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LEGISLATIVE SUMMARY

Bill C-60: The Citizen's Arrest and Self-defence Act

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Legislative Summary of Bill C-60

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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LEGISLATIVE SUMMARY OF BILL C-60: THE CITIZEN'S ARREST AND SELF-DEFENCE ACT

1 BACKGROUND

Bill C-60, An Act to amend the Criminal Code (citizen's arrest and the defences of property and persons) (short title: Citizen's Arrest and Self-defence Act), was introduced and received first reading in the House of Commons on 17 February 2011. It received second reading on 22 March 2011, and died on the *Order Paper* when Parliament was dissolved on 26 March 2011. The bill amends the *Criminal Code* (Code) [1] to enable persons who own or have lawful possession of property, or persons authorized by them, to arrest a person they find committing a criminal offence on or in relation to that property, within a reasonable time. The bill also amends the Code to simplify the provisions relating to the defences of property and persons.

1.1 THE CURRENT LAW IN CANADA

1.1.1 SELF-DEFENCE

In Canada, the law of self-defence has been codified in sections 34 to 37 of the *Criminal Code*. These sections set out the different circumstances in which a private citizen may defend himself or herself or another person against unlawful attack.

Section 34 of the Code defines the extent to which force is justified in repelling an unprovoked assault. Section 34(1) is a general defence that can be employed only by non-aggressors who never intend to cause grievous bodily harm or death through their actions. This section requires that the following four elements be established by a person accused of using force against another person:

- The accused was unlawfully assaulted.
- The accused did not provoke the assault.
- The force used by the accused was not intended to cause death or grievous bodily harm.
- The force used by the accused was no more than was necessary to defend himself or herself.

Section 34(1) of the Code, therefore, permits the accused to stand his or her ground, even when there is a possibility of escaping the situation. The question for the court is whether the force used was necessary to enable the accused to defend him or herself, not whether such a defence was wise in the circumstances.

Section 34(2) applies where the accused causes grievous bodily harm or death, whether intentionally or unintentionally, in responding to an assault. The accused is justified in the use of such force where he or she was under a reasonable apprehension of death or grievous bodily harm from the initial or continuing violence of the assault and believed, on reasonable grounds, that he or she must use such

force to preserve himself or herself from death or grievous bodily harm. Establishing "reasonableness" involves considering many factors, such as the relative size and strength of the two parties, whether the aggressor was armed, and any prior threats made against the accused.

Section 35 of the *Criminal Code* outlines the application of self-defence to those instances where the person seeking to rely on self-defence initiated or provoked the assault. It applies where the accused first assaulted the other person, but without intent to cause death or serious bodily harm, or where the accused has without justification, provoked an assault on himself or herself. The law permits a limited defence where the response of the person attacked escalates matters and the accused must respond to defend himself or herself.

Under section 35 of the Code, the accused is justified in using force subsequent to the assault if criteria similar to that found in section 34(2) apply, namely that the force is used under reasonable apprehension of death or grievous bodily harm from the person whom the defender originally assaulted or provoked and the defender must believe, on reasonable grounds, that the force is necessary to prevent his or her own death or grievous bodily harm. Other criteria that apply are that the defender did not, at any time before the need to protect himself or herself from death or grievous bodily harm, endeavour to cause death or grievous bodily harm, and there is an obligation upon the defender to decline further conflict and leave or retreat as far as is feasible before the need to defend from death or grievous bodily harm arises.

Section 36 of the Code establishes that provocation includes, for the purposes of sections 34 and 35, provocation by blows, words or gestures. Section 37 applies both to self-defence and defence of another. Like section 34(1), it imposes the requirement of proportionality. Section 37(1) justifies the use of force by a person in his or her own defence or in the defence of a person under his or her protection. The force used must be no more than is necessary to prevent the assault or its repetition. Section 37(2) states that the section will not justify the willful infliction of a hurt or mischief which is excessive in relation to the nature of the assault which the defender was trying to prevent. It is difficult to see where section 37 would apply; perhaps it can be relied upon where the accused intends to cause death or grievous bodily harm, but fails to do so. Under such circumstances, section 34(1) could not be relied upon because the accused was the aggressor, while section 34(2) could not be used because the accused did not cause death or grievous bodily harm.

The *Criminal Code*, therefore, sets out four different possible types of self-defence, but the basic principle can be simply stated – an individual who is unlawfully threatened or attacked must be accorded the right to respond.[2] But this right of response is not an unlimited one. The law requires that a person who uses force do so in a measured way and only utilize force that is necessary and proportionate to the threat.

A defence such as self-defence is treated no differently than substantive elements of an offence. Once a defence is properly before the court, in that it has been shown to have an "air of reality," the burden of disproving it beyond a reasonable doubt falls to the Crown.[3] The "air of reality" test means that, in order for the defence of self-

defence to be left with the judge or jury, there must be evidence capable of supporting every element of the defence upon which a properly instructed jury could acquit, in that the jury could be left with a reasonable doubt.[4] The Crown is not required to prove beyond a reasonable doubt that the conduct of the accused fails on every element of the defence. The Crown has only to prove beyond a reasonable doubt that any one of the elements set out in the defence was not established.[5]

The claim of self-defence can be based upon a mistaken perception, but the apprehension of death or grievous bodily harm must be reasonable. In other words, the belief that the accused could not otherwise preserve himself or herself must be based on reasonable and probable grounds. This mistake, therefore, must be one which an ordinary person using ordinary care could have made in the same circumstances.[6] A person claiming the right of self-defence cannot be expected to measure exactly the defensive action he or she takes. Nor can he or she be expected to stop and reflect upon the risk of deadly consequences which might result from taking justifiable defensive action.[7]

The self-defence provisions in the *Criminal Code* have been described as unwieldy and confusing and have been much criticized as a result. In the case of *R.* v. *McIntosh*,[8] Chief Justice Lamer stated that sections 34 and 35 are "highly technical, excessively detailed provisions deserving of much criticism. These provisions overlap, and are internally inconsistent in certain respects."[9] The judgment of the majority in *McIntosh*, however, has itself been called "highly unfortunate" for further muddying the waters around the self-defence provisions.[10] The majority in *McIntosh* held that section 34(2) of the Code was available as a defence when the accused was the initial aggressor. The argument was that Parliament must have intended for section 34(2) to be limited to unprovoked assaults, because it enacted section 35 to deal specifically with situations where the accused was the initial aggressor. This argument failed. The ruling seemed to go against the history of self-defence law, which pointed to a sharp distinction between unprovoked and provoked attacks.

1.1.2 Defence of Property

Sections 38 to 42 of the *Criminal Code* codify the legal power of people to use force to protect their property against theft or damage. Sections 38 and 39 deal with movable property, while sections 40 to 42 apply to the defence of real property and dwelling-houses. In general, more force is permitted in the protection of dwelling-houses or real property than can be used to defend movable property. The Code also recognizes that it is often difficult to distinguish between the defence of self and the defence of one's property. The Code, therefore, specifically provides that certain defences of property will amount to self-defence as well, at least where the trespasser refuses to leave the premises.

Section 38(1) sets out when force can be used in defence of personal property. Every person in peaceable possession[11] of personal property is justified in preventing a trespasser from taking that property or is justified in taking it back from a trespasser if he or she does not strike or cause bodily harm to the trespasser. But such a use of force is not always precluded, as section 38(2) provides that a

trespasser who persists in trying to take or keep the object is deemed to commit an unprovoked assault. This would then tie in to sections 34 and 37 of the Code in rendering any subsequent force used by the possessor potentially defensible. Therefore, while a possessor is not justified in striking or injuring a mere trespasser, if the trespasser turns from a thief into an assaulter, then the possessor can strike back using the self-defence provisions in section 34 or section 37 as justification.

Section 39 provides a defence to a person who uses force to defend personal property from removal by another person lawfully entitled to it. Section 39(1) protects an individual from criminal responsibility if he or she is in peaceable possession of personal property, has a claim of right to it,[12] and uses no more force than is reasonably necessary to defend it against another person, even a person who has a claim of law to that property. Such relief is denied in section 39(2) to a person defending personal property if that person does not have a claim of right to it and acts to defend the property from a person lawfully entitled to it. This section seems designed to discourage persons who dispute a claim from attempting to reassert possession over an item by force and to encourage them to use the legal process instead.[13]

Section 40 of the Code provides a justification for an assault committed by a person in lawful possession of a dwelling-house[14] while preventing or attempting to prevent a break-in of that house. It allows a person to use as much force as is necessary to prevent any person from forcibly breaking into or entering his or her home without lawful authorization. The force used must be necessary for that purpose (to prevent the break-in and not for any other reason).

Section 41 of the Code sets out the amount of defensive force that is justifiable in dealing with trespassers on real property or in a dwelling-house. Under the terms of section 41(1), anyone who is in peaceable possession of a dwelling-house or real property is justified in using force to prevent any person from trespassing or to remove a trespasser, if he or she uses no more force than is necessary.
Section 41(2) deems the trespasser to be committing an assault without justification or provocation if the trespasser resists attempts at preventing the trespass or being removed from the property. Hence this will permit the person removing the trespasser to rely upon section 34 if an assault is committed in doing so.

In the case of *R.* v. *Gunning*[15] the Supreme Court of Canada established that there are four elements to the section 41 defence:

- The accused must be in possession of land or a dwelling-house.
- His or her possession must be peaceable.
- The victim of the assault must be a trespasser.
- The force used to eject the trespasser must be reasonable in the circumstances.

The Supreme Court also affirmed that section 41 of the Code does not allow a person to kill an intruder in defence solely of his or her property; the intentional killing of a trespasser can only be justified where the person in possession of the property is able to make a case of self-defence.

Section 42 provides a justification for those who enter real property peaceably to take lawful possession of it. It sets out what actions will constitute assault upon persons who have lawful entitlement to the property. Section 42(1) justifies entering a dwelling-house or real property to take possession of it if the person is lawfully entitled to possession of it. The entry is only permitted by day and must be done peaceably. Section 42(2) sets out the legal effect of assaulting someone legally entitled to take possession of the dwelling-house or real property. An assault by a trespasser for the purpose of preventing someone from taking lawful possession of the property will be deemed to be an unprovoked and unjustified assault. This means that the person committing the assault will be limited to using section 35 rather than section 34 to support a claim of self-defence.

However, under section 42(3), where both parties have a lawful claim to the property, it is the party entering the property whose action is deemed to be without justification, and any subsequent assault is considered to have been provoked.

1.1.3 Citizen's Arrest

Since at least the 1100s, the criminal law in England recognized the duty of all citizens to assist in the capture and arrest of all persons suspected of having committed a crime.[16] The common law from its earliest times conferred certain powers on private citizens to arrest without the need to have a warrant. In Canada, the powers of a citizen to arrest without a warrant have been codified in section 494 of the *Criminal Code*. By the terms of section 494(1), anyone may arrest without warrant a person whom he or she:

- finds to be committing an indictable offence;[17] or
- believes, on reasonable grounds, has committed a criminal offence and is escaping from and freshly pursued by those with lawful authority to arrest that person.

The determination of what are "reasonable grounds" will be a question of fact depending on the circumstances of each case. To justify an arrest on the grounds of belief that the accused had committed an offence, the citizen who makes the arrest must establish that he or she had reasonable grounds to believe that the accused committed the offence for which he or she was actually arrested; it is not sufficient to establish that the accused had committed some offence.[18]

Section 494(2) of the *Criminal Code* states that anyone who is either the owner of, in lawful possession of, or has been authorized by the owner or the person in lawful possession of property, may arrest without warrant a person whom he or she finds committing a criminal offence on or in relation to that property. Section 494(3) requires that anyone other than a peace officer who arrests a person without a warrant must "forthwith" deliver that person to a peace officer.

Where a private citizen chooses to arrest someone without a warrant, he or she runs the legal risk that the person arrested is innocent and the arrest is wrongful. In this case, he or she may be sued for damages for false imprisonment. If the citizen is sued for damages by the accused, the citizen can raise the defence that he or she

believed on reasonable grounds that the accused committed a criminal offence. In such a proceeding, the citizen has the onus of establishing that his or her belief was reasonable.[19]

Sections 25, 27, and 30 of the *Criminal Code* are also relevant to the role of a private citizen in the prevention of crime and the ability to use force to do so. Section 25 sets out the protection from liability for certain persons who act under authority. Every person who is required or authorized by law as a private person to do anything in the administration or enforcement of the law is, if he or she acts on reasonable grounds, justified in doing what he or she is required or authorized to do and in using as much force as is necessary for that purpose. Pursuant to section 25(4), every person lawfully assisting a peace officer[20] is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested if certain conditions apply. These conditions include the suspected perpetrator's taking flight to avoid arrest and the impossibility of preventing such flight by reasonable means in a less violent manner. Section 26 of the Code imposes criminal liability for the use of force in excess of that authorized by law.

Section 27 allows a private person to use reasonably necessary force to prevent the commission of an offence which, if committed, would be one for which the offender might be arrested without warrant and would cause immediate and serious injury to any person or property. Section 27 is concerned with the use of force to prevent an offence, not the arrest of a potential offender. The Supreme Court has held that it is designed to permit an innocent bystander to use force to prevent an offence from occurring. It did not make sense to the Court to classify a personal assault as the commission of an offence which triggers the use of section 27; this interpretation would render sections 34 and 37 redundant.[21]

Finally, section 30 of the *Criminal Code* empowers anyone who witnesses a breach of the peace[22] to:

- interfere to prevent the continuation or renewal of the breach of the peace; and
- detain any person breaching the peace, for the purpose of giving that person into the custody of a peace officer, in which case the detention must be carried out with no more force than is reasonably necessary to prevent the continuation or renewal of the breach of the peace or it must be proportionate to the danger feared from such activity.

The most prominent recent case relating to the power of citizens to make arrests is that concerning Toronto grocery store owner David Chen.[23] Mr. Chen was charged with assault and forcible confinement after he tied up a man who had robbed his store an hour before he apprehended him. The judge acquitted Mr. Chen on the basis that the man he arrested returned to the store and so it was a continuing theft. Even though the original theft had taken place one hour before, it was found that the thief, by returning to commit another theft, was "found committing" an indictable offence within the meaning of section 494 of the *Criminal Code*. While considering, and rejecting, the issue of the use of excessive force, the judge warned of the "pitfall of taking the law into one's hand. One can never predict the outcome."

1.2 THE CURRENT LAW IN OTHER COUNTRIES

1.2.1 AUSTRALIA

In Australia, the Commonwealth *Criminal Code Act 1995*[24] states that self-defence is justified if it is believed that the conduct is necessary to defend oneself or another person; or to prevent or terminate the unlawful imprisonment of oneself or another person; or to protect property from unlawful appropriation, destruction, damage or interference; or to prevent criminal trespass to any land or premises; or to remove from any land or premises a person who is committing criminal trespass. The self-defence must also be a reasonable response in the circumstances. Self-defence does not apply if the person uses force that involves the intentional infliction of death or really serious injury to protect property, to prevent criminal trespass, or to remove a person who is committing criminal trespass.

These provisions are similar to those in Canada in that both a subjective and an objective test are applied to the conduct of the person claiming self-defence. One provision of note is that, in Australia, at least at the federal level, one is not permitted to cause death or "really serious injury" in the mere defence of property.

The power to arrest for a federal (or Commonwealth) offence is codified in section 3Z of the *Crimes Act 1914*.[25] Under the Act, a person who is not a police constable may, without warrant, arrest someone if the person believes on reasonable grounds that:

- the other person is committing or has just committed an indictable offence; and
- proceedings by summons against the other person would not:
  - ensure the appearance of the person before a court in respect of the offence,
  - prevent a repetition or continuation of the offence or the commission of another offence,
  - prevent the concealment, loss or destruction of evidence relating to the offence,
  - prevent harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence,
  - prevent the fabrication of evidence in respect of the offence, or
  - would not preserve the safety or welfare of the person.

A person who arrests another person must, as soon as practicable after the arrest, arrange for the other person, and any property found on the other person, to be delivered into the custody of a constable. Furthermore, the statute provides that a person must not, in the course of arresting another person for an offence, use more force, or subject the other person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest.

1.2.2 UNITED STATES

The legal situation in the United States is made complex by the fact that each state has its own criminal code. To choose just one example, the *Penal Code* of Texas[26] deals with self-defence in Chapter 9, "Justification Excluding Criminal Responsibility." Section 9.31 states that "a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force."

The *Penal Code* then goes on to state that the use of force is to be considered "reasonable" if the person using such force:

- knew or had reason to believe that the person against whom the force was used (1) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment, (2) unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's habitation, vehicle, or place of business or employment, or (3) was committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery;
- did not provoke the person against whom the force was used; and
- was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used.

The *Penal Code* also specifies that the use of force against another is not justified:

- in response to verbal provocation alone; or
- to resist an arrest or search that the actor knows is being made by a peace officer, or by a person acting in a peace officer's presence and at his direction, even though the arrest or search is unlawful.

The Texas *Penal Code* also provides that a person who has a right to be present at the location where the force is used, who has not provoked the person against whom the force is used, and who is not engaged in criminal activity at the time the force is used is not required to retreat before using force as described by this section. Deadly force is permissible, particularly in the situation where the person against whom such force was used unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment.

Of note in the Texas provisions is that they do not allow self-defence to be used as an excuse or justification as a response to verbal provocation alone. In addition, there is an emphasis in Texas on the defence of one's home, with deadly force permitted in such circumstances.

The power of citizens to make arrests in Texas is set out in the *Code of Criminal Procedure*.[27] Article 14.01 of this statute states that any person may, without a warrant, arrest an offender when the offence is committed in his or her presence or

within his or her view, if the offence is one classed as a felony or as an offence against the public peace. Article 14.06 mandates that the person making the arrest or the person having custody of the person arrested shall take the person arrested before a magistrate or have him taken before a magistrate without unnecessary delay, but not later than 48 hours after the person is arrested.

1.2.3 UNITED KINGDOM

In the United Kingdom, the Crown Prosecution Service has issued a guide called "Self-Defence and the Prevention of Crime."[28] In this guide, it is stated that defence of the person is governed by the common law, while arrest and the prevention of crime are governed by the *Criminal Law Act 1967*.

When reviewing cases involving assertions of self-defence or action in the prevention of crime and the preservation of property, prosecutors in the United Kingdom are urged to be aware of the balance to be struck between:

- the public interest in promoting a responsible contribution on the part of citizens in preserving law and order; and
- vigilantism and the use of violence generally.

As in Canada, the prosecution, in rebutting the defence of self-defence, must meet the criminal standard of proof; the burden of proof remains with the prosecution when the issue of self-defence is raised. The prosecution must have sufficient evidence to satisfy a jury beyond a reasonable doubt that the defendant was:

- not acting to defend himself or herself or another; or
- not acting to defend property; or
- not acting to prevent a crime or to apprehend an offender; or
- if he was so acting, the force used was excessive.

Self-defence is available as a defence to crimes committed by use of force.

The basic principles of self-defence are set out in *Palmer* v. *R.*:[29] "It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but only do, what is reasonably necessary."

There is no rule in U.K. law to say that people must wait to be struck first before they may defend themselves.[30] Failure to retreat when attacked and when it is possible and safe to do so is not considered conclusive evidence that a person was not acting in self defence. It is simply a factor to be taken into account.

An important difference from the law in Canada is in the case where the accused initially sought the confrontation. In the case of *R.* v. *Balogun*,[31] it was held that "[a] man who is attacked or believes that he is about to be attacked may use such force as is both necessary and reasonable in order to defend himself. If that is what he does then he acts lawfully." According to the Crown Prosecution Service guide, it follows that a person who starts the violence cannot rely upon self-defence to render

his or her actions lawful. Even when warding off attacks, if the person defending himself or herself volunteered for the fight, such actions are not lawful, they are unlawful acts of violence.

The power of a citizen to make an arrest applies only for indictable offences.[32] A citizen may arrest anyone who is in the act of committing an offence, or whom the arrestor has reasonable grounds for suspecting to be in the act of committing an offence. Where an offence has been committed, a citizen may arrest anyone who is guilty of that offence or whom the arrestor has reasonable grounds for suspecting to be guilty of it. There are two conditions which apply to a citizen's arrest, namely that there are reasonable grounds to believe the arrest is necessary for a reason specified and that it is not reasonably practical for a constable to make the arrest. The "reasons specified" are to prevent the person in question from:

- causing physical injury to himself or any other person;
- suffering physical injury;
- causing loss of or damage to property; or
- making off before a constable can assume responsibility.

In addition, members of the public (as well as police officers) may take action, including using reasonable force, to prevent a breach of the peace, which would not necessarily involve exercising the formal powers of arrest.[33]

A person may use such force as is reasonable in the circumstances for the purposes of:

- self-defence;
- defence of another;
- defence of property;
- prevention of crime; or
- lawful arrest.

The Crown Prosecution Service guide recommends that, in assessing the reasonableness of the force used, prosecutors should ask two questions:

1. Was the use of force necessary in the circumstances, i.e., was there a need for any force at all?
2. Was the force used reasonable in the circumstances?

The courts have indicated that both questions are to be answered on the basis of the facts as the accused honestly believed them to be.[34] It is, therefore, a subjective test but there is also an objective element to the test in that the members of the jury must then go on to ask themselves whether, on the basis of the facts as the accused believed them to be, a reasonable person would regard the force used as reasonable or excessive.

2 DESCRIPTION AND ANALYSIS

Bill C-60 contains four clauses. The following description highlights selected aspects of the bill; it does not review every clause.

2.1 SELF-DEFENCE (CLAUSE 2)

Under clause 2 of Bill C-60, sections 34 to 37 of the *Criminal Code* are repealed and replaced with a single self-defence provision (new section 34 of the Code) that applies to any offence. The current distinctions between provoked and unprovoked attacks, as well as any intention to use deadly force, are eliminated. Under new section 34, persons will not be guilty of an offence if:

- they believe on reasonable grounds that force, or a threat of force, is being used against them or another person;
- the actions that constitute the offence are committed for the purpose of defending or protecting themselves or the other person; and
- the act committed is reasonable in the circumstances.

It appears that this proposed test has mixed subjective and objective elements – the accused must believe that he or she is under threat (subjective test) and this belief must be reasonable in the circumstance (objective test).

Bill C-60 also sets out a non-exhaustive list of factors that the court may consider in determining whether the act committed is reasonable in the circumstances. The list of factors includes:

- the nature of the force or threat;
- 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;
- the person's role in the incident;
- whether any party to the incident used or threatened to use a weapon;
- the size, age and gender of the parties to the incident;
- the nature, duration and history of any relationship between the parties, including any prior use or threat of force and the nature of that force or threat;
- the nature and proportionality of the person's response to the use or threat of force; and
- whether the act committed was in response to a use or threat of force that the person knew was lawful.

The defence will not be available if the accused is responding to a threat or force that the other person is required or authorized by law to employ in the administration or enforcement of the law, unless the accused believes on reasonable grounds that the other person is acting unlawfully.

2.2 Defence of Property (Clause 2)

Under clause 2 of Bill C-60, sections 38 to 42 of the *Criminal Code* are repealed and replaced with a single defence of property provision (new section 35 of the Code). This new section eliminates the current distinction between the defence of personal and real property. Under the new provision, a person will not be guilty of an offence if he or she:

- believes on reasonable grounds that he or she is in peaceable possession of property or that they are acting under the authority of, or lawfully assisting, a person whom they believe on reasonable grounds is in peaceable possession of property;
- believes on reasonable grounds that another person:
  - is about to enter, is entering or has entered the property without being entitled by law to do so,
  - is about to take the property, is doing so or has just done so, or
  - is about to damage or destroy the property, or make it inoperative, or is doing so;
- commits the act that constitutes the offence for the purpose of:
  - preventing the other person from entering or removing the person from the property, or
  - preventing the other person from taking, damaging or destroying the property or making it inoperative, or retaking the property from that person; and
- the act committed is reasonable in the circumstances.

The new section on the defence of property will not apply if the person who commits the act that constitutes the offence does not have a claim of right to the property and the other person is entitled to its possession by law. The defence will also not apply where the other person is doing something that they are required or authorized to do by law in the administration or enforcement of the law, unless the accused believes on reasonable grounds that the other person is acting unlawfully.

2.3 Citizen's Arrest (Clause 3)

Clause 3 of Bill C-60 amends the citizen's arrest section of the *Criminal Code*, but only section 494(2). Thus, the powers of citizens to make arrests set out in section 494(1) remain as they are. These powers mean that anyone may arrest without warrant a person whom he or she finds to be committing an indictable offence or believes, on reasonable grounds, has committed a criminal offence and is escaping from and freshly pursued by those with lawful authority to arrest that person.

The amended section 494(2) applies to the owner or person in lawful possession of property or a person authorized by the owner or lawful possessor. As is currently the case, such a person may arrest without warrant a person whom he or she finds committing a criminal offence on or in relation to that property. But the amendment

goes on to allow such a person to make an arrest within a "reasonable time after the offence is committed." Such an arrest can be made if the person making the arrest believes on reasonable grounds that it is not feasible in the circumstances for a peace officer to make the arrest.

In addition, a new section 494(4) is added to the *Criminal Code*, clarifying that a person who makes an arrest under section 494 is a person who is authorized by law to do so for the purposes of section 25 of the Code. The purpose of this amendment is to make it clear that use of force is authorized in a citizen's arrest, but that there are limits on how much force can be used.[35]

NOTES

1. *Criminal Code*, R.S.C. 1985, c. C-46.
2. Morris Manning and Peter Sankoff, *Manning, Mewett and Sankoff: Criminal Law*, 4th ed., LexisNexis, Markham, Ont., 2009, p. 532.
3. *R.* v. *Lieberman*, [1970] 3 O.R. 407 (Ont. C.A.), paras. 411–412.
4. *R.* v. *Cinous*, [2002] 2 S.C.R. 3.
5. *R.* v. *Hebert*, [1996] 2 S.C.R. 272, para. 25.
6. *R.* v. *Reilly*, [1984] 2 S.C.R. 396.
7. *R.* v. *Kandola* (1993), 80 C.C.C. (3d) 481 (B.C.C.A.).
8. *R.* v. *McIntosh*, [1995] 1 S.C.R. 686.
9. Ibid., para. 16.
10. Manning and Sankoff (2009), p. 541.
11. "Peaceable possession" has been defined as a "possessor not seriously challenged by others." See *R.* v. *Born With a Tooth* (1992), 76 C.C.C. (3d) 169 (Alta. C.A.), para. 178.
12. "Claim of right" includes an honest although mistaken belief in entitlement to the property, even though the mistake is based on an error of law or fact. See *R.* v. *Lei* (1997), 120 C.C.C. (3d) 441 (Man. C.A.).
13. Manning and Sankoff (2009), p. 559.
14. "Dwelling-house" is defined in section 2 of the *Criminal Code* as:

    > the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence, and includes
    >
    > (*a*) a building within the curtilage [an area of land or structures around a dwelling or other structure] of a dwelling-house that is connected to it by a doorway or by a covered and enclosed passage-way, and
    >
    > (*b*) a unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence.

15. *R.* v. *Gunning*, [2005] 1 S.C.R. 627, para. 25.
16. R. E. Salhany, *Canadian Criminal Procedure*, 6th ed., Thomson Reuters, Aurora, Ont., 2010, para. 3.220. The Assize of Clarendon issued by Henry II in 1166 is one of the earliest records of the recognition of this duty. The common law on this issue is expressed in the maxim *Necessitas Indicit Privilegium Quoad Jura Privata* ("From necessity springs privileges upon private rights").

17. Section 34(1)(*a*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, indicates that an offence is deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment. Therefore, the term “indictable offence” includes hybrid offences. Hybrid offences are those that may be prosecuted either as indictable offences or as summary conviction offences.

18. Salhany (2010), para. 3.290.

19. Ibid., para. 3.280.

20. The term “peace officer” is defined in section 2 of the *Criminal Code* as including:

> (*a*) a mayor, warden, reeve, sheriff, deputy sheriff, sheriff’s officer and justice of the peace,
>
> (*b*) a member of the Correctional Service of Canada who is designated as a peace officer pursuant to Part I of the *Corrections and Conditional Release Act*, and a warden, deputy warden, instructor, keeper, jailer, guard and any other officer or permanent employee of a prison other than a penitentiary as defined in Part I of the *Corrections and Conditional Release Act*,
>
> (*c*) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process,
>
> (*d*) an officer within the meaning of the *Customs Act*, the *Excise Act* or the *Excise Act, 2001*, or a person having the powers of such an officer, when performing any duty in the administration of any of those Acts,
>
> (*d.1*) an officer authorized under subsection 138(1) of the *Immigration and Refugee Protection Act*,
>
> (*e*) a person designated as a fishery guardian under the *Fisheries Act* when performing any duties or functions under that Act and a person designated as a fishery officer under the *Fisheries Act* when performing any duties or functions under that Act or the *Coastal Fisheries Protection Act*,
>
> (*f*) the pilot in command of an aircraft
>
> > (i) registered in Canada under regulations made under the *Aeronautics Act*, or
> >
> > (ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft registered in Canada under those regulations, while the aircraft is in flight, and
>
> (*g*) officers and non-commissioned members of the Canadian Forces who are
>
> > (i) appointed for the purposes of section 156 of the *National Defence Act*, or
> >
> > (ii) employed on duties that the Governor in Council, in regulations made under the *National Defence Act* for the purposes of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and non-commissioned members performing them have the powers of peace officers.

21. *R.* v. *Hebert*, [1996] 2 S.C.R. 272.

22. The term “breach of the peace” has been defined as “offences against the public which are either actual violations of the peace, or constructive violations, by tending to make others break it.” There is no offence in Canada of breach of the peace. The only way that such conduct can be dealt with and restrained, apart from civil proceedings for damages, is by taking steps to have the persons committing such acts bound over to keep the peace and be of good behaviour. See *Frey* v. *Fedoruk et al.*, [1950] S.C.R. 517.
23. *R.* v. *Chen et al.*, 2010 ONCJ 641.
24. Australia, *Criminal Code Act 1995*, Act No. 12 of 1995 as amended.
25. Australia, *Crimes Act 1914*, Act No. 12 of 1914.
26. Texas, *Penal Code*.
27. Texas, Chapter 14, “Arrest Without Warrant,” in *Code of Criminal Procedure*.
28. United Kingdom, “Civilian Powers of Arrest,” in *Self-Defence and the Prevention of Crime*, 7 July 2009.
29. *Palmer* v. *R.*, [1971] A.C. 814 (United Kingdom).
30. *R.* v. *Deana*, 2 Cr. App. R. 75 (United Kingdom).
31. *R.* v. *Balogun*, [2000] 1 Archbold News 3 (United Kingdom).
32. United Kingdom, *Police and Criminal Evidence Act 1984*, s. 24A.
33. *R.* v. *Howell*, [1982] QB 416 (United Kingdom).
34. *R.* v. *Williams (G)*, 78 Cr. App. R. 276; *R.* v. *Oatbridge*, 94 Cr. App. R. 367 (United Kingdom).
35. Prime Minister of Canada, “The Citizen’s Arrest and Self-Defence Act,” Toronto, 17 February 2011.