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Tuesday, March 6, 2012

Chair

Mr. Dave MacKenzie

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● (1105)

[*English*]

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

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

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

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

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

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

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

In relation to self-defence, both Professor Stewart and Mr. Russomanno expressed concern about the new self-defence provision that would treat proportionality between the incoming threat and the defensive response as a factor to consider in determining whether the accused should be acquitted. By contrast, the current law treats proportionality between the threat and the response as a necessary criterion for the defence to succeed.

We do not consider this change to be a matter of concern. One reason for this shift is that the proportionality requirement is not actually applied literally in the courts. You've heard Professor Stewart refer to the principle that the accused need not weigh to a nicety the exact measure of defensive force he or she may use.

The courts recognize that in the heat of physical confrontation, people who perceive themselves to be at risk of harm are going to be frightened and agitated. Under these circumstances, the law does not expect a person to engage in detached reflection or to precisely calculate the amount of force that is just right to deflect the attack but no more than that. In other words, the courts recognize that actual proportionality between the threat and the response is too much to expect of a person caught up in a violent confrontation. The requirement of proportionality is, by virtue of the common law, interpreted more flexibly than its definition implies.

In simplifying the law of self-defence, the decision was made to avoid proportionality as a strict requirement, in part because it's not really a strict requirement under the law today. Instead, the ultimate measure of acceptable force would be reasonableness. Reasonableness is preferable, because by its very definition, it is flexible and slightly broader. It also certainly includes proportionality as a matter of logic.

For even greater clarity, proportionality is set out in the list of factors the court can consider, so there is really no possibility of the courts losing sight of its importance.

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

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

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

The unlawful attack element is also removed because it causes a great deal of difficulty under the current law. This element complicates trials unnecessarily by placing the focus on the early stages of a confrontation. In asking the jury to determine who attacked whom first, the jury must look to which actions constituted the first assault. This in turn requires the jury to determine what the accused believed about the intentions of the other party. It's far preferable to focus attention on the thoughts and actions of the defender at the time when they committed the actions they are charged with.

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

The second assurance is located in proposed subsection 34(3), which deals with the most common claims of self-defence against lawful conduct, namely against police action such as arrest. The new law would make it clear that in the case of police action, self-defence is only available if the defender reasonably believes the police are acting unlawfully, such as by using excessive force.

Those are my opening remarks.

Thank you.

● (1110)

The Chair: Thank you.

Madam Boivin.

[*Translation*]

Ms. Françoise Boivin (Gatineau, NDP): Ladies, thank you for coming to help us before we move on to the clause-by-clause study, which will be carried out on Thursday. Hearing from the different witnesses has been extremely beneficial. It goes to show that this issue is not simple. Drafting these documents must not have been simple either. I would be surprised if anyone were fundamentally against the goal we hope to achieve with Bill C-26.

Considering what we have heard, I appreciate your comments on certain notions that were not entirely clear to me. I had to briefly discuss them with you this morning. I will set them aside because you have addressed them already.

However, I still have some concerns about the bill in light of some of the witnesses' comments. I am still unsure how my questions can be answered. They mostly pertain to citizen arrests and the fact that a new dimension is being added. I know that it all stems from a single case. We have all said that trying to resolve a legal problem based on a specific case could lead to difficulties. Be that as it may, the two are not mutually exclusive.

Clearly, it is a matter of making the arrest within a reasonable time. As a lawyer, I always struggle a bit with that kind of an issue. I do know that reasonableness is sometimes the most difficult consideration to interpret before the courts. That's at the heart of the matter. Colleagues in attendance have talked about potential cases when it comes to reasonable time frames. We know that such questions will come up before the courts.

I would like to know whether you, as a Department of Justice expert, feel that it would be worthwhile to focus a bit more on reasonable time frames, to pre-set a maximum limit. Would it be beneficial to set a 48-hour time limit? The idea would be to avoid deficiencies of recollection three, four or five days later.

[*English*]

Ms. Catherine Kane (Director General and Senior General Counsel, Criminal Law Policy Section, Department of Justice): Thank you for the question.

That is a good point. We're certainly aware of the witnesses who have expressed concerns about what would be considered reasonable. We've tried to make it quite clear that it's "reasonable in the circumstances". If the committee were to consider adding a timeline, it would be very difficult to determine if that outer timeline was reasonable as well, because 24 or 48 hours, as an example, might not be reasonable if you were in a remote location, and it would be excessive if you were in an urban centre where the police could have been contacted within that period of time.

We're quite confident that the courts will interpret "reasonable in the circumstances", and in those cases that get interpreted by the courts, the law will settle it quite quickly.

There are pros and cons to having any sort of time limit, as opposed to leaving it with "reasonable". As you've noted, the courts deals with the term "reasonable" all the time in various contexts. I don't think we have any reservations that they won't deal with it appropriately in this context.

Ms. Françoise Boivin: Would there be any advantage in being precise about the distance one could go to arrest somebody?

● (1115)

[*Translation*]

Would it be possible, for instance, for a security agency employee to send a colleague a person's photograph taken from a video after being informed that the person had moved? I just want to know whether there is a way to limit the area within which an arrest can be made.

Ms. Joanne Klineberg: That's also an interesting idea. Section 494 may pose a problem in that regard. It states the following: "may arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property." Let's apply that, for instance, to a situation where a wallet is stolen downtown. How can it be determined where exactly the offence was committed? How can the application be limited in that context? If it were only a matter of shoplifting, for instance, that provision would make sense, but I have a hard time understanding how it would work in other contexts the legislation applies to.

Ms. Françoise Boivin: The issue that has been raised often concerns subjective and objective criteria. You actually spoke to some of the considerations nicely. You also talked about reasonableness, as far as the person's perception goes. Would it not be worthwhile to specify that it is a matter of the person's own perception? In different circumstances, we would be talking about reasonableness in the sense that a reasonable person is involved. As you said,

[*English*]

it's in the heat of the moment. It's very hard to put an objective person in those circumstances.

[*Translation*]

Ms. Joanne Klineberg: Let's take into consideration the three elements of self-defence.

The first element requires the person to believe, on reasonable grounds, that they are under threat and that force must be used. That is both an objective and a subjective element. The subjective aspect —what the person thinks—is considered first. Then, the objective analysis is done, whereby it is determined if the act was reasonable.

The second element is exclusively subjective. The only thing considered is the person's intention. It must be established that the person intended to defend themselves, rather than continue to commit the crime in progress.

The third element is purely objective, as the two other elements are used to determine the third. It must be decided what kind of reasonable grounds the person had regarding the threat and what that person's subjective intention was. All that is taken into account when deciding whether the person acted reasonably.

Ms. Françoise Boivin: Some of our witnesses told us that there may be an imbalance between the objective and the subjective criteria. Objective elements outnumber the subjective ones, although the issue is highly explosive, figuratively speaking.

[*English*]

In the heat of the moment....

[*Translation*]

Ms. Joanne Klineberg: I don't think that's the case for the three elements that define self-defence. As for the factors the court can consider, they are defined objectively. However, when deciding what is reasonable in the circumstances, the court or jury may take into account the person's subjective thoughts.

[*English*]

The Chair: Thank you.

Ms. Findlay.

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

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

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

● (1120)

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

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

The Chair: Mr. Scarpaleggia.

Mr. Francis Scarpaleggia (Lac-Saint-Louis, Lib.): Thank you, Chair. I am new to this committee; I am substituting for Irwin Cotler, and I have big shoes to fill here, especially since I am not a lawyer, so you'll have to excuse me if my questions are more simple.

It is an intriguing subject, I must say, and your presentations were superb and could easily be understood by a non-lawyer, so I congratulate you for that.

When we're talking about subjective beliefs that you are about to be attacked.... I believe that is included in the bill, that if someone feels they are under a threat and they react, they may not be found guilty under this law. Is that correct?

Ms. Joanne Klineberg: Yes.

Mr. Francis Scarpaleggia: It reminded me of a case in New York, I think it was in the 1970s or 1980s, of a fellow on a subway, an innocent fellow, a bit of a nervous character, but perhaps he had the right to be nervous in the circumstances. He had a gun, and I think four or five people, gang members, or whatever they were, got on the subway train and they intimidated him quite seriously; he panicked and shot them. In fact, I don't know if he killed any of them, but some of them were paralyzed for life and so on. If I recall correctly, in the subsequent investigation, it turned out that these four or five guys were actually quite bad guys and they had been convicted for serious violent crimes and so on.

In the context of a law like Bill C-26, how would he be treated? I don't recall if he was found guilty of overreacting or what the conclusion was, but I think you are familiar with this case. How would he have been treated by the law in the context of Bill C-26?

Ms. Joanne Klineberg: I don't think we would really be in a position to say what the outcome of the case would have been.

Mr. Francis Scarpaleggia: I understand.

Ms. Joanne Klineberg: It would depend on the evidence that was available to be admitted during the trial.

But certainly if one were to apply what's proposed to be the new law of self-defence here, the first question would be, did he have a reasonable perception that he was about to be attacked? That would be the first question. So his subjective beliefs there obviously are the most relevant place where we start.

The next question is really whether a reasonable person, with much the same background as he has, in that same situation would have had the same sense that an attack was coming.

The second element of self-defence would be, did he act for a defensive purpose as opposed to another purpose? Was he seeking revenge or was he seeking merely to protect himself? That would be the relevant question.

There is a third issue the court would have to examine in that case: would the reasonable person say that the steps he took in these circumstances, given everything else we know—given his beliefs, his fears, and all the other factors—have been reasonable? Fortunately, we get to leave those decisions for the people who hear the evidence.

● (1125)

Mr. Francis Scarpaleggia: Just to pursue this a little further, would the fact that these four individuals who were threatening him and who were not known to him—maybe his sixth sense told him these were bad guys, and afterward it was confirmed that they were extremely violent and could very well have hurt him—which would come out in a court case, work in his favour, or would they be considered irrelevant because he would not have been aware of them?

Ms. Joanne Klineberg: There certainly are cases in which the violent past of an attacker can be admitted in trial if that makes it more likely than not that a person's perception that he was about to be attacked was reasonable in the circumstances. The admissibility of that type of evidence depends a little bit on the nature of the case and on how relevant that information would be to supporting the claims of the accused. So there definitely is a mechanism for having evidence like that introduced, but it would depend on the facts of a particular case.

Mr. Francis Scarpaleggia: Would the defendant's psychological profile be discussed in court? For example, if the fellow was known to be quite timid, and maybe he was in therapy for his timidity, it wouldn't change the fact that he was surrounded by formerly convicted rapists and so on. Would the court go into that aspect of a person's personality?

Ms. Joanne Klineberg: You've hit on one of the most interesting and difficult aspects of self-defence, which is the degree to which the personal characteristics of the accused can be attributed to the reasonable person when we're looking at the reasonableness of the accused's actions.

Many of the accused's personal characteristics can be attributed to the reasonable person, but there's a limit. If we attribute every characteristic of our accused to the reasonable person, we've lost the benefit of the reasonable person test because we've made the reasonable person our accused.

The courts deal with where that line is on a continual basis. Certainly if a person had experienced violent attacks throughout their childhood, or if they had been victimized many times and that circumstance affected the way they approached situations or the way they perceived situations, to a degree those would be factors that could be attributed to the reasonable person so that we could better judge that person's actions and perceptions and be fair to them.

Mr. Francis Scarpaleggia: That's interesting.

The Chair: We're quite a bit over time.

Mr. Jean.

Mr. Brian Jean (Fort McMurray—Athabasca, CPC): Thank you, Ms. Klineberg. That was an excellent presentation and a good response to the evidence you heard.

I have to say I agree with you in relation to the position of the department as not being prescriptive in relation to a reasonable time and other things found throughout, because I think certainly the judges have interpreted statutes for years, and we have hundreds of years of case law in many courts across the world that have interpreted these and have good solid law to back them up.

Also, I appreciate the confirmation relating to technology and the use of technology. I think that was good, and good for the committee to hear that.

I'm interested in one particular statement you made, which is that proportionality is not applied literally in the courts. I would like you to expand on that if you could, please.

Ms. Joanne Klineberg: If you open up a dictionary and look at the definition of proportionality, it really speaks to a direct and limited relationship between two separate things. This is where these two things are proportional to each other. It doesn't allow for plus or minus five degrees or ten degrees. That's where the courts have said that proportionality between the threat you're trying to avoid and the harm you cause is obviously a guiding principle. We don't want to allow people to shoot others just because they're at risk of having a finger broken.

So there's no question that it's extremely important. This goes back to a decision from the House of Lords called Palmer, which I think dates from the early 1970s, that has driven the rest of the case law in this area throughout the common law world. It's almost an error of law for the court not to instruct the jury to apply proportionality, not in a rigid manner but to apply it in a flexible, tolerant manner.

In other words, if someone in a situation of heightened passion, where they're fearful for their lives, inflicts more harm than was absolutely necessary, you should still consider whether what they did was reasonable based on their fear, based on the heightened tension of the situation, based on the crisis mode they were in. You should give them that latitude. And the jury should not be told to find exactly how much force was proportional to the threat and no more. They're really told to come at it with much more generosity to the situation that the accused was in.

● (1130)

Mr. Brian Jean: Didn't Palmer also speak in relation to escalation between the parties?

Ms. Joanne Klineberg: Yes.

Mr. Brian Jean: Could you confirm what the court said in relation to that?

Ms. Joanne Klineberg: If you could be a little more specific, that would help me.

Mr. Brian Jean: They mentioned that when the parties are in the emotional throes of a battle, the escalation itself has to do with perception by the defence on what is reasonable in the circumstances: simply that the parties can get out of hand, but that should be considered as well by the jury.

Ms. Joanne Klineberg: Yes.

Mr. Brian Jean: Notwithstanding that the opposition may disagree, I think I'm a very reasonable man. I'm sure everybody in the room does as well. That's the difficulty for courts, to find what is reasonable in the circumstances given everything they have.

In the case of Mr. Scarpaleggia, that was a particularly interesting case because the accused did not understand who the parties were. It went a little bit beyond his sixth sense.

The only other question I have is whether you anticipate any need to change any other statutes besides the Criminal Code, particularly in regard to provincial statues for seizures and things like that. Is there any anticipation by the department that the provinces might have to make some amendments relating to their—

Ms. Catherine Kane: That issue would be canvassed with our provincial and territorial colleagues. We meet with them very regularly and give them updates on the status of legislation progressing through the House. We would leave it to them to determine if they have to do anything to bring their provincial laws in line.

At the present time, we don't think that will be necessary. Usually our provincial colleagues wait until they see imminence in terms of passage and royal assent before they specifically turn their mind to the need for any adjustments.

As noted previously, we will also be embarking on some public education material so we can explain to various audiences what these changes mean. That may stimulate provinces and others to look at whether there is a need for any adjustments to be made in provincial laws.

Mr. Brian Jean: Thank you very much.

Those are all of my questions, Mr. Chair.

The Chair: Thank you.

Mr. Jacob.

[*Translation*]

Mr. Pierre Jacob (Brome—Missisquoi, NDP): Good morning. My question is for Ms. Klineberg or Ms. Kane.

In the brief the Barreau du Québec submitted when it testified, there are important elements regarding citizen arrests that leap out at me. The brief states the following:

> In addition, the fact that a citizen's arrest must be made "within a reasonable time" after the commission of the alleged offence leaves the way open for a possible abuse of power. Any arrest includes elements of unforeseeability arising from the use of the force [...]

The Barreau provides examples and says that, in many cases, although police officers are well trained and very skilled, things can go wrong during an arrest, even when the people involved are not criminals.

I would like to know if you have considered minimizing risks in citizen arrests. That remains a considerable power. It's a matter of respecting the law and the rights of the arrested person.

● (1135)

[*English*]

Ms. Catherine Kane: Thank you for the question.

I think you're drawing a comparison, perhaps between the police, who are very well trained, and private security guards, who would be effecting a number of citizen's arrests. We can't necessarily expect the private citizen to be familiar with what an arrest is and so on.

As I mentioned, we are going to be providing some public education materials to advise the public that this is not meant to encourage them to take the law into their own hands; their first resort should always be to the police.

I don't think we would have concerns about private security companies not being well trained. Certainly in our meetings with them, when we were looking at options for law reform, and in their testimony before the committee, they did indicate how very frequently they are engaged in this activity.

It's a very sophisticated and well-trained organization. Because so many businesses do rely on private security guards, they would not be wanting them to engage in conduct that was abusive. And they are monitored and regulated in other ways than through the Criminal Code.

I don't think we have concerns that there will be abuses because of these reforms that would be any different from what might occur now. In fact, our hope would be that because the law will be changed and there will be more public awareness of this, it will be the opposite. There will be more rigour in terms of avoiding any potential abuse.

[*Translation*]

Mr. Pierre Jacob: The Barreau du Québec asked some questions about arrests made by a citizen or, in the case of larger companies, by a security agency. What would be done with arrested individuals? Where would they be taken? How would the arrested person's constitutional rights be ensured? What would happen in the event of an unlawful arrest? Would the citizen have civil or criminal immunity?

[*English*]

Ms. Catherine Kane: As to how this would arise, potentially, in the department store context, perhaps a person is observed by security officers—whether by a closed-circuit television or face to face—while stealing merchandise. They would see the person leave the store and would effect the arrest at that time. They could detain the person, but there's an obligation for them to turn the person over to police as soon as possible.

What we have been advised happens in the ordinary course of events is that they would then contact the police by telephone, indicating that they have a person in custody, so to speak. Sometimes, if it's a less serious offence, the police give them a number over the phone. They get the person's details, their contact information and so on, and then they release that person immediately. The person would then receive at home a notice to appear or a summons to appear in court.

So it wouldn't be a situation where the thief would be locked up in jail or detained for a prolonged period of time. Otherwise, the police would attend, and the police would take over at that point in time and would remove the person if the person were disruptive in any way or potentially causing threats to other people in the vicinity.

Is that getting at the heart of your question?

[*Translation*]

Mr. Pierre Jacob: In part.

Let’s assume that the arrest turned out to be unlawful. Would the citizen be prosecuted if the arrested individual basically considered the arrest to be unlawful confinement? Would the individual be able to sue the private security agency?

[*English*]

Ms. Catherine Kane: That would be a possibility: we can't say with certainty whether the wrong person is arrested. Obviously, there's embarrassment there, and there could be other damages. It's possible that the person may want to pursue civil charges. That's also why, in the context of citizen's arrest, we've added the “reasonable” period of time requirement. The farther away you get from the “finds committing” to the arresting at some point in the future, the greater the risk is that the wrong person will be identified.

It's part of the balancing act between what is reasonable and whether extending the time beyond “finds committing”, which is in the very act of the offence being committed, to some reasonable point past that, creates those risks. For the average shop owner, they may be less reluctant to arrest a day later than would a private security guard, who may have more confidence that they've identified the right person.

We're not foreclosing a person's civil remedies; if they are entitled to pursue those remedies, they will.

● (1140)

The Chair: Thank you.

Mr. Wilks has joined the panel as a guest. I just need consent from everyone; if there's no problem, he can ask questions.

Some hon. members: *D'accord*.

The Chair: Okay, Mr. Wilks.

Mr. David Wilks (Kootenay—Columbia, CPC): Thank you, Mr. Chair.

Thank you for allowing me to ask a question.

Thank you for coming today.

There was an inference from your comments with regard to excessive force by the police. From my 20 years of experience as a police officer, I can tell you that it's normally not what occurs, but it does happen from time to time. But here's what I'm getting at. You made an inference that if a police officer is arresting a person, and that person deems the arrest to be excessive in terms of arrest, that person may believe that excessive force is being used and could potentially resist.

I would hope that there was no reference to that person committing a criminal act of resisting arrest. What most police officers will do if a person resists.... In my case, then, I up the ante: if you're going to resist, I'm going to put a little more pressure on you.

I come from a police day when there were no tasers and there was no pepper spray; it was just you and me and let's see what happens—

Voices: Oh, oh!

Mr. David Wilks: And I didn't lose too often.

The fact of the matter is that if we are going to encourage people to resist the police because the person believes the arrest is not proper, you potentially could put someone in imminent harm.

The Chair: Mr. Wilks, this is only about citizen's arrest.

Mr. David Wilks: But it was raised when—

The Chair: I appreciate that, but the bill itself is just citizen's arrest.

Mr. David Wilks: I understand.

Ms. Joanne Klineberg: I don't think there's anything in the legislation that seeks to encourage anyone to resist law enforcement activities. However, it is already part of the law of self-defence that if a person has a reasonable belief that they're being assaulted—and this includes if a police officer is using excessive force or attacking them, as opposed to using force within the necessary parameters to arrest them—then the present law of self-defence allows a claim of self-defence against that conduct.

All we are seeking to do here is maintain that aspect of the law, which is going to be lost from where it is presently located as a by-product of other changes to the law of self-defence. This is just a restatement in a slightly different way of what the existing law is in respect of self-defence in these cases. I don't think there's anything in the legislation...and that this is something Canadians should consider doing certainly wouldn't form a part of our public education materials.

Mr. David Wilks: Thank you very much.

The Chair: Please go ahead, Madam Borg.

[*Translation*]

Ms. Charmaine Borg (Terrebonne—Blainville, NDP): Thank you.

Thank you for being here.

You have already answered most of my questions. However, a number of witnesses have said that security guards and citizens were not subject to the charter. If that is the case, how can we ensure that the arrested individual's constitutional rights are respected? Could you comment on that?

Ms. Joanne Klineberg: Are you referring to citizens or to security agencies?

Ms. Charmaine Borg: Yes, I'm talking about the people making the arrests.

Ms. Joanne Klineberg: We cannot know how the charter will be applied in a specific case. That's up to the courts. Generally, companies that provide security services come under provincial jurisdiction and are subject to codes of conduct. It is their responsibility to comply with the provincial legislation they come under. They are responsible for respecting the rights of Canadians in general. As we have said before, there are civilian remedies, or even regulatory or criminal remedies, if the companies' conduct is unreasonable in the circumstances. I don't know if more than that can be done.

● (1145)

Ms. Charmaine Borg: That answers my question. Thank you.

My second question is about the battered-woman syndrome. A witness pointed out that the subjective elements from subsection 34 (2) should take into consideration the conditions of battered women and their ability to use those self-defence provisions in court. I wanted to hear your thoughts on that. Do you think that should be expanded?

Ms. Joanne Klineberg: That was one of our concerns when we were preparing this bill. We are very much aware that it is really necessary to protect everything we have gained through case law regarding those types of situations. In the list of factors, paragraph 34 (2)(*f*) that we want to add mentions "the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force". That list of factors is used to try to reflect what the jurisprudence has established. I think that what is described there leaves the legislation as is.

Adding more elements to the legislation can cause problems, as there is always the risk of saying something that is not exactly correct or something that will become more rigid than what common law calls for.

I think that what we wrote is a good reflection of the law and the jurisprudence, especially when it comes to battered women. That allows the court to continue what it is currently doing, or to do even more if it wishes. We are not inhibiting anything, or taking anything away from the current legislation.

Ms. Charmaine Borg: I have a third question.

Several witnesses have expressed their concern over the fact that an individual would be able to arrest another individual within a reasonable time. You have already specified that including a specific time period of 24 hours or 48 hours, for instance, would not be a good idea. Would it be a good idea to add to the provision the words "at the first opportunity", so as to somewhat limit the reasonable time frame?

Ms. Joanne Klineberg: I think the intention is to extend the time period in cases where the arrest cannot be made when the crime is committed.

Ms. Charmaine Borg: So you are saying that following someone for a week to make sure they are the right person would not be allowed, right?

Ms. Joanne Klineberg: No.

Ms. Charmaine Borg: Thank you.

[*English*]

The Chair: Thank you.

Ms. Findlay.

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

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

● (1150)

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

In the scenario that I described earlier in response to Monsieur Jacob, if the person who is arresting calls the police and says they have arrested so-and-so for a theft, the police officer would either tell them to release that person and a summons to appear will be sent, or the police would come and take over. At that point the person would be subject to all the provisions and safeguards and notice requirements that police would otherwise provide to somebody they arrest.

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

Ms. Catherine Kane: Yes.

The Chair: Thank you.

Madam Boivin.

[*Translation*]

Ms. Françoise Boivin: Thank you.

I'm not sure I understood your answer to my colleague. Would it be inappropriate to amend the provision so that is reads as follows: "they make the arrest at the first opportunity, within a reasonable time"? I think that could be a good way to take into account the valid examples we have been provided with. As urbanites, we tend to forget that, in rural areas, the police is not very close. Therefore, the reasonable time frame may vary from one place to the next.

I understood the arguments you put forward when answering my earlier questions. However, the person could still act within a reasonable time without acting at the first opportunity. I don't know if you follow my reasoning. In such a context, I don't think things should be handled like that. Normally, the arrest is made right away, but in this case, the time period is extended. I think that people realize that may be necessary in some cases. That's not an issue. However, it would be prudent and reasonable for the legislator to stipulate that the arrest should be made at the first opportunity. It is not a matter of providing a free pass.

Ms. Joanne Klineberg: I think the idea is to extend the time period in cases where an immediate arrest is not possible. Under such conditions, I don't see how that could be disadvantageous. It is not up to you to decide when the arrest should be made. That must be done when possible, as soon as possible.

Ms. Françoise Boivin: So there is no problem. I don't think that goes against the current objective or that it changes the intended effect. It may even be a bit more specific.

Ms. Joanne Klineberg: Perhaps a bit. Be that as it may, we hope that the courts will take it to mean "as soon as possible", as in other areas where something must be done within a reasonable time. It is highly likely that the courts will interpret it that way even if nothing is added.

Ms. Françoise Boivin: If that amendment is passed, it will not change the original objective of the bill, as introduced. It would not take anything away from the bill. That is what I wanted to know. The amendment would not add a burden. You think that the courts will interpret it that way, but our amendment would remove all ambiguity. That would give the courts one less issue to decide on. Thank you for the clarification.

[*English*]

Ms. Catherine Kane: Excuse me. If there was a thought to add "at the first opportunity", it's almost like reverting back to the current law as it is, which has the element of "finds committing". We're giving—

● (1155)

Ms. Françoise Boivin: Not if you have the *délai raisonnable* attached to it....

Ms. Catherine Kane: But it's almost a mixed message, because if we say "reasonable", we want to give the courts—if the case gets to the court's attention—the opportunity to look at what was reasonable in the circumstances of that person arresting someone who they found committing....

Obviously, if they had an opportunity the day after, and the subsequent day, and so on, to arrest and they didn't, and they did it on day three, that might not be found to have been reasonable because they had previous opportunities. But if we add in the requirement or the guidance "at the first opportunity" and "reasonable", it's sending a confusing message about whether reasonable is only at the first opportunity. In other cases you could have—

Ms. Françoise Boivin: I see your point.

Ms. Catherine Kane: —an opportunity and you can't take it, because there's a risk there or you're not going to be able to carry it out, or whatever. You have to let that opportunity go by and hope that you'll have a second opportunity.

Ms. Françoise Boivin: They make the arrest at the first opportunity within a reasonable...and stop there. If you read the rest, I don't think it has that implication: If you read it as I would see it read, it would be that they make the arrest at the first opportunity within a reasonable...and then we continue:

> reasonable time after the offence is committed and they believe on reasonable grounds that it is not feasible in the circumstances for a peace officer to make the arrest.

We are past (a), so we are obviously in a second type of a situation.

It would be limiting. It would be sending a message that if you're not able to do it right now, the new law permits an extension. You have an extended period of another situation that can happen, as long as you're in a reasonable time and it is at the first opportunity.

You don't say, I'll go get two of my friends and we'll do the arrest because I don't feel comfortable doing it on my own, or something like that. It's really sending...you want to do it.

In the literature that you're going to prepare for people who could be interested in this new law, stress again that first we don't want to let citizens loose and tell them to please make a citizen's arrest. Second, if you're going to do it later than the immediate moment that you spotted the contravention, do it in a reasonable time, but do it at the first occasion. Don't start thinking, well, maybe I'm not ready right now, maybe I'll wait for a bit, until later on.

That's what I'm aiming at by saying that.

No comments? Excellent. Perfect. I'm so convincing. I love it.

Voices: Oh, oh!

[*Translation*]

Ms. Françoise Boivin: Would you object to something being added? Do you think that adding something would be a fundamental change?

Currently, the bill suggests that paragraph 34(2)(*f*) be added. It reads as follows:

> (*f*) 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;

What would you say to adding subparagraph 34(2)(*f*)(i), which would talk about "the person's ability to evaluate the degree of force in the circumstances"?

Ms. Joanne Klineberg: That is related to the issue I talked about earlier, that of determining the reasonableness of someone's actions. The reason why the person has difficulty evaluating the degree of force may make their actions unreasonable. It may be a matter of racism or something similar.

The wording you suggested is pretty general. It can include elements that are not currently included, but it can also include other elements. That depends somewhat on why the person is unable to evaluate the degree of force properly.

● (1200)

Ms. Françoise Boivin: Shouldn't that be taken into consideration? Do you think that adding that kind of a provision would be useful, or would it complicate things?

Ms. Joanne Klineberg: I think it would lead to more questions than answers. That is already something that the courts understand well, when it is relevant. In many cases, it's not at all relevant anyway. In the case of such a factor, we must really consider the wording used. There truly is a risk in this case.

Ms. Françoise Boivin: I have one 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? Would it solve a problem? Would we be able to clearly define the message, which is something the courts already often do? The courts are always criticizing lawmakers, saying that the legislation is vague and that they have a burden. They are criticized for creating law, but for once, we would tell them how to interpret matters.

Ms. Joanne Klineberg: 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.

I don't think your suggestion would change how the legislation is interpreted or applied.

Ms. Françoise Boivin: However, it does not change the lawmaker's intention behind Bill C-26.

Ms. Joanne Klineberg: It wouldn't do that either.

Ms. Françoise Boivin: Okay. Thank you.

[*English*]

The Chair: We have no further people on our list, and I think, Madam Boivin, we went way over on all of our time. I'm just thinking, if we have the answers to your questions....

[*Translation*]

Mr. Pierre Jacob: I have another question.

The Barreau du Québec concludes its brief by stressing that subsection 494(2) of the Criminal Code should remain as it is. In the brief, the following is said:

> We believe that an approach based on protecting the safety of individuals, including both the offender and victim of theft or property damage who enforces the law, is vastly preferable to an approach that could endanger individuals' safety.

I would like to hear what you think about the Barreau du Québec's opinion regarding subsection 494(2) of the Criminal Code.

[*English*]

Ms. Catherine Kane: We're always interested in the views of the various bar associations, but the position of *le Barreau* is basically that we shouldn't be changing the law at all. When the minister appeared before a committee, and in other statements he's made, he made it clear that the government is of the view that the law should be modernized, and that the current law for citizen's arrest is too constraining in its treatment of fines. The bill wouldn't be before the House or your committee if the view of *le Barreau* was agreed to by the government. So as in other instances, the law will evolve. The citizen's arrest law hasn't been changed for a number of years, and it's time there was a bit more flexibility provided.

The Chair: Thank you.

I think we will bring this part to an end. I want to thank the witnesses, and I want to thank the opposition for allowing Mr. Wilks to ask questions.

Just so that everybody's up to speed, on Thursday we will go to clause-by-clause on Bill C-26. If we have time, which we may, we'll have the report on organized crime back and we can try....

Oh, the clerk says you'll get it as soon as we all get back. He has the new version in his pocket.

Mr. Goguen.

Mr. Robert Goguen (Moncton—Riverview—Dieppe, CPC): I have a question for the clerk. The amendments were all highlighted, so obviously we'll be able to quickly get to what's been changed, correct?

The Clerk of the Committee: Yes.

● (1205)

The Chair: Thank you very much.

The meeting is adjourned.

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