Licence to *Khill*: What Appellate Decisions Reveal About Canada's New Self-Defence Law

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This paper presents novel findings about how appellate courts interpret and apply Canada's revamped self-defence law, contained in section 34 of the Criminal Code. The author identifies how section 34, described by the Canadian Department of Justice as a simplification of existing self-defence legislation and jurisprudence, significantly expands the availability of self-defence while removing and demoting principled constraints on the use of defensive force. The author studies self-defence appeals since section 34 has come into force. This study reveals the interpretive architecture of the new law and indicates where appeal decisions regularly turn.

The paper is organized into six parts. First, the author explains the methodology used to arrive at the list of section 34 appellate cases. Second, the author assesses the prevalence of self-defence elements within these appellate decisions. Third, the author explores how appellate courts interpreting section 34 have evaluated the accused's role in the incident. Fourth, the author assesses the scope of the modified objective approach and its evolution under section 34. Fifth, the author discusses how longstanding self-defence principles have been applied within the new framework. Lastly, the author discusses hybrid defences—the melding of self-defence and other defences—and their prevalence under the new law.

The author concludes by suggesting that section 34 has not resolved the complexity it was meant to address. Rather, it replaced one type of complexity with another. Appellate courts are now struggling to determine if, where, and how received principles such as necessity, proportionality, and retreat fit into section 34. Appellate decisions reveal that the operation of section 34 remains unpredictable, and guidance from appellate courts, most importantly the Supreme Court of Canada, is necessary. R v Khill, *scheduled to be heard by the Supreme Court of Canada in 2021, presents an important opportunity to clarify self-defence law in Canada.*

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Introduction

In 2012, Parliament revamped Canada's self-defence law, a law that had evolved gradually since Canada adopted its first *Criminal Code* in 1892. Between 1892 and 2012, incremental expansions occurred when Parliament attempted to simplify the law and when the judiciary attempted to tweak it to account for the range of reasonable human responses to force and the threat of force.[1] Over time, however, the law became overly complicated and incoherent.[2] Justice

1. See Noah Weisbord, "Who's Afraid of the Lucky Moose? Canada's Dangerous Self-Defence Innovation" (2018) 64:2 McGill LJ 349 (explaining the evolution of self-defence law in Canada and the complex, overlapping structure of the former self-defence provisions at 364).

2. See *ibid*.

David Paciocco called Canada's self-defence provisions "the most confusing tangle of sections known to law"[3] and the Supreme Court of Canada called on Parliament to fix them.[4] A 2009 shoplifting incident at the Lucky Moose Food Mart in Toronto's Chinatown provided the impetus for legal change.[5] Following owner David Chen's highly publicized citizen's arrest of shoplifter Anthony Bennett, Prime Minister Stephen Harper instructed the Department of Justice to consider expanding Canada's *Criminal Code* provisions on citizen's arrest, self-defence, and defence of property. In 2012, Parliament passed a bill expanding and simplifying self-defence with overwhelming support.[6] Bill C-26 became Canada's Lucky Moose law and the new section 34 of the *Criminal Code* contained the defence of person provision.

The Department of Justice describes the new defence of person provision, section 34 ("Lucky Moose"), as essentially a simplification and clarification of existing law.[7] Indeed, what had been a confusing tangle of *Criminal Code* provisions complicated by a century of accumulated jurisprudence was reduced to a single provision, section 34, with three elements: trigger, motive, and response:

i. the accused must believe, on reasonable grounds, that force is being used or threatened against him or another person: section 34(1)(a) [the trigger];
ii. the act of the accused said to constitute the offence must be done for the purpose of defending himself or another person: section 34(1)(b) [the motive]; and
iii. the act said to constitute the offence must be reasonable in the circumstances: section 34(1)(c) [the response].[8]

Legal scholars including David Paciocco and Kent Roach warned in articles comparing old and new self-defence provisions that Lucky Moose was not merely a simplification; it would also widen the availability of self-defence

3. David M Paciocco, *Getting Away with Murder: The Canadian Criminal Justice System* (Toronto: Irwin Law, 1999) at 274.

4. See *R v McIntosh*, [1995] 1 SCR 686, 21 OR (3d) 797 (note) ("legislative action is required to clarify the Criminal Code's self-defence regime" at para 17)

5. See Weisbord, *supra* note 1 at 369.

6. See Bill C-26, *An Act to Amend the Criminal Code (Citizen's Arrest and the Defences of Property and Persons)*, 1st Sess, 41st Parl, 2012 (assented to 28 June 2012), SC 2012, c 9.

7. See Canada, Department of Justice, *Bill C-26 (S.C. 2012 c. 9) Reforms to Self-Defence and Defence of Property: Technical Guide for Practitioners* (Guide) (March 2013) at 26, online (pdf): <www.justice.gc.ca/eng/rp-pr/other-autre/rsddp-rlddp/pdf/c26.pdf> [perma.cc/ZS49-NZ98]; Weisbord, *supra* note 1 at 373.

8. *R v Khill*, 2020 ONCA 151 at para 42.

in unprecedented ways.[9] This study of every self-defence appeal case in Canada under the new law demonstrates that these scholarly projections were correct. Self-defence can now be invoked in response to any threat of force used against an accused, not just an assault.[10] It may now be used to exculpate in relation to a greater variety of offences; for example, if an accused commits a hit-and-run to avoid force.[11] Lucky Moose extends to defence of others, where the previous legislation only permitted defence of self or of a limited class of others under the accused's protection. The most important change was that prior bright line requirements for self-defence to succeed—e.g., necessity, proportionality, and retreat for an initial aggressor[12]—were eliminated or relegated to a non-exhaustive list of factors for judges and juries to consider when determining whether the accused's forceful response was "reasonable in the circumstances".[13] The reasonableness of the response "in the circumstances"—not trigger or motive—has now become "the heart" of Canada's new self-defence law.[14]

This article presents novel findings about how Canadian appellate courts interpret and apply Lucky Moose. Through an overview of self-defence appeals since Lucky Moose came into force, this study reveals the interpretive architecture of the new law and indicates where appeal decisions regularly turn. Especially notable findings of this study—the first broad survey of Canadian appellate jurisprudence regarding the new self-defence law—include the following:

i. Under the new section 34(2), the reasonableness of the defensive response is assessed in light of a non-exhaustive list of nine factors, but some factors are more important than others. Imminence, the availability of other means of responding, and the nature and proportionality of the response are especially important, appearing in over fifty per cent of response cases.
ii. A key determinant in a significant number of self-defence appeals is whether the justices evaluate the reasonableness of defensive force in relation to broad incidents (single transaction analysis) or individual acts (freeze-frame analysis). Incidents begin at the first sign of

9. See David M Paciocco, "The New Defense against Force" (2014) 18:3 Can Crim L Rev 269 at 270 [Paciocco, "The New Defence"]; Kent Roach, "A Preliminary Assessment of the New Self-Defence and Defence of Property Provisions" (2012) 16:3 Can Crim L Rev 275 at 279–84, 293 [Roach, "Preliminary"]; Kent Roach, "Reforming Self-Defence and Defence of Property: Choices to be Made" (2011) 57 Crim LQ 151 at 152; Weisbord, *supra* note 1 at 374.

10. See Roach, "Preliminary", *supra* note 9 at 279.

11. See *R v Delellis*, 2019 BCCA 335.

12. See *Criminal Code*, RSC 1985, c C-46, s 34.

13. Roach, "Preliminary", *supra* note 9 at 277–78.

14. *Ibid* at 278.

trouble, whereas acts narrow the timeline to the seconds leading up to the use of force. There is no clear line of authority on whether judges and juries should focus on how the conflict materialized or only the final moments before violent force was deployed, and case outcomes are conflicting. There appears, however, to be an emerging pattern: courts that apply single transaction analysis consistently set aside trial decisions while courts that apply freeze-frame analysis typically show deference to decisions below.

iii. The "modified objective approach"[15] set out by the Supreme Court of Canada in *R v Lavallee* has expanded well beyond the domestic abuse context to encompass considerations of military training, prison environment, physical characteristics, and age when assessing the reasonableness of an accused's forceful response.[16]

iv. There is little agreement about what rules and principles from pre-2012 jurisprudence survived the 2012 codification. The place of longstanding doctrines including necessity, the *Baxter* instruction[17]—i.e., the finder of fact need not "weigh to a nicety" the proportionality of defensive force—and the "castle doctrine" are applied unevenly or not at all.

v. Parliament deliberately removed the language of justification from Lucky Moose, but according to Canadian appellate courts, defence of person is a justification defence, not an excuse (or neither). Initial fears that self-defence in Canada would become "a concession to human frailty" excusing a wider range of unreasonable violence, rather than a morally correct choice were wrong.[18] The evidence shows that appellate courts read justification back in.

Arguably the most important appeal decision under Lucky Moose is *R v Khill*.[19] In *Khill*, the Court of Appeal for Ontario grapples with many of the issues mentioned above, provides a nuanced interpretation of Lucky Moose, and overturns the trial court's acquittal, ordering a new trial. In 2018, army reservist Peter Khill made effective use of Canada's Lucky Moose expansion to win a complete acquittal after he shot and killed Jon Styres, an unarmed

15. Also called the "individualized objective approach" or "contextual objective approach".

16. [1990] 1 SCR 852, 4 WWR 1. This expansion from *Lavallee* began before the new law came into force, but gained new traction with the court's interpretation of sections 24(1)(c) and 34(2).

17. See *R v Baxter*, 27 CCC (2d) 96 at 113, 1975 CarswellOnt 54 (WL Can) (CA).

18. Weisbord, *supra* note 1 at 376; Paciocco, "The New Defence", *supra* note 9 at 274; Roach, "Preliminary", *supra* note 9 at 277.

19. See *R v Khill*, *supra* note 8.

Indigenous man whom Khill suspected was stealing his truck from his driveway.[20] After hearing noises outside and noticing that the dashboard lights of his 2001 pick-up truck were illuminated, Khill armed himself with a loaded shotgun and, using techniques he learned in the military, snuck out of the house to investigate. Arriving at the back of the pick-up unnoticed, Khill came upon Jon Styres leaning into the front passenger seat and levelled the shotgun at him. When Khill said, "Hey, hands up", Styres began to rise and turn towards Khill, whereupon Khill shot him in the chest, racked the shotgun, and shot again. Styres died. Khill testified at trial that as a trained reservist, he reacted instinctively to "neutralize a threat", rather than calling the police from inside his Hamilton-area home.[21] The jury applied Lucky Moose and acquitted Khill. Khill's acquittal confirmed that Lucky Moose's modified objective approach, originally intended to provide battered women and other vulnerable groups with realistic options to defend themselves, had expanded to include armed soldiers confronting threats to their property. The Crown appealed, giving the Court of Appeal for Ontario the opportunity to consider, among other issues, whether Khill's military training should have been taken into account when evaluating the reasonableness of his response; if self-defence under Lucky Moose is a justification, an excuse, or neither; and the significance of Khill's role in the fatal incident. The Court's reasoning is discussed throughout this article alongside other appeals dealing with related legal issues. In August 2020, the Supreme Court of Canada granted Khill leave to appeal.[22] This case will give the Supreme Court of Canada the opportunity to interpret key aspects of Lucky Moose.

Khill arguably provides the leading interpretation of Lucky Moose, but other appeal decisions from across Canada elucidate crucial aspects of the new law. The Court of Appeal of New Brunswick's reasoning in *R v Cormier* reveals the vast availability of legitimate do-it-yourself security through the combination of defence of property and defence of person.[23] In *R v Robertson,* the Court of Appeal for Saskatchewan contends with the demotion of traditional necessity and proportionality safeguards under Lucky Moose and their conversion into "factors" to consider.[24] The Nova Scotia Court of Appeal in *R v Francis* demonstrates how widening the timeframe of the self-defence

20. See *ibid* at paras 6–11.

21. Dan Taekema, "'Why Not Call 911?' Crown Grills Peter Khill About the Night He Killed Jon Styres", *CBC News* (19 June 2018), online: <www.cbc.ca/news/canada/hamilton/styres-khill-trial-hamilton-1.4712716> [perma.cc/X47P-3XSM] [Taekema, "Why Not Call 911?].

22. See *R v Khill*, *supra* note 8, leave to appeal to SCC granted, 39112 (6 August 2020).

23. 2017 NBCA 10.

24. 2020 SKCA 8.

analysis can reverse outcomes so that unlawful violence is deemed "reasonable in the circumstances".[25]

This paper proceeds in the following manner. Section I (Methodology) details the resources and methods used to research and compile the list of key appellate cases on the new self-defence law. Appendix A provides an overview of key appellate cases with substantive discussions of self-defence since the new provisions came into force. Section II (The Heart of Lucky Moose: Reasonableness of the Response) assesses the prevalence of the three self-defence elements (trigger, motive, and response) and the nine reasonableness factors throughout key appeals decisions. Appendix B and Appendix C list respective frequencies and percentages of the elements and factors. Section II(A) examines one reasonableness factor in particular: the accused's role in the incident (section 34(2)(c)) through ten informative cases found in Appendix D. Section III (Scope of the Modified Objective Approach) traces the evolution of the modified objective approach under Lucky Moose. The section identifies reasonableness factors with subjective undertones and flawed trial judgments with support from Appendix E. Section IV (Operation of Longstanding Principles) endeavours to locate traditional self-defence principles and requirements within the new framework, with particular attention to proportionality and necessity (Section IV(A) alongside Appendix F and Appendix G), retreat (Section IV(B) alongside Appendix H), and justification and excuse terminology (Section IV(C) alongside Appendix I). Section V (Hybrid Defences) presents the newly dubbed "Frankendefences" as an area for future research. Appendix J breaks down three groups of hybrid defences and examines their pervasiveness under the new law. The conclusion, which includes recommendations, encourages appellate judges to guide lower courts in the application of the current provision and the operation of longstanding self-defence principles by making use of key appellate cases and patterns discussed throughout the article.

I. Methodology

This study of Canada's new self-defence provision looks across and within cases to understand patterns of legal reasoning pertaining to the new section 34 of the *Criminal Code*. The research team—one professor and four law students—focused on the forest and the trees, qualitatively and quantitatively studying appellate decisions since Lucky Moose came into force on March 11, 2013. The researchers compiled the pool of key appeal cases by performing two independent searches, one on Lexis Advance Quicklaw and the other on WestlawNext Canada. Searches were conducted for the term "self-defence". Results were narrowed to cases published between March 11, 2013 and July

25. 2018 NSCA 7.

15, 2020 and limited to judgments from the appeal courts of each province and territory. Initial searches produced 381 results on Lexis Advance Quicklaw and 405 results on WestlawNext Canada.

Results were then further narrowed. First, the list was narrowed to cases mentioning the term "self-defence" at least three times. This was to ensure that the cases studied would include robust discussions of self-defence law and provide insights into its application. The number of minimum mentions was increased from three to six when the team discovered that cases with fewer than six mentions of the term "self-defence" did not provide sufficient legal reasoning to draw useful conclusions. This reduced the list to 163 results. Second, after reviewing the narrowed list of appeal cases, decisions were excluded if they did not contain substantive discussions of the law of self-defence. For example, cases that focused on procedural and evidentiary matters, rather than the substantive law, were excluded. The list of self-defence cases in Appendix A contains sixty-nine cases. From this list, cases that applied the former provisions were omitted, leaving forty-seven key cases interpreting substantive elements of Lucky Moose. This pool provided an overview of the most important Lucky Moose judgments from appeal courts across Canada.

The research focused on appellate decisions for several reasons. Trial decisions are not always reported, and the number of trial court decisions would be challenging to obtain. There are more than 1,500 unique trial decisions discussing "self-defence" since 2013. Furthermore, when trial decisions are reported, the reasoning behind the key reasonableness assessment is not always provided. This is because sections 34(1)(c) and 34(2) of Lucky Moose leave the reasonableness assessment to finders of fact, and Canadian juries do not provide reasons for their decisions. Meanwhile, appeal decisions provide a great deal of relevant information on how the law has been interpreted. Appellate court reasoning across and within cases is therefore the focus of this study.

II. The Heart of Lucky Moose: Reasonableness of the Response

Self-defence, as defined in section 34(1),[26] lays out the circumstances in which an actor may use unlawful yet reasonable defensive force in response to the use or threat of force from another person:

> Defence — use or threat of force
> 34 (1) A person is not guilty of an offence if
> (a) they believe on reasonable grounds that force is being used

26. Section 34 also applies to defence of others, but the focus of this study was self-defence cases.

> 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.[27]

The forty-seven key appeal cases offer insight into the significance of each self-defence element—trigger, motive, and response—under Lucky Moose. Twenty cases (forty-three per cent) focused entirely on the response element of Lucky Moose, section 34(1)(c).[28] In these cases, judges described the reasonableness of the response (section 34(1)(c)) as "the crux",[29] "the nub",[31] or the "critical issue" of the case.[30] By comparison, only one case turned on the trigger (section 34(1)(a))[32] and two on the motive (section 34(1)(b))[33]. Fourteen remaining cases (thirty-four per cent) analyzed the reasonableness of the response in combination with the other self-defence elements, trigger and/or motive.[34] This overview of cases demonstrates that reasonableness of the response is indeed the heart of Lucky Moose.[35]

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27. *Criminal Code*, *supra* note 12, s 34.

28. See *R v Robertson*, *supra* note 24; *R v Khill*, *supra* note 8; *R v Curran*, 2019 NBCA 27; *R v Takri*, 2019 NBCA 20; *R v AA*, 2019 BCCA 389; *R v Griffith*, 2019 BCCA 37; *R v Randhawa*, 2019 BCCA 15; *R v Doonanco*, 2019 ABCA 118; *R v Mohamad*, 2018 ONCA 966; *R v McPhee*, 2018 ONCA 1016; *R v Francis*, *supra* note 25; *R v Leroux*, 2018 BCSC 1429; *R v Dario*, 2018 BCCA 85; *R v Atzenberger*, 2018 BCCA 296; *R v Whiteley*, 2017 ONCA 804; *R v Jerrett*, 2017 ABCA 43; *R v Rasberry*, 2017 ABCA 135; *R v Kraljevic*, 2016 ONCA 860; *R v Mustard*, 2016 MBCA 40; *R v Hooymans*, 2015 ABCA 290.

29. *R v Rasberry*, *supra* note 28 at para 19.

30. *R v Randhawa*, *supra* note 28.

31. *Ibid*; *R v Francis*, *supra* note 25.

32. See *R v Fougere*, 2019 ONCA 505.

33. See *R v Wright*, 2016 ONCA 546; *R v Foster*, 2019 ONCA 282.

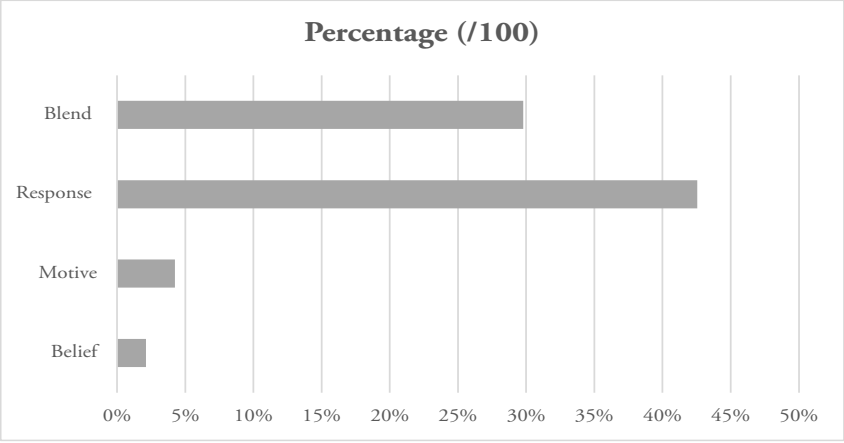
34. See *R v Paul*, 2020 ONCA 259; *R v Barrett*, 2019 SKCA 6; *R v La Force*, 2019 ONCA 522; *R v Billing*, 2019 BCCA 237; *R v Primmer*, 2018 ONCA 306; *R v Brown*, 2018 BCSC 1364; *R v Phillips*, 2017 ONCA 752; *R v Pomanti*, 2017 ONCA 48; *R v Cormier*, *supra* note 23; *R v Winter*, 2017 ABCA 100; *R v Rocchetta*, 2016 ONCA 577; *R v Cunha*, 2016 ONCA 491; *R v Levy*, 2016 NSCA 45; *R v Best*, 2016 NLCA 10.

35. See Roach, "Preliminary", *supra* note 9 ("*[t]he heart of the new self-defence . . . resides in section 34(1)(c)* which respectively require[s] that acts in defence of self and others . . . be 'reasonable in the circumstances.' These requirements will be the critical and perhaps illusive issue in most cases" at 278 [emphasis added]).

Table 1

Self-Defence: Element Findings	Frequency (/47)	Percentage (/100)
Belief (Section 34(1)(a))	1	2%
Motive (Section 34(1)(b))	2	4%
Response (Section 34(1)(c))	20	43%
Blend (Response +)	14	30%

Chart 1



Scholars and judges agree on the "subtle and elusive" quality of "the unstructured 'reasonableness in the circumstances' standard [at] the core of the defence".[36] Numbers now provide further confirmation. Section 34(2) of the *Criminal Code* flows from section 34(1)(c) and provides a non-exhaustive list of factors for triers of fact to consider in assessing the reasonableness of the response:

> 34(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant

36. Paciocco, "The New Defence", *supra* note 9 at 269. See also Weisbord, *supra* note 1 at 374; Alan Brudner, "Constitutionalizing Self-Defence" (2011) 61:4 UTLJ 867 at 897; *R v Khill*, *supra* note 8 ("[t]he approach to reasonableness in s 34(1)(c) and s 34(2) renders the defence created by s 34 more open-ended and flexible than the defences created by the prior self-defence provisions" at para 63); *R v Evans,* 2015 BCCA 46 at para 19; *R v Cormier*, *supra* note 23 at para 56.

> 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;
> (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

Factors that were once mandatory conditions, such as necessity, imminence, proportionality, and retreat, appear as discretionary considerations that depend on the circumstances of the case.[37] It is now for judges and juries to assign weight to any given factor, to assign no weight at all, and/or to devise additional factors.[38]

Despite the flexibility of section 34(2) and the elimination of traditional constraints, appeal courts have given preference to some reasonableness factors over others. Sections 34(2)(b) (imminence and the availability of other means) and 34(2)(g) (nature and proportionality of the response) each appear in approximately fifty per cent of the thirty-four key cases that discuss the response element. Imminence plays a pivotal role in eighteen decisions.[39]

37. See *R v Bengy*, 2015 ONCA 397 at para 47.

38. See *R v Khill*, *supra* note 8 at para 62.

39. See *R v Paul*, *supra* note 34; *R v Barrett*, *supra* note 34; *R v AA*, *supra* note 28; *R v Griffith*, *supra* note 28; *R v Doonanco*, *supra* note 28; *R v Mohamad*, *supra* note 28; *R v McPhee*, *supra* note 28; *R v Leroux*, *supra* note 28; *R v Brown*, *supra* note 34; *R v Dario*, *supra* note 28; *R v Atzenberger*, *supra* note 28; *R v Whiteley*, *supra* note 28; *R v Phillips*, *supra* note 34; *R v Cormier*, *supra* note 23; *R v Rasberry*, *supra* note 28; *R v Rocchetta*, *supra* note 34; *R v Cunha*, *supra* note 34; *R v Levy*, *supra* note 34.

Proportionality plays a pivotal role in sixteen.[40] The remaining six factors in section 34(2) are each at issue in less than thirty per cent of key cases, with sections 34(2)(a) (nature of the force or threat) and 34(2)(c) (role in the incident) appearing with greater frequency than sections 34(2)(d) (use or threat of weapon), 34(2)(e) (physical characteristics), 34(2)(f) (nature of prior relationship and interaction), and 34(2)(h) (response to lawful use of threat). The following chart compares how regularly each of the section 34(2) response factors were applicable in Lucky Moose appeals cases since the law came into force. Also see Appendix A.

Table 2

Reasonable Response Factor: Section 34(2)	Feequency (/34)	Percentage (/100)
a. Nature of the Force or Threat	9	26%
b. Imminence and Other Means Available	18	**53%**
c. Role in the Incident	7	21%
d. Use or Threat of Weapons	5	15%
e. Physical Characteristics	6	18%
f. Nature of Relationship and History of Interaction	4	12%
g. Nature and Proportionality of the Response	16	**47%**
h. Response to Lawful Use of Force or Threat	1	3%

Three key appeals—*R v Mohamad*,[41] *R v Francis*,[42] and *R v Khill*[43]—emphasized the significance of necessity, imminence, and proportionality under Lucky Moose and provided informative reasoning. In *R v Mohamad*, Strathy CJO and Watt and Epstein JJA for the Court of Appeal for Ontario explained:

> The catalogue of factors inform but are not dispositive of the reasonable response element of the justification in section 34(1)(c). Among the factors are (i) the nature of the original force or threat; (ii) the extent to which the actual or threatened

40. See *R v Robertson*, *supra* note 24; *R v Barrett*, *supra* note 34; *R v AA*, *supra* note 28; *R v Billing*, *supra* note 34; *R v Mohamad*, *supra* note 28; *R v McPhee*, *supra* note 28; *R v Leroux*, *supra* note 28; *R v Whiteley*, *supra* note 28; *R v Phillips*, *supra* note 34; *R v Cormier*, *supra* note 23; *R v Rasberry*, *supra* note 28; *R v Winter*, *supra* note 34; *R v Kraljevic*, *supra* note 28; *R v Cunha*, *supra* note 34; *R v Levy*, *supra* note 34; *R v Hooymans*, *supra* note 28.

41. See *supra* note 28 at para 218.

42. See *supra* note 25 at para 32.

43. See *supra* note 8 at para 61.

> use of force was imminent; (iii) the availability of means other than those used by the accused to respond to the potential use of force; and (iv) the nature and proportionality of the accused's actual response to the actual use or threat of force.[44]

Necessity (which is never explicitly mentioned in section 34), imminence, and proportionality, however, are not the entire story of section 34(2) under Lucky Moose. The accused's role in the incident under section 34(2)(c) has served a surprisingly important, malleable function in Lucky Moose jurisprudence.

A. Role in the Incident

Section 34(2)(c) is a Lucky Moose innovation. According to the Court of Appeal for Ontario in *Khill*, the accused's role in the incident "had no equivalent under the previous legislation".[45] Under the former section 35, discussed below, initial aggressors invoking self-defence were required to retreat before using deadly force, but this is different from section 34(2)(c). Section 34(2)(c) requires triers of fact to examine the accused's behaviour throughout the "incident" that gives rise to the "act".[46] Incidents begin at the first sign of trouble, whereas acts narrow the timeline to the seconds leading up to the use of force. The Department of Justice's *Technical Guide for Practitioners* explains that section 34(2)(c) "serves to bring into play considerations surrounding the accused's own role in instigating or escalating the incident".[47] The factor expands upon the "whole factual context and the tableau of the evidence" to examine the accused's overall responsibility.[48]

Appellate courts' determinations of whether reasonableness in the circumstances pertains to the overarching incident or only the ultimate act of force significantly alters their assessments of reasonableness. The question of whether to evaluate the incident in its entirety or to separate the interaction into component parts proved to be a decisive factor in ten of the forty-seven Lucky Moose appeals (twenty-one per cent). Four appeals (nine per cent) assessed the incident as one single transaction (the "single transaction analysis") while six (thirteen per cent) divided the narrative into individual frames (the "freeze-frame analysis"):

44. *Supra* note 28 at para 218.

45. *R v Khill*, *supra* note 8 at para 75.

46. *Ibid*.

47. *Supra* note 7 at 26.

48. *R v Pomanti*, *supra* note 34 at para 23, citing *R v Cunha*, *supra* note 34 at para 24.

Table 3

Single Transaction Cases	Citation	Outcome
R v Paul	2020 ONCA 259	Conviction set aside
R v Khill	2020 ONCA 151	Acquittal set aside
R v Francis	2018 NSCA 7	Conviction set aside
R v Cunha	2016 ONCA 491	Conviction set aside
Key Language "Broader context of the incident" (*Khill* at 83; *Paul* at 40) "Series of steps" (*Khill* at 78) "Series of altercations" (*Paul* at 42) "Single ongoing event" (*Whiteley* at 6) "Full self-defence narrative and factual tableau" (*Pomanti* at 23) "Whole factual context and entire tableau of the evidence" (*Cunha* at 47)		

Table 4

Freeze-Frame Cases	Citation	Outcome
R v Takri	2019 NBCA 20	Conviction upheld
R v AA	2019 BCCA 389	Conviction upheld
R v Forcillo	2018 ONCA 402	Conviction upheld
R v Leroux	2018 BCSC 1429	Conviction upheld
R v Whiteley	2017 ONCA 804	Conviction upheld
R v Pomanti	2017 ONCA 48	Conviction upheld
Key Language "The second confrontation" (*AA* at 15) "This second incident" (*AA* at 36) "Blows could no longer be justified" (*Whiteley* at 6) "As the altercation progressed" (*Whiteley* at 6)		

In *Khill*, the Court of Appeal for Ontario set aside Khill's acquittal and ordered a new trial to "consider whether the accused's behaviour throughout the incident sheds light on the nature and extent of the accused's responsibility for the final confrontation".[49] Justices Strathy, Doherty, and Tulloch reasoned that

49. *R v Khill*, *supra* note 8 at para 76.

the trial judge "left the jury unequipped to grapple with . . . the reasonableness of the act" by failing to instruct the jury on Khill's role in the entire incident.[50]

In their application for leave to appeal to the Supreme Court of Canada, defence attorneys Michael Lacy and Jeff Manishen argued that "what [Khill] did in the lead up to the shooting that killed Jon Styres . . . should not change the fact that he fired in self-defence".[51] According to Lacy and Manishen, Khill perceived his life to be at risk in the seconds prior to shooting Styres and thus, it may have been justifiable for him to pull his trigger within that narrow timeline. The wider timeframe, however, tells another story, one where Khill is the initial aggressor. Section 35 of the pre-Lucky Moose law contained a special provision for initial aggressors and those who "provoked an assault", one that requires "retreat . . . as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose".[52] Lucky Moose has removed this timeframe requirement. Under Lucky Moose, the assessment of Khill's response boils down to whether the finder of fact decides that it was reasonable for Khill "in the circumstances" to use deadly force against Styres.[53]

In *R v Francis*, Oland JA for the Nova Scotia Court of Appeal reviewed the violent altercation between Michelle Francis, a Mi'kmaw woman and sex worker, and Douglas Barrett. Francis and Barrett had traded sex for drugs regularly over the course of five years. On the night of the incident, Francis was in the midst of drug withdrawal and asked Barrett for help. Francis was aware of Barrett's reputation for predation and violence against sex workers but nevertheless got in his truck to procure drugs and then to use clean gear at his residence. She armed herself with a knife when Barrett called her to his bedroom. Despite her resistance to his sexual advances, Barrett got on top of Francis the following morning to have sex. Francis reached for the knife and stabbed Barrett in the back. Francis was charged with assault causing bodily harm. The trial judge found that "there [were] other options . . . apart from stabbing him in the back with the knife, with such force that [she] punctured his lung".[54]

The Nova Scotia Court of Appeal overturned the conviction and allowed the appeal, beginning with "the judge's identification of the stabbing as 'the first violent act'".[55] Justice Oland explained that "the first violent act was not, as

50. *Ibid* at para 85.

51. Dan Taekema, "Peter Khill's Legal Team Files Appeal to Supreme Court after Ontario Court Orders New Trial", *CBC News* (14 May 2020), online: <www.cbc.ca/news/canada/hamilton/peter-khill-jon-styres-supreme-court-1.5569315>.

52. *Criminal Code*, *supra* note 12, s 35(c) as it appeared on 10 March 2013.

53. See *ibid*, s 35(1)(d).

54. *R v Francis*, *supra* note 25 at para 24.

55. *Ibid* at para 25.

the trial judge isolated, the stabbing of Barrett, but rather his sexual assault of the appellant. [Francis] was entitled to defend herself against this assault, within the bounds of [section] 34(1)(c) reasonableness."[56] The trial judge had concentrated on the final act in his freeze-frame analysis rather than considering the whole incident in a single-transaction analysis. The trial decision thereby overlooked gender and racial disparities at play and failed to grapple with the violence experienced by Indigenous sex workers.[57] He instead blamed Francis for not leaving earlier and for bringing a concealed knife into the bedroom. According to the Nova Scotia Court of Appeal, the trial judge "did not take into account Mr. Barrett's intentional application of force [on Francis] in circumstances of a sexual nature such as to violate her sexual integrity".[58] The Court held that the trial judge did not fully consider "several of the relevant circumstances and factors in [section] 34(2)".[59] The Court sent the case back to trial for consideration of the whole incident.

Calls for single transaction analysis instead of the artificial freeze-frame analysis under Lucky Moose can be traced to *R v Cunha*.[60] Valter Cunha made the split-second decision to shoot another man. Cunha was in his apartment having dinner when his upstairs neighbour, Peter Silva, shouted for help from the hallway. Cunha entered the corridor to find Silva under attack by three men. Cunha armed himself and told the principal attacker to freeze. The attacker turned towards him and Cunha shot him twice. Justices MacPherson, Lauwers, and Hourigan for the Court of Appeal for Ontario set aside Cunha's conviction and allowed the appeal because the trial judge failed to assess the entire situation from the perspective of "a frightened homeowner suddenly confronted with armed men in his home".[61] Instead, the trial judge "artificially separated out the sequence of events . . . and failed to pay sufficient attention to the factual context and to the entire tableau of the evidence".[62]

Single transaction analysis prevails in *Cunha*, *Francis*, and *Khill*, but freeze-frame analysis has also been applied under Lucky Moose. In *R v Whiteley*, the accused was assaulted in his apartment but turned the tables on his attackers. What began as self-defence escalated into Whiteley getting "carried away", according to the trial judge, and beating one of his kneeling, defenceless

56. *Ibid* at para 27.

57. See Native Women's Association of Canada, "Sexual Exploitation and Trafficking of Aboriginal Women and Girls: Literature Review and Key Informants Interviews" (October, 2014), online (pdf): *Native Women's Association of Canada* <https://www.nwac.ca/wp-content/uploads/2015/05/2014_NWAC_Human_Trafficking_and_Sexual_Exploitation_Report.pdf>.

58. *R v Francis*, *supra* note 25 at para 32.

59. *Ibid*.

60. S*upra* note 34.

61. *Ibid* at para 47.

62. *Ibid*.

attackers with a metal bar he picked up from the floor, causing serious bodily harm.[63] Justices Doherty, LaForme, and Paciocco for the Court of Appeal for Ontario disagreed with the argument that "the altercation had to be looked at as a single ongoing event".[64] They reasoned that "some of the blows landed with the metal object could not be justified in self-defence" and that "the appellant continued to use deadly force after . . . the use of that degree of force was no longer necessary".[65] Similarly, in *R v Pomanti*, the Court of Appeal for Ontario rejected the argument that "the trial judge failed to appreciate the full self-defence narrative and factual tableau" and that he "broke down the appellant's evidence into its constituent parts".[66]

Whether the reasonableness of defensive force relates to broad incidents or individual acts remains unsettled in Canadian courts. Despite the Court of Appeal for Ontario's attempt in *Khill* to emphasize the overall incident, there is no clear guidance for determining the scope of a particular incident under Lucky Moose and case outcomes are conflicting. Nevertheless, this study reveals that there is an emerging correlation between the approach chosen and the deference given to trial court decisions. On the one hand, cases that applied single transaction analysis consistently set aside trial decisions. On the other hand, cases that applied freeze-frame analysis showed deference to decisions below. See Appendix D.

Triers of fact often frame defensive encounters as either incidents or acts. They are now competing alternatives under Lucky Moose that destabilize the law. The risk is that the methodology employed by triers of fact can predetermine the outcome of the self-defence analysis. Whereas single transaction analysis often sets aside trial decisions, freeze-frame analysis tends to uphold them. The problem is that, in climates of fear, such discretion creates unprecedented space for prosecutors, judges, and juries to infuse the defence with their own preconceived notions of reasonableness.[67]

63. *Supra* note 28 at para 5.

64. *Ibid* at paras 6–8.

65. *Ibid* at para 8.

66. *Supra* note 34 at paras 23–24.

67. See Weisbord, *supra* note 1 at 376.

III. Scope of the Modified Objective Approach

A. The Blueprint

The Supreme Court of Canada's decision in *R v Lavallee* served as a conceptual blueprint for Lucky Moose.[68] In that case, Lavallee shot her abusive spouse Kevin Rust in the back of the head as he left her bedroom. Rust had just beaten Lavallee and threatened to come back and kill her later if she did not kill him first. The justices expanded Canadian self-defence law by interpreting the "reasonableness" of deadly force in light of the defendant's subjective experiences.[69] Justice Bertha Wilson, relying on expert testimony to dispel a number of pervasive myths about battered women, wrote:

> If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to a world inhabited by the hypothetical "reasonable man".[70]

Expert testimony concerning the ability of an accused to perceive danger from her partner was admissible in relation to the issue of whether she reasonably apprehended death or bodily harm.[71] Expert testimony shedding light on why an accused failed to exercise what the trier of fact might view as possible avenues

68. See Department of Justice, *supra* note 7.

> One motivation for the list of factors is that it presents a means of codifying certain relevant considerations that derive from jurisprudence. In particular, two aspects of the landmark SCC decision in *Lavallee* are now codified: imminence of the attack is not a rigid requirement that must be present for the defence to succeed, but rather is a factor to consider in assessing the reasonableness of the accused's actions; and an abusive history between the accused and the victim is a relevant factor in assessing the reasonableness of the accused's actions.

See *Ibid* at 11.

69. *R v Lavallee*, *supra* note 16 at 873–83.

70. *Ibid* at 874.

71. See *ibid* at 870–91.

of escape was also admissible.[72] Relaxing the imminence standard acknowledged the impossible position of women in violent relationships: a rigid imminence standard would condemn abused women to wait for an attack to materialize before using defensive force.[73]

Lavallee galvanized a broader trend in Canadian criminal law to contextualize the objective reasonableness standard in light of the accused's characteristics and history—the modified objective (or "contextual objective" or "individualized objective") approach.[74] *Lavallee* served as impetus to incrementally expand the law of self-defence in the 1990s and 2000s. In *R v McConnell*, for example, the Court factored in expert evidence about the prison environment in determining whether an accused reasonably feared a threat from other inmates.[75] *Lavallee* did not delineate to what extent judges and juries should incorporate the accused's characteristics, situations, or life experiences into the reasonable person standard.

B. Extending Lavallee

In 2018, Khill successfully used *Lavallee*'s modified objective approach in his defence. Khill testified that, as a trained reservist, he reacted instinctively to "neutralize a threat", rather than staying inside and calling the police.[76] Khill's defence team called experts to support his contention that the jury should consider Khill's military training when evaluating the reasonableness

72. See *ibid*.

73. See *ibid* at 883. The Court noted: "I do not think it is an unwarranted generalization to say that due to their size, strength, socialization and lack of training, women are typically no match for men in hand-to-hand combat. The requirement imposed in *Whynot* that a battered woman wait until the physical assault is 'underway' before her apprehensions can be validated in law would, in the words of an American court, be tantamount to sentencing her to 'murder by installment'" (*ibid*). See Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2011*, by Maire Sinha, Catalogue No 85-002-X (Ottawa: Statistics Canada, 25 June 2013) (Statistics Canada states that eighty per cent of the victims of intimate partner violence are women).

74. Roach, "Preliminary", *supra* note 9 at 278.

75. 1995 ABCA 291 at 33–34, 169 AR 231, Conrad JA, dissenting, rev'd *R v McConnell*, [1996] 1 SCR 1075, 196 NR 307 (affirming Conrad JA's dissent). See also *R v Nelson* (1992), 8 OR (3d) 364 at 381, 71 CCC (3d) 449 (an accused with an intellectual impairment affecting their ability to perceive or respond to an assault may be analogous to the position of the so-called battered woman and therefore should not be judged in reference to the perceptions of the ordinary or reasonable person at 381).

76. Taekema, "Why Not Call 911?", *supra* note 21.

of his perception of the threat and his reaction to it.[77] Khill's acquittal and the appeal decision that followed confirmed that Lucky Moose's modified objective approach had grown to encompass armed soldiers confronting threats to their property.

According to legal scholar Vanessa MacDonnell, the modified objective approach, which MacDonnell calls the "hybrid approach" because it blends objective and subjective components, provides an effective way to "assist marginalized and vulnerable accused, whose self-defence claims can be negatively impacted by de-contextualized assumptions about how the 'reasonable person' would or should act in a dangerous situation".[78] Yet Lucky Moose codifies an expansive contextual approach that opens the door to indeterminate subjective dimensions.[79] Examining substantive discussions of the modified objective approach in recent jurisprudence can help to gauge its evolution under the new regime and highlight the subjective factors that drive the self-defence analysis.

C. Appellate Courts and the Modified Objective Approach

Thirty out of forty-seven key self-defence appeal cases discussed the modified objective approach,[80] representing sixty-four per cent of the cases.[81] The search terms used to identify discussions of the modified objective test were "objective", "subjective", "modified", "personal characteristics", "circumstances",

77. See *Criminal Code*, *supra* note 12, ss 34(1)(a), 34(1)(c); Samantha Craggs, "Military Training like Peter Khill's Lasts Decades, Psychologist Says During Murder Trial", *CBC News* (22 June 2018), online: <www.cbc.ca/news/canada/hamilton/khill-trial-1.4718224> [perma.cc/TD3D-VDZS].

78. Vanessa A MacDonnell, "The New Self-Defence Law: Progressive Development or Status Quo?" (2013) 92:2 Can Bar Rev 301 at 302, 326.

79. See *ibid* ("it is worth asking what it means, more broadly, to say that the new section 34 requires the trier of fact to consider context" at 317).

80. Sometimes called "contextual objective approach" or "individualized objective approach".

81. See *R v Robertson*, *supra* note 24; *R v Deslauriers*, 2020 QCCA 484; *R v Paul*, *supra* note 34; *R v Khill*, *supra* note 8; *R v Quash*, 2019 YKCA 8; *R v Barrett*, *supra* note 34; *R v RS*, 2019 ONCA 382; *R v Foster*, *supra* note 33; *R v Curran*, *supra* note 28; *R v AA*, *supra* note 28; *R v Griffith*, *supra* note 28; *R v Delellis*, *supra* note 11; *R v Brandon*, 2019 ABCA 429; *R v Doonanco*, *supra* note 28; *R v Mohamad*, *supra* note 28; *R v Forcillo*, 2018 ONCA 402; *R v Primmer*, *supra* note 34; *R v Francis*, *supra* note 25; *R v Leroux*, *supra* note 28; *R v Dario*, *supra* note 28; *R v Atzenberger*, *supra* note 28; *R v Whiteley*, *supra* note 28; *R v Phillips*, *supra* note 34; *R v Berry*, 2017 ONCA 17; *R v Cormier*, *supra* note 23; *R v Jerrett*, *supra* note 28; *R v Harkes*, 2017 ABCA 229; *R v Rasberry*, *supra* note 28; *R v Power*, 2016 SKCA 29; *R v Kraljevic*, *supra* note 28.

and "experiences". Ten cases discussed the modified objective approach at length, representing twenty-one per cent of key cases.[82] These ten cases critically analyzed the application of the modified objective test by lower courts and provided guidance to trial judges. The remaining cases did not analytically engage with the modified objective test, focused on issues beyond section 34,[83] or briefly glossed over subjective and objective considerations.[84] See Appendix E.

Under Lucky Moose, individual and contextual dimensions such as Battered Woman Syndrome (BWS), the physical characteristics of the parties, the environment and surroundings of the incident, and the age of the parties, have factored into the modified objective approach.

Group 1: Battered Woman Syndrome

In *R v Doonanco*, the Court of Appeal of Alberta invoked *Lavallee* in its discussion of BWS principles. The Court stated that "[t]hese principles must be communicated by the trial judge when instructing the jury in cases involving battered woman syndrome and the issue of self-defence."[85] Although the circumstances in *Doonanco* did not present an opportunity to assess how BWS might operate under Lucky Moose, the Court emphasized that "evidence of BWS, as explained by a qualified expert on a viable fact base, might assist a jury in the interpretation of the evidence".[86]

Evidence reviewed on appeal revealed that Deborah Doonanco was abused by her ex-partner, Kevin Feland. Doonanco divorced Feland in 2000, but they reconciled, and he returned to live with her in 2012. The abuse continued. On the night of Feland's death, he fired his gun inside Doonanco's home.

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82. See *R v Khill*, *supra* note 8; *R v Curran*, *supra* note 28; *R v AA*, *supra* note 28; *R v Doonanco, supra* note 28; *R v Mohamad*, *supra* note 28; *R v Primmer*, *supra* note 34; *R v Dario*, *supra* note 28; *R v Phillips*, *supra* note 34; *R v Berry*, *supra* note 81; *R v Power*, *supra* note 81.

83. See e.g. *R v Forcillo, supra* note 81, where the factors and characteristics of the modified objective approach (state of mind, objective reasonableness) are discussed. However, the primary grounds of appeal concerned the legal permissibility of the Crown's argument(s) and the appellant's motion to adduce fresh evidence on appeal. As a result, the Court's discussions about the test do not produce substantive rules or discourse.

84. See e.g. *R v Robertson*, *supra* note 24, where the discussion of the test was not analytical and did not see substantive engagement from the Court of Appeal for Saskatchewan. The modified objective approach was mentioned in a comment from Don Stuart of Queen's University Faculty of Law. See Don Stuart, Case Comment on *R v Robertson*, (April 2020) 60 CR (7th) at 93–95.

85. *R v Doonanco*, *supra* note 28 at para 40, citing *R v Malott*, [1998] 1 SCR 123 at para 21, 155 DLR (4th) 513.

86. *R v Doonanco*, *supra* note 28 at para 41.

Doonanco approached Feland with the intention of evicting him. She told him to leave, but he threatened her life and reached for his gun. Doonanco grabbed the gun first and pulled the trigger, killing Feland. In evaluating the confrontation, the Court of Appeal of Alberta stressed that "the principal relevance of the BWS defence is its explanation of why a person might remain in a relationship and might not flee the relationship before acting out in desperation".[87] Whether Doonanco was suffering from BWS was not a primary issue in the appeal. Still, following the reasoning in *Lavallee*, the Court considered why a woman might remain in an abusive relationship, the extent of the violence, the accused's ability to perceive danger, and whether the accused believed that killing her abuser was her only option.[88]

Group 2: Physical Characteristics

In *R v Dario*, the British Columbia Court of Appeal emphasized the importance of physical attributes when it explained that "triers of fact are entitled to take into account the physical characteristics of the parties".[89] The Court affirmed that physical characteristics are relevant to "determining whether the accused reasonably feared for their safety and whether they reasonably believed their actions were necessary to protect themselves from harm".[90] The Court ultimately dismissed the appeal due to the physical discrepancies between Dario and his opponents. The accused was taller, heavier, and stronger than his victims. The Court concluded that "regardless of which self-defence provision is applicable, the personal characteristics of the participants have been considered a relevant consideration".[91]

Group 3: Environment and Surroundings

Under Lucky Moose, Canadian courts have considered the environment and surroundings of the accused when assessing whether their response was reasonable in the circumstances. In *R v Primmer*, the accused and complainant were inmates in a correctional facility.[92] The complainant publicly challenged Primmer's authority amongst fellow inmates, whereupon Primmer punched the complainant twenty-five to thirty times. Primmer argued that he acted in self-defence as the complainant broke the "inmate's code".[93] He was convicted of

87. *Ibid* at para 190.

88. See *ibid* at para 40.

89. *R v Dario*, *supra* note 28 at para 46.

90. *Ibid* at para 46.

91. *Ibid* at para 49.

92. See *supra* note 34 at para 1.

93. *Ibid* at para 3.

assault causing bodily harm and appealed. The Court of Appeal for Ontario held that "[t]he prison setting and the 'inmate's code' had to be considered as crucial contextual factors in assessing self-defence."[94] However, the Court cautioned against overemphasizing the contextual factor Primmer raised, stating that the prison context "does not trump the *Criminal Code*'s legal definition of self-defence".[95] The accused argued that the trial judge failed to recognize that the "inmate's code" creates "certain norms and standards which required the appellant to use force to respond to the complainant's challenge or face at some point a violent attack from the complainant or other inmates".[96] The Court disagreed and ruled that the trial judge properly took the prison context into account. *Primmer* demonstrates that while the modified objective test permits some degree of contextualization, the test remains objective under Lucky Moose.[97] The environment of an accused is relevant to the reasonableness of their actions, but the contextual factor cannot "undermine the rationale behind adopting an objective test".[98]

Group 4: Age

Fifteen-year-old AA was convicted of assault with a weapon and assault causing bodily harm.[99] He appealed, arguing that his age should have factored into a contextual reasonableness analysis. The British Columbia Court of Appeal found that "the judge properly considered AA's youth in his analysis of section 34(2)(e) of the *Code*, which concerns the size, age, gender, and physical capabilities of the parties".[100] The Court concluded that although age is an important factor for consideration in section 34(2)(e) of the *Criminal Code*, "it is not determinative", and dismissed the appeal.[101]

D. Drawing the Line for Lower Courts

While appeals judges showed deference to lower courts in *Doonanco*, *Dario*, *Primmer*, and *AA*, they overturned the trial decision in *R v Curran* on the basis

94. *Ibid* at para 6.

95. *Ibid*.

96. *Ibid* at para 3.

97. See *ibid* at para 7.

98. MacDonnell, *supra* note 78 at 318.

99. See *R v AA*, *supra* note 28; *R v [EE] and [AA]* (12 April 2018), Duncan 4126-3-C (BC Prov Ct).

100. *R v AA*, *supra* note 28 at para 33.

101. *Ibid* at para 33, 35.

of the modified objective approach.[102] In *Curran*, tensions escalated between the accused and the complainant at Wize Guyz in Moncton, New Brunswick. The complainant, who was "drunk and belligerent",[103] followed Curran out of the bar and warned that "things were going to get bloody".[104] Curran, threatened by his opponent's height and weight, drew a knife and stabbed the complainant four times. Although Curran was acquitted of aggravated assault at trial, the Court of Appeal of New Brunswick overturned the decision, finding that "the trial judge applied a purely subjective test in determining whether the act committed by Curran was reasonable in the circumstances".[105] The trial judge erroneously "'climbed into the skin' of Curran and viewed his actions through a subjective lens, and not that of the objectively reasonable person in the community".[106] The correct inquiry was not "whether Curran believed that he acted reasonably under the circumstances, but rather whether the objectively reasonable person in the community would view it as being so".[107]

The Court of Appeal for Ontario made a similar determination with similar reasoning in *R v Phillips*.[108] Phillips brought a sawed-off shotgun to a fistfight outside of Jack's Bar in London, Ontario. The accused armed himself to protect his friend, who had squared off in preparation to fight. Phillips fired the shotgun at the unarmed victim, killing him at the scene. The Court ruled that the situation "left little room" for Phillips to successfully plead self-defence "unless the jury 'climbed into the skin of the respondent and accepted as reasonable a sociopathic view of appropriate dispute resolution' and accepted the moral code of the criminal sub-culture in which the appellant operated".[109]

R v Berry and *R v Power*,[110] post-Lucky Moose cases that applied the former self-defence provisions, rejected contextual factors as too far-reaching. In *Berry*, the accused appealed his conviction of second degree murder on the ground that the trial judge erred by overlooking how his reduced cognitive ability affected his personality, his psychological makeup, and his use of defensive force.[111] At trial, expert evidence was presented concerning the reduced cognitive and social capacities of the accused. The Court of Appeal for Ontario, however, rejected the appeal and asserted that "to permit the

102. See *R v Curran*, *supra* note 28; *R v Berry*, *supra* note 81; *R v Power*, *supra* note 81.

103. *R v Curran*, *supra* note 28 at para 3.

104. *Ibid* at para 4.

105. *Ibid* at para 17.

106. *Ibid*.

107. *Ibid* at para 20.

108. *Supra* note 34.

109. *Ibid* at para 98.

110. See *R v Berry*, *supra* note 81; *R v Power*, *supra* note 81.

111. See *R v Berry*, *supra* note 81 at para 69.

appellant to rely on the psychological makeup he puts forward here as an explanation for his actions would improperly conflate the subjective and objective components of the test".[112] The Court quoted Doherty JA in *R v Pilon*, who observed that to take on the worldview put forth by the accused "would be to effectively eliminate the 'reasonableness' requirement from the defence of self-defence. Instead of reflecting community values and the community perception of when a killing is justified, the validity of the self-defence justification would [lie] entirely in the eye of the killer."[113]

In *Power*, Constable Power push-kicked the homeless complainant during an arrest.[114] Power was aware that the complainant suffered from chronic alcoholism and that he was in poor mental and physical condition. Power was over six feet tall and weighed approximately 215 pounds at the time of the offence. The accused argued that his use of force was prompted by his previous interactions with the complainant. Power had seen the complainant "resist arrest passively and physically on occasion".[115] Thus, when the man quickly "came towards him", he resorted to force.[116] Power was convicted of assault causing bodily harm at trial. The conviction was overturned at the Court of Queen's Bench for Saskatchewan but was restored at the Court of Appeal for Saskatchewan. The justices found that the Queen's Bench erred in its "unnecessary focus on Constable Power's subjective belief" of the threat of violence.[117] Despite past interactions and fears that the complainant was "contagious" and "violent", the applicable test required the Queen's Bench to apply the objective reasonable person standard to evaluate his subjective perceptions and beliefs.[118]

In the wake of *Lavallee*, Canadian courts continue to seek the right balance between objective and contextual dimensions of the self-defence inquiry. They have not yet managed to establish principled limits on the subjectivization of the objective standard contained in sections 34(1)(c) and 34(2). Recent appeal cases provide examples of contextual factors that should be taken into account under Lucky Moose—BWS, prison context, diminished intellectual capacity, military training—but no unifying rationale. The *Khill* decision and appeal demonstrate the potential expansiveness of the modified objective approach under Lucky Moose and some of the implications of unchecked contextualization. *Khill* also provides an opportunity for the Supreme Court of Canada to establish principled limits on the modified objective approach that will assist trial courts deciding self-defence cases.

112. *Ibid* at para 73.

113. *Ibid*.

114. See *R v Power*, *supra* note 81 at para 7.

115. *Ibid* at para 4.

116. *Ibid* at para 9.

117. *Ibid* at para 38.

118. *Ibid* at para 94.

IV. Operation of Longstanding Self-Defence Principles

A. Proportionality and Necessity

Proportionality and necessity are longstanding requirements of self-defence in most common law jurisdictions.[119] For example, under Canada's former section 34(1), "[s]elf-defence against unprovoked assault": "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."[120] Necessity and proportionality requirements under the former section 35 were even more exacting for initial aggressors and contained a retreat requirement:

> 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.[121]

119. See Weisbord, *supra* note 1 at 356–68.

120. *Criminal Code*, *supra* note 12, s 34(1) as it appeared on 10 March 2013.

121. *Ibid*, s 35 as it appeared on 10 March 2013.

Under Lucky Moose, however, the language of necessity was eliminated.[122] The language of proportionality was diluted by adding "nature and proportionality of the person's response", and proportionality became one of several discretionary factors for finders of fact to consider in assessing reasonableness of the response.[123] Complicating matters further, appellate courts do not strictly consider proportionality under section 34(2)(g); instead, courts often consider proportionality under section 34 as a whole, as discussed below.

In *R v Gunning*, a case that applied the now-revoked defence of house or property provision under section 41, Charron J for a unanimous Supreme Court of Canada noted that the proportionality approach had become an inquiry into whether defensive force was "reasonable in all the circumstances".[124] Justice Abella later confirmed this in *R v Szczerbaniwicz* when she stated that proportionality *is* reasonableness in all the circumstances.[125] Under the new law, proportionality—a factor the Supreme Court of Canada previously equated with the reasonableness analysis—becomes one factor among many which may be considered. According to the Court of Appeal for Saskatchewan in *R v Robertson*, proportionality between the defensive act and the nature of the force or threat is now only one factor to be considered, "rather than being an essential element of the defence, as was the case under the former provisions".[126]

In *Robertson*, the Court of Appeal for Saskatchewan commented on the scope of the proportionality analysis under the new defence of person provision. The Court held that the old law required an accused to use "'no more [force] than is necessary' to defend" themselves, but the new law includes no such wording.[127] The Court went on to note that the new provision does not require an accused to engage in "some form of weighing exercise before determining what level or type of force is necessary to respond to an attack".[128] The new section 34 does not limit defensive force to "the bare minimum necessary in order to be lawful".[129] Instead, the determination of reasonableness is "dynamic" and "less rigid".[130]

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122. Necessity may arguably be found as a factor in assessing reasonableness of the response under 34(2)(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" (*ibid*, s 34(2)(b)).

123. *Ibid*, s 34(2)(g): "the nature and proportionality of the person's response to the use or threat of force".

124. 2005 SCC 27 at para 25.

125. 2010 SCC 15 at paras 20–21.

126. *Supra* note 24 at para 43.

127. *Ibid* at para 44.

128. *Ibid*.

129. *Ibid* at para 45.

130. *Ibid* at paras 44–45.

(i) Data from Key Appellate Cases

Proportionality was discussed at length in twenty-three cases, representing forty-nine per cent of the forty-seven appeal cases studied.[131] Though proportionality is listed as a factor under new section 34(2)(g), proportionality is often referred to generally under section 34(2), without express reference to section 34(2)(g). In thirteen cases, appeal courts included proportionality under a general discussion of section 34 and the 34(2) factors.[132] Proportionality was discussed generally under section 34(1), which includes trigger, motive, and response, in three cases.[133] In seven cases, proportionality was expressly assessed under section 34(2)(g).[134] In two cases, proportionality was discussed without reference to any provisions.[135]

In all twenty-three cases that discussed proportionality, the accused was convicted at trial. Of these, only six of the appeals were allowed and new trials ordered. However, of these six cases, half were overturned on issues unrelated to proportionality. These findings, though complex, suggest that proportionality continues to play an influential role in the reasonableness analysis and that appeal judges often defer to proportionality assessments made at trial.

131. See *R v Robertson*, *supra* note 24; *R v Paul*, *supra* note 34; *R v La Force*, *supra* note 34; *R v Fougere*, *supra* note 32; *R v Takri*, *supra* note 28; *R v AA*, *supra* note 28; *R v Griffith*, *supra* note 28; *R v Billing*, *supra* note 34; *R v Mohamad*, *supra* note 28; *R v McPhee*, *supra* note 28; *R v Francis*, *supra* note 25; *R v Leroux*, *supra* note 28; *R v Brown*, *supra* note 34; *R v Whiteley*, *supra* note 28; *R v Phillips*, *supra* note 34; *R v Pomanti*, *supra* note 34; *R v Cormier*, *supra* note 23; *R v Rasberry*, *supra* note 28; *R v Winter*, *supra* note 34; *R v Kraljevic*, *supra* note 28; *R v Cunha*, *supra* note 34; *R v Levy*, *supra* note 34; *R v Hooymans*, *supra* note 28.

132. See *R v Paul*, *supra* note 34; *R v La Force*, *supra* note 34; *R v Fougere*, *supra* note 32; *R v Takri*, *supra* note 28; *R v Griffith*, *supra* note 28; *R v Francis*, *supra* note 25; *R v Leroux*, *supra* note 28; *R v Brown*, *supra* note 34; *R v Whiteley*, *supra* note 28; *R v Phillips*, *supra* note 34; *R v Pomanti*, *supra* note 34; *R v Kraljevic*, *supra* note 28; *R v Cunha*, *supra* note 34.

133. See *R v Robertson*, *supra* note 24; *R v Mohamad*, *supra* note 28; *R v Winter*, *supra* note 34. *R v Robertson* mentions proportionality under both section 34(1)(c) and section 34(2)(g) and thus it is counted in both categories.

134. See *R v Robertson*, *supra* note 24; *R v AA*, *supra* note 28; *R v Billing*, *supra* note 34; *R v McPhee*, *supra* note 28; *R v Cormier*, *supra* note 23; *R v Rasberry*, *supra* note 28; *R v Levy*, *supra* note 34.

135. See *R v Hooymans*, *supra* note 28; *R v Forcillo*, *supra* note 81.

Table 5

Proportionality: General Findings	Frequency (/47)	Percentage (/100)
Proportionality and Necessity Decisions	23	49%
Proportionality Under Section 34 Generally	13	28%
Proportionality Under Section 34(1)	3	6%
Proportionality Under Section 34(2)(g)	7	15%
Proportionality at Random	2	4%

(ii) Types of Proportional and Disproportional Acts

Appellate courts used language such as "disproportionate",[136] "excessive force",[137] "no longer necessary",[138] "gratuitous",[139] and "out of proportion"[140] to refer to disproportional acts. Proportionality assessments within the key appeal cases fall into three general groups. The first group involves the disproportionate use of force following the neutralization of a threat. In these cases, the accused was initially justified in acting in self-defence, but their defensive acts became disproportionate and unnecessary when they continued to assault their subdued attacker. The second group of cases involve disproportionality on the basis of physical characteristics. In these cases, the courts compared the physical traits of the accused and their attackers and concluded that the accused could not have acted in self-defence due to their larger stature. In the final group of cases, the courts concluded that the level of force used to neutralize the initial threat was unbalanced and unmatched, or that the accused's actions were offensive in nature.

Group 1: Use of Force Following Neutralization of Threat

The key appeal cases illustrate that proportionality and necessity are typically treated as one and the same. Often, an unnecessary act is a disproportional act. In the cases of *R v Paul*, *R v Takri*, *R v Pomanti*, *R v Forcillo*, *R v Leroux*, *R v Whiteley*, and *R v Kraljevic*, the trial judges held that the accused failed

136. *R v Griffith*, *supra* note 28 at para 34.

137. *R v Leroux*, *supra* note 28 at para 32.

138. *R v Whiteley*, *supra* note 28 at para 8.

139. *R v AA*, *supra* note 28 at para 39; *R v Pomanti*, *supra* note 34 at para 5.

140. *R v McPhee*, *supra* note 28 at para 20.

to make out the defence of self-defence on the basis that their actions were unnecessary as the threat had been neutralized.[141] In these cases, proportionate defensive actions became disproportionate when the amount of force used was unnecessary to defend oneself.

In *Takri*, the Court of Appeal of New Brunswick upheld the conviction of the inmate accused who continued to assault his attacker at the Atlantic Institution.[142] The Court affirmed the trial judge's finding that "Takri initially acted in self-defence; however, when the threat was neutralized, his continued assault on LeBlanc was both disproportionate and unreasonable".[143] Similarly, in *Whiteley*, the Court of Appeal for Ontario upheld the finding of unnecessary and disproportionate use of force at trial.[144] As previously discussed, the trial judge found that Whiteley "got carried away" in repeatedly striking the complainant despite there being "very minimal physical danger" to the accused once the initial threat was neutralized.[145] The Court affirmed that the trial judge was correct in holding that "the appellant continued to use deadly force after, on a reasonable assessment of the circumstances as perceived by the appellant, the use of that degree of force was no longer necessary as the appellant was not in any imminent danger".[146] In this group of cases, necessity, proportionality, and the freeze-frame analysis were combined into a single, legally acceptable analysis.

Group 2: Difference in Physical Size and Characteristics

In the second group of cases, the trial judges compared the age and body size of the accused and the initial aggressor to assess proportionality and necessity. The cases of *R v Primmer*, *R v Leroux*, *R v Brown*, and *R v Winter* fall into this category. These cases were not determined solely on the basis of physical characteristics, but the analysis focused heavily on the comparison of physical traits. In *Winter*, the trial judge found that the complainant was smaller, older, and more intoxicated than Winter, who outweighed the complainant by nearly one hundred pounds.[147] The trial judge concluded, "the nature and proportionality of Winter's response to the use or threat of force was excessive

141. See *R v Paul*, *supra* note 34; *R v Takri*, *supra* note 28; *R v Pomanti*, *supra* note 34; *R v Forcillo*, *supra* note 81; *R v Leroux*, *supra* note 28; *R v Whiteley*, *supra* note 28; *R v Kraljevic*, *supra* note 28.

142. *R v Takri*, *supra* note 28.

143. *Ibid* at para 7.

144. See *R v Whiteley*, *supra* note 28.

145. *Ibid* at para 5.

146. *Ibid* at para 8.

147. See *R v Winter*, *supra* note 34 at para 5.

and disproportionate in all the circumstances".[148] The trial court in *R v Green* applied Lucky Moose and found the accused's acts disproportionate due to the stark difference in size between accused and complainant.[149] The accused argued that he was attacked by his apartment maintenance worker and that he punched him in the face to defend himself.[150] The trial judge held that the accused "had a very great physical advantage on the victim regarding their age, their size and their capabilities" and as such, the appellant's response was "completely disproportionate" and "not reasonable".[151] The size, age, gender, and physical capabilities of the parties explicitly fall under section 34(2)(e) of Lucky Moose.[152] Yet, in the cases listed above, the trial judges instead linked the physical characteristics of the parties to the proportionality and necessity assessment.

Group 3: Excessive Force and Offensive Acts

In the final group of cases, the trial judges found that the accused simply employed a degree of force unmatched to the amount of force used against them, or that the accused engaged in offensive acts. In the cases of *R v La Force*, *R v AA*, *R v Griffith*, *R v McPhee*, *R v Primmer*, *R v Pomanti*, *R v Rasberry*, *R v Winter*, and *R v Kraljevic*, the trial judges reasoned that the use of force was excessive and disproportionate, or that the accused did not act in defence to an attack or perceived threat.[153] In *La Force*, a fight broke out between the accused and the complainant, who were dating the same man. The accused stabbed the complainant with a pair of scissors and then bit her on the shoulder, ribcage, and breasts.[154] The accused had argued that she was "entitled to use as much force as is necessary to defend herself from attack" under section 34.[155] The Court of Appeal for Ontario disagreed and held that the accused engaged in offensive actions which were not for the purpose of defending herself, and thus

148. *Ibid*.

149. See 2015 QCCA 2109. The trial judge applied the new law and the Quebec Court of Appeal ordered a new trial on the basis that she should have applied the old law. However, this case is included in the discussion as it still involves analysis under the new law.

150. *Ibid*. This case was overturned on other grounds.

151. *Ibid* at para 15.

152. *Criminal Code*, *supra* note 12, s 34(2)(e).

153. See *R v La Force*, *supra* note 34; *R v AA*, *supra* note 28; *R v Griffith*, *supra* note 28; *R v McPhee*, *supra* note 28; *R v Primmer*, *supra* note 34; *R v Pomanti*, *supra* note 34; *R v Rasberry*, *supra* note 28; *R v Winter*, *supra* note 34; *R v Kraljevic*, *supra* note 28.

154. See *R v La Force*, *supra* note 34.

155. *Ibid* at para 7.

were not reasonable in the circumstances.[156] Similarly, in *Winter*, the accused struck the complainant in the face at an engagement party, causing severe injury to his eye, with no apparent threat from the complainant.[157] Winter argued that the complainant walked towards him in a "menacing way", but the trial judge held that "the nature and proportionality of Winter's response to the use or threat of force was excessive and disproportionate in all the circumstances".[158]

In *McPhee*, another case from the prison context, the accused climbed down from his bunk and engaged in a fight with his prison cellmate.[159] The accused punched his cellmate in the face and broke his orbital bone. The trial judge and the Court of Appeal for Ontario both held that the accused's actions were "totally out of proportion" to the cellmate's "ineffectual punches that did not land".[160] In the extreme case of *Rasberry*, the accused used three knives to attack his unarmed neighbour after his neighbour's homosexual advances.[161] The trial judge found that the "amount of force used by Rasberry of 23 stab wounds and 14 slash wounds, and the use of three knives in these events is so far out of proportion to the force or threat against the accused as to render the accused's actions to be unreasonable".[162]

The foregoing cases fall well within the three categories of proportionality identified in this paper. However, proportionality remains an elusive concept. It remains unclear whether proportionality is defined primarily by the necessity of force, the level of force used, the physical characteristics of the parties, or some other principle. Cases where courts found the accused's actions to be offensive, not defensive, seem better resolved under section 34(1)(b) [motive], which requires a defensive purpose. Further conflation of the proportionality analysis under Lucky Moose stems from the use of the *Baxter* instruction. The following section of this paper examines how appellate courts sporadically qualify their proportionality assessment with a recognition that "people in stressful and dangerous situations do not have room for detached reflection" and cannot be expected to "weigh to a nicety, the exact measure of defensive action".[163]

156. *Ibid* at paras 11–12.

157. See *R v Winter*, *supra* note 34 at para 2.

158. *Ibid* at para 5.

159. See *R v McPhee*, *supra* note 28.

160. *Ibid* at para 20; *R v McPhee*, 2015 ONSC 3001 at para 175.

161. See *R v Rasberry*, *supra* note 28.

162. *Ibid* at para 20.

163. *R v Billing*, *supra* note 34 at para 16; *R v Baxter*, *supra* note 17 at 111.

(iii) The Baxter Instruction

R v Baxter, a frequently cited pre-Lucky Moose self-defence case, initially borrowed its "weigh to a nicety" language from the Privy Council decision in *Palmer v The Queen*.[164] In *R v Hebert*, the Supreme Court of Canada endorsed *Baxter* as an appropriate instruction in self-defence cases involving allegations of excessive force.[165] In *R v Sinclair*, the *Baxter* instruction was said to have reached "near-canonical status".[166] Indeed, *Baxter* is mentioned and applied in the majority of self-defence cases. The research team was interested to learn whether, under Lucky Moose, the *Baxter* instruction has overtaken the proportionality rule.

In *Robertson*, the accused appealed, in part, on the basis that the trial judge failed to provide the *Baxter* instruction to the jury. The Court of Appeal for Saskatchewan dismissed this argument and held that "a *Baxter* instruction is not, and has never been, an absolute requirement of proper jury instruction" and "such an instruction is arguably of less importance under the current self-defence provisions".[167] Of the twenty-three appeal cases that discussed proportionality, two of the courts (including the *Robertson* Court) maintained that the *Baxter* instruction is not mandatory.[168] In three of twenty-three proportionality cases, the trial decision was appealed, in whole or in part, due to the trial judge's failure to instruct the jury on the *Baxter* instruction.[169] The ground of appeal failed in all three cases as courts have conclusively stated that the *Baxter* instruction is not mandatory. However, twelve cases (fifty-two per cent) applied the *Baxter* instruction in some shape or form.[170] Of the six cases in which the trial decision was overturned,[171] two were overturned due to the lower court's error in applying the *Baxter* instruction.[172]

164. (1971) 55 Cr App R 223 at 242, [1971] All ER 1077.

165. [1996] 2 SCR 272 at para 18, 135 DLR (4th) 577.

166. 2017 ONCA 38 at para 118 (not counted in the pool of forty-seven key appeal cases).

167. *R v Robertson*, *supra* note 24 at para 43.

168. See *ibid*; *R v Billing*, *supra* note 34 at para 23.

169. See *R v Robertson*, *supra* note 24; *R v Billing*, *supra* note 34; *R v Leroux, supra* note 28.

170. See *R v Paul*, *supra* note 34; *R v Griffith*, *supra* note 28; *R v Mohamad*, *supra* note 28; *R v McPhee*, *supra* note 28; *R v Francis*, *supra* note 25; *R v Leroux*, *supra* note 28; *R v Brown*, *supra* note 34; *R v Phillips*, *supra* note 34; *R v Rasberry*, *supra* note 28; *R v Kraljevic*, *supra* note 28; *R v Cunha*, *supra* note 34; *R v Levy*, *supra* note 34.

171. See *R v Robertson*, *supra* note 24; *R v Paul*, *supra* note 34; *R v Francis*, *supra* note 25; *R v Cunha*, *supra* note 34, *R v Fougere*, *supra* note 32; *R v Cormier*, *supra* note 23.

172. See *R v Paul*, *supra* note 34; *R v Cunha*, *supra* note 34.

Table 6

Proportionality: *Baxter* Findings	Frequency (/23)	Percentage (/100)
Application of *Baxter*	12	52%
Baxter "Not Mandatory"	2	9%
Appeal Based on Failure to Provide *Baxter* Instruction	3	13%

In the case of *R v Billing*, the accused appealed, in part, due to the omission of *Baxter* at trial. The British Columbia Court of Appeal held that the instruction for the jury to use their "common sense" in their assessment was tantamount to providing the *Baxter* instruction.[173] The Court referenced *Sinclair* which held, "the subject matter of the *Baxter* instruction is something a jury is likely to consider even without being specifically told to do so".[174] In *R v Gabriel*, a 2018 case that applied the former self-defence provisions, the Nova Scotia Court of Appeal also upheld an omission of *Baxter* on the grounds that the charge instructed the jury to apply their "common sense".[175] These appellate courts exhibited high levels of confidence that jury members would remain cognizant of the boundaries and nuances of proportionate force without explicit guidance.

Some lower court decisions have been overturned for overemphasizing or under-emphasizing the objective elements of proportionality. In *Cunha*, the trial decision was overturned for holding the accused to a standard of perfection and for failing to be alive to the fact that people in stressful situations do not have time for subtle reflection.[176] The *Cunha* Court found that the trial judge failed to take into account the "entire situation from Cunha's [subjective] perspective".[177] Interestingly, the trial decision in *Curran* was overturned for employing this very approach.[178] The trial judgment in *Curran* was overturned by the Court of Appeal of New Brunswick for overemphasizing the subjective element of the proportionality inquiry.[179] In *Curran*, the Crown appealed the acquittal of an accused involved in a stabbing outside a bar. The trial judge held that the accused had "no choice but to" stab an aggressor who had his arms up

173. *R v Billing*, *supra* note 34 at para 25.

174. *Ibid* at para 26.

175. 2018 NSCA 60 at para 60.

176. See *R v Cunha*, *supra* note 34 at para 25.

177. *Ibid* at para 47.

178. See *R v Curran*, *supra* note 28.

179. See *ibid* at para 17.

in surrender.[180] The Court of Appeal held that the trial judge "climbed into the skin of Curran and viewed his actions through a subjective lens, and not that of the objectively reasonable person in the community".[181] The Court recognized that assessing whether an act is reasonable in the circumstances is a "highly contextual, fact-specific exercise" but ultimately found that this judge went too far in his contextual approach.[182]

Lucky Moose relegated the once-mandatory safeguard of proportionality to one of nine discretionary factors and the weight of its application was left with the trier of fact. Proportionality discussions nevertheless emerged in half of the key appeal cases studied. Courts continue to inject proportionality and the *Baxter* instruction into the self-defence inquiry, despite the discretionary nature of this longstanding principle under Lucky Moose. Courts, however, struggle to draw the line between an excessively objective proportionality requirement that pits the accused against the "perfect" reasonable person, and an excessively subjective approach that excuses excessive force due to the intense and dynamic nature of the circumstances. Without further judicial guidance about its content and limits, the *Baxter* instruction is likely to further confound the proportionality analysis under Lucky Moose.

(iv) Necessity

Under the traditional common law formulation of self-defence, a defendant successfully makes out a claim of self-defence when they show that they were confronted by a serious threat of bodily harm or death, the threat was imminent, and the response was both necessary and proportionate.[183] Canada's pre-2012 self-defence provisions are rooted in necessity.[184] Under Lucky Moose, necessity is never mentioned. One way to understand the place of necessity in Canada's current self-defence law is to look to appellate decisions. Of the forty-seven Lucky Moose cases containing substantive self-defence analysis, eleven cases contained a relevant discussion of necessity.[185] Of the eleven cases that discuss

181. *Ibid* at para 17.

182. *Ibid* at para 23.

183. See VF Nourse, "Self-Defense and Subjectivity" (2001) 68:4 U Chicago L Rev 1235 at 1239; Wayne R LaFave, *Criminal Law*, 3rd ed (St Paul: West, 2000) at 495–96. On the "objectivity" of this requirement, see George P Fletcher, "Domination in the Theory of Justification and Excuse" (1996) 57:3 U Pitt L Rev 553 ("imminence, necessity and proportionality—speak to the objective characteristics of" self-defence claims at 561).

184. See *Criminal Code*, *supra* note 12, ss 34 (self-defence against unprovoked assault), 35 (self-defence in case of aggression), 37 (preventing assault).

185. See *R v Robertson*, *supra* note 24; *R v Khill*, *supra* note 8; *R v AA*, *supra* note 28; *R v*

necessity, three cases discuss it generally under the three-pronged test of self-defence under section 34(1) without specifying a particular provision, or 34(1)(c), the response element of Lucky Moose.[186] One case involving excessive force by law enforcement discusses necessity under section 34 generally and under section 34 in tandem with section 26, the *Criminal Code* provision prohibiting excessive force by the police.[187] Eight cases out of forty-seven discuss necessity under the section 34(2) response factors, but they vary in terms of which factor is applied.[188]

Table 7

Necessity: General Findings	Frequency (/47)	Percentage (/100)
Necessity Discussion	11	23%
Necessity Under Section 34(1) or 34(1)(c)	3	6%
Necessity Under Section 34(2)	8	17%
Necessity Under Section 34(2)(b)	3	6%
Necessity Under Section 34(2)(e)	1	2%
Necessity Under Section 34(2)(f)	1	2%
Necessity Under Section 34(2)(g)	3	6%
Necessity Under Section 34(2)(e)	1	2%

Forcillo, *supra* note 81; *R v McPhee*, *supra* note 28; *R v Dario*, *supra* note 28; *R v Whiteley*, *supra* note 28; *R v Phillips*, *supra* note 34; *R v Winter*, *supra* note 34; *R v Cunha*, *supra* note 34; *R v Hooymans*, *supra* note 28. *R v Forcillo* contains some discussion of necessity under both section 34 (self-defence) and section 26 (excessive force by person authorized by law to use force).

186. See *R v Robertson*, *supra* note 24; *R v AA*, *supra* note 28; *R v Winter*, *supra* note 34.

187. See *R v Forcillo*, *supra* note 81; *Criminal Code*, *supra* note 12 ("[e]very one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess", s 26).

188. See *R v Khill*, *supra* note 8; *R v McPhee*, *supra* note 28; *R v Dario*, *supra* note 28; *R v Whiteley*, *supra* note 28; *R v Phillips*, *supra* note 34; *R v Winter*, *supra* note 34; *R v Cunha*, *supra* note 34; *R v Hooymans*, *supra* note 28. *Winter* is counted in both the number of cases that discuss necessity under section 34(1) and the number of cases that discuss necessity under the section 34(2) factors. The trial judge explicitly referenced section 34(1) but then made references to the section 34(2)(g) factor of "the nature and proportionality of the person's response to the use or threat of force".

Three cases held that the defensive response was unnecessary under section 34(2)(b) because the use of force was not imminent and/or there were other available means to respond.[189] In *R v McPhee*, discussed above, the accused climbed down from his bunk and punched his cellmate. The trial judge noted that "[t]here were ample other means available to respond to the potential use of force" and that "[i]t was totally unnecessary in the circumstances" for the accused to climb down and punch his cellmate.[190] In *R v Phillips*, the Court of Appeal for Ontario cited the Supreme Court of Canada's decision in *Cinous* in which the Court held that the former self-defence laws were intended to cover situations of "last resort" and that "a jury would have to accept that the accused believed on reasonable grounds that his own safety and survival depended on killing the victim at that moment" in order for the defence to succeed.[191] Phillips admitted that it was not strictly necessary to shoot the deceased. The Court of Appeal for Ontario upheld his conviction, reasoning that section 34(2) entitled a jury to consider whether the accused "availed himself of other alternatives in the course of action he undertook".[192]

One case, *R v Dario*, discussed necessity under section 34(2)(e), "the size, age, gender and physical capabilities of the parties to the incident".[193] The British Columbia Court of Appeal held that triers of fact are entitled to compare the physical characteristics of the parties and that "[n]o one would question that the fact that an accused is shorter, lighter, and weaker than the alleged victim is relevant to determining whether the accused reasonably feared for their safety and whether they reasonably believed their actions were necessary to protect themselves from harm."[194] The physical difference between the parties was factored into the necessity of the use of defensive force.

In *R v Cunha*, the trial judge dismissed the accused's self-defence claim, holding "[t]here was no history between [the parties] which would have fed Mr. Cunha's apparent fear and which, if it existed, could have made precipitous action necessary for defensive or protective purposes."[195] Any history of interaction or communication between the parties to the incident is a factor under section 34(2)(f.1). The trial judge also held that the accused could have waited some time to ascertain whether the aggressor had a gun before shooting and "resorting to the use of devastating force".[196] The Court of Appeal for

189. See *R v McPhee*, *supra* note 28; *R v Whiteley*, *supra* note 28; *R v Phillips*, *supra* note 34.

190. *Supra* note 28 at para 20.

191. *Supra* note 34 at para 93; *R v Cinous*, 2002 SCC 29 at paras 121, 123–24 [emphasis omitted].

192. *R v Phillips*, *supra* note 34 at para 94.

193. *Supra* note 28.

194. *Ibid* at para 46.

195. *Supra* note 34 at para 46.

196. *Ibid* at para 22.

Ontario overturned the conviction, in part because the trial judge completely discounted any threat to the accused and failed to consider the situation from the accused's perspective as a frightened home-owner.[197]

Finally, three of the cases discuss necessity in relation to proportionality under section 34(2)(g).[198] In *R v Hooymans*, the accused claimed that the complainant called him a "fucking fag", punched him in the face, and threatened to kill him.[199] Hooymans argued that he retaliated by hitting back. The trial judge held that Hooymans "used force far in excess of what was necessary for self-defence" and convicted the accused.[200] The Court of Appeal of Alberta overturned the decision because it did not address how the fight started or unfolded, and held that the trial judge predicated his conviction entirely on the complainant's injuries while improperly discounting the accused's testimony.[201] The Court of Appeal referenced the trial judge's reasoning regarding necessity, but did not comment on it. In *R v AA*, the trial court held that the accused used excessive force when he continued to hit the complainant with a tennis racket after he had fallen down and ceased fighting back.[202] The trial court held that the accused's use of the racket was "objectively unreasonable — it was unnecessary, gratuitous, and no longer proportionate to the threat of force he previously faced".[203] While the trial court mentions proportionality, it does not reference section 34(2)(g). The British Columbia Court of Appeal upheld the trial decision and agreed that the accused used unnecessary force under section 34(1), without specifying which part of the section the accused had contravened.[204] In *R v Khill*, the Court of Appeal for Ontario noted that the former self-defence provisions contained justification language, with built-in necessity and proportionality requirements.[205] The Court stated that under the new section 34(2), "the nature of the force used is but one factor in assessing the reasonableness of the act" and that application of the new provisions will, in turn, be less predictable.[206]

Despite the absence of language regarding necessity in Lucky Moose, some appeal courts—eleven of forty-seven cases in the pool—incorporate necessity

197. See *ibid* at para 47.

198. See *R v Khill*, *supra* note 8; *R v Winter*, *supra* note 34; *R v Hooymans*, *supra* note 28.

199. *Supra* note 28 at para 4.

200. *Ibid* at para 10.

201. See *ibid.*

202. See *supra* note 28 at paras 21–22.

203. *Ibid* at para 39.

204. See *ibid* at para 40.

205. See *supra* note 8 at para 45.

206. *Ibid* at paras 62–63.

into their self-defence reasoning, albeit in an unpredictable manner.[207] As a previously built-in precondition to self-defence, necessity still plays a role in the reasoning of some trial courts, while it is not mentioned by others. This discrepancy should be resolved to ensure the same principles and test are applied across similar self-defence cases. This research indicates that a potential location for the necessity discussion is section 34(2)(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".[208] The *McPhee*, *Whiteley*, and *Phillips* decisions provide helpful discussions of necessity under section 34(2)(b) that appeal courts may want to build on.

B. Duty to Retreat and Castle Doctrine

(i) The Common Law and Codification

Canadian self-defence law evolved from the English common law where retreat was a requirement for deadly force to be justified. According to William Blackstone: "The party assaulted must . . . flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him."[209] The castle doctrine emerged in 1604. It permitted a man to use lethal force if attacked in his home on the logic that "the house of every one is his castle".[210] According to Edward Coke, the homeowner could assemble his friends and neighbours to defend his house but was prohibited from leaving the house to defend himself against violence with force.[211] Whereas the common law doctrine of self-defence was grounded in the

207. Under sections 34(2)(b) (see *R v McPhee*, *supra* note 28; *R v Whiteley*, *supra* note 28; *R v Phillips*, *supra* note 34), 34(2)(e) (see *R v Dario*, *supra* note 28), 34(2)(f.1) (see *R v Cunha*, *supra* note 34), and 34(2)(g) (see *R v Hooymans*, *supra* note 28; *R v AA*, *supra* note 28; *R v Khill*, *supra* note 8).

208. *Criminal Code*, *supra* note 12, s 34(2)(b).

209. William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1769) vol 4 at 185.

210. *Semayne's Case* (1604), 77 ER 194 at 194, 5 Co Rep 91a ("although the life of man is a thing precious and favored in law . . . if thieves come to a man's house to rob him, or murder, and the owner [or] his servants kill any of the thieves in defence of himself and his house, it is not felony" at 195). See also William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1768) vol 3 ("every man's house is looked upon by the law to be his castle" at 288).

211. See *Semayne's Case*, supra note 210 at 195. Contrast this position with the decision under

sanctity of human life, the castle doctrine provided a narrow, parallel doctrine grounded in property rights, liberty (freedom from unlawful interference in the home), and honour (a man's home is his castle).[212]

Sir James Fitzjames Stephen's 1878 draft *Criminal Code* contained simple, straightforward self-defence provisions that embodied Blackstone's conception of necessity, proportionality, duty to retreat, and the castle doctrine.[213] The 1879 Royal Commission, tasked with a redraft, reconceived the project, seeking to create a more comprehensive code that would render the law knowable to the general public by setting out different provisions for different scenarios.[214] This redraft became the basis for Canada's first (1892) *Criminal Code*, which explicitly required retreat only if the accused was the initial aggressor. Until 2012, the *Criminal Code* contained a retreat requirement for initial aggressors (former section 35), but no retreat language for passive victims (former section 34).[215] Read together, these provisions seemed to suggest that passive victims could stand their ground. Canadian courts nevertheless interpreted the law to include a "soft" retreat requirement in all self-defence claims.[216] Retreat became a factor—sometimes a decisive one[217]—in determining whether an accused

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Canada's new law in *R v Cormier*, *supra* note 23 (the accused successfully relied on the defence of property in leaving his apartment; defence of property morphs into defence of person).

212. See Jeannie Suk, *At Home in the Law: How the Domestic Violence Revolution is Transforming Privacy* (New Haven: Yale University Press, 2009) at 56, 58–59.

213. See generally Weisbord, *supra* note 1 at 362; Jula Hughes, "Codification – Recodification: The Stephen Code and the Fate of Criminal Law Reform in Canada" (19 April 2013) at 5–6, online (pdf): *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=2253561>; *Criminal Code (Indictable Offences) Bill* (UK), 41 Vict sess (1878), Bill 178, ss 119–20.

214. See UK, Criminal Code Bill Commission, *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences: With an Appendix Containing a Draft Code Embodying the Suggestions of the Commissioners* (London: George Edward Eyre & William Spottiswoode, 1879) ("instead of endeavouring to enunciate [the relevant] principles in abstract and general terms" in the code itself, the commissioners "judged it better to declare expressly what the law is in cases of such frequent or probable occurrence, that the law in respect of them has been settled . . . and leaving the general principles to be applied in cases so extraordinary that the law as applicable to them has never yet been decided, when if ever they arise" at 11).

215. See Brudner, *supra* note 36 at 870.

216. See *Criminal Code*, SC 1953-54, c 51, ss 34(1)–(2). Section 34(1) was available only to an accused who does not intend to cause death or grievous bodily harm; section 34(2) was initially thought to be available only to an accused who intended to cause death or grievous bodily harm but was eventually extended to include both those who do and do not intend to cause death or grievous bodily harm. See *R v Pintar*, (1996) 30 OR (3d) 483, 110 CCC (3d) 402.

217. See *R v Eyapaise* (1993), 20 CR (4th) 246 at para 14, 1993 CanLII 7265.

reasonably apprehended an assault or whether resort to force was necessary and proportionate.[218] In accordance with received common law principles, retreat could only be considered where it was a realistic option and, under the castle doctrine, no one was expected to retreat from their home. In time, the statutory retreat requirement for initial aggressors was softened.[219] *R v Cormier*,[220] citing *R v Sinclair*,[221] contains a summary of the place of retreat under the former self-defence provisions, including a discussion of the castle doctrine, that is especially helpful to judges.[222] Lucky Moose completely removed the language of retreat from Canada's self-defence law as well as the distinction between passive victims and initial aggressors.

Self-defence appellate decisions since 2013 indicate that retreat remains an important evidentiary consideration in the application and interpretation of Lucky Moose, though the operation of retreat under the new law remains unresolved. The Court of Appeal of New Brunswick in *Cormier* acknowledges that "the new provisions have substantially altered the principles of self-defence",[223] but concludes that "the principles governing 'retreat' [under the former provisions] . . . have analogous application to the present case".[224] Whether and how retreat should be considered under trigger, motive, and/or response remains unclear. As Strathy CJO and Watt and Epstein JJA for the Court of Appeal for Ontario explained in *R v Mohamad*, "the current [section] 34 does not eliminate the duty to retreat, nor does the section make the defence unavailable when an accused fails to retreat".[225] Rather, "under both [former and current] provisions, the possibility of retreat and the availability of alternative courses of action are simply factors to consider".[226] Within the response element, courts have been inconsistent on whether retreat relates to the general concept of reasonableness or to one specific reasonableness factor under section 34(2).

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218. See *R v Abdalla*, 2006 BCCA 210 at paras 22–24; *R v Proulx*, 1998 CanLII 6317 at paras 41, 47, 127 CCC (3d) 511(BCCA). See also *R v Northwest*, 1980 ABCA 132 (CanLII) at para 16, [1980] 5 WWR 48; *R v Cain*, 2011 ONCA 298 at paras 6–9.

219. See *R v McIntosh*, *supra* note 4 at paras 62–72.

220. See *supra* note 23.

221. See *supra* note 166.

222. For a summary of the place of retreat within the former self-defence provisions, see *R v Cormier*, *supra* note 23 at para 55. See also *R v Abdalla*, *supra* note 218 at para 24; *R v Boyd* (1999), 118 OAC 85 at paras 11–14, 41 WCB (2d) 92.

223. *R v Cormier*, *supra* note 23 at para 46.

224. *Ibid* at para 59.

225. *Supra* note 28 at para 195.

226. *Ibid* at para 245.

(ii) Data from Key Appellate Cases

Sixteen out of forty-seven key appeal cases (thirty-four per cent) addressed the issue of retreat.[227] Eleven cases (twenty-three per cent) explicitly used the term "retreat",[228] while the remaining decisions used words such as "avoid", "stand by", "flee", and "leave" instead of "retreat". All sixteen cases considered retreat under the response element of Lucky Moose. Yet, in one instance, *Billing*, retreat was discussed under both trigger (section 34(1)(a)) and response (section 34(1)(c)).[229] See Appendix H.

In *Billing*, the accused argued that he stabbed the complainant in self-defence for calling him "a goof" and dousing him in gasoline. To the accused, the term "goof" implied a "serious insult and an invitation to fight".[230] Billing appealed his conviction, arguing that the trial judge failed to instruct the jury that he did not have an obligation to retreat prior to taking defensive action. Justices Fenlon, Griffin, and Butler for the British Columbia Court of Appeal reasoned that "a person may take defensive action as a pre-emptive measure to prevent an assault if the person believes on reasonable grounds that he or she is about to be assaulted".[231] The Court discussed retreat under both sections 34(1)(a) (the trigger) and 34(1)(c) (the response). Under section 34(1)(a), it held that "a person . . . is not required to stand by and wait to be assaulted before taking action".[232] With regard to the response under section 34(1)(c), the Court found that while the availability of retreat is a "relevant factor under [section] 34(2)(b) in assessing the reasonableness of the appellant's actions", it is one of several factors "framed as open-ended considerations" that should not "be mistaken for requirements".[233] The justices concluded that retreat was not relevant to the case at bar and that it was not necessary for the trial judge to instruct the jury on retreat.

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227. See *R v Paul*, *supra* note 34; *R v Khill, supra* note 8; *R v AA*, *supra* note 28; *R v Billing*, *supra* note 34; *R v Doonanco*, *supra* note 28; *R v Mohamad*, *supra* note 28; *R v Leroux*, *supra* note 28; *R v Brown*, *supra* note 34; *R v Dario*, *supra* note 28; *R v Atzenberger, supra* note 28; *R v Francis*, *supra* note 25; *R v Cormier*, *supra* note 23 ; *R v Phillips*, *supra* note 34; *R v Cunha*, *supra* note 34; *R v Levy*, *supra* note 34; *R v Rocchetta*, *supra* note 34.

228. *R v AA*, *supra* note 28; *R v Billing*, *supra* note 34; *R v Doonanco*, *supra* note 28; *R v Mohamad*, *supra* note 28; *R v Leroux*, *supra* note 28; *R v Brown*, *supra* note 34; *R v Dario*, *supra* note 28; *R v Cormier*, *supra* note 23; *R v Cunha*, *supra* note 34; *R v Levy*, *supra* note 34; *R v Rocchetta, supra* note 34.

228. See *R v Billing*, *supra* note 34.

230. *Ibid* at para 5.

231. *Ibid* at para 9.

232. *Ibid*.

233. *Ibid* at paras 31, 33.

While *Billing* stands out as an anomaly, the decision reveals ambiguity within the new self-defence framework. Under the former section 34, evidence of failure to retreat was a "relevant factor for the trier of fact to consider on the issues of the accused's reasonable apprehension of death or grievous bodily harm and his reasonable belief in the availability of other means of self-preservation" (trigger and response), and retreat was also relevant to an assessment of whether "the accused had come to settle a score and was not acting in self-defence" (motive).[234] Lucky Moose shifts retreat away from the elements of trigger (section 34(1)(a)) and motive (section 34(1)(b)) and towards response (section 34(1)(c)). Not all judges and juries, however, have embraced the transition. *Billing* demonstrates that Canadian courts may nevertheless discuss retreat at various points within the self-defence analysis, complicating the evolution of the law.

Billing, however, is an anomaly. The remaining fifteen retreat cases examine the issue solely under the reasonableness of the accused's response (sections 34(1)(c)). It is now for lower courts to pigeonhole retreat into their response discussions and the corresponding reasonableness factors laid out in section 34(2). Without mention of the term "retreat" within sections 34(1)(c) and 34(2), courts differ on how to incorporate retreat into their reasonableness assessments. See Appendix H.

(iii) Retreat Under General Reasonableness

Six retreat cases out of sixteen (thirty-eight per cent) consider retreat generally under section 34(2) without mentioning which of the nine factors retreat pertains to.[235] In *Mohamad*, the accused appealed his life sentence for second degree murder. Mohamad and the deceased, Bakhtaryani, attended the same stag party one evening in 2011. Bakhtaryani believed Mohamad was complicit in robbing him of $20,000 and followed Mohamad into the parking lot outside the party. When Bakhtaryani shouted at Mohamad and advanced towards him, knife in hand, Mohamad fatally shot Bakhtaryani. Chief Justice Strathy and Watt and Epstein JJA for the Court of Appeal for Ontario upheld Mohamad's conviction and sentence. During their discussion of self-defence, they reasoned that "under the current s. 34, the availability of retreat is [one] factor for the trier of fact to consider in assessing the reasonableness of an accused's response", without relating it to imminence, other available means, the accused's role in the incident, the history between the parties, or any other factor in section 34(2).[236]

234. *R v Mohamad*, *supra* note 28 at para 224.

235. See *R v Paul*, *supra* note 34; *R v Mohamad*, *supra* note 28; *R v Brown*, *supra* note 34 at paras 45–51; *R v Francis*, *supra* note 25; *R v Cunha*, *supra* note 34; *R v Rocchetta*, *supra* note 34.

236. *R v Mohamad*, *supra* note 28 at para 195.

In *R v Brown*, Fitzpatrick J for the Supreme Court of British Columbia pointed out that courts must keep previous principles and considerations in mind while assessing whether the response was reasonable in all the circumstances.[237] Citing *R v Levy*, the Court provided examples: "an accused is not by law required to wait until he or she is actually assaulted before acting; an accused [is] not required to retreat before acting in self-defence; the imminence of the use of force; whether there were alternative means to respond; and the nature and proportionality of the actions of the accused".[238] As in *Mohamad*, the Court referred to the duty to retreat without identifying its place in section 34(2).

(iv) Retreat Under Specific Response Factors

Group 1: Imminence and the Availability of Other Means

In nine appeal cases, courts associated the duty to retreat with section 34(2)(b), the extent to which the force was imminent and other means were available.[239] In *AA*, previously discussed, appellant youth AA argued that victim BB, an older man playing tennis, came after him and his friends "with the intention of engaging them in physical confrontation".[240] AA punched and kicked BB until he fell to the ground, then struck BB repeatedly even though BB was no longer resisting or fighting back.[241] In dismissing the appeal, the British Columbia Court of Appeal agreed with the trial judge's reasoning that under section 34(2)(b), "AA *could have retreated* when BB was knocked to the ground . . . and effectively disabled".[242] The Court found AA's failure to retreat during the final stage of the confrontation was unreasonable in the circumstances.

In *R v Doonanco*, the accused contended that the trial judge improperly quoted one statutory factor in section 34(2) of the *Criminal Code* (section 34(2)(b)) "to the exclusion of other statutorily enumerated factors" when assessing the accused's failure to retreat.[243] Deborah Lee Doonanco shot and killed her

237. See *supra* note 34 at para 45.

238. *Ibid.*

239. See *R v AA*, *supra* note 28; *R v Billing*, *supra* note 34; *R v Doonanco*, *supra* note 28; *R v Leroux*, *supra* note 28; *R v Dario*, *supra* note 28; *R v Atzenberger, supra* note 28; *R v Cormier*, *supra* note 23; *R v Phillips*, *supra* note 34; *R v Levy*, *supra* note 34.

240. *R v AA*, *supra* note 28 at para 6.

241. See *ibid* at para 14.

242. *Ibid* at para 19 [emphasis added].

243. *Supra* note 28 at paras 184–85.

abusive partner, hid her gun, lit the house on fire with his body inside, and argued self-defence and BWS at trial. The trial judge informed the jury that, while the accused did not have an obligation to retreat from her own home, "her ability and opportunity to do so" was one factor to consider.[244] The Court of Appeal of Alberta ultimately concluded that the trial judge did not err in singling out duty to retreat and section 34(2)(b), but not other factors.

In *R v Dario*, the accused appealed on the ground that "he was prejudiced by the jury having been instructed to take into consideration 'whether there were other means available [to him] to respond to the potential use of force'".[245] He argued that under the former self-defence provisions, "the jury would have been instructed he had no duty to retreat".[246] The British Columbia Court of Appeal denied that the accused was deprived of some benefit available under the former provisions. The unanimous Court held that "had the jury charge been based on the former self-defence provisions, the trial judge would still have instructed it to consider, as a factor, whether other means were available to Dario to protect himself from the potential use of force".[247] Once again, the Court explicitly linked the possibility of retreat to the analysis of whether there were other means available under section 34(2)(b).

Group 2: Role in the Incident

Two cases—*R v Khill* and *R v Levy*—discussed retreat when evaluating the accused's role in the incident (section 34(2)(c)).[248] Under Lucky Moose, initial aggressors no longer face the strict retreat requirement of former section 35. The accused's role in and responsibility for the incident are merely factors within the overall reasonableness assessment. This lowers the hurdle for initial aggressors claiming self-defence.

As previously discussed, rather than calling the police, Khill left his bedroom and went outside to confront Styres, ultimately shooting and killing him. Khill testified that he shot Styres in self-defence, fearing that Styres was armed, and was acquitted by the jury. The Crown successfully appealed, in part, on the ground that the jury was not instructed to consider Khill's conduct during the incident.[249] The Court of Appeal for Ontario found that Khill's role in the incident was an important factor on the facts of the case, given his decision to

244. *Ibid*.

245. *Supra* note 28 at para 38.

246. *Ibid* at para 38.

247. *Ibid* at para 42.

248. See *R v Khill*, *supra* note 8 at paras 75–85; *R v Levy*, *supra* note 34 at paras 112, 129.

249. See *R v Khill*, *supra* note 8 at paras 3–4, 74.

leave his home and confront the intruder. The Court held that "[o]n the evidence . . . the jury could have found Mr. Khill took a series of steps, bringing about the confrontation with Mr. Styres, while at the same time failing to take measures that could well have *avoided the ultimate conflict*. For example, Mr. Khill could have called the police and waited in the house for their arrival."[250] The Court recognized, in the alternative, that a properly instructed jury could have determined that the accused was concerned for the safety of his wife and was reasonable in taking "proactive measures" to "neutralize the threat before it materialized".[251] The Court of Appeal for Ontario's decision does not provide much guidance on the place of retreat within Canadian self-defence law under Lucky Moose. It does not resolve the question of whether there remains a "soft" retreat requirement under Lucky Moose. The *Khill* decision may, however, encourage judges to provide helpful content to the reasonableness factors under section 34(2) as they instruct juries on their proper operation.

R v Levy, which precedes *Khill* by four years, raises similar concerns about the undisciplined operation of the retreat requirement under Lucky Moose. In *Levy*, the Nova Scotia Court of Appeal affirmed that "an accused need not wait until he or she is actually assaulted before acting, and an accused is not by law required to retreat before acting in self-defence".[252] The Court further stated that "[t]he imminence of the threat, the existence of alternative means to respond, and the *actions taken by the accused* are factors . . . to consider to determine if the act committed by the accused was reasonable in all of the circumstances."[253] In quashing the accused's second degree murder conviction, the Court reiterated the connection between the duty to retreat and the conduct of the accused, and presaged the relaxed retreat discussion in *Khill*.

(v) Retreat Behind Closed Doors

Retreat analysis emerges regularly in the home invasion context and the domestic violence context. Four retreat cases (twenty-five per cent) occurred in the home invasion context[254] while three cases involved domestic violence against women (nineteen per cent).[255]

250. *Ibid* at para 78 [emphasis added].

251. *Ibid* at para 79.

252. *Supra* note 34 at para 112.

253. *Ibid*.

254. See *R v Khill*, *supra* note 8; *R v Brown*, *supra* note 34; *R v Cormier*, *supra* note 23; *R v Cunha*, *supra* note 34.

255. See *R v Doonanco*, *supra* note 28; *R v Brown*, *supra* note 34; *R v Francis*, *supra* note 25.

Group 1: Home Invasion and the Castle Doctrine

In *R v Cunha*, MacPherson, Lauwers, and Hourigan JJA for the Court of Appeal for Ontario allowed the appeal of a frightened homeowner on the basis of the castle doctrine. According to the Court, "[i]t is also the law that a person who is defending himself, and other occupants of his house, is not obliged to retreat in the face of danger."[256] As previously discussed, Cunha's upstairs neighbour was attacked by marijuana dealers. The trial judge rejected Cunha's self-defence argument, finding that Cunha did not shoot with defensive or protective purpose as he did not verify that the attacker was armed.[257] The Court of Appeal ultimately found that the trial judge improperly "imposed on the appellant an obligation to wait and see whether [the attacker] had a gun or other weapon before acting", which "would have exposed [Cunha] to risk of serious harm" and deprived him of the protection of the castle doctrine.[258]

In *Cormier*, Larlee, Richard, and Baird JJA for the Court of Appeal of New Brunswick explained that the "rationale behind the principle that one does not have to retreat from one's own home is that one is legally entitled to use force to remove an intruder. The *Citizen's Arrest and Self-Defence Act* preserves this right for those in peaceable possession of property."[259] Furthermore, the Court of Appeal affirmed Coke's seventeenth-century formulation, reasoning that the castle doctrine "extends the same right to one who is lawfully assisting a person whom they believe on reasonable grounds is in peaceable possession of property".[260] Under *Cormier*, the castle doctrine may be invoked not only by homeowners but also by those assisting homeowners. Yet, as discussed in a later section, the melding of defence of property and defence of person under Lucky Moose goes beyond Coke's original formulation. Lucky Moose allows Cormier to exit the home, fatally confront his aggressor, and argue self-defence.

Justice Fitzpatrick, for the Supreme Court of British Columbia, rejected the castle doctrine argument put forth in *Brown*, where the accused had invoked it in relation to his vehicle. Brown argued that "it was not reasonable to expect that [he] would surrender his property to be searched by [his wife]" and contended that there was no duty to retreat when she attempted to search for her purse in his vehicle.[261] The trial judge had rejected Brown's argument, holding that the whole incident could have been avoided if the accused simply permitted his wife to search the truck for her purse. Justice Fitzpatrick found no error in the trial judge's discussion of retreat or the suggestion that Brown ought to have

256. *R v Cunha*, *supra* note 34 at para 9.

257. See *ibid* at para 17–19.

258. *Ibid* at para 28.

259. *R v Cormier*, *supra* note 23 at para 57.

260. *Ibid*.

261. *R v Brown*, *supra* note 34 at para 49.

conceded to the search of his property.[262] The *Brown* case can be distinguished from *Cunha* and *Cormier* and seems to stand for the proposition that, at least in Canada, unlike in Florida, castle doctrine and stand your ground principles do not apply to vehicles.[263]

Group 2: Domestic Violence and Retreat

Following *Lavallee*, Canadian courts have continued to use evidence of intimate partner violence to assess the reasonableness of the response under Lucky Moose.[264] BWS is treated as a circumstance that might assist the trier of fact in "fully and more accurately appreciating how objective considerations that might not *seem* to be consistent with self-defence might actually *be* consistent with self-defence".[265] In *Doonanco*, the accused introduced evidence of prior violence and physical abuse by her former husband. Although Watson, Bielby, and Wakeling JJA for the Court of Appeal of Alberta ultimately rejected her self-defence argument and affirmed her second degree murder conviction, they took chronic abuse into account when assessing Doonanco's failure to retreat. They explained that "the principle relevance of the BWS defence is its explanation of why a person might remain in a relationship and might not flee the relationship before acting out in desperation".[266] The justices warned, however, that it remains unclear how BWS operates "if at all, under the present *Code* with its different factorial approach".[267]

In *Francis*, previously discussed, the Nova Scotia Court of Appeal found an error of law in the trial judge's retreat analysis. The trial judge faulted Francis for not retreating from the threatening situation sooner, saying "Ms. Francis could easily have left when Mr. Barrett went to the bathroom. She didn't."[268] Francis wanted to leave, but "believed [Barrett] had the money to help alleviate her [drug withdrawal]".[269] She remained, knife in hand for protection, for the money Barrett had promised. According to the Nova Scotia Court of

262. See *ibid* at para 51.

263. See Fla Stat 2005, c 776, § 013(2)(a), 013(5)(a) (in Florida's self-defence law, "dwelling" is expansively defined and includes occupied motor vehicles).

264. See Martha Shaffer, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After *R v Lavallee*" (1997) 47:1 UTLJ 1 at 1; Gail Hubble, "Feminism and the Battered Woman: The Limits of Self-Defence in the Context of Domestic Violence" (1997) 9:2 Current Issues in Crim Justice 113 at 115.

265. *R v Doonanco*, *supra* note 28 at para 40 [emphasis in original].

266. *Ibid* at para 190.

267. *Ibid* at para 41.

268. *R v Francis*, *supra* note 25 at para 24.

269. *Ibid* at para 6.

Appeal, Francis's precarious situation as an Indigenous sex worker attacked in the home of an aggressive male demanded a broader, more contextualized notion of her failure to retreat, one that considered "the nature of the force or threat, the extent to which the use of force was imminent and what other means were available to respond, and the nature and proportionality of the appellant's response".[270] The Nova Scotia Court of Appeal did not cite *Lavallee* or discuss BWS, instead focusing on the trial judge's timeframe analysis, concluding that the initial use of force was not the stabbing, as the trial judge said, but Barrett's sexual assault of Francis. Though the Nova Scotia Court of Appeal's decision in *Francis* corrects the trial judge's erroneous analysis, MacDonnell warns that "strict adherence to the new law could dilute the robustness of the analysis mandated by *Lavallee*" and that courts may treat the list of factors in section 34(2) "as more or less covering the range of relevant considerations" to the exclusion of systemic dynamics and broad contextual factors.[271]

C. The Distinction Between Justification and Excuse

Self-defence is classified as a justification defence in most jurisdictions, not an excuse.[272] According to the Court of Appeal for Ontario in *Khill*, "[j]ustification treats an act that would normally be regarded as criminal as morally right, or at least morally acceptable in the circumstances."[273] The accused is deemed to have acted rightly in defending themselves rather than being excused as a

270. *Ibid* at para 32.

271. MacDonnell, *supra* note 78 at 319.

272. See Don Stuart, *Canadian Criminal Law: A Treatise*, 7th ed (Toronto: Carswell, 2014) [Stuart, *Canadian Criminal Law*] ("[t]he different terminology relates to an ancient era preceding the middle ages when justifications absolved, while excuses were merely a matter for mitigation of punishment" at 499); Brudner, *supra* note 36 ("[b]y general agreement, self-defence belongs within the category of defences called justifications rather than within the category called excuses" at 869). Kent Roach et al, *Criminal Law and Procedure: Cases and Materials*, 11th ed (Toronto: Emond, 2015) (noting that self-defence has "traditionally been considered a quintessential justification—an instance in which the accused is thought to have acted *rightly*, rather than simply being excused as a so-called concession to human frailty" at 888); The American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes: Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962* (Philadelphia, PA: The American Law Institute, 1985), s 3.04.

273. *R v Khill*, *supra* note 8 at para 45.

"concession to human frailty".[274] The prevalent view is that common law justification defences, of which self-defence is the prototypical example, contain built-in necessity and proportionality requirements.[275] According to Paul Robinson, "[a]ll justification defenses have the same internal structure: triggering conditions permit a necessary and proportional response."[276] Don Stuart writes:

> Self-defence has traditionally been regarded as a justificatory defence rooted in necessity founded on the instinct for self-preservation. Justification treats an act that would normally be regarded as criminal as morally right, or at least morally acceptable in the circumstances. The justificatory rationale for the defence is inimical to a defence predicated on a belief that is inconsistent with essential community values and norms.[277]

274. Guyora Binder, *Criminal Law* (New York: Oxford University Press, 2016) at 333. See also Roach et al, *supra* note 272 at 888. See e.g. Hamish Stewart, "The Role of Reasonableness in Self-Defence" (2003) 16:2 Can JL & Jur 317 at 336 (considering whether putative self-defence should function as an excuse or as a justification, and settling on justification); George P Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown & Company, 1978) ("[c]laims of justification concede that the definition of the offense is satisfied, but challenge whether the act is wrongful; claims of excuse concede that the act is wrongful, but seek to avoid the attribution of the act to the actor" at 759). The Supreme Court of Canada says that excuses rest "on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience. . . . Praise is indeed not bestowed, but pardon is". See *Perka v The Queen*, [1984] 2 SCR 232 at 248, 14 CCC (3d) 385. In a justification defence, the accused is not punished because, in the circumstances, "the values of society, indeed of the criminal law itself, are better promoted by disobeying a given statute than by observing it" (*ibid* at 247–48).

275. See Roach, "Preliminary", *supra* note 9 at 277–78, 299. See also Paul H Robinson, "In Defense of the Model Penal Code: A Reply to Professor Fletcher" (1998) 2:1 Buff Crim L Rev 25 at 39–40; Paul H Robinson & John M Darley, "Objectivist Versus Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory" (1998) 18:3 Oxford J Leg Stud 409 at 411–14; George P Fletcher, "The Right Deed for the Wrong Reason: A Reply to Mr. Robinson" (1975) 23:2 UCLA L Rev 293 at 293–95.

276. Paul H Robinson, "Criminal Law Defenses: A Systematic Analysis" (1982) 82:2 Colum L Rev 199 at 216 ("[a] mistake as to a justification is by its nature necessarily an excuse, not a justification" at 239–40).

277. Don Stuart, "Comment on *Khill*", Case Comment, (27 March 2020) NJI Criminal Law e-Letter 299 at 4 [Stuart, "Comment on *Khill*"].

Canada's former self-defence law was explicitly labelled a justification in the text of the legislation.[278] Lucky Moose, in contrast, removes the language of justification from the legislation and replaces it with the uninformative phrase "not guilty of an offence", which makes no distinction between justification, excuse, or any other ground for excluding liability.[279] Stuart points out, "[t]he word 'justification' no longer appears in the *Criminal Code* self-defence section 34, and this omission should not be overlooked."[280] The change has implications. If courts are treating the new section 34 as an excuse, it could expand self-defence unpredictably as they broaden its availability from those who act rightly, to those who act wrongly but forgivably.[281] Treating self-defence as a concession to human frailty rather than precluding wrongfulness altogether creates space to forgive the battered woman who acts unreasonably because of trauma, but it also risks putting racist, sexist, and homophobic triggering conditions back into play in Canadian law.

This research sought to determine whether appeal courts labelled and interpreted the new section 34 as a justification, an excuse, or neither. Eight of the forty-seven key appeals address the question of whether the new section 34 is a justification, an excuse, or neither.[282] Six of the eight cases in the pool call self-defence a justification despite the new section 34 completely removing the language of justification.[283] Only one case refers to self-defence as an excuse.[284] One court sidesteps the justification versus excuse distinction and concludes

278. Under the old Canadian law, an accused "is justified" if they acted in self-defence (see *Criminal Code*, *supra* note 12, s 34(2) as it appeared on 10 March 2013), while the current s 34(1) states that an accused is "not guilty of an offence" (*Criminal Code*, *supra* note 12). Also see *R v Sinclair*, *supra* note 166 (applying former s 34(2) and calling it a justification at paras 35, 44, 46, 49–57, 92).

279. *Criminal Code*, *supra* note 12, ss 34(1), 35(1).

280. Stuart, "Comment on *Khill*", *supra* note 277 at 6.

281. See Roach, "Preliminary", *supra* note 9 at 280–81. But see *R v Ryan*, 2013 SCC 3, in which the Supreme Court of Canada suggests that justification defences may be broader than excuses ("[g]iven the different moral qualities of the acts involved, it is generally true that the justification of self-defence ought to be more readily available than the excuse of duress" at para 26).

282. See *R v Khill*, *supra* note 8; *R v McGregor*, 2019 ONCA 307; *R v Griffith*, *supra* note 28; *R v Delellis*, *supra* note 11; *R v Mohamad*, *supra* note 28; *R v Forcillo*, *supra* note 81; *R v Whiteley*, *supra* note 28; *R v Jerrett*, *supra* note 28

283. See *R v Khill*, *supra* note 8; *R v McGregor*, *supra* note 281; *R v Griffith*, *supra* note 28; *R v Mohamad*, *supra* note 28; *R v Forcillo*, *supra* note 81; *R v Whiteley*, *supra* note 28.

284. See *R v Delellis*, *supra* note 11 (referring to accident and self-defence as "excuses", at times alternating between justification and excuse language at paras 46–48, 69, 71).

that "[t]he relevant inquiry is whether it is incumbent upon the presiding judge to explain to the jury what 'reasonableness' is and is not."[285] *Sinclair* discusses the justification versus excuse distinction but applies the former law and therefore does not shed light on whether the new section 34 is a justification, excuse, or neither. Four cases make one or more offhand mentions of self-defence as a justification without much discussion.[286] These offhand mentions are important because Parliament deliberately removed the language of justification from new section 34 and these judges re-insert it. The key Lucky Moose cases that explain the new section 34 as a justification defence are *Khill* and *Whiteley*.[287] *Khill* and *Whiteley* both call the new section 34 a justification defence, but they treat the justificatory aspect of section 34 somewhat differently, potentially opening two lines of cases. See Appendix I.

In *Whiteley*, Doherty, LaForme, and Paciocco JJA for the Court of Appeal for Ontario treat the new section 34 as a traditional justification defence, importing necessity as a requirement and including imminence as an indicator of necessity.[288] As discussed earlier, Whiteley was assaulted in his apartment but what began as self-defence escalated into Whiteley getting "carried away".[289] The Court of Appeal for Ontario agreed with the Crown and trial judge that "some of the blows landed with the metal object could not be justified in self-defence. . . . the use of that degree of force was no longer necessary as the appellant was not in any imminent danger".[290]

In *Khill*, Strathy CJO and Doherty and Tulloch JJA for the Court of Appeal for Ontario acknowledged that "[s]elf-defence has traditionally been regarded as a justificatory defence rooted in necessity founded on the instinct for self-preservation."[291] Yet, they reason, "killing another cannot be justified simply because the killer believed it was necessary. Justification defences demand a broader societal perspective."[292] It is important to note that under pre-Lucky Moose self-defence law, subjective belief in necessity was never a sufficient basis

285. *R v Jerrett*, *supra* note 28 at para 30.

286. See *R v McGregor*, *supra* note 282 at paras 81, 121; *R v Griffith*, *supra* note 28 at paras 36, 41, 57, 64; *R v Mohamad*, *supra* note 28 ("self-defence is a justification of last resort" at para 248); *R v Forcillo*, *supra* note 81 (calling self-defence a justification without much elaboration at paras 29, 30).

287. See *R v Khill*, *supra* note 8 at paras 45–46; *R v Whiteley*, *supra* note 28 at paras 6–8, 13.

288. See *R v Whiteley*, *supra* note 28 at para 8.

289. *Ibid* at para 5.

290. *Ibid* at para 8.

291. *Supra* note 8 at para 45.

292. *Ibid.*

for the justification; the accused's subjective belief was evaluated objectively.[293] But where the societal perspective on *necessity* prevailed under the former law,[294] the Court of Appeal for Ontario replaces necessity (objectively verified) with a broader reasonableness assessment. The Court of Appeal is explicit about this change.[295]

Under the prior self-defence provisions, some specific factors identified in the definitions of self-defence were preconditions to the availability of the defence. For example, under the former section 34(1), the force used could not be "more than is necessary" for the purposes of self-defence. Under the current section 34(2), the nature of the force used is but one factor in assessing the reasonableness of the defensive act.

The *Khill* justices note, "[t]he approach to reasonableness in [section] 34(1)(c) and [section] 34(2) renders the defence created by [section] 34 more open-ended and flexible than the defences created by the prior self-defence provisions."[296] They warn that the new law is "less predictable and more resistant to appellate review" and "[r]easonableness is left very much in the eye of the beholder, be it judge or jury."[297] Indeed, under the new law, a violent response like Khill's is justified because it is, in the opinion of the finder of fact, "reasonable in the circumstances",[298] not because it is objectively necessary.

It seems likely that the *Khill* decision will prevail over *Whiteley* when it comes to interpreting the scope of the justification defence provided in section 34. *Khill* is a more recent case and it contains careful and deliberate reasoning concerning justification. Justice Doherty sat on both cases and provided the reasons in *Khill*. If *Khill* is indeed the leading authority on the justification versus excuse distinction and the scope of the justification defence provided in section 34, the decision may indicate a more open-ended, less predictable concept of justification based on reasonableness rather than necessity in Canadian criminal law.

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293. "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." See *Criminal Code*, *supra* note 12, s 34(1) as it appeared on 10 March 2013. "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 . . . in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm" (*ibid*, s 35(a)(ii) as it appeared on 10 March 2013).

294. And under almost all self-defence laws in the common law world.

295. See *R v Khill*, *supra* note 8 at para 62.

296. *Ibid* at para 63.

297. *Ibid*.

298. *Criminal Code*, *supra* note 12, ss 34(1)(c) and 34(2).

V. Hybrid Defences

Out of forty-seven key self-defence cases, twenty-one cases (forty-five per cent) discussed the interaction between self-defence and other defences.[299] This research was especially focused on cases in which two or more defences that would not succeed independently were melded into a successful hybrid defence. A prototypical example was *R v Stanley* (2018), where Gerald Stanley's successful accident defence at trial was predicated on defence of property (explicit) and defence of person (implicit).[300]

From these twenty-one cases, it was evident that, in the course of an altercation, defence of property can morph into defence of person. A shoddy defence of person argument can, in the chaos of a confrontation, morph into an accidental killing. Self-defence can also morph into a "heat of passion" killing. Defence of another can morph into defence of self when the attacker turns their sights on the good Samaritan. Additionally, a "stew of individual failed defences" can be put to the jury in a rolled-up charge, providing a reasonable doubt about intent, resulting in an acquittal or a partial excuse.[301] Combined haphazardly, hybrid defences can result in capricious and biased outcomes. The research team dubbed these "Frankendefences". Frankendefences are a rich area for future research.

299. See *R v Paul*, *supra* note 34; *R v Khill*, *supra* note 8; *R v Barrett*, *supra* note 34; *R v La Force*, *supra* note 34; *R v Land*, 2019 ONCA 39; *R v McGregor*, *supra* note 282; *R v Foster*, *supra* note 33; *R v Ruff*, 2019 BCCA 412; *R v Griffith*, *supra* note 28; *R v Delellis*, *supra* note 11; *R v Brandon*, *supra* note 81; *R v Stubbs*, 2018 ONCA 1068; *R v Brown*, *supra* note 34; *R v Atzenberger*, *supra* note 28; *R v Hobbs*, 2018 BCCA 128; *R v Whiteley*, *supra* note 28; *R v Phillips*, *supra* note 34; *R v Pomanti*, *supra* note 34; *R v Cormier*, *supra* note 23; *R v Rasberry*, *supra* note 28; *R v Willis*, 2016 MBCA 113.

300. See Weisbord, *supra* note 1 at 354–55. "Stanley's highly improbable 'hang-fire' gun malfunction occurred after Boushie's vehicle was disabled and Stanley had fetched his handgun from the shed, fired two warning shots, approached the driver's side window, and reached in to shut the ignition off with his gun to Boushie's head. It could only be deemed accidental if the court accepted that Stanley was lawfully defending property and person prior to the fatal shot" (*ibid*). See also, Alexandra Flynn & Estair Van Wagner, "A Colonial Castle: Defence of Property in *R v Stanley*" (2020) 98:2 Can Bar Rev 358; Emma Cunliff, "The Magic Gun: Settler Legality, Forensic Science, and the Stanley Trial" (2020) 98:2 Can Bar Rev 270.

301. *R v Phillips*, *supra* note 34 at para 154.

Table 8

Hybrid Defences: General Findings	Frequency (/47)	Percentage (/100)
Hybrid Defence Cases	21	45%
Defence of Property and Defence of Person	6	13%
Provocation and Self-Defence	4	9%
Rolled-Up Charge	4	9%

A. Defence of Property and Defence of Person

In six cases, defence of property and defence of person interacted with each other and appeal courts contended with the resulting law.[302] The most important of these cases was *Cormier*, previously discussed, wherein the Court of Appeal of New Brunswick carefully explained how defence of another person's property "morphed" into Cormier's homicidal defence of self.[303]

Cormier was convicted of second degree murder for stabbing and killing Spencer Eldridge, who had repeatedly threatened Cormier and challenged him to a fight.[304] When Eldridge and a companion appeared at Cormier's father's apartment, Cormier locked himself inside. Eldridge departed, but returned a few hours later, beating the windows, having threatened by text message to smash every window in the apartment unless Cormier paid an alleged debt. Cormier, his father, and his friend armed themselves with knives and pipes and went outside. The evidence here was contested but showed that Eldridge swung a metal pipe at Cormier, whereupon Cormier stabbed Eldridge to death.[305] Not only had Cormier left a place of safety to confront Eldridge, but he had seemingly used homicidal force to defend "mere property".

The Court of Appeal found that under Canada's new law, it was open to the jury to conclude that "Cormier did exactly what the law allows him to do under [section] 35: use reasonable force to prevent Messrs. Eldridge and Beckingham from entering or damaging the property under the peaceful possession of Mr. Cormier Sr".[306] The jury was permitted to find that Cormier was acting reasonably in defence of property when he armed himself, opened the door, and confronted

302. See *R v Cormier*, *supra* note 23; *R v Khill*, *supra* note 8; *R v Whiteley*, *supra* note 28; *R v La Force*, *supra* note 34; *R v Brown*, *supra* note 34; *R v Pomanti*, *supra* note 34.

303. *R v Cormier*, *supra* note 23 at para 63.

304. See *ibid* at paras 1, 9.

305. See *ibid* at paras 13–20.

306. *Ibid* at para 62.

Eldridge outside.[307] Under section 35(c) of the pre-2012 law, if Cormier was found to have provoked the assault by confronting Eldridge, he would have been required to retreat. The new law contains no such restrictions.[308] The Court concluded that "[t]his is quite possibly a case in which what began as the defence of property quickly morphed into the defence of one's person."[309] In this way, the interplay of sections 34 and 35 of Lucky Moose extended the castle—and not even Cormier's own castle—into the street.

Not every appeal court contending with the relationship between defence of property and defence of person did this explicitly. In *Khill*, defence of property is an essential component of Khill's successful self-defence argument, but the elements of the new section 35 are never discussed.[310] Defence of property is essential but implicit in Khill's defence. Khill, armed with a shotgun, stealthily approached and confronted Styres. Khill aimed the loaded shotgun at Styres' back and surprised him by announcing his presence. When Styres turned around, Khill shot him dead. Neither the trial nor appeal court considered Khill's acts leading to the homicide to be unlawful (e.g., assault or dangerous handling of a firearm). Presumably, the trial and appeal court considered Khill's potentially illegal act as justified under defence of property.

Appeal courts sometimes reject the argument that defence of property and defence of person should be melded. In *La Force*, the appellant's main ground of appeal was that the trial judge failed to consider her defence of "lawful attempt to eject two trespassers" from her apartment in her self-defence claim.[311] The Court of Appeal for Ontario decided that defence of property added nothing to her defence of person argument, even though La Force was acting against people in her home.[312]

Whiteley appealed his conviction on the basis that the trial judge failed to give separate consideration to his defence of property claim after three men

307. See *ibid*. "The need for self-defence arguably only arose when Mr. Cormier reasonably apprehended the threat of imminent bodily harm when he saw Mr. Eldridge, armed with a pipe, coming at him. It is only at that point that Mr. Cormier used his knife to stab Mr. Eldridge" (*ibid*).

308. See *ibid* ("the new provisions have substantially altered the principles of self-defence . . . resulting in a more generous application which could lead to more acquittals" at para 46).

309. *Ibid* at para 63.

310. See *R v Khill*, *supra* note 8.

311. *R v La Force*, *supra* note 34 at para 6.

312. See *ibid* ("[e]ven when looked at through the lens of s. 35(1)(d) [defence of property], the evidence established beyond a reasonable doubt that the appellant's acts of stabbing and viciously biting Ms. Robinson were not reasonable in the circumstances" at para 12).

attacked him in his home.[313] The Court of Appeal for Ontario concluded that Whiteley's victim, whom Whiteley had seriously injured with a metal bar he picked up from the floor, "was no doubt a trespasser and defence of property under [section] 35 was in play", but again, defence of property "added nothing" to Whiteley's defence of person claim.[314]

Brown[315] and *Pomanti*[316] were also cases in which appeal courts were asked to decide whether defence of property should have been taken into account by the trial judge in a defence of person claim. Both courts rejected the argument that defence of property was improperly left out.

B. Defence of Provocation and Self-Defence

Two appeal courts have reasoned that self-defence and provocation are incompatible,[317] while another two found them to be compatible.[318] Under section 232(1) of the *Criminal Code*, "[c]ulpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation."[319] By comparison, self-defence requires that the accused "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" and "the act committed is reasonable in the circumstances".[320] The question that appeal courts have faced is whether the heat of passion requirement of provocation is compatible with the reasonableness requirements of self-defence. The cases that find self-defence and provocation compatible open the door to new hybrid defences, the melding of two or more failed defences into a successful one.

In *R v Doucette* (2015), the appellant asked at trial that self-defence and provocation be left with the jury. The trial judge refused to leave the defence of provocation, noting that it was inconsistent with the accused's

313. See *R v Whiteley*, *supra* note 28 at para 9.

314. *Ibid*.

315. See *R v Brown*, *supra* note 34 (in an argument over property that turned physical, there was no explicit argument that defence of property morphed into defence of person at paras 45–50).

316. See *R v Pomanti*, *supra* note 34 (a violent response to a home invasion discussed under reasonableness factors, not castle doctrine or defence of property).

317. See *R v Stubbs*, *supra* note 298; *R v Hobbs*, *supra* note 298.

318. See *R v Land*, *supra* note 298 at para 74; *R v Rasberry*, *supra* note 28.

319. *Criminal Code*, *supra* note 12, s 232(1).

320. *Ibid*, ss 34(1)(a), 34(1)(c).

self-defence argument.[321] The Court of Appeal for Ontario, per Doherty JA, agreed with the trial judge: "[t]he defence of provocation is predicated on a loss of self-control in response to a wrongful act or insult. By its very nature, it is somewhat inconsistent with a self-defence claim which asserts a justifiable reaction to a threat or assault."[322]

Doucette was tried under the former self-defence law, but the more recent case of *R v Stubbs* (2018) arrives at a similar conclusion under the new law.[323] In *Stubbs*, the Court of Appeal for Ontario reasoned, "[h]ere, the defences of self-defence and provocation might well have been incompatible".[324] Furthermore, the Court of Appeal for Ontario noted, the accused's decision not to raise provocation along with self-defence at trial may have been deliberate, "laced with tactical and practical considerations" that the trial court rightly decided not to second-guess.[325] The cases of *Foster*[326] and *Hobbs*[327] did not contend directly with the relationship between self-defence and provocation. They did, however, conclude that rage is inconsistent with self-defence.[328] This leaves unanswered the question of whether rage is synonymous with heat of passion in provocation cases.

Two appeal courts, the Court of Appeal for Ontario in *Land* and the Court of Appeal of Alberta in *Rasberry* found that self-defence and provocation are potentially compatible and can be advanced simultaneously.[329] The arguments of Land and Rasberry were meant to address the Crown's contention that they used excessive defensive force, precluding self-defence.

Toby Land was convicted of second degree murder for stabbing his roommate, Dominic Rock Doyon, repeatedly with a samurai sword, beating him with a pair of crutches, and bludgeoning him with a hammer in their

321. See *R v Doucette*, 2015 ONCA 583 at para 29 (Doucette was tried under the former self-defence law).

322. *Ibid* at para 30 (the Court did not discount the possibility, however, that in certain cases both defences might be available on the evidence).

323. See *supra* note 299.

324. *Ibid* at para 16.

325. *Ibid*.

326. See *R v Foster*, *supra* note 33. "[T]he trial judge concluded that the appellant became 'enraged' in the course of an altercation with Mr. Lavery and slashed him with the X-Acto blade 'in an act of aggression'. Acts of aggression are the antithesis of acts taken for a 'defensive purpose', one of the elements of a s. 34 defence" (*ibid* at para 17).

327. See *R v Hobbs*, *supra* note 298.

328. See *ibid* at para 48. "The applicant took no issue with the explanation of his counsel on sentencing that he was off his medication and just 'snapped' before punching the loss prevention officer. The explanation is inconsistent with a self-defence claim" (*ibid*).

329. See *R v Land*, *supra* note 299 at para 74; *R v Rasberry*, *supra* note 28.

apartment.[330] Doyon was seated on the couch with the sword beside him when Land confronted him verbally about Doyon's relationship with a fourteen-year old girl. Cross-examined about the incident, Land testified:

> I believe I called him a diddler, and then that's when he stood up . . . he stood up with the sword in his hand. Well, he reached over, grabbed the sword, and that's when he stood up with it . . . I still didn't see his face . . . I remember just seeing the sword and then he's standing up, pulling it out, saying, "I can do whatever the fuck I want with my life," something like that. . . . I believe I started swinging.[331]

Land, who is Indigenous, called an expert who testified that he had been physically and sexually abused as a child and that his extreme anger towards child molesters was triggered by Doyon, a larger and stronger man carrying on a sexual relationship with a fourteen year-old in their apartment.[332] Presumably because of his excessive force, Land did not argue self-defence. Furthermore, the trial judge refused to leave provocation with the jury because it did not meet the element of suddenness. The Crown argued successfully that an accused person who arms himself with a hammer and initiates a violent confrontation cannot claim that he was unprepared for the response. Land was convicted of second degree murder. He appealed.

The Court of Appeal for Ontario, per Paciocco JA, concluded that Land's provocation defence had an air of reality and should have been left with the jury.[333] The Court rejected the Crown's argument that Land's evidence amounted to a claim of self-defence and therefore precluded the defence of provocation.[334] According to the Court: "[T]he defences of self-defence and provocation are not inconsistent. A person can, at the same time, fear bodily harm and act to prevent it, while losing control through anger or rage in the face of an impending risk of bodily harm."[335] Here, the Court seemingly melded self-defence and provocation to create a hybrid defence that might succeed when self-defence or provocation alone would fail. This defence would be especially helpful to defendants in "excessive force" cases like Land where the defendant is reasonably fearful and enraged at the same time and responds disproportionately.

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330. See *R v Land*, *supra* note 299 at para 1.

331. *Ibid* at paras 32–33.

332. See *ibid* at para 39.

333. See *ibid* at paras 39, 72.

334. See *ibid* at paras 39, 73.

335. *Ibid* at para 74. "Moreover, there is nothing to prevent the defences from working in the alternative" (*ibid*).

Rasberry is another excessive force case melding self-defence and provocation. Rasberry stabbed Kelloway, a schoolteacher and neighbour, multiple times after Kelloway, according to Rasberry, threatened to anally rape him and then go upstairs and do the same to his wife.[336] At trial, the judge rejected Rasberry's self-defence claim, but accepted the partial defence of provocation. Rasberry was convicted of manslaughter and appealed on the basis that self-defence was improperly excluded from consideration. The Crown appealed the finding of provocation.[337] The Court of Appeal of Alberta accepted Rasberry's contention that self-defence should have been allowed at trial: "Rasberry correctly points out that the range of emotions involved in provocation is not limited to rage, but includes other forms of extreme emotion; and the defences of self-defence and provocation are not mutually exclusive."[338] The Court also found that there was evidence upon which the trial judge could conclude that what started as self-defence evolved into provocation when the accused lost self-control and used excessive force. In their reasoning, the justices relied on the decisions of the Court of Appeal of Quebec and later the Supreme Court of Canada in *R v Buzizi:*

> Bich JA of the Quebec Court of Appeal observed the case involved a "very particular situation" where self-defence and provocation were intertwined: [TRANSLATION] " . . . the victim's aggressive act was capable of causing a reaction which could conceivably arise in the context of either self-defence or provocation" (2012 QCCA 906 at para 104). There, the evidence on the record showed, and it was common ground, that the offender was under the influence of "many emotions", and his emotional state was "angry, mad, upset, 'out of it', scared, afraid, worried, trying to protect himself, reacting emotionally".[339]

The Supreme Court of Canada in *Buzizi* concluded that the defence of provocation should have been put to the jury.

In *Rasberry*, the Court of Appeal of Alberta noted that "[a]ccording to section 232(1) of the *Criminal Code*, the act must be done in the heat of passion caused by sudden provocation."[340] The justices reasoned, however, that

336. See *R v Rasberry*, *supra* note 28 at para 7.

337. See *ibid* at para 2.

338. *Ibid* at para 68.

339. *Ibid* at para 75 ("[h]ere, there was evidence upon which the Trial Judge found that what may have started out as a response in self-defence soon became excessive, showing the loss of self-control that is the basis of provocation" at para 71).

340. *Ibid* at para 76.

"the nature of the strong emotion elicited by the provocation is not constrained by definition".[341] This generous interpretation of heat of passion left open the possibility, for example, that what began as a violent provoked response could morph into legitimate self-defence or that a fearful person defending themself or another might become provoked, like Land, and be partially excused for a disproportionately violent response.

C. The Rolled-Up Charge

In *Watt's Manual of Criminal Jury Instructions*, the author describes the so-called rolled-up jury charge: "The rolled-up charge, prosaically described as 'a stew of failed individual defences, justifications, or excuses whose ingredients are combined together and left with other relevant evidence for jurors to consider cumulatively in deciding whether [the prosecutor] has proven the *mental element* essential in murder'".[342] Understood this way, the rolled-up charge is an incubator for hybrid defences. Without clear, disciplined judicial instruction to explain how various defences interact, there is a danger that the rolled-up charge will produce dangerous and unruly Frankendefences, hybrid defences that disguise capricious and biased decision-making.

Four self-defence appeal cases in the pool discussed the rolled-up charge.[343] In *R v Ruff*, Daniel Ruff was intoxicated when he hit his roommate, Warren Welters, forcefully in the head with a hammer. Welters died. Ruff raised the defences of intoxication and self-defence but was convicted of second degree murder. He appealed, arguing, among other things, that the judge had failed to provide a "rolled up" instruction on intent that included self-defence and intoxication.[344] Even if self-defence and intoxication defences would not succeed independently, Ruff maintained, the jury should be instructed that together they might create reasonable doubt about his intent to kill or cause grievous bodily harm. The British Columbia Court of Appeal found that the trial judge's charge was "essentially like a rolled-up instruction" and refused the appeal.[345]

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341. *Ibid*.

342. *R v Phillips*, *supra* note 34 at para 154, citing The Honourable Justice David Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed (Toronto: Thomson Reuters Canada Ltd, 2015) at 1206.

343. See *R v Ruff*, *supra* note 299; *R v Delellis*, *supra* note 11; *R v McGregor*, *supra* note 282; *R v Phillips*, *supra* note 34.

344. See *R v Ruff*, *supra* note 299.

345. *Ibid* at paras 39–40.

In two cases, appeal courts found error in the lower courts' rolled-up instructions. In *R v McGregor*, Robert McGregor was charged with kidnapping and first degree murder in connection with the disappearance and death of his ex-girlfriend, JM.[346] The trial judge instructed the jury on self-defence and provocation and included a rolled-up instruction, but McGregor was nevertheless convicted on both counts. McGregor appealed, taking issue with the place of provocation in the decision tree that the trial judge provided the jury to facilitate their deliberations.[347] The Court of Appeal for Ontario agreed with McGregor that the trial judge had misdirected the jury. Provocation could create a reasonable doubt about the intent for murder or, alternatively, serve as an independent defence, and this was not reflected in the decision tree.[348] Similarly, in *Delellis*, an appeal court overturned a trial judge for failing to provide a rolled-up charge to the jury. During a heated altercation outside a townhouse complex, Delellis drove into a driveway and struck McCormick, who died of cardiac arrest in hospital.[349] Delellis argued self-defence and accident. He was convicted. The British Columbia Court of Appeal identified problems in the trial judge's jury instruction that they analogized to a failure to deliver a rolled-up charge that would "meld" self-defence and accident.[350]

Finally, in *Phillips*, which involved a conflagration between armed, intoxicated youths outside Jack's Bar in London, Ontario, there was evidence for a rolled-up charge melding provocation, self-defence, and intoxication.[351] Although the trial judge ruled he would not give a rolled-up instruction, the Court of Appeal for Ontario reasoned that the trial judge's charge was adequate as it "provided the jury with the functional equivalent of a formal rolled-up charge".[352] In *Phillips*, the Court of Appeal for Ontario cited Watt's description

346. See *supra* note 282.

347. See *ibid* at para 41. "The appellant says that the trial judge erred in failing to include a separate entry or box for the statutory partial defence of provocation in the decision tree. This was required to ensure that the jury understood that the statutory defence was separate and apart from the mental element required to establish an unlawful killing as murder" (*ibid*).

348. See *ibid* at para 148. "Evidence of provoking conduct by the deceased and of the accused's reaction to it relevant to proof of the state of mind essential to make the unlawful killing murder need not qualify as provocation as defined in s 232(2) of the Criminal Code" (*ibid*).

349. See *R v Delellis*, *supra* note 11.

350. See *ibid* at paras 85–87. "The jury must understand it is obliged to assess the 'cumulative effect' of all relevant evidence in determining proof of fault, 'even if the same evidence does not raise a reasonable doubt about guilt when offered in support of a specific defence': *R v Cudjoe*, 2009 ONCA 543 at para. 104" (*ibid* at 87).

351. See *R v Phillips*, *supra* note 34 at para 157.

352. *Ibid* at para 164.

of the rolled-up charge as "a stew of failed individual defences" and provided a number of other helpful insights about the nature of the rolled-up charge in murder cases.[353] The Court clarified that "evidence that supplies the air of reality to place a defence, justification or excuse before a jury may also be relevant for the jury to consider in deciding whether the Crown has proven the mental or fault element in murder beyond a reasonable doubt."[354] Even where self-defence, provocation, or intoxication are not left to the jury, evidence of "anger, excitement or instinctive reactions can have an impact on the formation of the requisite intent for murder".[355]

If the judge or jury have a reasonable doubt about the requisite intent for murder, they must acquit. But cooking up a "stew of failed defences" that provide a reasonable doubt about requisite intent without carefully reasoning through how these defences interact risks broadening self-defence—and other defences such as provocation and intoxication—beyond recognition and opening the door to capricious and biased outcomes. The decision tree has proven to be a useful tool in avoiding these types of outcomes.

Conclusion and Recommendations

The old Canadian law of self-defence was excessively complex and rigid rules were often applied in ways that clashed with their underlying rationales.[356] According to the Department of Justice, "[t]he 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."[357] Yet, as this research demonstrates, Lucky Moose has not resolved the complexity. Rather, it replaced one type of complexity with another. Where judges and juries had previously struggled to understand the "overlapping and inconsistent" regime of rules and standards that constituted the old law, they are now struggling to determine if, where, and how received principles fit into Lucky Moose.

The heart of Canada's self-defence law is now, incontrovertibly, a non-exhaustive list of "response" factors to weigh and balance. But after seven years of appeal jurisprudence, it remains unclear whether and when the section 34(2) factors should apply and, if they apply, how they are to be balanced.[358] Lucky Moose came into force at a time when legal scholars are increasingly

353. *Ibid* at paras 154–159.

354. *Ibid* at para 154.

355. *Ibid* at para 156.

356. See Department of Justice, *supra* note 7 at 1.

357. *Ibid* at 8.

358. Stuart, *Canadian Criminal Law*, *supra* note 272 at 510–11.

warning, in other areas, that "the language of balance begs more questions than it solves",[359] "camouflages much of the scholar's and the court's thinking,"[360] and "does not lend itself to a rational reconstruction of the argumentative path".[361] Without more guidance from appeal courts on when the section 34(2) factors apply and how they relate, the operation of Lucky Moose remains unpredictable. Judges can play a constructive role by setting out and justifying possible decision trees that integrate the section 34(2) factors.

An important and promising aspect of the Court of Appeal for Ontario's decision in *Khill* is that, in finding error in the trial judge's omission of one of Lucky Moose's nine response factors in his charge, the justices treat the section 34(2) factors as matters of law and not unreviewable findings of fact. This may encourage appellate courts to provide guidance on the operation of the entire list of section 34(2) factors based on received self-defence principles. Ideally, appellate courts will seize the opportunity and explain where, and how received principles apply. Necessity, for example, constrains the operation of self-defence law in most common law jurisdictions, including Canada's pre-Lucky Moose regime, but under Lucky Moose the language of necessity has been removed from section 34. As previously discussed, some appeal courts (twenty-three per cent) nevertheless incorporate necessity into their self-defence reasoning, albeit in an unpredictable manner.[362] A sensible location for the necessity discussion is section 34(2)(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". The *McPhee*, *Whiteley*, and *Phillips* decisions provide a useful blueprint.[363]

Appeal courts, especially the Supreme Court of Canada, can provide crucial guidance to trial judges and finders of fact by locating received principles within the framework of the new law, along with clear guidance concerning

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359. Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford: Oxford University Press, 2007) at 86.

360. Grégoire CN Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge: Cambridge University Press, 2009) at 88–89.

361. Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights?" (2009) 7:3 NYU Intl J Cont L 468 at 482. See also Weisbord, *supra* note 1 at 387, citing Martin Luterán, "The Lost Meaning of Proportionality" in Grant Huscroft, Bradley W Miller & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (New York: Cambridge University Press, 2014) 21 at 36, citing Zucca, *supra* note 359, Webber, *supra* note 360, and Tsakyrakis, *supra* note 361.

362. Under sections 34(2)(b) (see *R v McPhee*, *supra* note 28; *R v Whiteley*, *supra* note 28; *R v Phillips*, *supra* note 34), 34(2)(e) (see *R v Dario*, *supra* note 28), 34(2)(f.1) (see *R v Cunha*, *supra* note 34), 34(2)(g) (see *R v Hooymans, supra* note 28; *R v AA*, *supra* note 28; *R v Khill*, *supra* note 8).

363. See *R v McPhee*, *supra* note 28; *R v Whiteley*, *supra* note 28; *R v Phillips*, *supra* note 34. For the full discussion, see above at Section IV(A)(iv).

their operation. Retreat, for example, never mentioned in section 34, has proven to be an important factor for appeal courts interpreting Lucky Moose, appearing in thirty-four per cent of cases. Furthermore, appellate courts seem to be homing in on a primary location for the retreat analysis, section 34(2)(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".[364] This overview of Lucky Moose jurisprudence also revealed that section 34(2)(b) is doing a lot of work while disguising a lot of discretion. Appellate courts deciding future self-defence cases are now well placed to provide content to section 34(2)(b), drawing on received principles (e.g., castle doctrine), reasoning from specific cases to a general rule (e.g., a prima facie retreat requirement for initial aggressors), carving out principled exceptions (e.g., domestic violence), establishing limits (e.g., on the timeframe analysis), and relating retreat to other self-defence principles (e.g., necessity). Situating received principles such as retreat within section 34 and unpacking them will encourage the evolution of a disciplined and nuanced self-defence jurisprudence, a jurisprudence capable of accounting for the range of reasonable human responses in a principled manner.

The majority of Lucky Moose appeal cases (sixty-four per cent) discussed the modified objective approach.[365] Yet this research reveals that the scope of the modified objective approach under Lucky Moose remains unbound. Trial judges and juries do not know what limitations should be set on the non-exhaustive list of contextual factors that triers of fact are meant to consider under section 34(2). Lucky Moose appeal decisions provide examples of contextual factors that should be taken into account—BWS, prison context, diminished intellectual capacity, military training—but no unifying rationale. What began as a laudable attempt by the Supreme Court of Canada to allow self-defence to function in the context of intimate partner violence has expanded to encapsulate pre-emptive strikes by prison gangs[366] and armed soldiers confronting individuals interfering with property outside the home.[367]

Almost half of Lucky Moose appeals (forty-five per cent) discussed the interaction between self-defence and other defences, including defence of property, defence of others, provocation, and accident. The most frequent interaction was defence of property and defence of person. The Court of Appeal of New Brunswick's decision in *Cormier* revealed just how easily defence of property can "morph" into self-defence under Lucky Moose, effectively justifying the use of deadly force to defend "mere" property.[368] It remains

364. Nine appeal cases out of sixteen discussing retreat analyzed it under section 34(2)(b).

365. For a full discussion of the modified objective approach, see Section III (C–D).

366. See *R v Primmer*, *supra* note 34 at para 6.

367. See *R v Khill*, *supra* note 8.

368. *R v Gee*, [1982] 2 SCR 286 at 302, 139 DLR (3d) 587; *R v Clark*, 1983 ABCA 65 (CanLII) at paras 31–34, 4 WWR 313; *R v Gunning*, *supra* note 124 at para 26 (Pre-Lucky Moose, deadly

unclear when a "stew of failed defences" can be put to the jury in a rolled-up charge and when trial judges should deny this incubator for hybrid defences. Some conscientious appeal courts discussed defences such as self-defence and provocation independently to see whether the elements were met. Others made use of sophisticated decision trees to indicate how different defences should interact. Combined haphazardly, however, as defence of property, defence of person, and accident were in the *Stanley* case, hybrid defences can result in capricious and biased outcomes.[369]

This research did not specifically identify the intergroup dimensions affecting the application of the new law. "Who's Afraid of the Lucky Moose" was primarily focused on intergroup dimensions.[370] Nevertheless, a preliminary glance at Lucky Moose appeals cases indicates that intergroup dynamics were often present, possibly influencing outcomes. *Khill*, decided soon after the *Stanley* verdict, involved a White, property-owning military reservist who stalked and killed an unarmed Indigenous man interfering with property in his driveway. Khill was acquitted at trial and the Court of Appeal for Ontario ordered a retrial. In *Francis*, the Nova Scotia Court of Appeal reconsidered the violent altercation between Michelle Francis, a Mi'kmaw woman and sex worker, and Douglas Barrett. The justices overturned Francis' conviction and ordered a retrial, reasoning that the trial judge erroneously identified Francis's stabbing of Barrett as the first violent act when the first violent act was, in fact, Barrett's sexual assault of Francis. Rasberry repeatedly stabbed his neighbour, Kelloway, after Kelloway made unwanted sexual advances. The Court of Appeal of Alberta accepted Rasberry's contention that what began as self-defence evolved into provocation, and that this hybrid defence should have been put to the jury. *Rasberry* echoed earlier "gay panic" cases where accused men were acquitted or partially excused for using excessive violence against individuals making homosexual advances.[371] With so little structure, the risk is that judges

force was never permitted to defend mere property, but courts occasionally acquitted defendants who, when lawfully defending property, deployed deadly force). See also Roach, "Preliminary", *supra* note 9 (warning that Lucky Moose opens the possibility "that seriously injuring or even killing a person solely to defend property could be considered to be a valid defence of property under section 35," which, unlike the former law, contains no proportionality requirement at 293.)

369. See Weisbord, *supra* note 1 at 390–92.

370. See *ibid.*

371. *R v Tran*, 2010 SCC 58 (the Supreme Court of Canada holding that the "ordinary person" who forms the standard in the defence of provocation "must be informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the Canadian Charter" at para 34).

and juries applying Lucky Moose will base their reasonableness decisions on private beliefs about the purpose of the law and prejudices about the victim and defendant.

It is unfair to defendants and victims, especially those from historically marginalized communities who have regularly been denied equal protection of the law, to leave so much of the unstructured "reasonable in the circumstances" analysis to the common sense of finders of fact, whether judge or jury.[372] Appeal courts can improve the law by providing principled constraints on the amorphous reasonableness analysis at the heart of Lucky Moose. After having surveyed all key appellate cases under Lucky Moose, these are some recommendations:

i. Lucky Moose provides new avenues for firearm carrying aggressors to win an acquittal after using deadly force to defend property. Canadian appellate courts should resurrect the bright-line prohibition on deadly force to defend "mere property". They should also delineate when defence of property can justifiably morph into defence of person, with special attention to the aggressor's role in instigating the fatal conflagration.
ii. Canadian appellate courts wishing to prioritize human life over the protection of property, liberty, and honour should read the soft retreat requirement back into Canadian self-defence law under section 34(2)(b). Even under Florida's expansive Stand Your Ground law, initial aggressors are required to retreat before relying on self-defence.
iii. Courts applying Lucky Moose should look beyond the moment the accused resorted to force (freeze-frame analysis) and assess the reasonableness of the accused's response along a wider timeframe if that timeframe provides additional context.
iv. Following *Lavallee*, the modified objective approach should benefit vulnerable defendants, not defendants whose personal characteristics make them unusually aggressive or pugnacious. Under received criminal law principles, excessive pugnaciousness is not intended to modify the objective approach.[373]

372. See Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada*, vol 5 (Montreal: McGill-Queen's University Press, 2015) ("[t]he failures of the justice system include the disproportionate imprisonment of Aboriginal people and the inadequate response to their criminal victimization" at 186). See generally David M Tanovich, *The Colour of Justice: Policing Race in Canada*, (Toronto: Irwin Law, 2006); David M Tanovich, "The Colourless World of *Mann*" (2004) 21 CR (6th) 47; Benjamin L Berger, "Race and Erasure in *R v Mann*" (2004) 21 CR (6th) 58; Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Halifax: Fernwood Publishing, 2017).

373. See *R v Hill*, [1986] 1 SCR 313 at 331, 27 DLR (4th) 187. Chief Justice Dickson stated:

v. Proportionality has been rendered nearly meaningless due to its dilution under the language of section 34(2)(g), its demotion to a non-exhaustive factor, and the operation of the *Baxter* instruction. Nevertheless, it frequently appears in self-defence cases. Appeal courts should provide concrete guidance about when defensive force becomes excessive.

The Court of Appeal for Ontario's decision in *Khill* leaves the door open for this kind of constructive judicial intervention. Appeal courts, including the Supreme Court of Canada, should seize the opportunity and provide crucial structure and guidance based on received self-defence principles. In climates of fear—depleted inner cities, segregated rural communities, crowded prisons—concepts of reasonableness are deeply contested, and finders of fact are not always as reasonable as Canadians would hope.

"We seek to encourage conduct that complies with certain societal standards of reasonableness and responsibility. In doing this, the law quite logically employs the objective standard of the reasonable person" (*ibid* at 324–25), whom he defined as someone having "a normal temperament and level of self-control", and as not being "exceptionally excitable, pugnacious or in a state of drunkenness" (*ibid* at 331).

Appendices

Appendix A: Overview of Key Cases

Legend	
	Trial Decisions
	Former Provisions and Retrospectivity
	Key Section 34 Decisions
	Other (See Brackets for Notes)

Case	Citation	Reference to Factors (paras)	Basis of Self-Defence Appeal	Key Factors
R v Vandewater	2020 SKQB 55 (Trial)	34, 45–46		
R v Robertson	2020 SKCA 8 (Misdirection on Outcome of Successful Self-Defence)	18–21, 24, 29–36, 43–52, 53–56	Response	Nature of the force or threat to which the person is responding (s 34(2)(a)), Whether any party used or threatened to use weapon (s 34(2)(d)), **Nature and proportionality of the person's response** (s 34(2)(g) (amount of force used versus consequences of force used)
R v Deslauriers	2020 QCCA 484	25, 70	*Scopelliti* Misguidance and Air of Reality	
R v Paul	2020 ONCA 259	24–44	Belief, Motive and Response	Imminence and other means available (s 34(2)(b), Person's role in the incident (s 34(2)(c)

Case	Citation	Reference to Factors (paras)	Basis of Self-Defence Appeal	Key Factors
R v Khill	2020 ONCA 151	53–63, 67–81, 83, 85–86	Response	**Person's role in the incident** (s 34(2)(c)), Whether any party to the incident used or threatened to use weapon (s 34(2)(d))
R v Quash	2019 YKCA 8 (Sentencing and Gladue)			
R v Barrett	2019 SKCA 6	28–37	Belief and Response	**Imminence and other means available** (s 34(2)(b)), Physical characteristics (s 34(2)(e)), Histories of relationships (s 34(2)(f)), Nature and proportionality of the response (s 34(2)(g)), Act in response to lawful use or threat force (s 34(2)(h))
R v La Force	2019 ONCA 522	11–12	Motive and Response	
R v Fougere	2019 ONCA 305		Belief	
R v Land	2019 ONCA 39 (Frankendefence only)			
R v RS	2019 ONCA 382	9, 12–13		
R v McGregor	2019 ONCA 307			
R v Foster	2019 ONCA 282		Motive	
R v Curran	2019 NBCA 27	1, 12–18, 21, 23	Response	

Case	Citation	Reference to Factors (paras)	Basis of Self-Defence Appeal	Key Factors
R v Takri	2019 NBCA 20		Response	
R v Ruff	2019 BCCA 412 (Frankendefence and Rolled-Up Instruction)			
R v AA	2019 BCCA 389	15–23	Response	ss 34(2)(a), 34(2)(b), **34(2)(d), 34(2)(e)**, 34(2)(g)
R v Griffith	2019 BCCA 37	35–36, 38, 46–49	Response	ss 34(2)(a), 34(2)(b), 34(2)(d), 34(2)(f)
R v Delellis	2019 BCCA 335 (Rolled-Up Instruction)	51–53, 99		
R v Billing	2019 BCCA 237	7–8, 16–23	Belief and Response	Nature and proportionality of the person's response (s 34(2)(g))
R v Randhawa	2019 BCCA 15	15–16, 25, 29, 33, 36, 46, 47	Response	
R v Brandon	2019 ABCA 429 (Property and Frankendefence)			
R v Doonanco	2019 ABCA 118	184–185, 189–190	Response	Whether there were other means available (s 34(2)(b))

Case	Citation	Reference to Factors (paras)	Basis of Self-Defence Appeal	Key Factors
R v Mohamad	2018 ONCA 966	195–200, 202–204, 209, 238–239, 245	Response	Nature of the original force or threat (s 34(2)(a)), Extent to which actual or threatened use of force was imminent and whether there were other means available (s 34(2)(b)), Nature and proportionality of the person's response (s 34(2)(g))
R v Cote	2018 ONCA 870 (Former)			
R v Forcillo	2018 ONCA 402			
R v Primmer	2018 ONCA 306	6–7	Motive and Response	Nature of the original force or threat (s 34(2)(a))
R v Stubbs	2018 ONCA 1068 (Frankendefence and Rolled-Up Charge)			
R v McPhee	2018 ONCA 1016	13, 16–27	Response	Other means available (s 34(2)(b)), Nature and proportionality of the response (s 34(2)(g))
R v Francis	2018 NSCA 7	18, 22–25, 28, 32–33	Response	Nature of the force or threat (s 34(2)(a)), Imminence and other means available (s 34(2)(b)), Nature and proportionality of the response (s 34(2)(g))
R v Gabriel	2018 NSCA 60 (Former)			

Case	Citation	Reference to Factors (paras)	Basis of Self-Defence Appeal	Key Factors
R v Leroux	2018 BCSC 1429	12–13, 18–21, 27–29, 32–34	Response	Nature of the threat (s 34(2)(a)), **Imminence** and other means available (s 34(2)(b)), Relative sizes (s 34(2)(e)), History (s 34(2)(f)), Nature and **proportionality** of the response (s 34(2)(g) referred to as "the factor that overwhelmed all the others")
R v Brown	2018 BCSC 1364	16, 23–24, 29, 42–46, 49–51	Motive and Response	Nature of the force or threat (s 34(2)(a)), Imminence and other means available (s 34(2)(b))
R v Sandhu	2018 BCPC 122 (Trial)	2–5, 7–14	Response	All with specific reference to Imminence and other means available (s 34(2)(b)), Nature and proportionality of the response (s 34(2)(g))
R v Dario	2018 BCCA 85	38–43, 44–46, 49–51	Response	Imminence and other means available (s 34(2)(b)), Physical characteristics (s 34(2)(e))
R v Atzenberger	2018 BCCA 128	124	Response	Other means available (s 34(2)(b)), Role in the incident (s 34(2)(c)), Physical characteristics (s 34(2)(e))
R v Hobbs	2018 BCCA 128			

Case	Citation	Reference to Factors (paras)	Basis of Self-Defence Appeal	Key Factors
R v Whiteley	2017 ONCA 804	7–8	Response	Imminence and other means available (s 34(2)(b)), Nature and proportionality of the response (s 34(2)(g))
R v Phillips	2017 ONCA 752	42, 87–90, 92–99	Motive and Response	Imminence and other means available (s 34(2)(b)), Role in the incident (s 34(2)(c)), Nature and proportionality of the response (s 34(2)(g))
R v Pomanti	2017 ONCA 48	5, 23–24	Belief and Response	
R v Sinclair	2017 ONCA 38 (Former)			
R v Berry	2017 ONCA 17 (Former)			
R v Borden	2017 NSCA 45	101	*Scopelliti* Misguidance	Role in the incident (s 34(2)(c))
R v Cormier	2018 NBCA 10	42–44, 59, 64–65	Response and Property Oversight	Imminence and other means available (s 34(2)(b)), Nature and proportionality of the response (s 34(2)(g))
R v Jerrett	2017 ABCA 43	22, 30, 32	Response	
R v Harkes	2017 ABCA 229 (Rolled-Up Charge)			

Case	Citation	Reference to Factors (paras)	Basis of Self-Defence Appeal	Key Factors
R v Rasberry	2017 ABCA 135	18–20, 46	Response	Nature of the force or threat (s 34(2)(a)), Imminence and other means available (s 34(2)(b)), Role in the incident (s 34(2)(c)), Use of weapon (s 34(2)(d)), Physical characteristics (s 34(2)(e)), **Nature and proportionality of the response (s 34(2)(g))**
R v Winter	2017 ABCA 100	5, 16–17	Belief and Response	Nature and proportionality of the response (s 34(2)(g))
R v Power	2016 SKCA 29 (Former)			
R v Kralievic	2016 ONCA 860	11, 13–15, 19–20	Response	Nature and proportionality of the response (s 34(2)(g))
R v Hope	2016 ONCA 623 (Former)			
R v Rochetta	2016 ONCA 577	23–30	Response and Balance of Probabilities	Imminence and other means available (s 34(2)(b))
R v Wright	2016 ONCA 546	7–11	Motive	
R v Cunha	2016 ONCA 491	10, 22–23, 28–29, 47	Motive and Response	Imminence and other means available (s 34(2)(b)), Nature and proportionality of the response (s 34(2)(g))

Case	Citation	Reference to Factors (paras)	Basis of Self-Defence Appeal	Key Factors
R v Levy	2016 NSCA 45	34, 107, 112, 118–120, 124, 129, 132–138, 151–158	Belief, Motive and Response	Imminence and other means available (s 34(2)(b)), Role in the incident (s 34(2)(c)), Nature and history of relationship (s 34(2)(f)), Nature and proportionality of the response (s 34(2)(g))
R v Best	2017 NLCA 10	10–13	All	Air of reality
R v Mustard	2016 MBCA	15, 41	Response	
R v Willis	2016 MBCA 113 (Charter Case)			
Green v R	2015 QCCA 2109 (Retrospectivity)			
R v Doucette	2015 ONCA 583 (Former)			
R v Bengy	2015 ONCA 397 (Retrospectivity and Former)	29, 47–48		
R v Muise	2015 NSCA 54 (Former)			
R v Evans	2015 BCCA 46 (Former)			
R v Hooymans	2015 ABCA 290	10–12	Response	Nature and proportionality of the response (s 34(2)(g))
R v Simms	2014 YKCA 8			
R v Mohamed	2014 ONCA 442 (Former)			
R v Rodgerson	2014 ONCA 366 (Former)			

Case	Citation	Reference to Factors (paras)	Basis of Self-Defence Appeal	Key Factors
R v Feng	2014 BCCA 71 (Former)			
R v Richter	2014 BCCA 244 (Former)			
R v Ball	2013 BCSC 2371 (Trial)	33–35, 38, 41	Belief and Response	Imminence and other means available (s 34(2)(b))
R v Carriere	2014 ABQB 645 (Retrospectivity)	98–100		
R v Lavallee	190 1 SCR 852 (Former)			

Appendix B: Self-Defence Elements

Total Central Cases Under New Section 34: 47

Self-Defence: Element Findings	Frequency (/47)	Percentage (/100)
Belief (Section 34(1)(a))	1	2%
Motive (Section 34(1)(b))	2	4%
Response (Section 34(1)(c))	20	43%
Blend (Response +)	14	30%

Appendix C: Reasonableness Factors

Reasonable Response Factor: Section 34(2)	Feequency (/34)	Percentage (/100)
a. Nature of the Force or Threat	9	26%
b. Imminence and Other Means Available	18	**53%**
c. Role in the Incident	7	21%
d. Use or Threat of Weapons	5	15%
e. Physical Characteristics	6	18%
f. Nature of Relationship and History of Interaction	4	12%

Reasonable Response Factor: Section 34(2)	Feequency (/34)	Percentage (/100)
g. Nature and Proportionality of the Response	16	**47%**
h. Response to Lawful Use of Force or Threat	1	3%

Appendix D: Role in the Incident

Single Transaction Cases	Citation	Outcome
R v Paul	2020 ONCA 259	Conviction set aside
R v Khill	2020 ONCA 151	Acquittal set aside
R v Francis	2018 NSCA 7	Conviction set aside
R v Cunha	2016 ONCA 491	Conviction set aside
Key Language "Broader context of the incident" "Entirely for the jury to decide" "Full consideration of the relevant circumstances" "Whole factual context and factual tableau"		

Freeze-Frame Cases	Citation	Outcome
R v Takri	2019 NBCA 20	Conviction upheld
R v AA	2019 BCCA 389	Conviction upheld
R v Forcillo	2018 ONCA 402	Conviction upheld
R v Leroux	2018 BCSC 1429	Conviction upheld
R v Whiteley	2017 ONCA 804	Conviction upheld
R v Pomanti	2017 ONCA 48	Conviction upheld
Key Language "The threat was neutralized" "Early stages of the confrontation" "Blows no longer justified" "As the altercation progressed"		

Appendix E: Modified Objective Approach

Modified Objective: General Findings	Frequency (/47)	Percentage (/100)
Modified Objective Approach	30	64%
Substantive Discussion of Modified Objective Approach	10	21%

	Case	Citation	Key Paragraphs	Key Issues
1	*R v Robertson*	2020 SKCA 8	45	
2	*R v Deslauriers*	2020 QCCA 282	26	Overview of the subjective and objective aspects of element
3	*R v Paul*	2020 ONCA 259	24	
4	***R v Khill***	2020 ONCA 151	48–52, 96–102	Reasonable response, consideration of personal circumstances
5	*R v Quash*	2019 YKCA 8	8, 77	
6	*R v Barrett*	2019 SKCA 6	30	
7	***R v RS***	2019 ONCA 382	17, 33, 42	Error in application of objective requirement by trial judge, looking at the actual circumstances of the incident, reduced mental capacity of accused
8	*R v Foster*	2019 ONCA 282	17, 18	Enraged state of mind as "antithesis of defensive purpose", subjective perceptions of accused

	Case	Citation	Key Paragraphs	Key Issues
9	*R v Curran*	2019 NBCA 27	10, 16–23	Error in application of modified objective test
10	***R v AA***	2019 BCCA 389	31–35, 37, 39	Age
11	*R v Griffith*	2019 BCCA 389	3, 48–49, 51	
12	*R v Delellis*	2019 BCCA 335	44, 51, 66–68, 70, 80, 85	
13	*R v Brandon*	2019 ABCA 429	11, 19–20	
14	***R v Doonanco***	2019 ABCA 118	39–40	BWS and other special psychological characteristics
15	*R v Mohamad*	2018 ONCA 966	214–217, 222, 231, 248	Consideration of personal characteristics, circumstances of the events, comparison of old and new laws
17	***R v Primmer***	2018 ONCA 306	6	Prison setting
18	*R v Francis*	2018 NSCA 7	22	Discussion of subjective components of new section 34
19	*R v Leroux*	2018 BCSC 1429	19, 23–25, 34	Subjective and objective aspects
20	***R v Dario***	2018 BCCA 85	45, 49	Consideration of personal characteristics
21	*R v Atzenberger*	2018 BCCA 296	116, 128	Overview of subjective and objective components of new section 34
22	*R v Whiteley*	2017 ONCA 804	7	

	Case	Citation	Key Paragraphs	Key Issues
23	***R v Phillips***	2017 ONCA 752	92–98	Rejection of accused's application of modified objective test
24	***R v Berry*** (Old Provisions)	2017 ONCA 17	66–68, 72–73	Rejection of accused's plea for "psychological makeup" to be included in the test
25	*R v Cormier*	2017 NBCA 10	40	
26	*R v Jerrett*	2017 ABCA 43	22, 28–30	Meaning of "reasonable"
27	*R v Harkes*	2017 ABCA 229	42–43	Perception and state of mind of appellant
28	*R v Rasberry*	2017 ABCA 135	16	
29	***R v Power*** (Old Provisions)	2016 SKCA 29	14–15, 18, 22–23, 34–35, 37, 39, 41–42, 50, 79	Clarifications on the objectivity and subjectivity of each subsection of the test
30	*R v Kraljevic*	2016 ONCA 860	10–11, 18	

Appendix F: Proportionality

Proportionality: General Findings	Frequency (/47)	Percentage (/100)
Proportionality and Necessity Decisions	23	49%
Proportionality Under Section 34 Generally	13	28%
Proportionality Under Section 34(1)	3	6%
Proportionality Under Section 34(2)(g)	7	15%
Proportionality at Random	2	4%

Proportionality: *Baxter* Findings	Frequency (/23)	Percentage (/100)
Application of *Baxter*	12	52%
Baxter "Not Mandatory"	2	9%
Failure to Provide *Baxter* Instruction	3	13%

Appendix G: Necessity

Necessity: General Findings	Frequency (/47)	Percentage (/100)
Necessity Discussion	11	23%
Necessity Under Section 34(1) or 34(1)(c)	3	6%
Necessity Under Section 34(2)	8	17%
Necessity Under Section 34(2)(b)	3	6%
Necessity Under Section 34(2)(e)	1	2%
Necessity Under Section 34(2)(f)	1	2%
Necessity Under Section 34(2)(g)	3	6%
Necessity Under Section 34(2)(e)	1	2%

Appendix H: Retreat

Legend	
	Key Retreat Decisions
	General Retreat Decisions
	Retreat Decisions Without Explicit Mention of Retreat

Case	Citation	Key Paragraph	Key Element	Category	Notes
R v Paul	2020 ONCA 259	24, **33**, 35, 42–43	Response (34(1)(c))		No explicit mention of retreat. Read between the lines "No reason to use a machete to chop Tall P"

Case	Citation	Key Paragraph	Key Element	Category	Notes
R v Khill	2020 ONCA 151	75–85	Response (34(1)(c)): Role in the Incident (34(2)(c))	Home invasion	No explicit mention of retreat. Read between the lines. "Series of steps bringing about the confrontation" "Could have avoided the ultimate conflict"
R v AA	2019 BCCA 389	19, 36, 39	Response (34(1)(c)): Imminence and Availability of Other Means (34(2)(b))		"Could have retreated" "Unnecessary, gratuitous, and no longer proportionate to the threat of force he previously faced"
R v Billing	2019 BCCA 237	5, 9, 33	Belief (34(1)(a)) and Response (34(1)(c)): Imminence and Availability of Other Means (34(2)(b))		Confusing instruction. Unintentional discussion of retreat under sections 34(1)(a) and 34(1)(c). Are retreating and standing by similar concepts? "Not required to stand by and wait to be assaulted before taking action" (9)
R v Dooncanco	2019 ABCA 118	37, 40, 184–185, 189–190	Response (34(1)(c)): Imminence and Availability of Other Means (34(2)(b))	Domestic violence	"Failure to retreat as factor to consider" "Explanation of why the person might remain in the relationship and might not flee before acting out in desperation"

Case	Citation	Key Paragraph	Key Element	Category	Notes
R v Mohamad	2018 ONCA 966	**195, 199,** 202–204, 209–210, 238–239, 245	Response (34(1)(c))		**Key retreat case under new provisions.** When does the duty to retreat commence? Overlap with role in the incident. "Shooting was the only available option, not retreat" "They do not need to retreat in the early stages of the confrontation . . . however, as the confrontation develops and the individual decides to respond to the threat by the use of lethal force, they can only do so if there are no other viable options available to them such as flight or use of safe haven" (**199**) "Under the former section 34(2), the possibility of retreat was only relevant in an assessment of an accused's apprehension or belief after the assault began . . . the instruction on the current section 34 left it open to the jury to accept . . . that it was unreasonable for the appellant not to pursue other means inside the banquet hall before . . . the appellant knew that the deceased was armed" (**203**)

Case	Citation	Key Paragraph	Key Element	Category	Notes
R v Mohamad (cont'd)					"The availability of other alternatives, such as retreat, are relevant factors for the trier of fact to consider under both the reasonable apprehension and reasonable belief issues in the former section 34(2)" (**245**)
R v Leroux	2018 BCSC 1429	27–29, 31–34	Response (34(1)(c)): Imminence and Availability of Other Means (34(2)(b))		Connection between retreat and proportionality. "The factor, relating to the third requirement, that the judge found overwhelmed all the others was the excessive force used, given that the threat . . . was not imminent" (**28**) "Any threat posed was not imminent and could easily have been avoided" (**33**)
R v Brown	2018 BCSC 1364	45–**51**, 54	Response (34(1)(c)): Imminence and Availability of Other Means (34(2)(b))	Car invasion and domestic violence	"An accused is not required to retreat before acting in self-defence" (45) "The whole situation could have been avoided" (46)
R v Dario	2018 BCCA 296	38–43	Response (34(1)(c)): Imminence and Availability of Other Means (34(2)(b))		Retreat as relevant factor under both old and new provisions.

Case	Citation	Key Paragraph	Key Element	Category	Notes
R v Atzenberger	2018 NSCA 296	124, 128	Response (34(1)(c)): Imminence and Availability of Other Means (34(2)(b))		No explicit mention of retreat. Read between the lines. "There was another obvious means available to respond . . . leave the premises" (124)
R v Francis	2018 NSCA 7	22–25, 32	Response (34(1)(c))	Sexual abuse	No explicit mention of retreat. Read between the lines. "Francis could easily have left when Barrett went to the bathroom . . . she didn't" "He faulted the appellant for not leaving earlier" (32)
R v Cormier	2017 NBCA 10	56–**64**, 65–68	Defence of Property and Response (34(1)(c)): Imminence and Availability of Other Means (34(2)(b))	Home invasion	**Key retreat case under current provisions.** Emphasis that failure to retreat is not barrier to self-defence but merely factor for consideration under 34(2)(b). Explanation of castle doctrine. "The rationale behind the principle that one does not have to retreat from one's own home is that one is legally entitled to use force to remove an intruder" (57) "Failure to remain inside"

Case	Citation	Key Paragraph	Key Element	Category	Notes
R v Phillips	2017 ONCA 752	88, 90, 92–95	Response (34(1)(c)): Imminence and Availability of Other Means (34(2)(b))		No explicit mention of retreat. Read between the lines. "You could have run off or shouted instead of firing"
R v Cunha	2016 ONCA 491	9, 22, 28, 38, 47	Response (34(1)(c))	Home invasion	Frightened homeowner. Mostly read between the lines with 'wait'. "Person who is defending himself, and other occupants of his house, is not obliged to retreat in the face of danger" "The trial judge effectively imposed on the appellant an obligation to wait and see whether Barros had gun or other weapon before acting" (28)

Case	Citation	Key Paragraph	Key Element	Category	Notes
R v Levy	2016 NSCA 45	**122, 129**	Response (34(1)(c)): Imminence and Availability of Other Means (34(2)(b)), Role in the Incident (34(2)(c))		Emphasis on imminence and availability of other means. Reference to role in the incident. "An accused need not wait until he or she is actually assaulted before acting, and an accused is not by law required to retreat before acting in self-defence . . . the imminence of the threat, the existence of alternative means to respond, and the actions taken by the accused are factors that belong in the things that a trier of fact is required to consider to determine if the act committed . . . was reasonable in all of the circumstances" (**112**)
R v Roccheta	2016 ONCA 577	26–28	Response (34(1)(c))		

Retreat: General Findings	Frequency (/47)	Percentage (/100)
Reference to Retreat	16	34%
Explicit Mentions of "Retreat"	11	23%

Retreat: Element Findings	Frequency (/16)	Percentage (/100)
Response	16	100%
Response with Belief	1	6.3%

Retreat: Factor Findings	Frequency (/16)	Percentage (/100)
General Reasonableness	6	38%
Imminence and Availability of Other Means	10	63%
Role in the Incident	2	13%

Retreat: Context Findings	Frequency (/16)	Percentage (/100)
Home Invasion	4	25%
Violence Against Women	3	19%

Appendix I: Justification and Excuse

Case	Citation	Justification/Excuse
R v Khill	2020 ONCA 151	Justification
R v McGregor	2019 ONCA 307	Justification
R v Griffith	2019 BCCA 37	Justification
R v Delellis	2019 BCCA 335	Excuse
R v Mohamad	2018 ONCA 966	Justification
R v Forcillo	2018 ONCA 402	Justification
R v Whiteley	2017 ONCA 804	Justification
R v Jerrett	2017 ABCA 43	Neither

Justification/Excuse: General Findings	Frequency (/47)	Percentage (/100)
Justification/Excuse	8	17%
Explicit Mentions of Justification	4	9%
Explicit Mentions of "Excuse"	1	2%
In-Depth "Justification" Discussions	2	4%

Appendix J: Hybrid Defences

Hybrid Defence Cases	Citation
R v Paul	2020 ONCA 259
R v Khill	2020 ONCA 151

Hybrid Defence Cases	Citation
R v Barrett	2019 SKCA 6
R v La Force	2019 ONCA 522
R v Land	2019 ONCA 39
R v McGregor	2019 ONCA 307
R v Foster	2019 ONCA 282
R v Ruff	2019 BCCA 412
R v Griffith	2019 BCCA 37
R v Delellis	2019 BCCA 335
R v Brandon	2019 ABCA 429
R v Atzenberger	2018 BCCA 296
R v Hobbs	2018 BCCA 128
R v Whiteley	2017 ONCA 804
R v Phillips	2017 ONCA 752
R v Pomanti	2017 ONCA 48
R v Cormier	2017 NBCA 10
R v Rasberry	2017 ABCA 135
R v Willis	2016 MBCA 113

Hybrid Defences	Frequency (/47)	Percentage (/100)
Hybrid Defence Cases	21	45%
Defence of Property and Defence of Person	6	13%
Provocation and Self-Defence	4	9%
Rolled-Up Charges	4	9%