Between a Rock and a Hard Place:
The Retroactive versus Prospective Application of the
2013 Defence of the Person and Property Amendments

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[1] Until June of this year, debate had been waging in Ontario courts over whether amendments to the *Criminal Code*'s defence of the person and property provisions introduced in 2013 ("the 2013 amendments") applied retroactively or prospectively. Court decisions had gone both ways; however, for quite some time *R. v. Pandurevic*,[1] in which the Superior Court ruled that the provisions apply retroactively, was the leading case in Ontario. This changed in the spring of 2015 when the Ontario Court of Appeal ruled in *R. v. Bengy*[2] that the 2013 provisions apply only prospectively.

[2] *Bengy* was disappointing for a number of reasons. Firstly, while the Court of Appeal found that Justice MacDonnell got the test for determining retroactive versus prospective application wrong in *Pandurevic*, it did not propose an alternative test. Secondly, it seemed to close the door on the time-honoured tradition of courts employing statutory interpretation to determine Parliamentary intent. Thirdly, it went against the principle that accused persons should be permitted to avail themselves of benefits brought about through legislative change. Lastly, this judgment has left those whose offences occurred prior to the coming into force of the 2013 amendments to cope with the former defence provisions, which have been the subject of judicial and academic criticism for decades.

[3] Although *Pandurevic* was a compelling, well-reasoned judgment, it was not without its problems. While Justice MacDonnell found that the 2013 amendments would have a

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[1] *R. v. Pandurevic*, 2013 CarswellOnt 6880, 298 C.C.C. (3d) 504 (Ont. S.C.J.).

[2] *R. v. Bengy*, 2015 ONCA 397, [2015] O.J. No. 2958.

neutral or beneficial effect on most accused individuals wishing to raise defence of the person or property, it is undeniable that some accused individuals would fare worse under the 2013 amendments.[3]

[4] Furthermore, despite the problems with *Bengy*, it does seem to accord well with the Supreme Court of Canada's decision in *R. v. Dineley*. In this case the Court ruled, "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" and that where legislative changes affect substantive rights, retroactive application has been found undesirable.[4]

[5] Then there is *R. v. Parker*,[5] in which Justice Paciocco found a middle ground by applying both the former provisions and the 2013 amendments. However, *Bengy* rejected this approach as being overly complex and contrary to the "need for certainty" articulated by the Supreme Court in *Dineley*.

[6] Caught between a rock and a hard place, what is a poor criminal lawyer to do? Well, of course, we are stuck with *Bengy* for now. However, the issue of the retroactive versus the prospective application of the 2013 amendments seems to be ripe for appeal to the Supreme Court of Canada. Such an appeal would provide the Supreme Court with the opportunity to revisit its judgment in *Dineley* and consider it in light of the competing rights involved in relation to the 2013 amendments.

[7] While it would be difficult to predict which way the Supreme Court would go, my money would be on one of the two "P"s: *Pandurevic* or *Parker*. Although both of these cases

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[3] See for example *R. v. Wang*, 2013 ONCJ 220 (Ont. C.J.).

[4] *R. v. Dineley*, [2012] 3 S.C.R. 272, 2012 CarswellOnt 13486.

[5] *R. v. Parker*, [2013] O.J. No. 1755, 2013 CarswellOnt 4437 (Ont. C.J.).

have their own issues, both of them are more grounded in constitutional principles and basic fairness than *Bengy*.

Background of the 2013 Amendments

[8] The *Criminal Code* defence of the person and personal property provisions that existed prior to the 2013 amendments had been around since 1892. To say that over 121 years, they were getting a bit rusty and awkward would be understating the matter. Over the last few decades these provisions have become the subject of scathing judicial and academic criticism. They have been called "murky";[6] "unbelievably confusing";[7] overly detailed and technical; "a mess";[8] "hopelessly confusing and muddled";[9] "notoriously confusing and illogical";[10] "a source of bewilderment and confusion";[11] "an embarrassment to the rule of law";[12] and "the most confusing tangle of sections known to law."[13] After considering the former provisions in the 1995 case of *R. v. McIntosh*, Chief Justice Lamer, as he then was, stated that giving effect to the provisions' 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..."[14]

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[6] *R. v. Lei*, 120 C.C.C. (3d) 441, [1997] M.J. No. 548 (Man. C.A.) at para. 15.

[7] *R. v. McIntosh*, [1995] 1 S.C.R. 686, 1995 CarswellOnt 4 at paras. 18-19.

[8] Colvin, Eric and SanjeevAn. *Principles of Criminal Law*, 3rd. Ed. (Toronto: Thomson Carswell, 2007), p. 322, cited in cited in *R. v. Pandurevic, supra* note 1 at para. 16.

[9] Manning, Mewett and Sankoff. *Criminal Law*, 4th Ed. (Markham: LexisNexis, 2009), cited in *R. v. Pandurevic, supra* note 1 at para. 16.

[10] *R. v. Finney*, [1999] O.J. No. 4215, 1999 CarswellOnt 3540 (Ont. C.A.) at para. 17.

[11] *Ibid*. at para. 25.

[12] *R. v. Pandurevic, supra* note 1 at para. 16.

[13] Paciocco, David. *Getting Away With Murder: The Canadian Criminal Justice System* (Toronto: Irwin Law, 1999), p. 274, cited in *R. v. Pandurevic, supra* note 1 at para. 16.

[14] *R. v. McIntosh, supra* note 7 at para. 19.

[9] Parliament eventually heeded calls for reform. The 2013 amendments were introduced by Bill C-26, the *Citizen's Arrest and Self-Defence Act*, S.C. 2012, c. 9, received Royal Assent on June 28, 2012 and came into force on March 11, 2013.

[10] A guide to the 2013 amendments, published by the Department of Justice, entitled *Bill C-26 (S.C. 2012 c. 9): Reforms to Self-Defence and Defence of Property: Technical Guide for Practitioners* ("the Guide"), explained that the purpose of Bill C-26 was to correct the "overly complex and detailed" legislative approach taken to the former provisions that has created "internally inconsistent versions of the same defence" and "caused problems for judges in crafting jury instructions, and errors in jury instructions [which give] rise to unnecessary appeals."[15]

[11] The Guide explained that the 2013 amendments did not change the core elements of the provisions but rather simplified them:

> **...the new defences extract from the old provisions the common core elements of each defence, and codify those core elements in a single simple framework that is capable of assessing a defence claim in any situation**. The new laws give effect to the defences' underlying principles in a more transparent way; they will facilitate jury instructions and allow decision-makers to come to conclusions more easily and simply.[16]

[12] Furthermore, the 2013 amendments imported legal principles that had developed in the common law into the legislative scheme.[17] The Guide stated that the codification of

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[15] 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), p. 1. Available online: http://www.justice.gc.ca/eng/rp-pr/other-autre/rsddp-rlddp/index.html [Guide].

[16] Guide, *ibid.*, pp. 1-2 [emphasis in original]. The Guide also stated, "The Guide stated, "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**." (p. 8; emphasis in original).

[17] For example, s. 34(2)'s inclusion of factors such as the imminence of the threat, the nature of the relationship between the parties and any history of interaction or communication between the parties reflect the Supreme Court of Canada's ruling in *R. v. Lavallee*, [1990] 1 S.C.R. 852. In *Lavallee*, the Court ruled that the requirement of "imminence," which had been read into s. 34(2)(a) of the former provisions through case law, should only be considered one factor in assessing an accused's reaction to a threat. Furthermore, any abusive history that existed between the parties is relevant in assessing the reasonableness of the accused's actions.

principles that have emerged from the jurisprudence "signals that the new law is not intended to displace old jurisprudence…[but rather] indicate[s] that previously recognized self-defence considerations continue to apply wherever relevant."[18]

[13] A detailed chart comparing the former provisions and the 2013 amendments can be found at Appendix "A."

The Retroactive vs. Prospective Debate

[14] As Bill C-26 was silent on whether the 2013 amendments were to apply retroactively or prospectively, courts were left with the task of determining Parliament's intention through statutory interpretation. One of the principles of statutory interpretation is that Parliament is presumed to intend that legislation affecting substantive rights will apply only prospectively.

[15] Despite the Guide's many statements that the intent was not to alter the core elements of the defence provisions, courts have found that the 2013 amendments do affect substantive rights. However, this does not end the debate. The presumption that legislation that introduces substantive changes will apply prospectively, is rebuttable where there is evidence of a "clear legislative intent that [the statute] is to apply retrospectively."[19]

[16] And therein lies the rub: does evidence of such a "clear legislative intent" exist in regard to the 2013 amendments?

Another example is the replacement of the requirement that the accused use "no more force than necessary," employed in ss. 34(1) and 37(1) of the former provisions, with the requirement that the accused's act be "reasonable in the circumstances." This change accords with the findings in cases such as *R. v. Gunning*, [2005] 1 S.C.R. 627 and *R. v. Szczerbaniwcz*, [2010] 1 S.C.R. 455 that have deemed these terms to be equivalent:

Akhtar, Suhail A.Q. "The New Defence of Self-Defence," Conference Paper for the National Criminal Law Program, Ottawa, ON, July 2013, p. 7.

[18] Guide, *supra* note 15, p. 11.

[19] *R. v. Dineley, supra* note 4 at para. 10; *R. v. Bengy, supra* note 2 at para. 59.

R. v. Pandurevic

[17] Justice MacDonnell began his decision in *Pandurevic* by acknowledging that as the 2013 amendments affected the parameters of the defence of the person and property provisions, they made substantive changes to these provisions, and thus properly fell within the scope of the presumption against retroactive application.[20] However, this was not the end of the road, as this presumption could be rebutted. He ruled that courts should consider the following when determining whether the presumption would be rebutted:

(i) the nature of the mischief that the legislation was meant to address;

(ii) the manner in which the legislation addressed it;

(iii) the extent to which substantive rights will be adversely affected by a retrospective application; and

(iv) the consequences of a purely prospective application.[21]

(i) Nature of the Mischief the 2013 Provisions were Meant to Address

[18] Justice MacDonnell found that the 2013 amendments were meant to address some pretty serious mischief that had been wrought by the former provisions, stating, "[t]he 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."[22]

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[20] *R. v. Pandurevic, supra* note 1 at paras. 5-6.

[21] *Ibid*. at para. 8.

[22] *Ibid*. at para. 10. See also *R. v. Grandin*, 2001 CarswellBC 961, 154 C.C.C. (3d) 408 (B.C.C.A.) at para. 30.

(ii) Manner in which the 2013 Provisions addressed the Mischief

[19] After examining the Guide and statements made by parliamentary officials about Bill C-26,[23] Justice MacDonnell determined that the fact that it was not Parliament's intention to alter the essential nature of the defence provisions, but rather to clarify them, implied that the provisions were to apply retroactively:

> When the provisions of the *Citizen's Arrest and Self-defence Act* are considered in the context of the circumstances leading up to and surrounding its enactment, it is plain that Parliament's aim was *not* to alter the essential nature of the defence of self-defence. The intention, rather, was to put an end to a situation that was an embarrassment to the rule of law. Parliament sought to substitute clarity and common sense for the incoherence, confusion and occasional absurdity that virtually every informed observer associated with the former statutory scheme…
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> When the purpose of the legislation is characterized in this way, it points firmly toward an intention that upon the coming into force of the amendments, judges and juries would immediately begin to assess claims of self-defence under the amended provisions regardless of whether the allegedly defensive acts occurred before or after March 11, 2013. That is, it points toward a retrospective application of the amendments.[24]

(iii) Extent to which Substantive Rights will be Adversely Affected by Retrospective Application

[20] Justice MacDonnell found that "[b]y clearing the path to the core issue of reasonableness" the 2013 amendments would benefit all accused wishing to raise defence of the person or personal property.[25] He acknowledged that there may be circumstances where "the cleared path is narrower than before". However, he found that these would arise infrequently[26] and should not be determinative of Parliament's intent regarding the temporal application of the 2013 amendments, reasoning, "It was open to Parliament to

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[23] *R. v. Pandurevic*, *supra* note 1 at paras. 17-22.

[24] *Ibid.* at paras. 23-24.

[25] *Ibid*. at para. 40.

[26] *Ibid*. at para. 37.

conclude that the benefits of a retrospective application substantially outweighed the disadvantages that this might give rise to in isolated instances."[27]

[21] While Justice MacDonnell recognized that fairness to the accused was not the only factor to consider in this analysis, as "concerns for stability, certainty and predictability would remain relevant even if fairness were factored out of the analysis," he concluded that "fairness is unquestionably a major consideration."[28] There is a natural aversion to allowing the retroactive application of legislative amendments that would adversely affect the rights of accused persons, either by rendering certain actions illegal that were legal at the time they were performed or by limiting or eradicating a defence upon which an accused person could have expected to rely at the time the offence occurred. However, this aversion may not arise where the accused's position is not affected by the amendments or is improved by them.[29]

[22] Several courts, including the Ontario Court of Appeal in *Bengy*, have based their decisions that the 2013 amendments apply prospectively upon the Supreme Court of Canada case of *Dineley*. In *Dineley* the accused was charged with "over 80" and raised a *Carter* "evidence to the contrary" defence.[30] During an adjournment, the *Tackling Violent Crime Act,* S.C. 2008, c. 6 came into force. This *Act* seriously restricted the application of the *Carter* defence, and the Crown moved to exclude the accused's "evidence to the contrary" on this basis. The trial judge held that excluding the evidence in this way would constitute an abuse of process. The evidence was allowed and the accused was acquitted.

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[27] *R. v. Pandurevic*, *supra* note 1 at para. 40.

[28] *Ibid*. at para. 35.

[29] *Ibid.* at para. 36.

[30] A *Carter* defence involved raising evidence to rebut the presumption of the accuracy of breathalyzer results.

[23] The Court of Appeal allowed the Crown's appeal, finding that the amendments were merely procedural or evidentiary in nature and thus operated retroactively.

[24] The Supreme Court of Canada allowed the accused's appeal and restored his acquittal. The Court found that statutory amendments to the *Criminal Code* only apply retroactively in exceptional cases, particularly where they impact upon substantive rights of the accused. The Court found that as the amendments introduced through the *Tackling Violent Crime Act* restricted the use or application of a defence, they impacted accused individual's substantive rights and should not operate retroactively.

[25] Justice MacDonnell distinguished the situation in *Pandurevic* from that in *Dineley*. While the amendments in *Dineley* "had a *substantial* adverse effect on the vested rights of a party" in that they "removed or virtually removed what would otherwise have been a complete defence," the 2013 amendments "do not remove, virtually remove or substantively alter the core elements of the defence of self-defence;" rather, they "facilitate the application of those core elements and 'give effect to [them] in a more transparent and consistent way.'"[31] The fact that the 2013 amendments provided a benefit to the vast majority of accused persons was "a significant factor attenuating the force of the presumption against retroactive or retrospective application and an important feature distinguishing this case from cases such as *Dineley* ..."[32]

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[31] R. *v. Pandurevic, supra* note 1 at para. 34.

[32] *Ibid.* at para. 37. The situation in *Dineley* can also be differentiated on the basis that *Dineley* was quite fact-specific. The fact that it was impossible for police to gather evidence retrospectively was a major factor in the Supreme Court's decision that the legislation in question should apply only prospectively. The issue of retrospective evidence gathering does not arise in regard to the 2013 amendments.

(iv) Consequences of purely Prospective Application

[26] Justice MacDonnell's main reason[33] for ruling that the 2013 provisions should apply retroactively was that accused persons should not be forced to continue to contend with a regime that was universally regarded as unsatisfactory and detrimental to the proper administration of justice:[34]

> **To hold otherwise would put the remedial goals of the legislation on hold, and would leave the evils that the legislation was intended to cure to linger, perhaps for years, continuing to damage the repute of the administration of justice**. It would leave the criminal trial courts with two versions of self-defence, one of which has been almost universally labeled as unsatisfactory. Further, it would leave those whose claim to self-defence involved conduct preceding March 11, 2013 but whose trials occurred after that date in the anomalous position of being unable to claim the benefit of amendments designed not to alter the essential nature of their defence but to clarify and to foster more reliable assessments of it.[35]

R. v. Bengy

[27] In *Bengy*, Justice Hourigan, writing for the Court, rejected what he called Justice MacDonnell's "broad" analysis. He disagreed that courts should consider the four factors set out by Justice MacDonnell to determine whether the presumption against retrospective application is rebutted and cited the statement from *Dineley* that this presumption must be

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[33] In *R. v. Caswell*, Justice Morgan referred to the following statement by Justice MacDonnell as "the single best rationale for applying the legislation immediately" and concluded that the amendments to the defence of property regime contained within the 2013 provisions ought to apply to the case before him: *R. v. Caswell*, [2013] S.J. No. 448, 2013 CarswellSask 504 (Sask. P.C.) at paras. 15-16.

[34] This reasoning is in line with the following statement made by Justice Wilkinson in *Pusch v. Tarnowski*, 1997 CarswellSask 59, 153 Sask. R. 287 (Sask. Q.B.): "Where the character of the legislation is remedial in nature, designed to provide a remedy for that which the legislature considered to be a presently existing defect in the legislation, the legislation may be applied retrospectively."

In *Pusch v. Tarnowski*, the Court found that as *The Family Maintenance Act* was introduced to remedy the exclusion of common law spouses from the benefits of spousal support and to correct an imperfection in the existing law, fairness dictated that the *Act* ought to apply to the case before the court even though it had come into force after the parties to the litigation separated: *Pusch v. Tarnowski*, 1997 CarswellSask 59, 153 Sask. R. 287 (Sask. Q.B.) at para. 17.

Other cases where the remedial nature of the legislative amendments were found to rebut the presumption against retroactivity include *Streight v. Smith*, 1976 CarswellBC 16, 1 B.C.L.R. 181 and *Re Molley*, [1975] 1 W.W.R. 727 (B.C.) at para. 10.

[35] *R. v. Pandurevic, supra* note 1 at para. 25 [emphasis added].

rebutted by evidence of a "clear legislative intent that [the statute] is to apply retrospectively."[36]

[28] Justice Hourigan found that there was nothing in the legislation or on the record that explicitly demonstrated such a legislative intent, stating,

> At its highest, there is evidence that Parliament recognized the need to clarify the law of self-defence. From this, we are asked to draw an inference that Parliament must have intended that the change take effect retrospectively.
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> This, of course, begs the question: If the need for immediate reform of the law were so pressing, why would Parliament not explicitly make the law retrospective?[37]

[29] Justice Hourigan rejected the appellant's submission that that the presumption against retroactive application does not apply when an amendment confers a benefit to accused persons. He found that such an approach would lead to the very uncertainty that the presumption against retroactivity is designed to eliminate.[38] He stated, "By focusing on the impact of the legislation, we are drawn into a quagmire of attempting to ascertain the effect of the legislation on individual cases."[39] This could be a difficult exercise since the 2013 amendments could be prejudicial to some accused and beneficial to others, depending on the circumstances of the case.[40]

[30] Justice Hourigan found that focusing on the effects of the legislation would also raise other problems. He asked, for example, whether an individual who would lose the benefit of a defence he would have had under the former provisions would be able to claim that his section 11(g) *Charter* right not to be found guilty of an offence that was not an

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[36] *R. v. Bengy, supra* note 2 at para. 59.

[37] *Ibid*. at paras. 59-60.

[38] *Ibid*. at para. 55.

[39] *Ibid*. at para. 63.

[40] *Ibid*. at paras. 56 and 63.

offence at the relevant time was being violated.[41] He postulated that the only way the new law could apply retroactively without violating 11(g) would be if it applied retroactively for some accused but not others, depending on which application would be more beneficial. He pointed out that this would raise the possibility in cases with multiple defendants that both the former self-defence provisions and the 2013 amendments would be applicable.[42] It could also be possible for a single defendant to take the position that part of his defence would benefit from the 2013 amendments, while another part would be adversely affected. Justice Hourigan stated, "At that juncture, the notions of predictability and certainty that underlie the presumption against retrospectivity would be eliminated. Moreover, such a practice would run contrary to the legislative objective of simplifying and clarifying the law of self-defence."[43]

[31] Justice Hourigan concluded,

> The court's task, as mandated by the Supreme Court in *Dineley*, is limited to ascertaining whether there is clear evidence of a Parliamentary intent that the legislation be given retrospective effect. Absent clear legislative intent, courts have no residual discretion to rewrite the law to accord with a subjective view of optimal fairness.[44]

[32] He found that Parliament can be presumed to have understood the consequences of not explicitly stating whether legislation it passes is to apply retroactively or prospectively and that, as there was nothing in Bill C-26 suggesting otherwise, the presumption against retroactive application applied.[45]

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[41] *R. v. Bengy, supra* note 2 at para. 64. Justice Hourigan stated that while Justice MacDonnell recognized that such accused may exist, he "appeared willing to ignore their substantive rights because, in the case before him, the new legislation benefitted the accused."

[42] *Ibid*. at para. 65.

[43] *Ibid*. at para. 65.

[44] *Ibid*. at para. 66.

[45] *Ibid.* at para. 66.

Problems with *R. v. Bengy*

[33] While Justice Hourigan found that Justice MacDonnell got the test for determining retroactive versus prospective application wrong, he did not propose an alternative test. Rather, he simply repeated the ruling from *Dineley* that unless the court discerns a "clear legislative intent" that Parliament intended the legislation to apply retroactively, it will apply prospectively. However, unlike Justice MacDonnell who provided a clear test courts could apply in order to discern whether a "clear legislative intent" existed, Justice Hourigan provided no guidance on this issue.

[34] In fact, Justice Hourigan seemed to suggest that nothing short of an explicit statement from Parliament could constitute "clear legislative intent," asking, "If the need for immediate reform of the law were so pressing, why would Parliament not explicitly make the law retrospective?"[46] While such a question seems to contain a certain satisfying logic, it appears to confuse the notions of "clear" and "explicit" and essentially closes the door on the ability of courts to employ statutory interpretation to determine the intent of Parliament.

[35] Justice Hourigan seems to be championing an approach where "the legislature makes the law and the court's job is to apply that law to particular facts." This approach is attractive in that it seems to maintain the strict separation of powers between the legislature and the courts. However, in *Driedger on the Construction of Statutes*, Ruth Sullivan suggest that this is not a realistic view of how the separation of powers actually works or how it should work. She advocates for a more "pragmatic approach" where the "legislature makes statutes and the court's job is to resolve disputes in accordance with the law. With this approach, statutes are the primary but not the sole source of law…

[46] *R. v. Bengy, supra* note 2 at para. 60.

supplemental law consists of the rest of the statute book, the common law and the evolving legal tradition which draws on current social and political values as well as those of the past." Sullivan reasons that this approach "reconciles the reality of judicial choice with the imperatives of democracy," for "[e]ven if it were possible, it would be wrong for courts to apply the directives of the legislature mechanically and blindly to particular facts. Courts must act as mediators to ensure that disputes are resolved in ways that respect *all* the values of constitutional democracy." While some may argue that this approach provides too much discretion to the judiciary, Sullivan submits that "in truth, pragmatism does not 'give' judges additional discretion; it merely acknowledges the discretion they have, and must have, to resolve interpretation disputes. The only real question is whether we are content with formalism or would rather know the 'real' reasons for a decision."[47]

[36] If courts are to determine Parliament's "real" intention in regard to the temporal application of the 2013 amendments, it is clear that they must go beyond what Parliament explicitly said or did not say and examine the rationale behind the amendments and the real-life effects they will have on accused persons.

[37] Justice Hourigan's assertion that the Court in *Dineley* did not examine whether the legislation in question was beneficial or prejudicial to the accused is inaccurate. Justice Deschamps, writing for the majority in *Dineley*, took issue with the Court of Appeal's finding that that the *Carter* defence had not been "eliminated, neutered or abolished"[48] and found that legislation must be interpreted so as not to deprive an accused of a defence that would have been open to him at the time of the alleged offence:

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[47] Sullivan, Ruth. *Driedger on the Construction of Statutes, 3rd ed*. (Toronto: Butterworths, 1994), p. 225 cited in *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, [2002] N.J. No. 198 at para. 31.
[48] *R. v. Dineley, supra* note 4 at paras. 18 and 70.

> Unlike MacPherson J.A., I must conclude that the *Carter* defence has been eliminated as an independent means to raise a reasonable doubt about the reliability of breathalyzer test results. This, in my view, indicates that the provisions are not merely procedural; they affect a defence open to an accused and are therefore subject to the presumption against the retrospective application of new legislation. I agree with Mayrand J.A. in *R. v. Gervais* (1978), 43 C.C.C. (2d) 533 (Que. C.A.), that the right of an accused to rely on a defence is a substantive right and that **new legislation has to be interpreted so as not to deprive the accused of a defence that would have been open to him or her at the time of the impugned act** (p. 535).[49]

[38] It is clear from this statement that the Court was considering the effect the legislation would have on the accused from the perspective of fairness. In *Dineley* the Court determined that the fact that the legislative amendment eliminated a defence indicated that the legislation should apply only prospectively. It does not necessarily follow from this finding that legislation that confers a benefit should also only apply prospectively.

[39] As the value underlying the presumption against retroactive application is fairness to the accused, it seems illogical not to permit retroactive application in a situation where the legislative amendment would promote fairness by assuring that accused individuals had access to a legitimate defence.

[40] Moreover, although Justice Hourigan raised the possibility of an accused's 11(g) *Charter* right being violated through the retrospective application of the 2013 amendments, he failed to consider that restricting the 2013 amendments to purely prospective application could violate the spirit of 11(i) of the *Charter*. Although 11(i) deals with accused persons receiving the benefit of subsequently enacted, more generous *sentencing* regimes, not *defence* regimes, it seems logical that the animating principle behind 11(i)—ensuring that accused persons obtain the benefit of new legislation—would apply equally to defence regimes. Justice Paciocco made this point eloquently in *Parker*:

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[49] *R. v. Dineley, supra* note 4 at para. 18 [emphasis added].

> …it would defeat the objectives of the presumption against retroactivity to apply it to new defences in criminal cases and it would result in actions, considered justifiable and legal at the time of trial, to be condemned and punished by conviction. The *Charter*, of course, is silent on this issue, but it does provide in section 11(i) that accused persons receive the benefit of subsequently enacted, more generous sentencing regimes. Although this provision does not address changes in defences, the values it reflects are indistinguishable from the principle I am describing; accused persons should receive the benefit of the law in place at the time of their alleged offence, as well as the benefit of new substantive provisions in effect at the time of their trials that protect their liberty interests. In my view, there is no realistic basis for presuming in such cases that Parliament must have intended to apply those rules only in the future. Instead, Parliament can and should be taken to intend that when a new defence is created, accused persons yet to be tried for previous alleged offences should have access to that defence where it operates more generously for them than the prior law.[50]

[41] In *Parker*, Justice Paciocco applied both the former provisions and the 2013 amendments and found that neither assisted the accused. In his 2014 article, "The New Defense against Force," Justice Paciocco defended this approach, explaining that since giving the 2013 amendments either a solely retroactive or a solely prospective application would lead to unconstitutional outcomes, the only reasonable solution is for courts to consider both regimes: "If Parliament intended that no-one should be convicted who would have had a defence at the time, and that no-one should be convicted if the current law does not support a finding of guilt, the trial judge is obliged to consider and apply both regimes…"[51] "With both regimes applying, there is no risk of unconstitutional outcomes."[52]

[42] While Justice Hourigan has a point when he states that focusing on the impact of the legislation could draw us into a quagmire of ascertaining the effect of the legislation on a case-by-case basis, Justice Paciocco argues that there is no alternative since any other solution will lead to unconstitutional outcomes. He also argues that the complexity of applying both regimes has been overstated, explaining,

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[50] R. *v. Parker, supra* note 5 at para. 5.

[51] Paciocco, David. "The New Defense against Force," 18 Can. Crim. L. Rev. 269, p. 306.

[52] *Ibid*., p. 306.

> For trial judges sitting alone there will be no need to consider both regimes in most cases. If after applying the current regime the trial judge concludes that the defence succeeds there is no need to go on. Nor is there a need to go on if the defence fails based on any one of the fixed factual requirements of amended section 34, since those fixed factual requirements applied to each of the old self-defence provisions. Even if the defence failed because the trial judge concluded that the accused's act was not reasonable, the only issues apt to produce a different outcome are cases that turn on provocation concerns, or cases where the accused caused grievous bodily harm or death and proportionality is the concern…
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> Even in jury trials, the obligation to consider both regimes for transition cases does not mean that judges directing juries should routinely direct them on both defences. Settled authority on jury directions in self-defence cases requires trial judges to take a "functional approach," and to trouble jurors solely with the self-defence provisions that most directly apply and that have realistic application. In effect, unlike when the air of reality test is applied, the presiding judge is to see what outcomes are realistic…[53]

[43] Given the diverse approaches taken by the courts in *Pandurevic*, *Parker* and *Bengy*, not to mention the numerous other cases that have resulted in conflicting decisions on the temporal application of the 2013 amendments, the natural question that arises is: what would the Supreme Court do?

[44] Would the Supreme Court agree that the Ontario Court of Appeal's decision in *Bengy* was correctly decided based on *Dineley* and leave those whose alleged offences occurred prior to March 11, 2013 to contend with the rusty old provisions? Would it approve of Justice MacDonnell's test and subsequent analysis in *Pandurevic* and apply the 2013 amendments retroactively? Would it do so knowing that the 2013 amendments could deprive some accused of a defence they would have had under the former provisions? Would it be willing to wade into the quagmire with Justice Paciocco and adopt his approach of applying both regimes, despite the complexity and uncertainty this approach would inevitably create?

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[53] Paciocco, David, *supra* note 51, pp. 306-307.

[45] Hard to say. Regardless of whether the 2013 amendments are applied retroactively, prospectively or contemporaneously, we are faced with a messy situation with no easy answers. All of these approaches come with their own set of problems. However, it seems unlikely that the Supreme Court would adopt the approach taken in *Bengy*, which seems to work the greatest unfairness to the greatest number of people. Not only has *Bengy* left those individuals whose alleged offences occurred prior to March 11, 2013 to contend with the murky, muddled mess of the former defence provisions, it has also valued certainty and simplicity over fairness, thereby seriously circumscribing the ability of courts to safeguard the rights of accused individuals. While certainty and simplicity are laudable goals, they cannot be permitted to trump the ultimate goal of the criminal justice system: to ensure that accused persons are treated fairly and that justice is served.

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SCHEDULE "A"

This schedule contains four charts. The first and second charts deal with defence of the person and the third and fourth charts deal with defence of property.

The first chart sets out the former defence of the person provisions and the 2013 amendments, side-by-side and the second points out the major differences between the former defence of the person provisions and the 2013 amendments, section by section.

The third chart sets out the former defence of property provisions and the 2013 amendments side-by-side and the fourth points out the major differences between the former defence of property provisions and the 2013 amendments, section by section.

DEFENCE OF THE PERSON:
FORMER PROVISIONS AND THE 2013 AMENDMENTS

Former *Criminal Code of Canada* Provisions relating to Defence of the Person	**2013 *Criminal Code of Canada* Provisions relating to Defence of the Person**
<u>Self-Defence</u> S. 34(1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself. S. 34(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.	**<u>Self-Defence/Defence of a Third Party</u>** S. 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.

S. 35 Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault on himself by another, may justify the use of force subsequent to the assault if

(a) he uses the force
  (i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and
  (ii) in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;
(b) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and
(c) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.

S. 36 Provocation includes, for the purposes of sections 34 and 35, provocation by blows, words or gestures.

<u>Self-Defence/Defence of a Third Party</u>

S. 37 (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

S. 37(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

S. 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.

DEFENCE OF THE PERSON:
COMPARISON OF THE FORMER PROVISIONS AND THE 2013 AMENDMENTS

Former Provisions	2013 Amendments
In ss. 34(1) and 34(2), being the victim of an "unlawful assault" was a precondition to taking justifiable defensive action	In s. 34(1), a person can take defensive action if he/she believes "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" Whether the accused was responding to a lawful use or threat of force is now contained within subsection 34(2), which lists the factors to be considered when determining whether the act committed was "reasonable in the circumstances"
In order to avail oneself of s. 34(1), one could not have provoked the assault	Not engaging in provocation is no longer a precondition to availing oneself of ss. 34(1) and (2); rather, "the person's role in the incident," which would involve an assessment of whether he/she provoked the attack or threat of attack, is listed in s. 34(2) as a factor to be considered when determining whether the act committed was "reasonable in the circumstances"
In order to avail oneself of s. 34(1), the force one used could not be "intended to cause death or grievous bodily harm" and be "no more than is necessary" to defend oneself	S. 34(1) removes the necessity of proving what degree of harm the accused intended to inflict; rather, it requires that the act that constitutes the offence must be "committed for the purpose of defending or protecting themselves or the other person" and that it must be "reasonable in the circumstances"
In ss. 34(1) and (2), acting in self-defence is a justification	In s. 34(1), acting in defence of the person renders one not guilty of an offence

S. 34(2)(a) stated that causing death or bodily harm in repelling an "unlawful assault" could only be justified if the accused was "under reasonable apprehension of death or grievous bodily harm"	S. 34(1) requires that the accused believes "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" S. 34(2)(b) lists the following as factors to be considered in determining whether the "act committed is reasonable in the circumstances": (a) the nature of the force or threat; […] (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 threat or force; (f.1) any history of interaction or communication between the parties to the incident; Consideration of these factors would necessarily lead a trier of fact to consider whether the accused was "under reasonable apprehension of death or grievous bodily harm"
S. 34(2)(b) stated that causing death or bodily harm in repelling an "unlawful assault" could only be justified if the accused believed, "on reasonable grounds, that he [could not] otherwise preserve himself from death or grievous bodily harm"	S. 34(1)(c) requires that the defensive "act committed is reasonable in the circumstances" S. 34(2), lists "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" as one of the factors to be considered in determining whether the "act committed is reasonable in the circumstances"
S. 35 permitted self-defence to apply to an accused who had committed an initial assault, so long as that assault was not intended to cause death or grievous bodily harm, or to an accused who has provoked an assault on him/herself	"the person's role in the incident", which would involve an assessment of committing an initial assault or engaging in provocation is listed in s. 34(2) as one of the factors to be considered in determining whether the "act committed is reasonable in the circumstances"

Under s. 35, the accused could only use force "under reasonable apprehension of death or grievous bodily harm" and if he/she believed, "on reasonable grounds, that it [was] necessary in order to preserve himself from death or grievous bodily harm"	S. 34(1)(c) requires that the defensive "act committed is reasonable in the circumstances" "the nature of the force or threat" is listed in s. 34(2) as one of the factors to be considered in determining whether the "act committed is reasonable in the circumstances"; considering this factor would include an assessment of whether it was reasonable for the accused to fear that he would be killed or seriously harmed and whether it was necessary to use force to protect him/herself from such a result
In order to avail him/herself of s. 35, the accused could not have "endevour[ed] to cause death or grievous bodily harm" at any time before the necessity of protecting himself from death or grievous bodily harm arose	"the person's role in the incident", which would involve an assessment of whether the accused had "endevour[ed] to cause death or grievous bodily harm," is listed in s. 34(2) as one of the factors to be considered in determining whether the "act committed is reasonable in the circumstances"
In order to avail him/herself of s. 35, the accused must have "declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm"	S. 34(2) lists "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" and "the person's role in the incident" as factors to be considered in determining whether the "act committed is reasonable in the circumstances" Consideration of these factors would include an assessment of whether the accused declined further conflict and/or retreated from the conflict
S. 36 stated that provocation includes "blows, words or gestures"	Subsections 34(1) and (2) make no mention of provocation, though provocation could be considered under paragraphs 34(2)(c), (f) and (f.1), which requires the court to consider "the person's role in the incident"; "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 threat or force;" and "any history of interaction or communication between the parties to the incident" in determining whether the "act committed is reasonable in the circumstances"

S. 37(1)(a) permits an accused to use force "to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it"	S. 34(1)(a) removes the need for the person being defended to be "under [the accused's] protection" and allows an accused to take defensive action if he/she believes, on reasonable grounds, that force or the threat of force is being made against "another person" S. 34(1)(c) preserves the "no more force than is necessary" requirement by stating that the act committed must be "reasonable in the circumstances"
S. 37(1)(b) states that nothing in the section will "justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force was intended to prevent"	S. 34(1)(b) requires that the "act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person." The wilful, excessive infliction of a hurt or mischief could not be for the purpose of defending or protecting. S. 34(1)(c) requires that the act must be "reasonable in the circumstances" S. 34(2) lists "the person's role in the incident," which would involve an assessment of any wilful or excessive behaviour, as one of the factors to be considered in determining whether the "act committed is reasonable in the circumstances"

DEFENCE OF PROPERTY:
FORMER PROVISIONS AND 2013 AMENDMENTS

Former *Criminal Code of Canada* Provisions relating to Defence of Personal Property	**2013 *Criminal Code of Canada* Provisions relating to Defence of Personal Property**
<u>Defence of Personal Property</u> S. 38(1) Every one who is in peaceable possession of personal property, and every one lawfully assisting him, is justified (a) in preventing a trespasser from taking it, or (b) in taking it from a trespasser who has taken it, if he does not strike or cause bodily harm to the trespasser. S. 38(2) Where a person who is in peaceable possession of personal property lays hands on it, a trespasser who persists in attempting to keep it or take it from him or from any one lawfully assisting him shall be deemed to commit an assault without justification or provocation.	**<u>Defence of Personal Property</u>** S. 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.

DEFENCE OF PROPERTY:
COMPARISON OF THE FORMER PROVISIONS AND THE 2013 AMENDMENTS

S. 38(1) permitted an individual who was in peaceable possession of personal property to prevent a trespasser from taking the property or to take the property back from a trespasser who has taken it, so long as he/she does not strike or cause bodily harm to the trespasser	S. 35(1) permits an individual who is in peaceable possession of property to take defensive action against another person who he/she believes, on reasonable grounds, is going to unlawfully enter the property; is about the take the property, is taking the property or has just taken the property; or is about to damage or destroy the property or is in the process of damaging or destroying the property. S. 35(1) does not mention specifically prohibited acts such as striking or causing bodily harm; rather, it requires that the act that constitutes the offence must be "reasonable in the circumstances" and must be committed for the purpose of preventing the person from entering the property, removing the person from the property, preventing the person from taking, damaging or destroying the property or retaking the property from the person.
S. 38(2) deemed any attempt on the part of the trespasser to maintain possession of the property to be an unjustified, unprovoked assault, which would bring the self-defence provisions into play	S. 35(1) makes recourse to the self-defence provisions unnecessary. Its requirement that the accused's act be "reasonable in the circumstances" encompasses situations in which a trespasser may attempt to maintain possession of the property in question.