



THE CANADIAN  
BAR ASSOCIATION  

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L'ASSOCIATION DU  
BARREAU CANADIEN

## **Bill C-26, *Criminal Code* amendments (citizen's arrest and the defences of property and persons)**

**NATIONAL CRIMINAL JUSTICE SECTION  
CANADIAN BAR ASSOCIATION**

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## **PREFACE**

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Criminal Justice Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Criminal Justice Section of the Canadian Bar Association.

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# **Bill C-26, *Criminal Code* amendments (citizen's arrest and the defences of property and persons)**

## **I. INTRODUCTION**

The *Criminal Code* provisions concerning self-defence, defence of others, and defence of property have been subject to decades of criticism, and have been an ongoing source of frustration for lawyers, judges and juries. This is due to the multiplicity of relevant *Code* sections and subsections, and the variations among their elements. Many high-profile cases have faltered on jury instructions regarding self-defence.

The CBA's National Criminal Justice Section (CBA Section) is one among many organizations that have called for reform of these provisions of the *Criminal Code*<sup>1</sup>, and we welcome the effort in Bill C-26 to update and simplify the law. The proposed legislation includes a complete revision of the *Criminal Code* provisions for self-defence and defence of property, a revision the CBA Section has urged for years. In particular, we support the Bill's creation of two comprehensive sections governing the defence of self and others (section 34), and the defence of property (section 35), totally replacing the current sections 34-42.

In spite of our general support for this initiative, we believe that the Bill requires certain important amendments before passage. We believe that it is essential to maintain the subjective element in self-defence, an element that has been affirmed in decades of case law. One of the foremost principles of Canada's criminal law is that, to be convicted, a person must have a guilty mind, as well as culpable conduct. In our view, the current wording of Bill C-26 falls short of maintaining the essential subjective element. As such, it risks denying a defence to innocent Canadians facing unlawful aggression.

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<sup>1</sup> See, for example, National Criminal Justice Section, Report of the Criminal Recodification Task Force, *Principles of Criminal Liability, Proposals for a New General Part of the Criminal Code of Canada* (Ottawa: CBA, 1992) at 75.

The legislation also appears intended to further protect citizens who undertake arrests. The CBA does not agree that such protection need be expanded. We believe that the amendments to allow citizens expanded powers of arrest should not be included in the Bill. The proposed changes would create uncertainty in the law, unnecessarily endanger innocent citizens, and confuse the role of private security personnel.

## II. SUBJECTIVE ELEMENT OF SELF-DEFENCE

Under the current self-defence provisions, subjective as well as objective (reasonable) elements are determinative of the most serious cases, those in which someone has died or has been grievously injured (under the present section 34(2)).

The current section 34(2) hinges on the accused's reasonable apprehension of death or grievous bodily harm, and the accused's reasonable belief that personal preservation was at risk otherwise. But it is well-established that courts must consider the subjective perceptions of a reasonable person in the circumstances of the accused, and it is long-recognized that a reasonable person's perceptions may be honestly mistaken.

Further, it is a pillar of the common law of self-defence that a person in dire circumstances is not expected, and may not be able, to measure to a nicety the degree of force used in self-defence.

The proposed draft of a new section 34 appears to strengthen the objective standard of a "reasonable person," and weaken consideration of the subjective perceptions of a person who claims to have acted in self-defence. In the proposed section:

- section 34(1)(a) requires one to "believe on reasonable grounds" that force or a threat of force exists;
- section 34(1)(c) requires that one's particular act of self-defence be "reasonable in the circumstances;" and
- section 34(2) lists various factors that may be relevant to whether the act of self-defence was reasonable in the circumstances, including
  - (g) the nature and proportionality of the person's response to the use or threat of force . . .

The CBA Section recommends a more even balance of “objective” and “subjective” wording in the new provisions. This could be accomplished by one or more of the following modifications, alone or in combination with each other:

- proposed section 34(2)(g), referring to proportionality, could simply be deleted. The preceding subsections include three prior references to “reasonableness,” as well as permitting consideration of “other means available to respond.” Given all these objective provisions, the addition of a proportionality provision shifts the balance away from proper consideration of the accused’s subjective perceptions.
- removing the words “reasonable grounds” from section 34(1)a) so that it addresses only the subjective element (because both section 34(1)(c) and section 34(2) fully affirm the objective element.) Section 34(1) then would read:

“A person is not guilty of an offence if they believe that force is being used against them . . .”
- changing section 34(1)(c) to read:

“the act committed is reasonable in the circumstances as perceived by the accused.”
- adding to the list of factors for consideration, in section 34(2):

“the potential for mistaken perceptions by the accused” or  
“the ability of a person in the accused's circumstances to measure degrees of force”.

### **RECOMMENDATION**

1. **The CBA Section recommends that section 34 be reworded to better balance objective and subjective elements.**

### **III. FACTORS TO CONSIDER IN DETERMINING SELF-DEFENCE**

A further concern is that Bill C-26’s proposed section 34(2) lists specific factors, “among other factors,” that a court may consider “in determining whether the act committed is reasonable in the circumstances.” Although the proposed section could be interpreted as a non-exhaustive list of factors, the CBA Section is concerned that it may be used as a “checklist” to determine whether self-defence is available.

Notably, section 34(2)(b) enables a court, in any factual circumstances, to consider whether an accused had “other means available to respond to the potential use of force.” This could potentially contradict the common-law principle that one need not retreat in one's own home.

**RECOMMENDATION**

- 2. The CBA Section recommends changing section 34(2) to read: “The court shall consider the relevant circumstances of the accused, other parties, and the act, including but not limited to the following factors . . .”.**

Further, section 34(2)(f) refers to any “relationship” between the parties. Although the wording is capable of broad interpretation, it may be improperly limited to domestic relationships. Under the existing law the parties' knowledge of one another (and even prior violence not known to the other party) is properly considered by the trier of fact, regardless of the nature of the parties' relationship. We recommend changing the words “any relationship” in section 34(2)(f), to “any interaction or communication.”

**RECOMMENDATION**

- 3. The CBA Section recommends changing section 34(2)(f) from “any relationship” to “any interaction or communication”.**

Section 34(2)(e) is limited to consideration of the “size, age and gender of the parties.” We recommend expanding that wording, such as allowing consideration instead of the:

“physical capabilities of the parties”.

**RECOMMENDATION**

- 4. The CBA Section recommends expanding the scope of section 34(2)(e), for example to allow consideration of the “physical capabilities of the parties”.**



#### **IV. SELF-DEFENCE AGAINST PERSONS IN AUTHORITY**

Since persons in authority retain the protection of section 25 of the *Criminal Code*, we recommend that section 34(3), which duplicates that protection, be deleted from the proposed provisions. Alternatively, if section 34(3) is retained, section 34(2)(h) could be deleted, as the two provisions appear to overlap.

##### **RECOMMENDATION**

- 5. The CBA Section recommends deleting section 34(3) of Bill C-26, which duplicates section 25 of the Criminal Code. If section 34(3) is retained, then section 34(2)(h) should be deleted, as the two sections of the Bill overlap.**

#### **V. DEFENCE OF PROPERTY**

Parallel with our comments regarding the proposed section 34, the CBA Section recommends additional wording to balance the subjective and objective elements in section 35, and to ensure that the provision is available to people legitimately defending property.

This could be furthered by a modification changing section 35(1)(d) to:

"the act committed is reasonable in the circumstances as perceived by the accused".

##### **RECOMMENDATION**

- 6. The CBA Section recommends that section 35 be reworded to better balance subjective and objective elements, and that section 35(1)(d) be changed to read, "the act committed is reasonable in the circumstances as perceived by the accused".**

#### **VI. CITIZEN'S ARREST**

The CBA Section believes that the existing version of section 494(2) is adequate. We are concerned that the changes proposed to section 494(2) in Bill C-26 would overly expand the scope of citizen's arrest. This expansion would likely:

- create uncertainty in the law by leaving private citizens to judge the meaning of "arrest within a reasonable time" and the meaning of "believe

on reasonable grounds that it is not feasible . . . for a peace officer to make the arrest”;

- encourage citizens, who are untrained in arrest procedures, to risk personal harm, as well as liability for wrongful arrests. Arrestees are more likely to resist citizen’s arrest than arrest by police, and ordinary citizens are less likely to have knowledge of physical controls or tactical communications to deal with resistance; and
- encourage unjustified arrests by private security personnel, not subject to public oversight. Such personnel often lack the necessary range of equipment or adequate training to safely and lawfully make arrests in a manner proportionate to the circumstances, in the regular course of their duties.

We believe that anything which could unnecessarily expand the (perceived) mandate of private security officers and ordinary citizens to make arrests should be avoided. Given these serious concerns, we recommend that section 494(2) not be amended.

#### **RECOMMENDATION**

7. **The CBA Section recommends that Bill C-26 omit any amendment to section 494(2) dealing with citizen’s arrest.**

## **VII. CONCLUSION**

The CBA Section welcomes the initiative taken in Bill C-26. As one of many associations that have, for years, called for clarification of the law of self-defence and defence of property, we believe this initiative is long overdue. Given this history, it is especially important that the proposed changes achieve their goal. We offer some important amendments to the Bill, which would avoid potentially denying innocent Canadians, faced with unlawful aggression from others, a legitimate defence.

Further, we believe that section 494(2) should not be amended. The proposed amendments to citizen’s arrest powers create legal uncertainty and risk, if not physical danger, for those citizens who might attempt to use them. As proposed, the Bill could then actually cause harm to ordinary Canadians, which we know is not the intent of Parliament.

## VIII. SUMMARY OF RECOMMENDATIONS

1. The CBA Section recommends that section 34 be reworded to better balance objective and subjective elements.
2. The CBA Section recommends changing section 34(2) to read: “The court shall consider the relevant circumstances of the accused, other parties, and the act, including but not limited to the following factors . . .”.
3. The CBA Section recommends changing section 34(2) (f) to change “any relationship” to “any interaction or communication”.
4. The CBA Section recommends expanding the scope of section 34(2)(e), for example to allow consideration of the “physical capabilities of the parties”.
5. The CBA Section recommends deleting section 34(3) of Bill C-26, which duplicates section 25 of the Criminal Code. If section 34(3) is retained, then section 34(2)(h) should be deleted, as the two sections of the Bill overlap.
6. The CBA Section recommends that section 35 be reworded to better balance subjective and objective elements, and that section 35(1)(d) be changed to read, “the act committed is reasonable in the circumstances as perceived by the accused”.
7. The CBA Section recommends that Bill C-26 omit any amendment to section 494(2) dealing with citizen’s arrest.