okay. And you've written three books on evidence law. I can't remember the other one.

Mr. Hamish Stewart: I've written on evidence. I've written a textbook on evidence as well as a treatise on evidence, and recently a book on section 7 of the Canadian Charter of Rights and Freedoms.

Mr. Brian Jean: I can tell you from my experience in relation to the criminal law that for the most part judges have a lot of flexibility and latitude relating to the interpretation. I would suggest in this particular case that they will indeed read in necessity and proportionality as primary concerns. Given, of course, common law for hundreds of years, given what's happened in the High Court of Australia and the Privy Council, which of course our courts continue to refer to and look at, I would suggest that given that both of those courts use both necessity and proportionality in self-defence, this will continue.

I did want to ask about a practical example. You mentioned in your paper that defence is not available where it should be. I've been racking my brain, because I did do five or six trials a week, and I couldn't think of one that would apply to what you're suggesting. I was hoping that you could give me an idea about that.

● (1220)

Mr. Hamish Stewart: I think you're right to say that it would be possible to interpret this clause as prioritizing necessity and proportionality over the other factors listed in proposed subsection 34.(2). I think the clause is open to that interpretation.

I think it would give clearer guidance to trial judges and juries if it were made explicit rather than being left in a list of factors. As Mr. Preston said, in response to a question about reasonableness, none of these concepts is perfectly precise, as law never is. I'm concerned that—

Mr. Brian Jean: I was just wondering, and I only have a minute....

Mr. Hamish Stewart: Oh, you want the example.

Mr. Brian Jean: I want a practical example. I'm more of a practical person, and I'm wondering if you could give me an example of the defence not being available where it should be, because I racked my brain on it.

Mr. Hamish Stewart: Imagine someone who is being pushed around, let's say, in a bar. So the defender's being pushed around by the attacker and the defender uses reasonable and proportionate force to push that person back and he gets charged with assault.

The force was necessary and proportional, just pushing and shoving, so it's not really that big a deal. But the proposed subclause says that the court may also consider the person's role in the incident. Does that give an opportunity for the prosecution to argue that the defender was being rude and obnoxious and therefore sparked the incident and should be deprived of self-defence?

I realize people may disagree about this example, but in my view those triggering incidents should not be considered part of the self-defence claim if they're at that low level of just being rude and obnoxious. I'm concerned that this may invite considerations that are extraneous to self-defence as I understand it.

Mr. Brian Jean: I'm done. I love the ability to discuss with academics, I really do. Thank you, Professor Stewart.

The Chair: Mr. Cotler, you were out of the room, but we'll let you back in this round.

Hon. Irwin Cotler (Mount Royal, Lib.): Thank you, Mr. Chair.

I want to compliment our witnesses.

My question would be to Professor Stewart, though it could be answered by any others. I appreciated the three elements you've put forward and also how the criteria could be a danger, could trump the three elements and result in an acquittal or even a conviction.

My question has to do with a controversy that arose out of a question put by Brian Jean to the minister about the defender firing warning shots at somebody coming onto his property and stealing things. The concern was whether the minister's response about the warning shots would be encouraging vigilantism. I think the minister was maybe taken out of context.

My question is on the example itself, and not necessarily the minister's response to it. How would your elements relate to that kind of situation?

Mr. Hamish Stewart: I think this example would fall under the defence of property in proposed section 35 rather than self-defence in proposed section 34, but the issues are similar.

The trespasser comes on your property, and that's a wrongful act. Section 35, under the current law, gives the property owner some power to repel a trespasser in that circumstance. The question is whether it's necessary, whether it's proportionate.

Proposed section 35 refers to whether the act is reasonable in the circumstances. It does not provide the list of factors mentioned in proposed section 34 and does not refer specifically to the question of proportionality. My instinctive response to that example is that firing shots in those circumstances is a disproportionate reaction to the threat, unless the threat is greater than you have described it.

There's a well-known Ontario self-defence case from 1975, the Baxter case, where shots were fired in a situation like that and the court was concerned that this was an over-reaction to the threat posed by the trespasser. I think this provision would be easier to explain to juries and to apply if some of these elements were made more explicit.

● (1225)

Hon. Irwin Cotler: Right.

Would any of the other witnesses like to respond as well?

Mr. Preston.

Supt Greg Preston: The facts always dictate the answer to any question, so I don't believe I can give you one definitive answer and say it can never be done, nor can I say it can always be done. It really is dependent on the facts.

One thing is quite clear: from a police perspective we certainly don't encourage the use of firearms. We recognize that there is danger whenever one is discharged, regardless of whether it was aimed to shoot somebody or aimed as a warning. So that obviously raises concerns for us. But I'm not really in a position to say that can never be done, because there will be occasions when it is reasonable.

I can envision circumstances in which the offenders who are on the person's property are gang members. Or you're in an isolated community where the police are hours away, and you can articulate why you were concerned about your safety. You'd have to evidence that. So there are any number of facts that could dictate an answer to this.

What is clear, though, is that we are certainly not encouraging people to bear arms in every incident—but neither can I say they should never be allowed to do so.

Mr. Brian Jean: I noticed that when Mr. Preston was talking about all of those issues of reasonableness and factors, Mr. Stewart was nodding his head in agreement. His nod isn't on the record, but I'd like to get that on the record.

Ms. Françoise Boivin: Good God.... Nice try, Brian. We're not in court.

Mr. Brian Jean: Thanks, Mr. Stewart.

Mr. Hamish Stewart: I will simply state that I agreed with Mr. Preston's remarks on the hypothetical example of shots being fired over a trespasser's head.

Ms. Françoise Boivin: I notice he's nodding his head too.

The Chair: Go ahead, Mr. Cotler; you have less than a minute.

Mr. Alex Scholten: I was also nodding, so I agree with Mr. Preston's comments.

Thank you.

The Chair: Thank you.

I wasn't trying to be flippant. Mr. Cotler was out of the country on parliamentary business with a government minister. I know it was a long time away, so welcome back.

Mr. Jacob.

[*Translation*]

Mr. Pierre Jacob (Brome—Missisquoi, NDP): Before putting my questions, I would like to mention that I particularly appreciate the objective distance, the thoroughness and the specific nature of the replies given by Mr. Hamish Stewart. Both types of activities are necessary, the work of academics as well as of those who practise. The activities of those who practise are equally necessary, but often they do not have the time to study the imperatives. They have constraints involving the management of their offices and their clients that do not allow for this objective distance. However, both are necessary. I thank you for being here with us today, Mr. Stewart.

My first question is for you. It concerns section 34.2. In the text that introduces a list a factors in French, there appears to be a slight difference from the English wording. Is it not true that in French, the word "*notamment*" could mean "more importantly, particularly, especially", whereas the English wording

[*English*]

"among other factors".

[*Translation*]

That does not appear to mean exactly the same thing.

[*English*]

Mr. Hamish Stewart: I'd like to be sure I understand your question. You're pointing to a difference between the French text and the English text of the bill, and suggesting that the French text is.... French, of course, is not my first language. I'm not immediately seeing the difference you're getting at.

The English text indicates that "the court may consider, among other factors". The French text indicates,

[*Translation*]

"the court may consider, among other factors",

[*English*]

which is “the tribunal may take into account the following factors”. Am I missing something in my understanding of the French text?

[*Translation*]

Mr. Pierre Jacob: The translation of the word “*notamment*” could be “more importantly, particularly, especially”.

[*English*]

Mr. Hamish Stewart: “Especially these factors”....

● (1230)

Mr. Pierre Jacob: Exactly.

Mr. Hamish Stewart: That may be. Even if that is the right way to read it, there are two things to bear in mind. First of all, when there's a difference between the French and English text it raises a complex question of bilingual statutory interpretation and how the difference should be sorted out.

There are a number of principles governing that exercise. The primary one is the quest for a common meaning, but subordinate to that there are others, including the principle of reading the text as favourably as possible towards the rights of the accused. In this case that would mean reading it more broadly to favour a broader version of the defence.

My fundamental concern is that the factors of necessity and proportionality should be highlighted, and the factor of the defender's knowledge that the force is lawful should actually not count at all. That is to say, if the defender knows that the force being used is lawful, then the defender ought not to resist the force. One could still include these other factors in the bill, but I think it would have to be made clear that they were subordinate to the main lines of the defence of self-defence.

I hope I'm answering your question.

[*Translation*]

Mr. Pierre Jacob: Thank you, Mr. Stewart.

My second question is for Mr. Alex Scholten, President of the Canadian Convenience Stores Association.

Earlier you talked about sales of $38 billion. What is the percentage of convenience stores that belong to chains, and what is the percentage of family businesses, if there are a few left?

[*English*]

Mr. Alex Scholten: The breakdown between the large chains and the independents is about 50-50. The independents, then, would make up the smaller number of stores. I couldn't give you an exact number, but definitely about half are probably nearer the one site, as opposed to more.

[*Translation*]

Mr. Pierre Jacob: I'd like to know how many hours are allocated to the training of employees, of staff. Do they have specific security-related training concerning the Charter of Rights, privacy concerns, new technologies, etc.? I'd like to know, in terms of the number of hours, if the large chains offer training to their staff or owners.

[*English*]

Mr. Alex Scholten: They would definitely provide training on safe practices, safe habits, what to do in the event of a criminal activity taking place. From my perspective as a former retailer, my staff would be trained on what to do in the event of a shoplifting case coming up, how they should react, what they should do in terms of contacting a manager. This would be our initial training that we would put them through when they first start, but also whenever an incident arises we'd remind all of our staff each time that comes up. I wasn't coming from a large retail chain. The large retail chains would have very specific rules and requirements and training procedures. I couldn't speak to how often they would train, but I know they have those.

We also, as an association, have training programs that we offer online to all retailers across the country. That training includes things like safe habits, safe people—that's one of the courses that we offer—training employees, training the retail owners on how they should react in the event of any type of criminal activity, not just shoplifting.

The Chair: Thank you, Mr. Jacob. Time's up.

Madam Findlay.

Ms. Kerry-Lynne D. Findlay (Delta—Richmond East, CPC): I'm smiling, for the record. Happy Valentine's Day, everybody.

Some hon. members: Oh, oh!

Ms. Kerry-Lynne D. Findlay: I want to thank you all for being here today. We appreciate your assistance as we look at this legislation. You bring a variety of perspectives, so that's very helpful.

I wanted to follow up on what Monsieur Jacob was talking about, so I'm directing this more towards you, Mr. Scholten.

As I understand it, the Canadian Convenience Stores Association, I believe you said, represents over 25,000 stores. I think you called them C-stores. That's a new term for me, but it makes it a little easier to say. Of course these are located in every community of Canada, looking after Canadians' daily needs.

I'm interested in understanding a little more of the profile of your organization's members. Would they include C-stores that are, for instance, what we would call a corner store, standing independently on its own, as well as a store that might be found in a mall, for instance?

● (1235)

Mr. Alex Scholten: Yes, we would cover all stores that would be offering convenience items. That would include everything from a corner store to a stand-alone store to some of the small retail outlets you'd see in a shopping mall.

Ms. Kerry-Lynne D. Findlay: Then would I be correct in assuming that there might be quite a different profile in terms of the number of employees those stores might have? For instance, I'm thinking of corner stores in my community at home, where often there's just one or two people there and sometimes, particularly on a night shift, if they're open 24 hours, there would only be one person in the store. Is that correct?

Mr. Alex Scholten: It would depend on the nature of the business and what the owner of that business dictated as being necessary. The typical age is 17 to 35. The late-night practices would depend on a business-by-business basis. Again, we have training for our retail members and the late hours and how to act in the safest manner possible. We have developed materials that would help them to be able to determine what was best for their situation. We have also worked very closely with the B.C. government on some new work-safe provisions dealing with late-night practices as well, so that the owners of the stores are much more aware of situations that could arise and how to protect their staff and customers.

Ms. Kerry-Lynne D. Findlay: Would it be fair for me to assume that some of your organization's members wouldn't have the capacity or the size to have security guards there, it would be the owner-operator or their employee who is running things?

Mr. Alex Scholten: Yes, that would be absolutely fair. With profit margins of 1% to 1.5%, there is no money to hire security guards or have extra staffing. We're at a very cost-efficient operating basis.

Ms. Kerry-Lynne D. Findlay: Do you feel that the changes our government is proposing would give your members some more confidence in how to deal with criminality when they are victimized or presented with it in their store?

Mr. Alex Scholten: Absolutely. It creates a situation where we have more flexibility in how we can protect our property by not simply being able to act while a crime is being committed but in a reasonable time period afterwards. That definitely gives our members much more flexibility, and we'd very much encourage that.

Ms. Kerry-Lynne D. Findlay: I assume as well that part of your training you're talking about, or instructions, would be to continue to tell those who might be on the front line in the stores that they need to contact law enforcement in whatever way they can at the earliest time possible. Would that be correct?

Mr. Alex Scholten: That is absolutely correct. Our members first and foremost want to make sure that they're not putting themselves or their customers and employees in harm's way. Unfortunately, the reality of the situation is they often have to.

I would note in the case of Mr. Chen that in his testimony he outlined the fact that the day before this incident came up he had a shoplifter who was caught in the act and they called police immediately and waited four hours for the police to show up at their site, just because of the priority of the situation and the priority level of the crime. That gives you an idea of what we as retailers go through on a day-to-day basis. So the laws we're talking about would give us much more flexibility, but we realize that we always want the police to be doing the law enforcement and not us. We can help them by having that flexibility.

The Chair: Thank you.

Madame Borg.

[*Translation*]

Ms. Charmaine Borg (Terrebonne—Blainville, NDP): Thank you. My first question is for Mr. Stewart.

In the brief you submitted to the committee, which is indeed very complete, you mentioned a concern regarding the fact that a judge could choose to base his finding on only part of section 34, the list of reasonable grounds. I'd like to know how you think we might curtail judiciary discretion in this matter?

● (1240)

[*English*]

Mr. Hamish Stewart: As I said before, and as Mr. Preston also said, in the law and particularly, I think, in the law of defences, we're never going to get away from the concepts of reasonableness and proportionality.

We're never going to have a completely precise standard for deciding these things. The reason I'm suggesting that it would be better to highlight the three elements I began with, and then treat the other factors as potentially relevant to them, rather than putting them all into one set of factors, is that I do think it would confine the discretion of the judge a little bit more. There's always going to be some discretion here, but I think it would confine it a little bit more.

I should say, this is not just the discretion of judges; it's the discretion of juries in murder cases. These will be where self-defence is raised. These will typically be tried by a jury. Under the bill as it stands, the jury would have to be instructed in accordance with this section: "Members of the jury, you need to decide whether the crown has proved beyond a reasonable doubt that this act was not reasonable in the circumstances, and in deciding that you should consider these factors." Then when the jury comes back with its verdict, the crown, the accused, and the public are not really going to know exactly what it was that moved the jury one way or another.

If we put the jury instruction in terms of the elements being the wrongful threat, the necessity of the response, and the proportionality of the response, I think we'll have a better idea of what it is juries are deciding when they're deciding these questions.

I hope that answers your question.

[*Translation*]

Ms. Charmaine Borg: Yes, thank you.

I would have a second question for you. You did not mention this in your brief, but you might have something to say about it.

Last week we heard about battered woman syndrome from some witnesses. With reference to section 34(2)(b), some felt that this could lead to some confusion if the woman did not go elsewhere, that is to say if she did not consult a group, for instance. Some wondered if she could still invoke self-defence.

Can you tell me your thoughts on this?

[*English*]

Mr. Hamish Stewart: If I'm reading it correctly, I don't think the bill prevents the battered woman from raising the defence in that situation. It does, however, ask the fact-finder to consider whether the use of force was imminent, and whether there were other potential means, so that's going to be a factor to be considered along with the others.

In the leading case on this topic, the Lavallee decision from 1990, the Supreme Court of Canada interpreted the phrase “reasonable apprehension of death or grievous bodily harm” in subsection 34(2) as it now stands. The crown, the prosecution in that case, tried to persuade the court that this meant an imminent threat, and the court said it didn't have to be imminent but asks whether it was a reasonable threat. It could be coming along later.

I don't think this section excludes that, so it would still be possible to make that kind of argument in those types of cases. My suggested reframing of the section doesn't exclude it either, because the question would still be whether it was necessary to do what was done, whether it was a proportionate response in light of the situation the person was in. What the Supreme Court emphasized in Lavallee itself was the role of the expert witness's testimony in explaining to the jury the situation this person was in, which otherwise looked like a very unsympathetic case for self-defence. I don't think either this or my version would exclude that.

The Chair: Thank you, Ms. Borg.

Go ahead, Mr. Woodworth.

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

Thank you to all of the witnesses. I've appreciated your comments, each one of you, which I thought were very thoughtful.

I hope Superintendent Preston and Mr. Scholten won't mind if I say that I understand that you're here because you're representing others, whereas I will say to Professor Stewart that I doubly appreciate your attendance. I know that you're here because you love just and honest laws and sound principle. I hope that you and I are kindred souls in that respect. I appreciate that, and I wanted you to know it.

Having said that, though, I'd like to engage with you a little bit regarding your comments. In particular, I'd like to focus on proposed paragraph 34(2)(h): “whether the act committed was in response to a use or threat of force that the person knew was lawful”.

Now, we've already discussed the fact that this is subject to an overriding requirement of reasonableness. Quite frankly, I'm not sure that I can even imagine a case in which a judge or jury would conclude that defending against the lawful use of force was reasonable. Assume, for the sake of argument, that some judge or jury had specifically had their attention brought to the fact that a person knew that the use or threat of force he or she was defending against was lawful. If the judge and jury still concluded that it was reasonable for the accused to have offered whatever defence he or she did, I would be okay with that. In other words, the underlying principle on which I would be happy to rest is the notion that a judge or a jury should have some residual discretion to conclude that an individual's conduct was reasonable.

Is there any chance that I might convince you that residual discretion for a judge and jury to conclude that the conduct was reasonable isn't really a dramatically bad thing? Is there any chance I could convince you of that?

● (1245)

Mr. Hamish Stewart: There's always a chance. I'd like to think of myself as not having completely settled views on any issue. Therefore, there's a chance.

I endorse the first thing you said very much. I do find it difficult to imagine a set of facts where this factor could be the decisive one, given all the other things that might be in play in a case of self-defence.

Mr. Stephen Woodworth: It would not be the decisive one, in other words.

Mr. Hamish Stewart: Yes. To that extent, I think it's hard to imagine what role it's supposed to play. Of course that leads me to wonder why it's in there. I'm wondering whether this factor, the use of force by law enforcement, is clearly excluded by proposed subsection 34(3) of the bill, which clearly says that this self-defence provision doesn't apply if the person is responding to the authorized use of force by a law enforcement officer—

Mr. Stephen Woodworth: Because of our time limitations, I just would like your observations on whether it is not perhaps a good thing to leave a residual discretion for reasonableness with the judge or the jury.

Mr. Hamish Stewart: My sense at the moment is that there may be sufficient discretion within the concept of what is a necessary and proportionate response, because proportionality is not a precise concept either. Self-defence cases are replete with observations by judges to the effect that you can't be expected to weigh exactly how much force you need to use in response to a serious threat to your life or your person. So I'm wondering what this would add to those other regions of discretion.

Mr. Stephen Woodworth: At the very least, it causes the judge or the jury to specifically put their minds to each of these points. It would be in the instructions. I just have to say that I'm okay with it. And it's often that the shoe is on the other foot. We often get witnesses coming here to tell us to give judges more discretion. In this case, we're giving them a little discretion, and I'm okay with it. I will have to leave it for you to ponder, perhaps.

I have one more question, if I have time, for Superintendent Preston. The issue is that right now, as I understand it, if people are charged with an offence because they were trying to defend themselves or were trying to arrest someone who had committed an offence against them, it may often be the case that the law is so unclear that the police, just as a default position, have to charge such individuals and let the courts sort it out. My impression is that these amendments will perhaps avoid the necessity of some of those charges. Does that seem right to you?

● (1250)

Supt Greg Preston: I would like to think that we don't charge people just because it's the easier thing to do.

Mr. Stephen Woodworth: No, but the law is not clear.

Supt Greg Preston: I agree with you, and that's one of the comments I made at the beginning. We do look to this to be clearer than it currently is, and therefore we endorse it. It should make things easier for our members. There are situations that are tough. You can have a tough situation, one in which you could potentially have some serious injuries. The grounds appear to exist. The charges are being laid right now. I think this will assist us in delineating, better than we do right now, where that line is, what is lawful versus what is unlawful.

Mr. Stephen Woodworth: And there will be more time for other more important things. Thank you.

The Chair: Thank you, Mr. Woodworth.

Ms. Davies.

Ms. Libby Davies (Vancouver East, NDP): Thank you very much, Chairperson.

Thank you to the witnesses for coming today. We're having a very interesting discussion on this bill.

I'd just like to raise one question. I think one of the things the committee is looking at is the balance. Has the right balance been struck in terms of citizen's arrest and the right to defence? I know it's very difficult to speculate on what the outcome of the proposed law will be in terms of any further challenges, but when you look at this bill, it includes not only the person, say, in the store, the store owner or an employee, but also persons authorized by them. So I assume that could mean security people. I know in some business areas there are security people hired by a business association. I know in Chinatown in Vancouver we have such a situation. So the person authorized by them might be hired through an association.

The concern I have is whether this bill will open up a greater possibility for people to actually be targeted based on stereotypes, and whether someone who's authorized or a person in the store, the keeper or an employee, because of the way someone looks or acts, would believe they were committing an offence.

I wonder, Mr. Stewart, if you could address that. The bill does say that they can arrest someone committing a criminal offence, so it leaves us with the impression that you somehow have to see them, but even noting these CCTV cameras, what you see in a little camera is not a hundred percent necessarily what actually might be going on. So I am concerned as to whether this might leave the door open to people actually being targeted because of the stereotype involving something that they wear or the stigma they have of being someone who looks like a criminal, who looks like a drug user, who looks like someone who's up to no good, that kind of thing. Does it leave the door open for more arrests, false arrests, based on that premise?

Mr. Hamish Stewart: All right. I haven't thought as much about the proposed section 494 as about the rest of the bill, but I'll try to give an answer.

I think that in the bill as it stands, the requirement that a person be found committing an offence has been interpreted in others parts of the Criminal Code to mean there exists a reasonable belief that a person is committing the offence. Mr. Preston has suggested expanding that to reasonable grounds to believe that an offence has been committed, even if the person exercising the power doesn't see it themselves.

I don't think the danger you point to can be avoided entirely in practice, but stereotypical beliefs about a person's behaviour, it seems to me, could not form part of a reasonable basis on which to exercise the power.

I guess that would be my suggested way of controlling it. So if the person exercising this arrest power says “Well, I thought the person was shoplifting because...” and then gives several reasons, and some of those reasons include stereotypes about a certain class of persons, then I think those could not count as part of the reasonable grounds, and that reasoning might affect the lawfulness of the arrest that was made. That's my opinion, but I don't think there's any way to eliminate that entirely in practice.

Mr. Preston might have something to add to that.

Supt Greg Preston: I think, with respect, the human frailties you point to exist with the shop owners themselves potentially. So if you bring loss prevention officers in, they possess those same potential frailties.

So I don't see this as expanding.... In fact it already exists. The LPOs, the loss prevention officers I spoke of, are the ones who are actually carrying out a large portion of the arrests in the larger chains. In the smaller chains, obviously, it is the shop owners. So when you look at it, really it goes both ways. Whether it's the shop owner or the loss prevention officer, they still have to be able to apply the law lawfully. They can't go to these types of grounds that aren't grounds. They're impermissible inferences. You can't go there.

So I'm not too concerned about it at all. What I'm more concerned about is the fact that people are acting under circumstances that I believe most of society would expect, and yet right now there appears to be a gap, because, as you pointed out, it's the “finds committing” that is the problem that I think needs to be considered by this committee, the fact that in essence we have a broad class of citizens typically being the agents of the property owner, who are entrusted to carry out this activity because the police can't be in all places. And yet there is a gap, and I believe there's a gap even in the proposed legislation.

● (1255)

The Chair: Thank you, Ms. Davies.

Mr. Goguen.

Mr. Robert Goguen (Moncton—Riverview—Dieppe, CPC): Thank you.

Thank you to all the witnesses for coming today. You brought up some interesting points. The finance committee will have to focus some more attention on it. Thank you.

A lot of the discussion we've had here has to do with the commercial context, obviously the shoplifting, and obviously everyone wants.... It's a cornerstone of the legislation that the police are the first line of defence against crime. Out of necessity, I believe, probably in a lot of cases security officers or designated personnel are necessary because the police are otherwise occupied. But what about the situation in more rural areas, where obviously because of geography, distance, limited resources, the police can't react immediately? Do you think the inclusion of the requirement that the person making the arrest reasonably believes the police officer cannot make the arrest because of circumstances is something that will cause citizens to behave, to not take on vigilante-type attitudes?

I will throw that open to each one of you.

Supt Greg Preston: Again, we've looked at this. We believe it informs the decision-making. The idea is that if you have an opportunity to contact the police, we should be involved. I really believe that's all that provision does. It helps inform, so that people take reasonable steps. That's all we're asking.

That's my view of that. Again, what is reasonable will be informed by the facts. If we're talking about a rural community that is three hours north of any major centre, that's different from being in downtown Edmonton, Vancouver, or Toronto.

Mr. Robert Goguen: Fair enough.

Mr. Hamish Stewart: I think that general point also applies to the self-defence provisions and defence of property provisions in a more general way. If it's possible to avoid a threat by calling the police to deal with it, then that's preferable to the citizen using force, particularly deadly force, to defend himself or herself. But sometimes that's just not possible.

Mr. Alex Scholten: I would say that it's not just rural communities, but even urban sites, where having police attention to some of these matters is not very prompt. Retailers are frustrated by that. They feel the attention that is necessary to protect their business interests is not there.

Giving them the ability to act when a crime is committed, or a reasonable period afterwards, gives them more flexibility in terms of protecting their own interests and helping the police after the fact.

Mr. Robert Goguen: Did your association delve into Statistics Canada and figure out the average response time of the police on a shoplifting offence?

Mr. Alex Scholten: No, unfortunately we don't have that.

Mr. Robert Goguen: I'm kidding.

Thank you. I have no further questions.

The Chair: We've completed all of our rounds.

I want to thank the witnesses for being here. I apologize that we lost the first quarter of the meeting, but it looks like it was sufficient in the end. We're a little bit early.

Thank you again for being here. It was very much appreciated.

The meeting is adjourned.

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