Date: 2013 10 23
Docket: S-1-CR-2012 000047

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

EAGLE QUILL HUNTER

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Ruling on Application.

Heard at Yellowknife, NT, on October 7, 2013.

Reasons filed: October 23, 2013

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REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE K. SHANER

Counsel for the Applicant: Blair MacPherson

Counsel for the Respondent: Paul A. Falvo

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## BACKGROUND

[1] During the week of October 7, 2013, Eagle Quill Hunter was tried by judge and jury on two counts of aggravated assault, as a result of events that took place on June 25, 2011. His position was that he acted in self-defence.

[2] On March 11, 2013, almost two years following the events resulting in the charges, the *Citizen's Arrest and Self-defence Act,* S.C. 2012, c.9 came into force. Among other things, it repealed and replaced the self-defence provisions formerly found in sections 34 to 37 of the *Criminal Code.*

[3] The *Citizen's Arrest and Self-defence Act, supra,* does not contain transitional or other express provisions dealing with its temporal operation. Thus, prior to calling evidence at trial, the Crown brought an application for a ruling on whether the new provisions apply retrospectively or prospectively.

[4] This issue has been before a number of trial level courts throughout Canada and it is unsettled. As Crown counsel pointed out, the cases fall into three categories: those that hold the provisions should be applied prospectively (*R. v. Evans,* 2013 BCSC 462; *R. v. Wang,* 2013 ONCJ 220; *R. v. Simon,* 2013 ABQB

3030; *R. v. Williams,* 2013 BCSC 1774); those that hold they should be applied retrospectively (*R. v. Pandurevic,* 2013 ONSC 2978; *R. v. I.A.O.S.,* 2013 BCPC 166; *R. v. Caswell,* 2013; *R. v. Trudell*); and, those that an accused should have the benefit of that version of the legislation that provides the greatest benefit. (*R. v. Parker,* 2013 ONCJ 195; *R. v. Sanderson,* 2013 MBQB 139; *R. v. Urquhart,* 2013 BCPC 184).

[5] The Crown's position at the application was that the new provisions have prospective application and, accordingly, Mr. Hunter cannot rely on them to defend conduct occurring before they came into force.

[6] Defence counsel suggested that the jury should be instructed on the version of the legislation that would give the most benefit to Mr. Hunter. Alternatively, he submitted that the new provisions should be applied retrospectively.

[7] After hearing and considering counsels' submissions, I determined that the provisions should apply retrospectively. I provided my ruling orally on October 8, 2013 and indicated that written reasons would follow.

## ISSUES

[8] Where new legislation affects substantive or vested rights, there is a presumption against retrospective application. Thus, the starting point is to determine whether the new provisions are substantive.

[9] The presumption against retrospective application of new legislation is very strong; however, it is rebuttable. The second issue is, therefore, whether circumstances exist that enable the Court to find that the presumption has been rebutted.

## ANALYSIS

### *Is the New Legislation Substantive or Procedural?*

[10] Defence counsel submitted that the new self-defence provisions should be treated as either procedural legislation or legislation that simply clarifies and codifies the existing law of self-defence. Either characterization would result the new provisions having immediate application to Mr. Hunter's case.

[11] Characterizing it as procedural legislation engages the principle that, subject to language manifesting a contrary intention, Parliament "intends an enactment dealing with exclusively procedural matters . . . to apply immediately to all

proceedings, whether commenced before or after the enactment comes into force." *R. v. Dineley,* [2012] 3 S.C.R. 272, at para 35.

[12] Similarly, clarifying legislation, which is intended merely to correct defects in earlier versions, "does not implicate the concerns associated with retrospective or retroactive legislation and may even bolster the known purpose of the earlier legislation." *Apotex Inc. v. Merck & Co.* 2011 CarswellNat 4918; 2011 FCA 329, para 50.

[13] Comparing the former and current versions of the self-defence provisions in the *Criminal Code*, I am unable to agree with Defence counsel that these changes are procedural. They are substantive.

[14] As stated by Deschamps, J., in *R. v. Dineley*, *supra,* at paragraph 16, "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." While the *Citizen's Arrest and Self-defence Act, supra*, may be said to have preserved certain concepts found in the former self-defence provisions, such as reasonableness and proportionality, the two versions are in substance very different.

[15] Prior to the *Citizen's Arrest and Self-defence Act, supra*, the *Criminal Code* set out four different, yet somewhat overlapping, categories of self-defence.

[16] Section 34(1) provided for self-defence against an unprovoked assault where there was no intent by the accused to kill or inflict grievous bodily harm and where the force exerted to repel the attack was no more than necessary (proportionality).

[17] Section 34(2) provided for self-defence against an unprovoked assault where the accused intended to cause death or grievous bodily harm but where, objectively, it was reasonable that the accused believed he or she would suffer grievous bodily harm or death and, subjectively, the accused in fact believed that. Unlike section 34(1), however, there was no requirement for proportionality.

[18] Section 35 addressed the situation where an accused provoked an assault without intending to cause death or grievous bodily harm, but where, on an objective standard, it was reasonable that the accused believed he or she would suffer grievous bodily harm or death and, on a subjective standard, the accused in fact believed that. Just as in section 34(2), this category did not require that the force used in self-defence be proportional to the assault; but, it did require the accused to have retreated from the danger as far as feasible before the necessity of preserving him- or herself arose.

[19] Finally, s. 37 provided for self-defence in order to prevent an assault against the accused or a person under his or her protection.

[20] These legislative provisions were the subject of a significant amount of judicial consideration, leading to a variety of factors gathered from case law that triers of fact were to apply in determining questions of subjective and objective reasonableness, proportionality and others.

[21] The new version is as follows:

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

[22] Also included in the new provisions is a non-exhaustive list of factors to be used to inform the trier of fact in determining reasonableness. This reflects many of the considerations previously found only in case law:

> 34. (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.

[23] It is clear that the changes are substantive. The new provisions replace the four categories of self-defence with one general category. Regardless of the circumstances under which the alleged need to defend oneself arises, an accused may now rely on self-defence if the three factors enumerated in the *Criminal Code* are present, all of which concern the accused's belief and motivation. The reasonableness of the accused's actions is determined in reference to a codified list of factors. Lawyers and judges need not decide which of the four categories applies in any particular case and juries no longer have to be instructed on how to apply different threshold tests. The changes brought about by the *Citizen's Arrest and Self-defence Act*, *supra*, represent a completely new approach to the conceptualization and application of self-defence in Canadian law.

***Do the Provisions have Prospective or Retrospective Effect?***

[24] Having determined that the changes are substantive, I turn to the analysis of whether the current legislation has prospective or retrospective effect.

[25] The Crown's position that the new provisions apply prospectively is based on the reasoning in *Dineley*, *supra*. There, the majority applied the well-known presumption against retrospective application of new legislation:

> [10] There are a number of rules of interpretation that can be helpful in identifying the situations to which new legislation applies. Because of the need for certainty as to the legal consequences that attach to past facts and conduct, courts have long recognized that the cases in which legislation has retrospective effect must be exceptional. More specifically, where legislative provisions affect either vested or substantive rights, retrospectivity has been found to be undesirable. New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively (*Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, at pp. 266-67; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 57; *Wildman v. The Queen*, [1984] 2 S.C.R. 311, at pp. 331-32).

[26] In *Dineley, supra,* the question was whether amendments to the *Criminal Code* through the *Tackling Violent Crime Act*, S.C. 2008, c. 6 applied prospectively

or retrospectively. These amendments limited the evidence an accused could use to raise doubt about the reliability of breathalyzer results and, effectively, removed a defence that was previously available to the accused whose appeal was pending.

[27] Deschamps, J., for the majority, determined that the amendments were substantive and, applying the principle of interpretation cited above, found that they were prospective only. Accordingly, the defendant in that case was able to rely on the former provisions, which were more favourable.

[28] There is no question that there is a presumption against retrospective application; however, the inquiry does not end there. While the presumption is a strong one, it is nevertheless rebuttable, so long as there is "some sufficient indication that the legislation is meant to change the law for the past as well as the future". Sullivan, Ruth, *Sullivan on the Construction of Statutes,* 5th ed. Markham, Ont: LexisNexis, 2008 (at 679).

[29] This was the conclusion reached by MacDonnell, J. in *R. v. Pandurevic,* 2013 ONSC 2978:

> [8] In short, the presumption against retroactive or retrospective application of legislation affecting substantive rights is rebuttable. *All of the relevant circumstances must be considered, among them the purpose of the legislation, the mischief it was intended to cure, and the consequences of applying it retrospectively on the one hand or prospectively on the other.* Only after considering all of those matters can a determination be made as to whether the presumption should prevail. (emphasis added)

[30] In this case, the relevant circumstances are the purpose of the legislation and the consequences of its retrospective application, including consideration of the beneficial nature it. These are addressed below.

Purpose of the Legislation

[31] Legislative bodies enact laws to meet some identified need. In the case of the *Citizen's Arrest and Self-defence Act, supra,* the need for new legislation arose out of the recognition that the law of self-defence in Canada was a complicated and convoluted compilation of statute and judge-made law that was difficult to understand, interpret and apply.

[32] In *Pandurevic, supra,* McDonnell, J., cited a number of examples of courts and academics expressing dissatisfaction and concern with the state of the law, including the following (footnotes omitted):

> [10] The incoherence of the manner in which ss. 34 to 37 of the *Criminal Code* articulated the defence of self-defence has been the subject of uniformly withering criticism from law reformers, academics and all levels of the Canadian judiciary for more than 30 years.
>
> [11] In 1982, in one of the more charitable characterizations to be found, the Law Reform Commission of Canada described ss. 34 to 37 as "unduly complicated" and as containing "excess detail". The judicial characterization was considerably more damning. Writing for the majority in *R. v. McIntosh*, 1995 CanLII 124 (SCC), [1995] 1 S.C.R. 686, Chief Justice Lamer described the self-defence provisions as 'highly technical', 'excessively detailed', 'deserving of much criticism', and 'internally inconsistent'. He acknowledged that both juries and judges find them 'unbelievably confusing', that giving effect to their plain meaning "may lead to some absurdity", and that "any interpretation which attempts to make sense of [them] will have some undesirable or illogical results". He concluded that "it is clear that legislative action is required…"

[33] The challenges of the former self-defence provisions were also the subject of criticism by Professor Don Stuart in his textbook, *Canadian Criminal Law: a Treatise,* 5th ed. Scarborough, Ont.: Thomson Carswell, 2007 (at 509-510):

> Our courts have tried to make the provisions relating to the defence of person more coherent and comprehensible. They have sought to apply flexible criteria to situations in which agonizing choices have to be made quickly. However, there are limits to which the courts can go. The existing criteria and distinctions suffer from undue complexity, some illogicality and excessive detail.
>
> The time has come to abandon the artificial and unnecessary distinctions inherent in sections 34(1), 34(2), 35 and 37. We should squarely recognize it is unwise to arbitrarily distinguish in advance between situations of fatal and non-fatal self-defence, defence of those under protection and defence of strangers, and self-defence by an aggressor and simple self-defence.

[34] That the changes brought forward through the *Citizen's Arrest and Self-defence Act*, *supra,* were in response to many of these historical concerns is evident in the "Explanatory Note" accompanying the *Order Fixing March 11, 2013 as the Day on which the Act Comes into Force* respecting the legislation, SI/2013-5 February 13, 2013, as follows:

> In relation to self-defence and defence of property, there have been long-standing problems associated with the manner in which the law is drafted and expressed in the *Criminal Code*. There are currently four sections describing the law of self-defence as it applies in different circumstances, and five sections describing the defence of property as it applies in different circumstances. While the outcome of cases is generally viewed as satisfactory, the law was articulated in a confusing and complicated manner. As a result of the complexity of the law, charges may have been laid in cases where they would not have been if the laws were more

> clearly understood. As well, the confusing nature of the law led to many appeals based on errors in jury instructions.

The Consequences of Retrospective Application

[35] In a system focused on fairness, it is inimical to expect that one accused is limited to a self-defence regime fraught with widely recognized deficiencies and risks, while another, simply due to the passage of time, may rely on legislation meant to cure those deficiencies.

[36] An important factor in this case is that unlike the amendments considered in *Dineley, supra,* the *Citizen's Arrest and Self-defence Act, supra,* does not foreclose on an accused's ability to rely on self-defence or narrow its scope. Rather, this is "beneficial" legislation; that is, legislation that does not adversely affect existing rights or the legal character of certain actions. The essence of self-defence is preserved and the circumstances where it is available are both clarified and broadened.

[37] The presumption against retrospective application applies in the case of beneficial legislation, but the presumption is easier to rebut. This point is made by Professor Sullivan:

> It is often claimed that the presumption against the retroactive (or retrospective) application of legislation does not apply to beneficial legislation. . .
>
> ***
>
> Nearly always what is meant by such assertions is that beneficial legislation, like purely procedural legislation, is presumed to have an immediate effect. It applies immediately and without restriction because generally there is no reason to limit it. Few people are likely to complain that the benefit they received was unfair or upset their legitimate expectations.
>
> Although beneficial legislation should normally be given immediate effect, there is no reason to exempt it from the presumption against retroactive application. When the impact of legislation is purely beneficial, the presumption against retroactivity may be easy to rebut. However, considerations such as stability, certainty and predictability remain relevant even when the surprise is pleasant. . .
>
> *Sullivan on the Construction of Statutes*, *supra*, (at 707)

[38] The new self-defence provisions in the *Criminal Code* have obvious positive implications for the way it is explained to and conceptualized by juries and, of course, the way it is applied by any trier of fact. They reflect the complexity of the circumstances that may arise in a situation where a person feels they are faced with

the threat of, or actual, force. At the same time, they distil the defence down to its bare essentials. The seemingly arbitrary categorization of the circumstances where it is available has been replaced with a clear articulation of principles that appeal to the very common sense upon which judges repeatedly instruct jurors to rely. An accused benefits from greater certainty and predictability and from the diminished risk of errors in jury instructions or errors by juries in applying those instructions. Ultimately, it benefits the entire system by reducing the risk of a miscarriage of justice.

[39] In light of these circumstances, I conclude that the presumption against retrospective application is rebutted.

## REMAINING ARGUMENTS

### *Both Prospective and Retrospective Application*

[40] Defence counsel also argued that the issue of what provision applies should be left to the end of the evidence and then the jury instructed on the version of the legislation that would give Mr. Hunter the most benefit. This was based on the decisions of *R. v. Parker, supra, R. v. Sanderson*, *supra,* and *R. v. Urquhart*, *supra.* I note that these cases were all decided by judges sitting alone.

[41] In my view, to hold that an accused in the position of Mr. Hunter should have the benefit of either version of legislation would be incorrect. It is fraught with challenges, not the least of which is the potential for significant confusion on the part of jury members. Moreover, this approach falls far short of providing any acceptable level of certainty and predictability for an accused. Finally, it would almost certainly call for the judge to make findings of fact which are properly the province of the jury.

### *The "in the system" Argument*

[42] Finally, defence counsel argued that Mr. Hunter should be entitled to apply the new provisions retrospectively because he was "in the system" when they came into effect. This is based on *Wigman v. The Queen,* [1987] 1 S.C.R. 246, which involved an accused whose appeal from conviction was pending at the same time as the Supreme Court of Canada provided a new interpretation of a provision of the *Criminal Code,* which was more favourable to him. The Court held:

> 29 Provided that he is still in the system, an accused charged with an offence is entitled to have his or her culpability determined on the basis of what is held to be the proper and accurate interpretation of the *Code*. The same reasoning was inevitably though implicitly adopted in *Ancio*. Obviously, the respondent Ancio was

> still in the system; once it is established in the case at bar that the appellant is still in the system, then the rationale for applying to him the ruling in *Ancio* is the same as the one which was taken for granted in *Ancio* with respect to the respondent Ancio.
>
> 30 This rationale is grounded in the principle that an accused should not be convicted on the basis of the interpretation of a statute which, at the appropriate time, is known to be wrong. …

[43] There is, perhaps, some analogy between the present case and the situation in *Wigman:* if an accused should not be convicted because of an erroneous interpretation of a statute, then an accused should not be convicted because of an over-complex and deficient law.

[44] Nevertheless, I do not accept this as a basis for finding that the current self-defence provisions in the *Criminal Code* should be applied retrospectively. Mr. Hunter's case was pending when the new legislation came into effect, but the legal issue was different from that in *Wigman* and the analytical framework is also different. The *Wigman* case involved an existing law, the *interpretation* of which was modified while the accused's case was pending, whereas Mr. Hunter's case is concerned with the temporal application of new legislation. The latter calls for analysis based on principles of statutory interpretation. The former does not.

## CONCLUSION

[45] For the foregoing reasons, the self-defence provisions effected by the *Citizen's Arrest and Self-defence Act, supra,* apply retrospectively.

K. Shaner
J.S.C.

Dated in Yellowknife, NT this
23nd day of October, 2013

Counsel for the Applicant: Blair MacPherson
Counsel for the Respondent: Paul A. Falvo

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