

Saved by the Bell? Retrospective Application of *Bill C-26* (New Self-Defence and Defence of Property Provisions of the *Criminal Code*)

AMI KOTLER *

I. SUMMARY

The new self-defence and defence of property provisions came into force on March 11, 2013. These extremely important provisions replace the former sections 34-42 of the *Criminal Code*.¹ Not surprisingly, the question has arisen: what law should courts apply to offences now coming to trial that took place before these provisions came into force? Do the new provisions apply retrospectively, or only to incidents that took place after March 11, 2013?

This article argues that pursuant to the Supreme Court of Canada's decision in *R v Dineley*,² the new provisions do not apply retrospectively. Because they affect substantive rights, they are subject to a strong presumption against retrospectivity. That is, they fall under the long-standing presumption that the law in effect at the time of an alleged offence should determine its legality. Parliament's decision not to overrule that presumption (e.g., by enacting transitional provisions) must be respected.³

* The writer is a Crown Attorney with Manitoba Justice. The views expressed in this article, however, are purely his and do not represent the position of Manitoba Justice, the Attorney General or the Government of Manitoba.

¹ RSC 1985, c C-34, s 1.

² 2012 SCC 58, [2012] 3 SCR 272 [*Dineley*]. On this point, see especially para 10.

³ Provisions that govern the transition from old legislation to new legislation and set out which rules apply to pre-existing cases are not unusual in criminal law - see e.g. *Youth Criminal Justice Act*, SC 2002, c 1, ss 158-165.

Jurisprudence to date has been divided and some lower courts have suggested that if the new provisions are more advantageous to the Accused, he or she should be able to rely on them. With respect, given the way the new provisions work, it is by no means clear that they are more advantageous to the defence. More importantly, even if they were, this would still not overrule *Dineley*. Until the Supreme Court reviews the new provisions and revisits its earlier conclusion, it remains the law.

There is also an argument that people should not be prosecuted for actions which are now considered legal, even if they were illegal at the time. The wording of the amendments makes this unlikely, but should a case arise where the Accused would be convicted under the old provisions but acquitted under the new ones, the Crown retains the discretion to stay proceedings in appropriate cases on public interest grounds. Otherwise, the general rule remains – justly – that people should be tried on the basis of the substantive law under which they acted.

II. DISCUSSION

A. The New Provisions

Sections 34 to 42 used to provide for the application of self-defence and/or defence of property in a number of distinct, fact-specific situations. Unfortunately, there was significant overlap between the situations and charging juries became a complex and difficult task that created a troubling risk of error. Judges and commentators called out for years for legislative reform of this area of the law.⁴

The new provisions bring these sections together and identify what Justice Canada calls the “core elements” of each defence. In order to advance the defence, the Accused must establish an air of reality in relation to each of these core elements. A variety of considerations go into determining whether these “core elements” are made out. In the case of self-defence, the new section provides a non-exhaustive list:

34. (1) A person is not guilty of an offence if

⁴ See e.g. Department of Justice Canada, *Bill C-26 (SC 2012 c 9) Reforms to Self-Defence and Defence of Property: Technical Guide for Practitioners* (Ottawa: Department of Justice, 2013) at 4 [Technical Guide]; *R v Pandurevic*, 2013 ONSC 2978 at paras 10-16, 298 CCC (3d) 504 [Pandurevic].

- (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
 - (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
 - (c) the act committed is reasonable in the circumstances.
- (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
- (a) the nature of the force or threat;
 - (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
 - (c) the person's role in the incident;
 - (d) whether any party to the incident used or threatened to use a weapon;
 - (e) the size, age, gender and physical capabilities of the parties to the incident;
 - (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;
 - (f.1) any history of interaction or communication between the parties to the incident;
 - (g) the nature and proportionality of the person's response to the use or threat of force; and
 - (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.
- (3) Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

As Justice Canada explains, the new self-defence provisions “convert some of the factual elements that were ‘required elements’ under the old law (*i.e.* rigid conditions that had to be satisfied for any particular version of self-defence to succeed) into ‘factors’ or ‘considerations’ that feed into the determination of one or more of the [three] core elements of the new defence of person rules.”⁵ That is to say, many statutory pre-conditions in sections 34-37 have now been recast as factors to consider in determining whether the new version of self-defence is made out.

⁵ *Technical Guide*, *supra* note 4 at 2.

The new defence of property provisions are similar, though they do not include an explicit list of factors to consider in determining whether the Accused's "act" was "reasonable."

35. (1) A person is not guilty of an offence if
- (a) they either believe on reasonable grounds that they are in peaceable possession of property or are acting under the authority of, or lawfully assisting, a person whom they believe on reasonable grounds is in peaceable possession of property;
 - (b) they believe on reasonable grounds that another person
 - (i) is about to enter, is entering or has entered the property without being entitled by law to do so,
 - (ii) is about to take the property, is doing so or has just done so, or
 - (iii) is about to damage or destroy the property, or make it inoperative, or is doing so;
 - (c) the act that constitutes the offence is committed for the purpose of
 - (i) preventing the other person from entering the property, or removing that person from the property, or
 - (ii) preventing the other person from taking, damaging or destroying the property or from making it inoperative, or retaking the property from that person; and
 - (d) the act committed is reasonable in the circumstances.
- (2) Subsection (1) does not apply if the person who believes on reasonable grounds that they are, or who is believed on reasonable grounds to be, in peaceable possession of the property does not have a claim of right to it and the other person is entitled to its possession by law.
- (3) Subsection (1) does not apply if the other person is doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

No transitional provisions were enacted. Justice Canada, however, did produce a "Technical Guide for Practitioners" which asserts a number of times that the new provisions were not meant to change Canada's laws of self-defence or defence of property, merely to make them easier to understand and apply.⁶ Robert Goguen, the Parliamentary Secretary to the Justice Minister, suggested the same thing in Parliament, stating that the provisions of Bill C-26 would "maintain the same level of protection as the existing laws[.]"⁷

⁶ See e.g. *Technical Guide*, *supra* note 4 at 2 ("Overall, it is Parliament's intention to give effect to established self-defence principles in a more transparent and consistent way.").

⁷ *Ibid* at 4.

B. The Law on Retrospectivity⁸

The leading case on retrospectivity remains *R v Dineley*. The Supreme Court considered the application of Bill C-2 (the *Tackling Violent Crime Act*), which effectively eliminated an Accused's ability to raise a doubt about the reliability of breathalyser results simply by testifying as to his or her alcohol consumption and calling an expert to perform an extrapolation. The Accused's trial began before the Act came into force and concluded after it was in effect. As with Bill C-26, no transitional provisions had been provided by Parliament.

The trial judge held that the Act did not apply to the Accused's case and only applied prospectively. The Ontario Court of Appeal disagreed. In a 4-1 decision, the Supreme Court of Canada restored the trial judge's decision.⁹

Deschamps J observed that there is a strong presumption against retrospectivity where substantive rights have been affected. Absent some indication from Parliament that retrospective application was intended, courts will hesitate to read it in.¹⁰

It does not matter whether on its face the amendment is procedural or substantive. What matters is whether its operation actually affects substantive rights. Where it does, the presumption applies. In relation to criminal defences specifically, Deschamps J stated that where an amendment affects the content of a defence, this suggests that substantive rights have been affected: "The fact that new legislation has an effect on the content or existence of a defence, as opposed to affecting only the manner in which it is presented, is an indication that substantive rights are affected."¹¹

⁸ For the purposes of this discussion, the terms "retrospectivity" and "retroactivity," while conceptually distinct, are effectively equivalent. See e.g. *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358 at 381, 143 DLR (4th) 577.

⁹ Cromwell J agreed with the majority's statement of the relevant principles, but disagreed as to their application to the Act in question.

¹⁰ *Dineley*, *supra* note 2 at paras 10, 44-51. This is consistent with section 44(f) of the federal *Interpretation Act*, RSC c I-21, which provides that

Where an enactment . . . is repealed and another enactment . . . is substituted therefor, except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment [Emphasis added].

¹¹ *Dineley*, *supra* note 2 at para 16.

In the case of Bill C-2, the restriction placed on the Accused's ability to challenge the breathalyser's accuracy had "an effect on the content" of a defence and therefore made it subject to the presumption against retrospectivity.¹²

C. Application to Bill C-26

As noted above, Justice Canada's position is that these changes were not intended to change the substantive law, but merely to simplify it and make it easier to understand and apply: "The intent of the new law is to simplify the legislative text itself, in order to facilitate the application of the fundamental principles of self-defence without substantively altering those principles."¹³

With respect, notwithstanding these claims, it is hard to see how these amendments will be interpreted as purely procedural in nature. The new provisions re-write a major section of Part I of the *Criminal Code*, replacing several distinct defences with two general ones. *Dineley* held that the fact that new legislation affects the content of a defence is an indication that substantive rights are affected.¹⁴ Here, the amendments clearly affect the content of the defences:

- There are fewer requirements. Where an air of reality might previously have been necessary in relation to four or five elements to justify placing a defence before a jury, now it is only necessary in relation to three;
- The role of what used to be statutory pre-conditions for the applicability of a defence has changed. Now they are only non-determinative "considerations" that may not preclude the applicability of the defence;
- Conversely, situations in which some of the listed "considerations" might previously not have applied are now all subject to all of them, potentially making acquittal more difficult.

These are substantive changes. Even Justice Canada admits that despite its best efforts, the new provisions may affect the application of the law:

It is acknowledged that the law as it applies to some subset(s) of circumstances could be subtly altered by the elimination of circumstance-specific self-defence requirements. In developing the new defence, the greatest of care was taken to ensure

¹² *Ibid* at para 18.

¹³ *Technical Guide*, *supra* note 4 at 2.

¹⁴ *Dineley*, *supra* note 2 at para 16.

that any such alterations would be as few in number and as small in scale as possible.¹⁵

In the circumstances, it seems clear that the presumption in *Dineley* applies to the new provisions and that they thus apply prospectively, not retrospectively.

D. Jurisprudence to Date

Since the passage of Bill C-26, a number of courts have considered its application to the new self-defence and defence of property provisions. The first case to consider the issue was *R v Evans*,¹⁶ a decision of the British Columbia Supreme Court.

The Accused had been charged with aggravated assault and had relied on self-defence. The trial commenced the day that the new provisions came into force. Both counsel agreed that it was too early to say whether the new provisions would provide a broader or narrower benefit to defendants, generally speaking. Fisher J agreed, and questioned the value of such an inquiry in any event. Rather, she observed, the issue is whether the amendments affected substantive rights.¹⁷ Pointing to the change of statutory requirements that varied from section to section to factors for consideration that applied in all cases where self-defence is claimed, she concluded that the amendments affected substantive rights and that the presumption against retrospectivity applied.¹⁸

The Alberta Court of Queen's Bench reached the same conclusion in *R v Simon*.¹⁹ Defence counsel in that case had asked the trial judge to instruct the jury on both the old self-defence provisions and the new ones. Moreau J. declined to do so and held, following *Dineley*, that the new provisions did not apply retrospectively. Moreau J also pointed out that (i) it was bound to create confusion if the jury was instructed on two different sets of legislation; (ii) it was not clear that the new provisions were necessarily better for the defence

¹⁵ *Technical Guide*, *supra* note 4 at 2 [emphasis added].

¹⁶ *R v Evans*, 2013 BCSC 462, 278 CRR (2d) 228 [Evans]

¹⁷ *Ibid* at paras 12-13, 16.

¹⁸ *Ibid* at paras 25-26. It should be noted that Fisher J had access to Justice Canada's "Technical Guide" in reaching her conclusion, and, in fact, quoted it extensively. See e.g. paras 23-24. Its many statements that Parliament did not intend to change the substance of the law did not affect her conclusion that substantive rights had been affected. For a different perspective in this regard, see *Pandurevic*, *supra* note 4 at paras 21-23.

¹⁹ 2013 ABQB 303 (available on WL Can)[Simon].

than the old provisions; and (iii) as a matter of statutory interpretation, even beneficial amendments are subject to the presumption against retrospective application.²⁰

The Ontario Court of Justice followed similar reasoning in *R v Wang*.²¹ The Accused had been charged with assault causing bodily harm and possession of a weapon for a purpose dangerous to the public peace. He, too, relied on self-defence. The Crown argued that Bill C-26 had not changed the substantive application of the law, merely the analytical framework through which the principles were analyzed. The defence took the position that the Accused was entitled to rely on the law as it existed at the time of the offence and that the amendments changed his substantive rights in this regard.²²

The Court agreed with the defence. Pringle PJ observed that self-defence exonerates what would otherwise constitute criminal activity. “In that sense,” she wrote, “the self-defence provisions of the *Criminal Code* recognize and define substantive criminal rights.”²³ Notwithstanding the “Technical Guide’s” statements that the amendments were meant only to simplify the law, she observed that the legal significance of certain facts – e.g., whether an Accused was provoked, whether he/she intended to cause bodily harm, etc. – had been altered. This meant a change in the content of the defence. She also pointed to Justice Canada’s acknowledgment (set out above) that the changes could affect the substantive law in certain cases and concluded that “While it may be that the practical effect of these changes to the law of self-defence will not be great, it is clear the law did change the content of the defence.”²⁴

The Crown also argued that to the extent the amendments changed the law, they did so to the benefit of the Accused. The Court rejected this argument summarily. Pringle PJ observed that sometimes retrospective application of a law will assist an Accused’s interests and other times it will be adverse to them. This is not the test. The Accused acted at the time based on the law as it existed then. To change the rules now would affect the substance of his defence.²⁵

²⁰ *Ibid* at para 22.

²¹ 2013 ONCJ 220 (available on WL Can)[Wang].

²² *Ibid* at paras 13-14.

²³ *Ibid* at para 17.

²⁴ *Ibid* at paras 16-19.

²⁵ *Ibid* at paras 20-21.

In *R v Parker*,²⁶ another decision of the Ontario Court of Justice, Paciocco PJ expressed reservations about the conclusion reached in *Evans*. He seemed to agree with Fisher J's conclusion that the amendments affected substantive rights. Indeed, he went so far as to suggest that "Even though the objective of these amendments was to simplify the law, there is a realistic possibility that in particular cases, the new section 34 defence can produce different results than the now-repealed provisions."²⁷

His concern, rather, stemmed from his observation that rules against retroactivity arose in order to protect individuals from being punished for actions that were not illegal at the time. That is, they were meant to ensure fairness to defendants and avoid abusive exercise of state power. To use these rules to narrow or restrict the applicability of a new defence, he felt, would defeat their objectives. He stated, "[t]here is, in my view, no public interest in convicting someone of an act that is considered and declared by Parliament by the time of trial to have social approval and not be wrong, even if that declaration occurred after the event in question."²⁸

Paciocco PJ did not actually rule on the issue of retroactivity. Rather, he applied both the old and new self-defence rules to the facts before him, and found that neither availed a defence to the Accused.²⁹

Several observations are apparent. First, given his decision to apply both sets of provisions, Paciocco PJ's comments on retroactivity are only *obiter*. Second, and more importantly, they do not overrule *Dineley*. The Supreme Court has issued a clear ruling on this issue, which Parliament was certainly aware of when it drafted the amendments. If Parliament wanted the new provisions to apply to old cases, it would have said so.³⁰ Third, as Fisher J

²⁶ 2013 ONCJ 195 (available on WL Can)[*Parker*].

²⁷ *Ibid* at para 2.

²⁸ *Ibid* at para 5.

²⁹ Dhillon PJ took the same approach in *R v Urquhart*, 2013 BCPC 184 at paras 57-104 (available on WL Can)[*Urquhart*], as did Schulman J in *R v Sanderson*, 2013 MBQB 139 at para 16 (available on WL Can)[*Sanderson*]. Such an approach would obviously be much more difficult in a jury case where the charge would have to encompass both the old and new provisions. See *Simon*, *supra* note 19 at para 22.

³⁰ This is, of course, subject to the overriding requirement that legislation comply with the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [Charter]. *Quaere* whether Paciocco PJ's reference to the "public interest" may have been intended to suggest the possibility that conviction in such circumstances might violate a principle of fundamental justice under

observed in *Evans*, it is not as simple as saying the new provisions “expand” or “narrow” a defence. The impact of the amendments is broad – they will probably assist Accused in some cases while making things worse for them in other cases.

To put that another way, the overwhelming majority of cases will not involve “convicting someone of an act that is considered and declared by Parliament by the time of trial to have social approval.”³¹ The amendments do not make acts legal that were previously illegal – they simply change the nature of the analysis. Some matters that were statutory preconditions for the applicability of the defence are now factors for the jury to consider in determining whether the defence is made out. Other matters which may not have been requirements before are now part of the jury’s considerations. Either way, there will still have to be a weighing of all the circumstances in determining whether the defence is made out.

In the rare case where an Accused would be convicted under the old law but acquitted under the new one, it is open to the Crown to consider staying the charge on public interest grounds. This approach is preferable, it is submitted, to disregarding binding authority from the Supreme Court or adopting a strained and problematic interpretation of the legislation.

The Ontario Superior Court of Justice held that the new provisions applied retrospectively in *R v Pandurevic*.³² Like the other judges who had considered the issue, MacDonnell J concluded that the new provisions affected substantive rights and were *prima facie* subject to the presumption in *Dineley*. He found, however, that the presumption had been rebutted by Parliament’s clear intention to simplify the rules surrounding self-defence and “put an end to a situation that was an embarrassment to the rule of law.”³³ Parliament must, he held, have wanted to stop the “incoherence, confusion and occasional absurdity” associated with the old rules as soon as possible and could not have intended them to continue to apply to offences pre-dating the new legislation.³⁴ He was also of the view that at least most of the time, the

section 7 of the *Charter*.

³¹ *Parker, supra* note 26 at para 5.

³² *Supra* note 4.

³³ *Ibid* at para 23.

³⁴ *Ibid* at paras 23-25. Morgan PJ reached the same conclusion in relation to the new defence of property provisions in *R v Caswell*, 2013 SKPC 114 (available on WL Can). The Accused in that case had been charged with assaulting his girlfriend and had argued that

new provisions would be more advantageous to the defence than the old ones.³⁵

With respect, it is hard to see how the presumption against retrospectivity is overruled by the remedial nature of the legislation. All amendments are, presumably, remedial – otherwise, why would they be enacted? This is a separate question from whether Parliament intended to overrule the longstanding presumption that people should be tried on the basis of the law in effect at the time they committed their offence, for better or for worse. Had Parliament wanted to immediately halt the application of the old rules, it could easily have provided transitional provisions to do so. It chose not to do so.

Other recent cases (as of the time of writing) to address the retrospectivity question include *R v Crocker*,³⁶ a decision of the Newfoundland and Labrador Provincial Court, *R c Patterson Jones*,³⁷ a decision of the Cour du Quebec, and *R v S(IAO)*,³⁸ a decision of the British Columbia Provincial Court. None of these decisions dealt with the issue at length. In *Patterson Jones*, Belisle JQC cited *Wang, Evans and Simon*, and held that the old provisions applied, not the new ones.³⁹ In *S(IAO)*, on the other hand, Brooks PJ referred to *Evans and Pandurevic* and concluded that the new provisions applied retrospectively.⁴⁰ In *Crocker*, the Crown and defence both took the position that the new provisions applied retrospectively. Gorman PJ agreed, though he noted that “it appears incongruous to judge a person’s actions based upon legislation that was not in effect at the time.” Ultimately, he went on to consider the case under the old rules as well, concluding that the result would have been the same.⁴¹

he had been trying to stop her from destroying his television set. After referring to *Evans, Parker and Pandurevic* at paras 9-11, Morgan PJ concurred with MacDonnell J’s rationale for applying the new provisions retrospectively. *Ibid* at paras 5-18.

³⁵ *Ibid* at paras 37-40.

³⁶ 2013 CarswellNfld 290 (Prov Ct)(available on WL Can)[*Crocker*].

³⁷ 2013 QCCQ 6632 (available on WL Can)[*Patterson Jones*].

³⁸ 2013 BCPC 166 (available on WL Can)[*S(IAO)*].

³⁹ *Patterson Jones*, *supra* note 37 at para 7.

⁴⁰ *S(IAO)*, *supra* note 38 at para 6. It should be noted that in this case, as in *Crocker*, *supra* note 36, both counsel argued that the new provisions applied retrospectively.

⁴¹ *Ibid* at paras 38, 67.

Given the number of cases with the potential to raise self-defence issues, more decisions ruling both ways can be expected (likely by the time this article is published!).

III. CONCLUSION

At a policy level, there is some intuitive appeal to the idea that people should not be pursued for actions that are now deemed socially acceptable. As a legal matter, however, the rule is clear. The amendments change the law of self-defence and defence of property in a substantive way. Therefore the presumption against retrospectivity applies. As Pringle PJ observed in *Wang*, “I don’t believe that generosity [to the Accused] is the test to determine which law applies[.]”⁴²

Moreover, it is far from clear that the new provisions operate exclusively to expand the operation of either self-defence or defence of property. Indeed, as Fisher J observed in *Evans*, the contrary may be true. The amendments may operate to the benefit or detriment of an Accused, depending on the facts.⁴³

Surely, retrospective application of the new provisions cannot vary from case to case depending on whether it would assist the Accused. That would create confusion and risk significant unfairness.⁴⁴ Rather, Parliament’s silence suggests that it anticipated the application of *Dineley* and intended that the amendments apply prospectively. Absent a constitutional challenge, Parliament’s will must be respected. Unless and until the Supreme Court

⁴² *Wang*, *supra* note 21 at para 20.

⁴³ *Evans*, *supra* note 16 at para 25. Of course, it also may not matter which version is applied. In all three cases so far where the court has applied both the new law and the old law to the same set of facts, the end result has been the same. *Parker*, *supra* note 26 at paras 41-42; *Urquhart*, *supra* note 29 at paras 92-104; *Sanderson*, *supra* note 29 at paras 21-22. See also *Crocker*, *supra* note 36 at para 67.

⁴⁴ Section 11(i) of the *Charter*, *supra* note 30, provides that everyone charged with an offence has the right “if found guilty, and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.” [emphasis added]. See also *Interpretation Act*, *supra* note 10, s 44(e). A distinction is thus drawn between sentencing, an inherently individualized exercise, and the issue of guilt or innocence, which involves the larger question of what actions society deems acceptable. It is submitted that while sentences can be reasonably be expected to vary from offender to offender, the same act committed in the same circumstances should not, as a general rule, be legal for some people but not for others.

holds otherwise, the new provisions apply only to new cases, not to offence dates prior to March 11, 2013.

