



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Khill, 2021 SCC  
37

**APPEAL HEARD:** February 18,  
2021

**JUDGMENT RENDERED:**  
October 14, 2021

**DOCKET:** 39112

**BETWEEN:**

**Peter Khill**  
Appellant

and

**Her Majesty The Queen**  
Respondent

- and -

**Association québécoise des avocats et avocates de la défense and Criminal  
Lawyers' Association (Ontario)**  
Intervenors

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,  
Martin and Kasirer JJ.

**REASONS FOR  
JUDGMENT:**  
(paras. 1 to 147)

Martin J. (Wagner C.J. and Abella, Karakatsanis and  
Kasirer JJ. concurring)

**CONCURRING  
REASONS:**  
(paras. 148 to 234)

Moldaver J. (Brown and Rowe JJ. concurring)

**DISSENTING REASONS:** Côté J.  
(paras. 235 to 244)

**NOTE:** This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

---

**Peter Khill**

*Appellant*

v.

**Her Majesty The Queen**

*Respondent*

and

**Association québécoise des avocats et avocates de la défense and  
Criminal Lawyers' Association (Ontario)**

*Interveners*

**Indexed as: R. v. Khill**

**2021 SCC 37**

File No.: 39112.

2021: February 18; 2021: October 14.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin  
and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Criminal law — Defences — Self-defence — Charge to jury — Scope of  
“person’s role in the incident” in s. 34(2)(c) of Criminal Code — Accused charged*

*with second degree murder after shooting deceased in what he claimed was self-defence — Accused acquitted by jury — Whether trial judge failed to instruct jury to consider accused's role in the incident in accordance with s. 34(2)(c) — If so, whether error material to acquittal — Criminal Code, R.S.C. 1985, c. C-46, s. 34(2)(c).*

In the early morning of February 4, 2016, K was awoken by his partner, who alerted him to the sound of a loud knocking outside their home. K went to the bedroom window and observed that the dashboard lights of his pickup truck were on. He retrieved his shotgun from the bedroom closet and loaded two shells. Dressed only in underwear and a T-shirt, K left his house through the back door in his bare feet and quietly approached the truck. As he rounded the rear of the truck, K noticed someone bent over into the open passenger-side door. He shouted to the person, who would later be identified as S, “Hey, hands up!” As S turned towards the sound of K’s voice, K fired, racked the action and fired a second time, striking S twice in the chest and shoulder. After S fell to the ground, K searched him for weapons. There was no gun, only a folding knife in S’s pants pocket. K told the 911 dispatcher and police that he had shot S in self-defence, as he thought S had a gun and was going to shoot him.

At his trial on a charge of second degree murder, K admitted that his intentional use of deadly force caused S’s death, but he claimed he acted in self-defence under s. 34 of the *Criminal Code*. In his charge to the jury, the trial judge described some of the statutory factors in s. 34(2) that should assist the jury in weighing whether the act of shooting S was reasonable in the circumstances. The trial judge did not make

any reference to K's "role in the incident" under s. 34(2)(c). The jury found K not guilty.

The Court of Appeal unanimously overturned K's acquittal and ordered a new trial, having concluded that the omission of K's "role in the incident" as a discrete factor for the jury to consider was a material error. The Court of Appeal determined that an accused's "role in the incident" was not limited to unlawful conduct or provocation, but rather that the new s. 34 entitled the jury to refer to an accused's behaviour throughout the incident to determine the extent of their responsibility for the final confrontation and the reasonableness of the act underlying the offence. K appeals to the Court.

*Held* (Côté J. dissenting): The appeal should be dismissed.

*Per* Wagner C.J. and Abella, Karakatsanis, **Martin** and Kasirer JJ.: The phrase "the person's role in the incident" in s. 34(2)(c) of the *Criminal Code* refers to the accused's conduct, such as actions, omissions and exercises of judgment, during the course of the incident, from beginning to end, that is relevant to whether the ultimate act was reasonable in the circumstances. This expression is not limited to conduct that could be classified as unlawful, provocative or morally blameworthy, or labelled "excessive". In the present case, the jury was not instructed to consider the effect of K's role in the incident on the reasonableness of his response. This was an error of law that had a material bearing on the jury's verdict, and a new trial is necessary to ensure

the jury is appropriately instructed with respect to the principles of self-defence and the significance of K's role in the incident.

Under the old self-defence provisions in the *Criminal Code*, the accused could access the defence through four different doors depending on the circumstances that gave rise to the accused's use of force. One provision, the new s. 34, replaced the previous four overlapping statutory categories of self-defence. The structure of s. 34 is simplified and unified in that the same three basic components or questions arise in all cases of self-defence: first, under s. 34(1)(a), the accused must reasonably believe that force or a threat of force is being used against them or someone else; second, under s. 34(1)(b), the subjective purpose for responding to the threat must be to protect oneself or others; and third, under s. 34(1)(c), the accused's act must be reasonable in the circumstances.

The three inquiries under the new s. 34(1) can usefully be conceptualized as (1) the catalyst (s. 34(1)(a)); (2) the motive (s. 34(1)(b)); and (3) the response (s. 34(1)(c)). The catalyst considers the accused's state of mind and the perception of events that led them to act. Unless the accused subjectively believed on reasonable grounds that force or a threat thereof was being used against their person or that of another, the defence is unavailable. The question is not what the accused thought was reasonable based on their characteristics and experiences, but rather what a reasonable person with those relevant characteristics and experiences would perceive. The motive considers the accused's personal purpose in committing the act that constitutes the

offence. This is a subjective inquiry which goes to the root of self-defence: if there is no defensive or protective purpose, the rationale for the defence disappears. Clarity as to the accused's purpose is critical, as the spectrum of what qualifies as a reasonable response may be limited by the accused's purpose at any given point in time.

The final inquiry, the response, examines the accused's response to the use or threat of force and requires that the act committed be reasonable in the circumstances. While s. 34(1)(a) and (b) address the belief and the subjective purpose of the accused, the reasonableness inquiry under s. 34(1)(c) is primarily concerned with the reasonableness of the accused's actions, not their mental state. The reasonableness inquiry under s. 34(1)(c) operates to ensure that the law of self-defence conforms to community norms of conduct. By grounding the law of self-defence in the conduct expected of a reasonable person in the circumstances, an appropriate balance is achieved between respecting the security of the person who acts and security of the person acted upon. The transition to "reasonableness" under s. 34(1)(c) illustrates the new scheme's orientation towards broad and flexible language: the ordinary meaning of the provision is more apparent to the everyday citizen and not dependent on an appreciation of judicial interpretation or terms of art.

This flexibility is most obviously expressed by the requirement to assess the reasonableness of the accused's response by reference to a non-exhaustive list of factors set out in s. 34(2). Through s. 34(2), Parliament has expressly structured how a decision maker ought to determine whether an act of self-defence was reasonable in the

circumstances. The factors are not exhaustive, which allows the law to develop. The question is not the reasonableness of each factor individually, but the relevance of each factor to the ultimate question of the reasonableness of the act. Once a factor meets the appropriate legal and factual standards, it is for the trier of fact to assess and weigh the factors and determine whether or not the act was reasonable. This is a global, holistic exercise, and no single factor is necessarily determinative of the outcome.

One of the factors to be considered, which is at issue in the instant case, is “the person’s role in the incident”, set out in s. 34(2)(c). The proper interpretation of s. 34(2)(c) emerges from following the basic principles of statutory interpretation: reading the words of the statute in their entire context, in their grammatical and ordinary sense, harmonious with the scheme and object of the statute. The plain language meaning of a person’s “role in the incident” is wide-ranging and neutral. It captures both a broad temporal scope and a wide spectrum of behaviour, whether that behaviour is wrongful, unreasonable, or praiseworthy. The “person’s role in the incident” captures conduct, such as actions, omissions and exercises of judgment in the course of the incident, from beginning to end, that is relevant to whether the act underlying the charge is reasonable — in other words, that, as a matter of logic and common sense, could tend to make the accused’s act more or less reasonable in the circumstances.

The inclusive temporal reach of s. 34(2)(c) is evident from the word “incident”, which has a broad and open-ended meaning. The “incident” incorporates a broader temporal frame of reference than the specific threat the accused claims



motivated them to commit the act in question. In choosing the broad phrase “the person’s role in the incident”, Parliament signaled that the trier of fact should consider the accused’s conduct from the beginning to the end of the incident giving rise to the act that constitutes the offence, as long as that conduct is relevant to the ultimate assessment of whether the accused’s act was reasonable. This expansive temporal scope distinguishes the “person’s role in the incident” under s. 34(2)(c) from other factors listed under s. 34(2), some of which are temporally bounded by the force or threat of force that motivated the accused to act on one end and their subsequent response on the other. Section 34(2)(c) was intended to serve a distinctive, balancing and residual function as it captures the full scope of actions the accused could have taken before the presentation of the threat that motivated the claim of self-defence, including reasonable avenues the accused could have taken to avoid bringing about the violent incident. Rather than a forensic apportionment of blows, words or gestures delivered immediately preceding the violent confrontation, the “incident” extends to an ongoing event that takes place over minutes, hours or days. Only a full review of the sequence of events can establish the role the accused has played to create, cause or contribute to the incident or crisis.

The words “person’s role in the incident” must be interpreted in light of the expansive and substantive changes to the law and not read simply with reference to the old self-defence provisions. Imposing an additional unwritten condition that the accused’s prior conduct be sufficiently wrongful before their “role in the incident” can be considered by the trier of fact creates an unnecessary and unduly restrictive

threshold. In drafting s. 34(2)(c), Parliament could have, but did not, use the words “the person’s wrongful role in the incident”. The requirement that conduct be wrongful before it can be considered by the trier of fact essentially imports a reasonableness assessment onto the factor of the accused’s conduct throughout the incident (under s. 34(2)(c)), instead of focusing the assessment on the overall reasonableness of the accused’s act (under s. 34(1)(c)), as Parliament directed.

While “the person’s role in the incident” is meant to be broad temporally and behaviourally, it nevertheless contains threshold requirements and is therefore not without limits. The conduct must relate to the incident and be relevant to whether the ultimate responsive act was reasonable in the circumstances. Thus, the type of conduct that would not meet the “relevance” threshold is conduct during the incident that has no bearing on whether or not the act was reasonable. The relevance inquiry is guided by both the temporal and behavioural aspects of “the person’s role in the incident” — namely, the conduct in question must be both temporally relevant and behaviourally relevant to the incident. This is a conjunctive test. The many obligations trial judges have when instructing a jury also operate as sufficient safeguards or guardrails, and the trial judge continues to play a gatekeeping role in instructing the jury to consider the “role in the incident” under s. 34(2)(c) as defined. Moreover, Parliament has chosen to trust juries with the task of assessing the reasonableness of the accused’s act having regard to the non-exhaustive list of factors in s. 34(2), and juries are regularly asked to apply the reasonableness standard to a number of offences and defences by asking what a reasonable person would have done in like circumstances. Finally, appellate courts

retain a supervisory role to assess the reasonableness of the verdict and they are equipped to ensure that the trial judge provided adequate instructions to the jury.

Such an interpretation of s. 34(2)(c) does not mean that an accused could be convicted of murder or other serious crimes of violence based exclusively on negligent or careless conduct leading up to a violent confrontation. A jury cannot properly convict an accused based solely on their prior conduct, even if it was unreasonable; instead, the Crown must prove beyond a reasonable doubt that an accused's act in response to a force or threat thereof was unreasonable, with reference to all of the relevant factors listed under s. 34(2). Accordingly, trial judges are expected to instruct the jury that a claim of self-defence should fail only if they conclude that the accused's ultimate act was unreasonable. More fundamentally, the burden for murder will not be met based on merely negligent or careless behaviour, and a failure to instruct the jury otherwise would be a clear error open to appellate review. Instead, the jury must consider the cumulative effect of all the relevant evidence to decide if the requisite level of fault has been established beyond a reasonable doubt.

In the present case, the trial judge provided extensive and detailed instructions to the jury, particularly with respect to the three essential elements of self-defence that the Crown had to disprove beyond a reasonable doubt. Absent from the instructions, however, was any reference to K's role in the incident under s. 34(2)(c). The jury received no instructions on how this factor should have informed their assessment of reasonableness and there was no linking of the evidence to this

specific factor. The charge failed to communicate that the jury had to consider all of K's actions, omissions and exercises of judgment throughout the entirety of the incident, and may have left the misleading impression that the reasonableness inquiry should focus on the mere instant between the time K perceived an uplifted gun and the time that he shot S. While the omission of a factor under s. 34(2) may not, in every instance, represent an error, K's role in the incident should have been expressly drawn to the attention of the jury and the absence of any explanation concerning the legal significance of his role in the incident was a serious error. This non-direction had a material bearing on the acquittal that justifies setting aside K's acquittal and ordering a new trial.

*Per Moldaver, Brown and Rowe JJ.:* Where the Crown seeks to use an accused's prior conduct to challenge their entitlement to self-defence, the prior conduct, in order to come within s. 34(2)(c), must reach a threshold of wrongfulness capable of negatively impacting the justification for the use of force which undergirds the accused's claim of self-defence. In this case, a properly instructed jury could find that K's prior conduct leading up to his use of lethal force was excessive, such that it could constitute a "role in the incident". The trial judge was therefore required to instruct the jury to determine whether K had a "role in the incident" and, if so, how that role may have affected the reasonableness of his use of lethal force. The failure to provide an instruction of this kind necessitates a new trial.

When Parliament revised the *Criminal Code*'s self-defence provisions, it had two goals in mind: first, it looked to bring a measure of simplicity to the law of self-defence; and second, it sought to retain the core principles and considerations which informed the prior law. The previous ss. 34 to 37 have been replaced with a single, unified provision at s. 34 that removes the technical prerequisites which made one self-defence provision available in the circumstances rather than another. Under the revised law, a claim of self-defence involves three elements: first, the accused must believe on reasonable grounds that force, or a threat of force, is being used against them or another person (s. 34(1)(a)); second, the accused must have acted for the purpose of defending themselves or others from that use of force or threat of force (s. 34(1)(b)); and, third, the accused's act, purportedly committed in self-defence, must be reasonable in the circumstances (s. 34(1)(c)).

Section 34(2) sets out a list of factors for the jury to consider in assessing the ultimate reasonableness of the accused's conduct under s. 34(1)(c). While this multifactorial analysis is new, the factors contained in s. 34(2) are largely drawn from considerations recognized under the previous self-defence provisions and developed through the Court's jurisprudence interpreting and applying them. By maintaining those considerations, Parliament intended that they continue to inform the self-defence analysis, albeit with respect to the single question of whether the accused's act was reasonable in the circumstances.

To answer the question of whether a trial judge is obliged to direct a jury, under s. 34(2)(c), to consider an accused's "role in the incident" leading up to their use of lethal force, it is first necessary to determine what types of prior conduct are capable of amounting to a "role in the incident" where the Crown seeks to use the accused's prior conduct to challenge their entitlement to self-defence. Only if the conduct in question is capable of amounting to a "role in the incident" must it be left for the jury to consider as part of its reasonableness analysis under s. 34(1)(c).

The scope of s. 34(2)(c) turns on the principle of justification — the *raison d'être* of any claim of self-defence. The prior law codified this principle of justification by limiting the availability of some self-defence provisions if the accused's prior conduct amounted to provocation or unlawful aggression. Under the revised law, s. 34(2)(c) retains the concern about prior wrongful conduct of this kind. Parliament simply changed the prior law's consideration of such conduct from a threshold determinant in some cases into a factor relevant to whether the accused's use of force was reasonable.

In cases where the Crown seeks to use an accused's prior conduct to challenge their entitlement to self-defence, s. 34(2)(c) must be construed narrowly: under s. 34(2)(c), an accused has a "role in the incident" only when their conduct is sufficiently wrongful as to be capable of negatively impacting the justification for the use of force which undergirds their claim of self-defence. Examples of prior conduct that meet the threshold of wrongfulness include: (a) provocation; (b) unlawful

aggression; and (c) conduct that is excessive in the circumstances as the accused reasonably perceived them to be.

A trial judge sitting with a jury has the responsibility of deciding whether there is an evidentiary foundation upon which a jury could find that the accused's prior conduct was sufficiently wrongful so as to amount to a "role in the incident". If such a foundation exists, then the trial judge must instruct the jury to: determine whether the prior conduct was sufficiently wrongful to amount to a "role in the incident" under s. 34(2)(c); and if so, weigh the accused's "role in the incident" along with the other factors in s. 34(2) in determining whether the act that constitutes the alleged offence was reasonable in the circumstances.

Without guardrails to ensure that the jury focuses only on prior conduct that is legally capable of affecting justification, there is nothing preventing a jury from rejecting a self-defence claim on the basis of prior conduct that, while imperfect, is not sufficiently wrongful as to be capable of negatively affecting justification. Similarly, declining to place guardrails around the jury's evaluation of an accused's prior conduct risks inappropriately limiting appellate review in self-defence cases.

In the present case, there was an evidentiary basis upon which the jury could find that K's prior conduct was excessive in the circumstances as he reasonably perceived them to be. The trial judge was therefore obliged to instruct the jury to decide if that conduct, in fact, reached the threshold for including it in s. 34(2)(c) and, if it did,

to consider that factor in the s. 34(1)(c) reasonableness analysis. While the trial judge did instruct the jury to consider all of the circumstances, the s. 34(1)(c) charge overwhelmingly focused the jury's attention on the moment of the shooting. Any brief mention of K's prior conduct fell short of the kind of guidance called for by a circumscribed interpretation of s. 34(2)(c). The trial judge failed to properly instruct the jury to consider K's role in the incident and this constituted a legal error that might reasonably be thought to have had a material bearing on the acquittal.

*Per Côté J. (dissenting):* There is agreement with Moldaver J. on the analysis and interpretation of s. 34(2)(c) of the *Criminal Code*, and that the trial judge erred in law by failing to properly instruct the jury to consider K's "role in the incident" as part of the s. 34(1)(c) reasonableness analysis. However, there is disagreement with Moldaver J.'s conclusion that the trial judge's error was material to the acquittal, thus warranting a new trial. The appeal should be allowed and the acquittal restored.

On an appeal from an acquittal, the Crown has a heavy burden of demonstrating that the error of the trial judge had a material bearing on the acquittal. An accused is entitled to a jury that is properly — not perfectly — instructed. In reviewing a jury charge, appellate courts are to take a functional approach, and the content of the charge cannot be divorced from the greater context of the trial, including the submissions of counsel.



In the case at bar, a functional review of the jury charge reveals that the Crown has not met its heavy burden. The trial judge's reference to the totality of the circumstances and his review of the evidence were functionally equivalent to an additional direction to consider K's "role in the incident" under s. 34(2)(c). In addition, the Crown's closing submissions focused almost entirely on the alternative courses of conduct that K could have followed. K's actions prior to the shooting were front and centre for the jury and they were told to take into account any alternative means that had been available to him to respond and the proportionality of his actions when deciding whether the act of shooting was reasonable under s. 34(1)(c). The Crown's lack of objection to the jury charge further speaks to the overall satisfactoriness of the charge. The jury was clearly in a position to fully appreciate the value and effect of the evidence in assessing the reasonableness of K's response, and the Crown has not demonstrated that the trial judge's failure to instruct on s. 34(2)(c) was material to the verdict.

### **Cases Cited**

By Martin J.

**Referred to:** *R. v. McIntosh*, [1995] 1 S.C.R. 686; *Brisson v. The Queen*, [1982] 2 S.C.R. 227; *R. v. Nelson* (1992), 8 O.R. (3d) 364; *R. v. Pintar* (1996), 30 O.R. (3d) 483; *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3; *R. v. Cain*, 2011 ONCA 298, 278 C.C.C. (3d) 228; *R. v. Baxter* (1975), 27

C.C.C. (2d) 96; *R. v. Hebert*, [1996] 2 S.C.R. 272; *R. v. Kong*, 2005 ABCA 255, 53 Alta. L.R. (4th) 25, rev'd 2006 SCC 40, [2006] 2 S.C.R. 347; *R. v. Pétel*, [1994] 1 S.C.R. 3; *R. v. Parr*, 2019 ONCJ 842; *R. v. Robertson*, 2020 SKCA 8, 386 C.C.C. (3d) 107; *R. v. Bengy*, 2015 ONCA 397, 325 C.C.C. (3d) 22; *R. v. Pilon*, 2009 ONCA 248, 243 C.C.C. (3d) 109; *R. v. Evans*, 2015 BCCA 46, 321 C.C.C. (3d) 130; *R. v. Green*, 2015 QCCA 2109, 337 C.C.C. (3d) 73; *R. v. Power*, 2016 SKCA 29, 335 C.C.C. (3d) 317; *R. v. Cormier*, 2017 NBCA 10, 348 C.C.C. (3d) 97; *R. v. Carriere*, 2013 ABQB 645, 86 Alta L.R. (5th) 219; *R. v. Chubbs*, 2013 NLCA 60, 341 Nfld. & P.E.I.R. 346; *R. v. Charlebois*, 2000 SCC 53, [2000] 2 S.C.R. 674; *R. v. Currie* (2002), 166 C.C.C. (3d) 190; *R. v. Sheri* (2004), 185 C.C.C. (3d) 155; *R. v. Kagan*, 2004 NSCA 77, 224 N.S.R. (2d) 118; *Reilly v. The Queen*, [1984] 2 S.C.R. 396; *R. v. Phillips*, 2017 ONCA 752, 355 C.C.C. (3d) 141; *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350; *R. v. Billing*, 2019 BCCA 237, 379 C.C.C. (3d) 285; *R. v. Robinson*, 2019 ABQB 889; *R. v. Cunha*, 2016 ONCA 491, 337 C.C.C. (3d) 7; *Brunelle v. R.*, 2021 QCCA 783; *R. v. Craig*, 2011 ONCA 142, 269 C.C.C. (3d) 61; *R. v. Gunning*, 2005 SCC 27, [2005] 1 S.C.R. 627; *R. v. Szczerbaniwicz*, 2010 SCC 15, [2010] 1 S.C.R. 455; *R. v. Zora*, 2020 SCC 14; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Soltys* (1980), 8 M.V.R. 59; *Soerensen v. Sood* (1994), 123 Sask. R. 72; *State Farm Mutual Insurance Company v. Economical Mutual Insurance Company*, 2018 ONSC 3496, 80 C.C.L.I. (5th) 283; *R. v. Paice*, 2005 SCC 22, [2005] 1 S.C.R. 339; *R. v. Lessard*, 2018 QCCM 249; *R. v. Hibbert*, [1995] 2 S.C.R. 973; *R. v. Borden*, 2017 NSCA 45, 349 C.C.C. (3d) 162; *R. v. Mateo-Asencio*, 2018 ONSC 173; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1

S.C.R. 402; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *R. v. Sylvester*, 2020 ABQB 27; *R. v. Merasty*, 2014 SKQB 268, 454 Sask. R. 49; *R. v. Browne*, [1973] N.I. 96; *R. v. Ameralik*, 2021 NUCJ 3, 69 C.R. (7th) 161; *R. v. Rabut*, 2015 ABPC 114; *R. v. Knott*, 2014 MBQB 72, 304 Man. R. (2d) 226; *R. v. Vaz*, 2019 QCCQ 7447; *R. v. Trotman*, 2019 ONCJ 591; *R. v. Lewis*, 2018 NLSC 191; *R. v. S(H)*, 2015 ABQB 622; *R. v. Fletcher*, 2015 CM 1004; *R. v. Williams*, 2013 BCSC 1774; *R. v. Ball*, 2013 ABQB 409; *R. v. Boyd* (1999), 118 O.A.C. 85; *Dubois v. R.*, 2010 QCCA 835; *Perka v. The Queen*, [1984] 2 S.C.R. 232; *R. v. Grandin*, 2001 BCCA 340, 95 B.C.L.R. (3d) 78; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135; *MediaQMI inc. v. Kamel*, 2021 SCC 23; *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *Azoulay v. The Queen*, [1952] 2 S.C.R. 495; *R. v. Rodgeron*, 2015 SCC 38, [2015] 2 S.C.R. 760; *R. v. A.D.H.*, 2013 SCC 28, [2013] 2 S.C.R. 269; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *R. v. Corbett*, [1988] 1 S.C.R. 670; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *R. v. Flores*, 2011 ONCA 155, 274 O.A.C. 314; *R. v. Levy*, 2016 NSCA 45, 374 N.S.R. (2d) 251; *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. Jack* (1993), 88 Man. R. (2d) 93, aff'd [1994] 2 S.C.R. 310; *Rex v. Stephen*, [1944] O.R. 339; *R. v. Barreira*, 2020 ONCA 218, 62 C.R. (7th) 101; *R. v.*

*Jacquard*, [1997] 1 S.C.R. 314; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26; *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104; *R. v. Morin*, [1998] 2 S.C.R. 345.

By Moldaver J.

**Referred to:** *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3; *R. v. Bengy*, 2015 ONCA 397, 325 C.C.C. (3d) 22; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *R. v. Pintar* (1996), 30 O.R. (3d) 483; *R. v. Siu* (1992), 71 C.C.C. (3d) 197; *R. v. Lei* (1997), 123 Man. R. (2d) 81; *R. v. Finney* (1999), 126 O.A.C. 115; *Perka v. The Queen*, [1984] 2 S.C.R. 232; *R. v. Ryan*, 2013 SCC 3, [2013] 1 S.C.R. 14; *R. v. Hibbert*, [1995] 2 S.C.R. 973; *R. v. Rafilovich*, 2019 SCC 51; *R. v. Baxter* (1975), 27 C.C.C. (2d) 96; *R. v. Hebert*, [1996] 2 S.C.R. 272; *R. v. Barton*, 2019 SCC 33; *R. v. Jacquard*, [1997] 1 S.C.R. 314; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26; *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *R. v. Corbett*, [1988] 1 S.C.R. 670; *R. v. Sutton*, 2000 SCC 50, [2000] 2 S.C.R. 595; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197.

By Côté J. (dissenting)

*R. v. Sutton*, 2000 SCC 50, [2000] 2 S.C.R. 595; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *R. v. Jacquard*, [1997] 1 S.C.R. 314; *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301; *R. v.*

*Luciano*, 2011 ONCA 89, 273 O.A.C. 273; *Azoulay v. The Queen*, [1952] 2 S.C.R. 495; *R. v. Barreira*, 2020 ONCA 218, 62 C.R. (7th) 101; *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245.

## **Statutes and Regulations Cited**

*Citizen's Arrest and Self-defence Act*, S.C. 2012, c. 9, s. 2.

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 25, 27, 34 [repl. 2012, c. 9, s. 2], 35 [*ibid.*], 36 [rep. 2012, c. 9, s. 2], 37 [*ibid.*], 232, 235(1), 265(1)(b), 494.

*Zero Tolerance for Barbaric Cultural Practices Act*, S.C. 2015, c. 29, s. 7.

## **Authors Cited**

Brudner, Alan. "Constitutionalizing self-defence" (2011), 61 *U.T.L.J.* 867.

Canada. Department of Justice. *Bill C-26 (S.C. 2012 c. 9) Reforms to Self-Defence and Defence of Property: Technical Guide for Practitioners*. Ottawa, March 2013 (online: <https://www.justice.gc.ca/eng/rp-pr/other-autre/rsddp-rlddp/pdf/c26.pdf>; archived version: [https://www.scc-csc.ca/cso-dce/2021SCC-CSC37\\_1\\_eng.pdf](https://www.scc-csc.ca/cso-dce/2021SCC-CSC37_1_eng.pdf)).

Canada. House of Commons. *House of Commons Debates*, vol. 146, No. 58, 1st Sess., 41st Parl., December 1, 2011, pp. 3833-34, 3841.

Canada. House of Commons. *House of Commons Debates*, vol. 146, No. 109, 1st Sess., 41st Parl., April 24, 2012, pp. 7063-65.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Human Rights*, No. 25, 1st Sess., 41st Parl., March 8, 2012.

Canada. House of Commons. Standing Committee on Justice and Human Rights. *Evidence*, No. 18, 1st Sess., 41st Parl., February 7, 2012, pp. 2, 9.

- Canada. Law Reform Commission of Canada. Working Paper 29. *Criminal Law — The General Part: Liability and Defences*. Ottawa: Minister of Supply and Services Canada, 1982.
- Canada. Senate. Standing Senate Committee on Legal and Constitutional Affairs. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 19, 1st Sess., 41st Parl., May 17, 2012.
- Canadian Oxford Dictionary*, by Katherine Barber, ed. Don Mills, Ont.: Oxford University Press, 1998, “incident”.
- Coughlan, Steve. “The Rise and Fall of Duress: How Duress Changed Necessity Before Being Excluded by Self-Defence” (2013), 39 *Queen’s L.J.* 83.
- Fehr, Colton. “Self-Defence and the Constitution” (2017), 43 *Queen’s L.J.* 85.
- Ferguson, Gerry. “Self-Defence: Selecting the Applicable Provisions” (2000), 5 *Can. Crim. L. Rev.* 179.
- Ferzan, Kimberly. “Justification and Excuse”, in John Deigh and David Dolinko, eds., *The Oxford Handbook of the Philosophy of the Criminal Law*. New York: Oxford University Press, 2011, 239.
- Fletcher, George P. “The Right and the Reasonable”, in Russell L. Christopher, ed., *Fletcher’s Essays on Criminal Law*. New York: Oxford University Press, 2013, 150.
- Merriam-Webster’s Collegiate Dictionary*, 11th ed. Springfield, Mass.: Merriam-Webster, 2003, “role”.
- Muñoz Conde, Francisco. “Putative Self-Defence: A Borderline Case Between Justification and Excuse” (2008), 11 *New Crim. L. Rev.* 590.
- Ormerod, David. *Smith and Hogan’s Criminal Law*, 15th ed. Oxford: Oxford University Press, 2018.
- Paciocco, David M. “Applying the Law of Self-Defence” (2008), 12 *Can. Crim. L. Rev.* 25.
- Paciocco, David M. “The New Defense against Force” (2014), 18 *Can. Crim. L. Rev.* 269.
- Parent, Hugues. *Traité de droit criminel*, t. I, *L’imputabilité et les moyens de défense*, 5<sup>e</sup> éd. Montréal: Thémis, 2019.

Roach, Kent. “A Preliminary Assessment of the New Self-Defence and Defence of Property Provisions” (2012), 16 *Can Crim. L. Rev.* 275.

Stewart, Hamish. “The constitution and the right of self-defence” (2011), 61 *U.T.L.J.* 899.

Stuart, Don. *Canadian Criminal Law: A Treatise*, 2nd ed. Toronto: Carswell, 1987.

Sullivan, Ruth. *Statutory Interpretation*, 3rd ed. Toronto: Irwin Law, 2016.

Watt, David. *Watt’s Manual of Criminal Jury Instructions*, 2nd ed. Toronto: Thomson/Carswell, 2015.

Weisbord, Noah. “Who’s Afraid of the Lucky Moose? Canada’s Dangerous Self-Defence Innovation” (2018), 64 *McGill L.J.* 349.

APPEAL from a judgment of the Ontario Court of Appeal (Strathy C.J.O. and Doherty and Tulloch JJ.A.), 2020 ONCA 151, 149 O.R. (3d) 639, 60 C.R. (7th) 233, [2020] O.J. No. 797 (QL), 2020 CarswellOnt 2479 (WL Can.), setting aside the acquittal of the accused and ordering a new trial. Appeal dismissed, Côté J. dissenting.

*Michael W. Lacy and Jeffrey R. Manishen*, for the appellant.

*Susan L. Reid and Rebecca Schwartz*, for the respondent.

*Vincent R. Paquet*, for the intervener Association québécoise des avocats et avocates de la défense.

*Ian R. Smith*, for the intervener the Criminal Lawyers’ Association (Ontario).

The judgment of Wagner C.J. and Abella, Karakatsanis, Martin and Kasirer JJ. was delivered by

MARTIN J. —

## I. Introduction

[1] The law of self-defence plays an important part in the criminal law and in society. At the core of the defence is the sanctity of human life and physical inviolability of the person. Preserving life and limb operates to explain both why the law allows individuals to resist external threats and why the law imposes limits on the responsive action taken against others in its name. Life is precious. Any legal basis for taking it must be defined with care and circumspection (*R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 82).

[2] The contours of our law of self-defence are tied to our notions of culpability, moral blameworthiness and acceptable human behaviour. To the extent self-defence morally justifies or excuses an accused's otherwise criminal conduct and renders it non-culpable, it cannot rest exclusively on the accused's perception of the need to act. Put another way, killing or injuring another cannot be lawful simply because the accused believed it was necessary. Self-defence demands a broader societal perspective. Consequently, one of the important conditions limiting the availability of self-defence is that the act committed must be reasonable in the circumstances. A fact



finder is obliged to consider a wide range of factors to determine what a reasonable person would have done in a comparable situation.

[3] In March 2013, Parliament's redesigned *Criminal Code* provisions on self-defence came into force. These changes not only expanded the offences and situations to which self-defence could apply, but also afforded an unprecedented degree of flexibility to the trier of fact. This flexibility is most obviously expressed by the requirement to assess the reasonableness of the accused's response by reference to a non-exhaustive list of factors, one of which is "the person's role in the incident". The interpretation and breadth of this new phrase is at the heart of this appeal.

[4] Is this factor, as argued by Mr. Khill, restricted to cases of unlawful conduct, morally blameworthy behaviour or provocation as previously defined in the repealed provisions? Or does it include any relevant conduct by the accused throughout the incident that colours the reasonableness of the ultimate act that is the subject matter of the charge? I conclude that it is the latter. While the ultimate question is whether the act that constitutes the criminal charge was reasonable in the circumstances, the jury must take into account the extent to which the accused played a role in bringing about the conflict to answer that question. It needs to consider whether the accused's conduct throughout the incident sheds light on the nature and extent of the accused's responsibility for the final confrontation that culminated in the act giving rise to the charge.

[5] In the present case, this jury was not instructed to consider the effect of Mr. Khill's role in this incident on the reasonableness of his response and I am satisfied this was an error of law that had a material bearing on the jury's verdict.

## II. Background

[6] In the early morning of February 4, 2016, Mr. Khill was awoken by his then-common law partner, Melinda Benko, and alerted to the sound of a loud knocking outside their home. Mr. Khill went to the bedroom window and, looking out over the driveway, observed that the dashboard lights of his pickup truck were on. He retrieved his shotgun from the bedroom closet and loaded two shells stored in a bedside table. Dressed only in underwear and a T-shirt, he immediately made his way to the house's back door.

[7] In the moments that followed, Mr. Khill left his house through the back door in his bare feet. Ms. Benko remained in the house and was looking out the bedroom window. He traversed through the "breezeway", a passage between the garage and the house itself, and cautiously opened the door to the driveway. The property's unlit frontage was pitch black. But, from this vantage point, Mr. Khill noticed movement inside the cab of the truck. Stepping as quietly as he could, Mr. Khill advanced towards the vehicle. As he rounded the rear of the truck, he noticed someone bent over into the open passenger-side door. Having gone unnoticed to this point, Mr. Khill shouted to the unidentified person, "Hey, hands up!"

[8] The person leaning into Mr. Khill's truck was Mr. Jonathan Styres. Forensic evidence from the scene estimated that the distance between Mr. Khill and Mr. Styres was between 3 and 12 feet. As Mr. Styres turned towards the sound of Mr. Khill's voice, Mr. Khill fired, racked the action and fired a second time, striking Mr. Styres with two concentrated bursts of shot in the chest and shoulder. Blood spatter analysis indicated that Mr. Styres was fully or partially turned towards the interior of the truck when at least one of these wounds was sustained. After Mr. Styres fell to the ground, mortally wounded, Mr. Khill searched Mr. Styres for weapons. There was no gun. He found only a folding knife tucked into Mr. Styres' pants pocket.

[9] Mr. Khill returned inside the home to discover Ms. Benko on the phone with 911 dispatch. The recording captured Ms. Benko telling Mr. Khill: "Baby, they have to come" (A.R., vol. III, at p. 218). After Mr. Khill took the phone, he stated to the dispatcher:

He was in the truck with his hands up — and not like, not with his hands up to surrender, but his hands up pointing at me. It was pitch black, and it looked like he was literally about to shoot me, so I shot him.

(A.R., vol. II, at p. 126)

[10] The first officer arrived on scene approximately five minutes after the call was placed and performed CPR on Mr. Styres until paramedics arrived. Shortly after, Mr. Khill was arrested for attempted murder and uttered to the arresting officer:

. . . “Like I’m a soldier. That’s how we were trained. I came out. He raised his hands to like a gun height, it was dark, I thought I was in trouble,” . . . “Does self-defence mean anything in court?”

(A.R., vol. III, at pp. 126-27)

[11] While no definitive timeline emerged from the evidence, Mr. Khill’s counsel submitted to this Court that the time between Mr. Khill first hearing the noises in his bedroom and the death of Mr. Styres was a matter of minutes at most, and certainly less than ten minutes.

[12] At trial, Mr. Khill testified that he feared that whoever had entered the truck may well attempt to enter the garage or house next. Mr. Khill claimed that he perceived the threat from the noise outside as so imminent that it was unnecessary to take the time to call 911. At the same time, he acknowledged in cross-examination that he was aware no one had attempted to enter the home or garage before he chose to go outside and confront whoever was in his truck. Mr. Khill claimed that his intent was to find out who was outside, confront them and, “if they choose to surrender, then [he] would disarm and detain them” (A.R., vol. V, at p. 306). The defence also adduced evidence about Mr. Khill’s and Ms. Benko’s concerns that someone may have previously tested the electronic keypad to their home.

[13] Mr. Khill’s training as a part-time reservist in the Canadian Armed Forces featured prominently at trial. His experience consisted of intermittent employment from 2007 to 2011 with a local artillery unit, ending some five years before the incident.

The only training qualifications in evidence consisted of the two most basic army courses, being the Basic Military Qualification and Soldier Qualification courses, one of which he completed on a part-time basis as a co-op student in high school. He explained his decision to leave the home with a gun was a learned response from his training to “gain control and neutralize the threat” (A.R., vol. V, at p. 302). Mr. Khill acknowledged that when he received his training years before, a clear line was drawn between battlefield conditions and civilian life. There was also evidence that he had received training that even in war-like situations, the military has strict rules concerning the use of deadly force.

[14] Mr. Khill admitted he spent no time thinking and his response did not include “any of the civilian aspects” suggested by the Crown, such as calling 911, turning on the porch light or verbally confronting Mr. Styres from a safe distance (A.R., vol. V, at p. 356; see also pp. 300, 352 and 355). While acknowledging that staying inside the safety of his home with Ms. Benko would have been a reasonable option, Mr. Khill claimed that going outside, advancing alone into the darkness with a loaded gun against an unknown number of assailants, possibly armed as heavily as he was, seemed reasonable to him. Mr. Khill also explained his mistaken perception that Mr. Styres had a gun was based on his military training about what hand movements are consistent with the raising of a firearm. Despite failing to confirm whether Mr. Styres in fact possessed a weapon, Mr. Khill nevertheless fired two successive volleys into Mr. Styres at short range, killing him.

### III. Lower Court Decisions

#### A. *Ontario Superior Court of Justice (Glithero J.)*

[15] Mr. Khill was tried by judge and jury for second degree murder. He admitted that his intentional use of deadly force caused Mr. Styres' death. He claimed he acted in self-defence under s. 34 of the *Criminal Code*, R.S.C. 1985, c. C-46. The central issue at trial was whether the killing was lawful or unlawful.

[16] The Crown argued that Mr. Khill acted recklessly, unreasonably and unlawfully by resorting to deadly force for what was, and he knew to be, a property crime. The Crown's theory was that Mr. Khill's military training was limited and dated and he unlawfully killed Mr. Styres despite being in no immediate danger. The Crown described Mr. Khill's actions as rash and unreasonable, suggesting that had he taken a moment to properly consider the situation, he could have instead resorted to a number of prudent alternatives, including calling 911 and staying inside with Ms. Benko. Had he done so, the deadly confrontation could have been avoided and Mr. Styres would still be alive.

[17] Mr. Khill expressly took the position that he did not act in defence of property. He claimed that his conduct, both preceding and during the shooting, was motivated solely to defend himself and his common-law partner. He said he sought to regain control and acted instinctively according to his military training without any

thought. Despite Mr. Khill testifying to his impression that he and Ms. Benko were under immediate threat the moment he heard the noises outside, his counsel at trial suggested to the jury that self-defence was not an issue at that stage. Instead, the defence's closing address directed the jury to focus on the "split second" before Mr. Khill fired, and not his decision to go outside, when assessing his claim of self-defence.

[18] In his charge to the jury, the trial judge provided a thorough overview of the evidence and the respective submissions of each party. The trial judge correctly explained that Mr. Khill's claim of self-defence rested on three questions: (1) whether Mr. Khill believed on reasonable grounds force was threatened or being used against him and Ms. Benko; (2) whether Mr. Khill acted for the purpose of defending himself; and (3) whether Mr. Khill's actions were reasonable in the circumstances. The Crown bore the onus of convincing the jury, beyond a reasonable doubt, that the answer to at least one of these questions was "no".

[19] The trial judge reiterated several important principles, including that an honest but mistaken belief can still support a claim of self-defence so long as the belief was reasonable. The trial judge also described to the jury some of the statutory factors that should assist them in weighing whether the act of shooting Mr. Styres was reasonable in the circumstances, as required by s. 34(1)(c). Absent from this list of factors was any reference to Mr. Khill's "role in the incident" under s. 34(2)(c). Thus, the charge contained no instruction to the jury to consider the role Mr. Khill played in and throughout the entire incident that led to the shooting.

[20] The jury found Mr. Khill not guilty.

B. *Court of Appeal for Ontario, 2020 ONCA 151, 149 O.R. (3d) 639 (Strathy C.J.O. and Doherty and Tulloch J.J.A.)*

[21] The Court of Appeal for Ontario unanimously overturned Mr. Khill's acquittal and ordered a new trial. Writing for the Court of Appeal, Doherty J.A. concluded that the omission of an accused's "role in the incident" as a discrete factor for the jury to consider under s. 34(1)(c) was a material error. He determined that an accused's "role in the incident" was not limited to unlawful conduct or provocation as that word was defined in the prior self-defence provisions. Instead, the flexibility of the new provisions entitled the jury to refer to an accused's behaviour throughout the incident to determine the extent of an accused's responsibility for the final confrontation and the ultimate reasonableness of the act underlying the offence.

[22] In Mr. Khill's case, Doherty J.A. took the view that the reasonableness of Mr. Khill's actions could not be judged simply based on his perceptions at the moment he fired. Instead, the trial judge should have directed the jury to consider how Mr. Khill's actions leading to the incident contributed to the final confrontation. The trial judge did review the evidence from the incident as a whole. However, without instruction on this particular factor, it may not have been clear to the jury that they should consider Mr. Khill's role throughout the incident when assessing the ultimate reasonableness of his actions. The jury may have looked favourably on Mr. Khill's



actions, or they may have considered them unreasonable, but in the end it was essential for the jury to be directed as to Mr. Khill's role in the incident.

#### IV. Issue

[23] Did the trial judge commit an error of law in failing to instruct the jury on Mr. Khill's role in the incident and did this omission have a material impact on the verdict?

#### V. Parties' Submissions

[24] Mr. Khill claims there was no material error in the jury instructions and proposes a very narrow reading of "the person's role in the incident". He argues that the 2013 amendments to the self-defence provisions were not meant to significantly alter the scope of the protection afforded by self-defence in Canadian criminal law. As such, he says that s. 34(2)(c) is directed at only unlawful, provocative or morally blameworthy conduct on the part of the accused — categories based in the previous legislation. He argues it is not intended to direct a jury to consider whether morally blameless or pro-social conduct can defeat a self-defence claim on what he asserts is some "but for" causation analysis.

[25] Mr. Khill submits that because he was not engaged in unlawful, provocative or morally blameworthy conduct, no instruction on his role in the incident

was warranted and the omission was not an error. He disagrees with the Court of Appeal's conclusion that even where an accused's conduct is not unlawful or provocative as that word was defined in the prior self-defence provisions, s. 34(2)(c) renders an accused's conduct during the "incident" relevant. In his view, the broader interpretation adopted by the Court of Appeal operates to unnecessarily constrain the availability of self-defence and effectively imposes a duty to retreat from one's own home.

[26] The Crown argues that the Court of Appeal was correct in holding that the trial judge committed a reversible error by failing to instruct the jury to consider Mr. Khill's role in the incident when assessing the reasonableness of the shooting. This was a mandatory factor for the jury to consider under s. 34(2)(c) of the new self-defence provisions. Parliament made deliberate, substantial and substantive changes to the self-defence provisions in its 2013 amendments and the chosen phrase of "the person's role in the incident" has a broad and flexible meaning. This phrase was intended to enlarge the scope of the inquiry of reasonableness — one capable of positive or negative inferences. In design and purpose, this factor is intended to force a consideration of the wider context in which the accused acted.

[27] The Crown argues that s. 34(2)(c) is not limited to illegal or provocative conduct, nor does it impose a "but for" test of causality. Instead, juries must be directed to examine the entirety of the accused's actions leading up to the illegal act underlying the charge. The trier of fact must 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 that culminated in the act giving rise to the charge. As this jury did not understand the significance of Mr. Khill's role in the incident as a discrete factor, it lacked important information, which impacted its deliberations. Mr. Khill's role in the incident leading up to the confrontation was potentially a significant factor in the assessment of the reasonableness of the shooting, and the non-direction had a material bearing on the verdict.

## VI. Analysis

[28] I first provide a brief overview of both the previous provisions on self-defence and the current law. That groundwork is necessary to evaluate Mr. Khill's claim that these amendments merely simplified the law but did not change its substance. I then explore the new s. 34 in more detail. That review is essential in its own right and informs the context, purpose and scheme of the amendments, which will be key considerations when I turn to the proper interpretation of the new phrase "the person's role in the incident".

### A. *The Previous Law of Self-Defence and the Impetus of Reform*

[29] Under the old self-defence provisions in the *Criminal Code*, the accused could access the defence through four different doors depending on the circumstances that gave rise to the accused's use of force. The self-defence provisions were found in

ss. 34(1) (unprovoked assaults without intention to cause death), 34(2) (assaults causing death or bodily harm), 35 (provoked assaults) and 37. Section 37 extended the defence to accused persons who acted to defend themselves or anyone under their protection, even if they intended to cause death or bodily harm, so long as the act was necessary and proportionate.

[30] Each section established its own set of what may be described as “preliminary conditions” that needed to be satisfied to bring a particular self-defence section into play, as well as “qualifying conditions” that needed to be met to successfully establish the defence (D.M. Paciocco, “Applying the Law of Self Defence” (2008), 12 *Can. Crim. L. Rev.* 25, at p. 49). A failure to meet these conditions could preclude a claim of self-defence from either being put before the jury or accepted by it. For example, the accused must have faced an unlawful assault (or reasonably perceived such an assault) to access the defence. Subsection 34(1) required that this assault was not provoked by the accused and that the accused only used as much force as was necessary to defend themselves, without the intention to cause death or grievous bodily harm. In contrast, s. 34(2) was applicable where the accused caused death or grievous bodily harm, including where the accused intended this result, as long as the accused held a reasonable apprehension they faced the same harm and could not otherwise preserve themselves (*Brisson v. The Queen*, [1982] 2 S.C.R. 227, at pp. 257-58).

[31] Adding to the complexity, some of these requirements went beyond factual findings about what occurred and required legal determinations such as the accused's intention or the legal qualities of certain actions. To show the accused provoked an unlawful assault, the Crown had to point to "conduct by the accused that [was] intended by him or her to provoke an assault on the accused" (*R. v. Nelson* (1992), 8 O.R. (3d) 364 (C.A.), at p. 371). Thus, the legal effect of an act like seizing a weapon in the heat of an argument would not be judged on whether it instigated the assault in fact, but would require a determination of whether the accused did so for the purpose of preventing versus initiating the confrontation (*R. v. Pintar* (1996), 30 O.R. (3d) 483 (C.A.), at pp. 499-501).

[32] Some requirements for establishing self-defence under the old law also included an objective reasonableness component. For example, under s. 34(2), the accused had to show a *reasonable* apprehension of death or grievous bodily harm, and a *reasonable* belief that they could not otherwise preserve themselves from harm. Courts developed factors to assist in evaluating the reasonableness of the accused's beliefs and actions, such as the imminence of the threat, the opportunity to retreat, restraint, the proportionality of the force used and the history between the parties (*R. v. Lavallee*, [1990] 1 S.C.R. 852, at p. 876; *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 40; *R. v. Cain*, 2011 ONCA 298, 278 C.C.C. (3d) 228, at para. 9; D. M. Paciocco, "The New Defense against Force" (2014), 18 *Can. Crim. L. Rev.* 269, at pp. 291-92). These factors were not inflexible requirements; for instance, the accused was not required to "weigh to a nicety" the amount of force used under the rubric of

proportionality (*R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (Ont. C.A.), at p. 111; see also *R. v. Hebert*, [1996] 2 S.C.R. 272, at para. 18; *R. v. Kong*, 2005 ABCA 255, 53 Alta. L.R. (4th) 25, at paras. 206-9 (per Wittman J.A., dissenting), rev'd 2006 SCC 40, [2006] 2 S.C.R. 347 (agreeing with Wittman J.A.)). The retreat requirement, read into s. 34(1) and (2) by the courts, was a “soft” one, and even the express statutory requirement to retreat “as far as it was feasible to do so” under s. 35 was “softened” over time (N. Weisbord, “Who’s Afraid of the Lucky Moose? Canada’s Dangerous Self-Defence Innovation” (2018), 64 *McGill L.J.* 349, at p. 365). Similarly, the significance of imminence as a discrete factor was contextualized with greater nuance following the Court’s analysis of self-defence in the context of domestic violence in *Lavallee*.

[33] The four doors into self-defence under ss. 34 to 37, with their exacting, often intention-based preconditions, drew substantial criticism from lawyers, scholars and the judiciary. They described the regime as “overlap[ping]”, “complex”, “excessively detailed” and “little more than a source of bewilderment and confusion” (*R. v. Pétel*, [1994] 1 S.C.R. 3, at p. 12; *McIntosh*, at para. 16; *Pintar*, at p. 492).

[34] While challenging enough for judges sitting alone, jury charges routinely involved redundant and winding paths to acquittal to accommodate the various options that arose based on the evidence on which a jury could reasonably rely. Judges were left with the unenviable task of ensuring the accused was not denied any viable path to acquittal, but also had to avoid over-charging the jury with unnecessarily confusing

instructions (*Hebert*). The result was often lengthy, prolix, contradictory, and burdensome instructions (Paciocco (2008)).

B. *The Reform of the Self-Defence Provisions*

[35] In response to decades of prevailing criticism concerning the complexity and unworkability of the prior provisions, Bill C-26 came into force on March 11, 2013 and introduced extensive amendments to the law of self-defence, defence of property and citizen's arrest (*Citizen's Arrest and Self-defence Act*, S.C. 2012, c. 9, s. 2). One provision, the new s. 34, replaced the previous four overlapping statutory categories of self-defence in ss. 34 to 37. The defence of property provisions were similarly unified and are now in s. 35.

[36] Parliament's restatement of the law of self-defence under s. 34 now reads:

**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 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.

### **Factors**

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

(a) the nature of the force or threat;

(b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;

(c) the person's role in the incident;

(d) whether any party to the incident used or threatened to use a weapon;

(e) the size, age, gender and physical capabilities of the parties to the incident;

(f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;

(f.1) any history of interaction or communication between the parties to the incident;

(g) the nature and proportionality of the person's response to the use or threat of force; and

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



### **No defence**

(3) Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

[37] The structure of s. 34 is simplified and unified in that the same three basic components or questions arise in all cases of self-defence: first, under s. 34(1)(a), the accused must reasonably believe that force or a threat of force is being used against them or someone else; second, under s. 34(1)(b), the subjective purpose for responding to the threat must be to protect oneself or others; and third, under s. 34(1)(c), the accused's act must be reasonable in the circumstances. Section 34(2) sets out nine non-exhaustive factors that shall be taken into account when considering if the accused's act was reasonable in the circumstances under s. 34(1)(c).

[38] The legislative history of Bill C-26 has been cited as extrinsic evidence of Parliament's intent to retain the existing scope and jurisprudential principles for self-defence rather than implement substantive changes (House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 18, 1st Sess., 41st Parl., February 7, 2012, at p. 2 (Hon. Rob Nicholson)). While the stated purpose of Bill C-26 was to clarify and simplify the law (*Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 19, 1st Sess., 41st Parl., May 17, 2012) (Hon. Rob

Nicholson)), s. 34 does much more than streamline self-defence and remove layers of complexity.

[39] Parliament looked to the previous sections and corresponding jurisprudence to find a coherent way forward. It worked with, but not necessarily within, the existing elements of the prior law. Parliament then dismantled the structure of the old provisions and constructed something original. In doing so it took many of the building blocks from the prior law, left some as rubble, brought in some new materials and reshaped others to fit the new form. There is now only one door to the new edifice for all cases of defence of the person. Even if one accepts that the new unified framework in s. 34 was built upon the foundation of the old provisions and case law, it changed the law of self-defence in significant ways by broadening the scope and application of self-defence and employing a multifactorial reasonableness assessment.

[40] First, the new self-defence provisions are “broader in compass” (Paciocco (2014), at pp. 275-76). For instance, under former s. 34(1) and (2), the accused had to show they faced or reasonably perceived an unlawful “assault”. Under the new law, what is relevant is reasonably apprehended “force” of any kind, including force that is the product of negligence. The accused’s response under the new law is also no longer limited to a defensive use of force. It can apply to other classes of offences, including acts that tread upon the rights of innocent third parties, such as theft, breaking and entering or dangerous driving. Replacing “assault” with “force” also clarifies that imminence is not a strict requirement, consistent with jurisprudence interpreting the

old provisions since *Lavallee* (imminence remains a factor under s. 34(2)(b)). The accused need not believe that the victim had the *present* ability to effect a threat of physical force, as is required in order to establish an assault under s. 265(1)(b) of the *Criminal Code*. Finally, s. 34 is equally applicable whether the intention is to protect oneself or another, and is no longer circumscribed to persons “under [the accused’s] protection”, as was previously required by former s. 37.

[41] Second, Parliament chose a novel methodology when it removed the tangle of preliminary and qualifying conditions under the previous provisions and established a unified framework with a general reasonableness standard. The conditions formerly imposed by each of the self-defence provisions were screening devices used to determine whether the defence was left with the jury in the first place, and then to determine whether the defence had been established. Some of these concepts are now incorporated into s. 34(2) as relevant factors in the reasonableness inquiry. As such, the legal effect of the erstwhile preliminary and qualifying conditions in former ss. 34 to 37 has been transformed.

[42] The importance of this reform cannot be overstated. As Justice Paciocco writes, “the evaluative component of the defence is more fluid, and factors that would not have been contemplated under the repealed provisions are now available to the decision-maker” (Paciocco (2014), at p. 295). It is now for the trier of fact to weigh these factors and determine the ultimate success of the defence. The discretion conferred on triers of fact means they are now free to grant the defence in the absence

of what was previously a condition for its success. For example, while the previous s. 34(1) required as a preliminary condition that the force used be “no more than is necessary”, under the new framework, the nature and proportionality of the accused’s response to the use or threat of force is but one factor (s. 34(2)(g)) that informs the overall reasonableness of the accused’s actions in the circumstances.

[43] Likewise, provocation or the absence of provocation is no longer a preliminary requirement that funnels the accused through one door or another, but rather simply a factor to be considered. The trier of fact is therefore “freer . . . to treat provocation as an ongoing consideration that can influence the final determination of reasonableness rather than a mere threshold consideration that expires in influence once it is determined which self-defence provision is to be applied” (Paciocco (2014), at p. 290).

[44] The upshot of Parliament’s choice is that the defence is now more open and flexible and additional claims of self-defence will be placed before triers of fact. Even in situations where the extent of the accused’s initial involvement is contested or the violent encounter developed over a series of discrete confrontations, the unified framework under s. 34 means judges need only provide juries with a single set of instructions.

[45] Replacing preliminary and qualifying conditions with reasonableness factors also means these factors must be considered in all self-defence cases in which

they are relevant on the facts. By contrast, under ss. 34 to 37 of the prior regime, some requirements were only engaged in certain situations, depending on which of those provisions governed. For example, while the former s. 37 required that the force used be no more than necessary, there was no similar requirement under the former s. 34(2) (*Hebert*, at para. 16). Now, however, the proportionality of an accused's actions in response to a threat is always a discrete factor to be considered under s. 34(2)(g). It may be a deciding factor, even where the accused was an otherwise innocent victim of circumstance (*R. v. Parr*, 2019 ONCJ 842; *R. v. Robertson*, 2020 SKCA 8, 386 C.C.C. (3d) 107, at paras. 41-43).

[46] In practice, the new provisions are simultaneously more generous to the accused and more restrictive: the provisions narrow the scope of self-defence in some factual circumstances and broaden it in others (*R. v. Bengy*, 2015 ONCA 397, 325 C.C.C. (3d) 22, at paras. 47-48; Paciocco (2014), at p. 296). The transposition of mandatory conditions into mere factors suggests more flexibility in accessing the defence, but this added flexibility is counter-balanced by the requirement to consider certain factors — including proportionality and the availability of other means to respond to the use or threat of force — in every case in which they are relevant, regardless of the genesis of the confrontation or the features of the dispute.

[47] The question also arises whether the amendments have altered the scope or nature of self-defence by shifting its moral foundation from justification to excuse. On a justificatory account of self-defence, killing in self-defence is not considered

wrongful because it upholds the right to life and autonomy of the person acting. It is grounded on the necessity of self-preservation (*R. v. Pilon*, 2009 ONCA 248, 243 C.C.C. (3d) 109, at para. 68). In contrast, an excuse negates the blameworthiness of the accused. It mainly works by denying the voluntary character of an act that is nevertheless wrongful. A number of theorists have questioned whether self-defence is a justification, especially outside the classic case of defence against an unlawful use of force. They are divided in cases where the accused uses force against a reasonably perceived threat that does not exist in fact, against an attack that they have provoked, and when the defending act is not proportional or necessary (A. Brudner, “Constitutionalizing self-defence” (2011), 61 *U.T.L.J.* 867, at pp. 891-95; C. Fehr, “Self-Defence and the Constitution” (2017), 43 *Queen’s L.J.* 85, at p. 109; K. Ferzan, “Justification and Excuse”, in J. Deigh and D. Dolinko, eds., *The Oxford Handbook of the Philosophy of the Criminal Law* (2011), 239, at p. 253; K. Roach, “A Preliminary Assessment of the New Self-Defence and Defence of Property Provisions” (2012), 16 *Can. Crim. L. Rev.* 275, at p. 276-77). In such cases, the defending act is not considered rightful or tolerable by many authors, but guilt can be avoided when the circumstances call into question the voluntariness of the act, which brings it closer to an excuse and the law of necessity.

[48]       The 2013 amendments further obscure the moral foundation of self-defence. The new provisions retain the underlying principle that the accused’s actions are a response to an external threat to their bodily integrity. However, unlike the old law, the self-defence provisions no longer use the language of justification. Section 34

simply states that the accused “is not guilty of an offence” where the requirements of the defence are met. Further, the elimination of an “unlawfu[l] assaul[t]” (per the previous s. 34(1)) or an “apprehension of death or grievous bodily harm” (per the previous s. 34(2)) as discrete triggering features arguably removes any residual boundary between the “morally justifiable” and “morally excusable” categories of the defence. Some argue that the new s. 34 may accommodate a continuum of moral conduct, including acts that are merely “morally permissible” where the threat and response meet a reasoned equilibrium (Fehr, at p. 102). This suggests the defence is neither purely a justification nor an excuse, instead occupying a middle ground of “permissibility” between rightfulness and blamelessness. As will become apparent, the line between justification and excuse has been blurred by the amendments, and this must be taken into consideration in interpreting the new provisions. Because the defence is now available in circumstances that may not fit neatly within the traditional justification-based framework, the need to consider all of the accused’s conduct over the course of the incident that is relevant to the reasonableness of the act of purported self-defence takes on greater importance.

[49] To summarize, while a driving purpose of the amendments was to simplify the law of self-defence in Canada, Parliament also effected a significant shift. It is widely recognized by appellate courts across the country and academics that these amendments resulted in substantive changes to the law of self-defence (*Bengy*, at paras. 45-50; *R. v. Evans*, 2015 BCCA 46, 321 C.C.C. (3d) 130, at paras. 19-20 and 30; *R. v. Green*, 2015 QCCA 2109, 337 C.C.C. (3d) 73, at paras. 49-50; *R. v. Power*, 2016

SKCA 29, 335 C.C.C. (3d) 317, at para. 26; *R. v. Cormier*, 2017 NBCA 10, 348 C.C.C. (3d) 97, at para. 46; *R. v. Carriere*, 2013 ABQB 645, 86 Alta L.R. (5th) 219, at paras. 92-101; *R. v. Chubbs*, 2013 NLCA 60, 341 Nfld. & P.E.I.R. 346, at para. 7; see also Department of Justice, *Bill C-26 (S.C. 2012 c. 9) Reforms to Self-Defence and Defence of Property: Technical Guide for Practitioners*, March 2013 (online) (“Technical Guide”), at pp. 10-28; Fehr, at p. 88; Paciocco (2014), at p. 271; D. Watt, *Watt’s Manual of Criminal Jury Instructions* (2nd ed. 2015), at p. 1255). The words “person’s role in the incident” in s. 34(2)(c) must be interpreted in light of the expansive and substantive changes to the law and not read simply with reference to the old provisions.

[50] I will now turn to a more detailed review of the three inquiries under s. 34 before setting out how the new phrase “person’s role in the incident” under s. 34(2)(c) should be interpreted.

### C. *The Three Inquiries Under Section 34*

[51] The three inquiries under s. 34(1), set out above, can usefully be conceptualized as (1) the catalyst; (2) the motive; and (3) the response (Technical Guide, at p. 11; C.A. reasons, at para. 42; see also S. Coughlan, “The Rise and Fall of Duress: How Duress Changed Necessity Before Being Excluded by Self-Defence” (2013), 39 *Queen’s L.J.* 83, at p. 116). I will now discuss each of these inquiries separately.



(1) The Catalyst — Paragraph 34(1)(a): Did the Accused Believe, on Reasonable Grounds, that Force Was Being Used or Threatened Against Them or Another Person?

[52] This element of self-defence considers the accused's state of mind and the perception of events that led them to act. As stated previously, the new provisions include both defence of self and defence of another. Unless the accused subjectively believed that force or a threat thereof was being used against their person or that of another, the defence is unavailable.

[53] Importantly, the accused's actual belief must be held "on reasonable grounds". Good reason supports the overlay of an objective component when assessing an accused's belief under s. 34(1)(a) and in the law of self-defence more generally. As self-defence operates to shield otherwise criminal acts from punitive consequence, the defence cannot depend exclusively on an individual accused's perception of the need to act. The reference to reasonableness incorporates community norms and values in weighing the moral blameworthiness of the accused's actions (*Cinous*, at para. 121). It "is a quality control measure used to maintain a standard of conduct that is acceptable not to the subject, but to society at large" (Paciocco (2014), at p. 278).

[54] The test to judge the reasonableness of the accused's belief under the self-defence provisions has traditionally been understood to be a blended or modified objective standard. Reasonableness was not measured "from the perspective of the hypothetically neutral reasonable man, divorced from the appellant's personal

circumstances” (*R. v. Charlebois*, 2000 SCC 53, [2000] 2 S.C.R. 674, at para. 18).

Instead, it was contextualized to some extent: the accused’s beliefs were assessed from the perspective of an ordinary person who shares the attributes, experiences and circumstances of the accused where those characteristics and experiences were relevant to the accused’s belief or actions (*Lavallee*, at p. 883).

[55] For example, an accused’s prior violent encounters with the victim were taken into account to assess whether the accused believed on reasonable grounds that they faced an imminent threat of death or grievous bodily harm (*Pétel*, at p. 13-14; *Lavallee*, at pp. 874 and 889; *Charlebois*, at para. 14; *R. v. Currie* (2002), 166 C.C.C. (3d) 190 (Ont. C.A.), at paras. 43-44; *R. v. Sheri* (2004), 185 C.C.C. (3d) 155 (Ont. C.A.), at para. 77). An accused’s mental disabilities were also considered in the reasonableness assessment (*Nelson*, at pp. 370-72; *R. v. Kagan*, 2004 NSCA 77, 224 N.S.R. (2d) 118, at paras. 37-45).

[56] However, not all personal characteristics or experiences are relevant to the modified objective inquiry. The personal circumstances of the accused that influence their beliefs — be they noble, anti-social or criminal — should not undermine the *Criminal Code*’s most basic purpose of promoting public order (*Cinous*, at para. 128, per Binnie J., concurring). Reasonableness is not considered through the eyes of individuals who are overly fearful, intoxicated, abnormally vigilant or members of criminal subcultures (*Reilly v. The Queen*, [1984] 2 S.C.R. 396, at p. 405; *Cinous*, at para. 129-30; *R. v. Phillips*, 2017 ONCA 752, 355 C.C.C. (3d) 141, at para. 98).

Similarly, the ordinary person standard is “informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the *Canadian Charter of Rights and Freedoms*” (*R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350, at para. 34). Personal prejudices or irrational fears towards an ethnic group or identifiable culture could never acceptably inform an objectively reasonable perception of a threat. This limitation ensures that racist beliefs which are antithetical to equality cannot ground a belief held on reasonable grounds. Doherty J.A. succinctly illustrated this principle in his reasons in this appeal, at para. 49:

For example, an accused’s “honest” belief that all young black men are armed and dangerous could not be taken into account in determining the reasonableness of that accused’s belief that the young black man he shot was armed and about to shoot him. To colour the reasonableness inquiry with racist views would undermine the very purpose of that inquiry. The justificatory rationale for the defence is inimical to a defence predicated on a belief that is inconsistent with essential community values and norms.

[57] The question is not therefore what the accused thought was reasonable based on their characteristics and experiences, but rather what a reasonable person with those relevant characteristics and experiences would perceive (*Pilon*, at para. 74). The law also continues to accept that an honest but mistaken belief can nevertheless be reasonable and does not automatically bar a claim to self-defence (*Lavallee*, at p. 874; *Pétel*, at p. 13; *R. v. Billing*, 2019 BCCA 237, 379 C.C.C. (3d) 285, at para. 9; *R. v. Robinson*, 2019 ABQB 889, at para. 23 (CanLII); *R. v. Cunha*, 2016 ONCA 491, 337 C.C.C. (3d) 7, at para. 8).

[58] Reasonableness is ultimately a matter of judgment and “[t]o brand a belief as unreasonable in the context of a self-defence claim is to declare the accused’s act criminally blameworthy” (C.A. reasons, at para. 46; see also *Cinous*, at para. 210, per Arbour J. in dissent but not on this point; *Pilon*, at para. 75; *Phillips*, at para. 98; G. P. Fletcher, “The Right and the Reasonable”, in R. L. Christopher, ed., *Fletcher’s Essays on Criminal Law* (2013), 150, at p. 157).

(2) The Motive — Paragraph 34(1)(b): Did the Accused Do Something for the Purpose of Defending or Protecting Themselves or Another Person from that Use or Threat of Force?

[59] The second element of self-defence considers the accused’s personal purpose in committing the act that constitutes the offence. Section 34(1)(b) requires that the act be undertaken by the accused to defend or protect themselves or others from the use or threat of force. This is a subjective inquiry which goes to the root of self-defence. If there is no defensive or protective purpose, the rationale for the defence disappears (see *Brunelle v. R.*, 2021 QCCA 783, at paras. 30-33; *R. v. Craig*, 2011 ONCA 142, 269 C.C.C. (3d) 61, at para. 35; Paciocco (2008), at p. 29). The motive provision thus ensures that the actions of the accused are not undertaken for the purpose of vigilantism, vengeance or some other personal motivation.

[60] The motive provision also distinguishes self-defence from other situations that may involve the excusable or authorized application of force by an accused, such as preventing the commission of an offence (s. 27), defence of property (s. 35) or

citizen's arrest (s. 494). Clarity as to the accused's purpose is critical, as the spectrum of what qualifies as a reasonable response may be limited by the accused's purpose at any given point in time. The range of reasonable responses will be different depending on whether the accused's purpose is to defend property, effect an arrest, or defend themselves or another from the use of force.

[61] An accused's purpose for acting may evolve as an incident progresses or escalates. Parliament's decision to modify the law of defence of person, defence of property and citizen's arrest under a single bill recognized this overlap, as each is "directly relevant to the broader question of how citizens can lawfully respond when faced with urgent and unlawful threats to their property, to themselves and to others" (*House of Commons Debates*, vol. 146, No. 58, 1st Sess., 41st Parl., December 1, 2011, at p. 3833 (Robert Goguen)). Initial steps taken to defend one's property may transition into a situation of self-defence. Likewise, separate defences may rightly apply to distinct offences or phases of an incident (*Cormier*, at para. 67). At the same time, great care is needed to properly articulate the threat or use of force that existed at a particular point in time so that the assessment of the accused's action can be properly aligned to their stated purpose. Clarity of purpose is not meant to categorize the accused's conduct in discrete silos, but instead appreciate the full context of a confrontation, how it evolved and the accused's role, if any, in bringing that evolution about. As recognized by the then-Parliamentary Secretary for the Minister of Justice at second reading, "all of these laws, any one of which may be pertinent to a given case, must be clear, flexible and provide the right balance between self-help and the resort to the police. That is why

all these measures are joined together in Bill C-26” (*House of Commons Debates*, vol. 146, No. 58, at p. 3833 (Robert Goguen)).

(3) The Response — Paragraph 34(1)(c): Was the Accused’s Conduct Reasonable in the Circumstances?

[62] The final inquiry under s. 34(1)(c) examines the accused’s response to the use or threat of force and requires that “the act committed [be] reasonable in the circumstances”. The reasonableness inquiry under s. 34(1)(c) operates to ensure that the law of self-defence conforms to community norms of conduct. By grounding the law of self-defence in the conduct expected of a reasonable person in the circumstances, an appropriate balance is achieved between respecting the security of the person who acts and security of the person acted upon. The law of self-defence might otherwise “encourage hot-headedness and unnecessary resorts to violent self-help” (Roach, at pp. 277-78). That the moral character of self-defence is thus now inextricably linked to the reasonableness of the accused’s act is especially important as certain conditions that were essential to self-defence under the old regime — such as the nature of the force or threat of force raising a reasonable apprehension of death or grievous bodily harm — have been turned into mere factors under s. 34(2).

[63] The transition to “reasonableness” under s. 34(1)(c) illustrates the new scheme’s orientation towards broad and flexible language. While later judicial interpretations of the old law treated the words “no more force than is necessary” as

akin to “reasonableness” (*R. v. Gunning*, 2005 SCC 27, [2005] 1 S.C.R. 627, at paras. 25 and 37; *R. v. Szerbaniwicz*, 2010 SCC 15, [2010] 1 S.C.R. 455, at paras. 20-21), the new provision explicitly adopts this standard and applies it in all cases. As such, the ordinary meaning of the provision is more apparent to the everyday citizen and not dependent on an appreciation of judicial interpretation or terms of art (Technical Guide, at p. 21). This reflects Parliament’s intent to make the law of self-defence more comprehensible and accessible to the Canadian public (*House of Commons Debates*, vol. 146, No. 109, 1st Sess., 41st Parl., April 24, 2012, at pp. 7063-64 (Robert Goguen)).

[64] Through s. 34(2), Parliament has also expressly structured how a decision maker ought to determine whether an act of self-defence was reasonable in the circumstances. As the language of the provision dictates, the starting point is that reasonableness will be measured according to “the relevant circumstances of the person, the other parties and the act”. This standard both casts a wide net of inquiry covering how the act happened and what role each person played and modifies the objective standard to take into account certain characteristics of the accused — including size, age, gender, and physical capabilities (s. 34(2)(e)). Also added into the equation are certain experiences of the accused, including the relationship and history of violence between the parties (s. 34(2)(f) and (f.1)).

[65] Nevertheless, the trier of fact should not be invited to simply slip into the mind of the accused. The focus must remain on what a reasonable person would have

done in comparable circumstances and not what a particular accused thought at the time. For example, even if Mr. Khill's military training qualifies as a relevant personal characteristic, it does not convert the reasonableness determination into a personal standard built only for him, much less a lower standard than would otherwise be expected of a reasonable person in his shoes. The law of self-defence cannot offer different rules of engagement for what happens at the homes of those with military experience or allow "training" to replace discernment and judgment. Section 34(1)(c) asks whether the "act committed is reasonable in the circumstances". It does not ask whether Mr. Khill's military training makes his act reasonable nor whether it was reasonable for this accused to have committed the act. The question is: what would a reasonable person with similar military training do in those civilian circumstances?

[66] As observed by Doherty J.A. at para. 58 of his reasons, the "relevant circumstances of the accused" in s. 34(2) can also include any mistaken beliefs reasonably held by the accused. If the court determines that the accused believed wrongly, but on reasonable grounds, that force was being used or threatened against them under s. 34(1)(a), that finding is relevant to the reasonableness inquiry under s. 34(1)(c). However, while s. 34(1)(a) and (b) address the belief and the subjective purpose of the accused, the reasonableness inquiry under s. 34(1)(c) is primarily concerned with the reasonableness of the accused's *actions*, not their mental state.

[67] Courts must therefore avoid treating the assessment of the reasonableness of the *act* under s. 34(1)(c) as equivalent to reasonable *belief* under s. 34(1)(a). Beyond



honest but reasonable mistakes, judges must remind juries that the objective assessment of s. 34(1)(c) should not reflect the perspective of the accused, but rather the perspective of a reasonable person with some of the accused's qualities and experiences. As simply put by the then-Parliamentary Secretary to the Minister of Justice at second reading, "If a person seeks to be excused for the commission of what would otherwise be a criminal offence, the law expects the person to behave reasonably, including in the person's assessment of threats to himself or herself, or others" (*House of Commons Debates*, vol. 146, No. 58, at p. 3834 (emphasis added) (Robert Goguen)).

[68] Parliament provides further structure and guidance because the fact finder "shall" consider all factors set out in paragraphs (a) to (h) of s. 34(2) that are relevant in the circumstances of the case. The original bill introduced in the House of Commons provided only that the court "may" consider the enumerated factors, but that was changed to make "it clear that it is obligatory, rather than permissible, for the court to consider all relevant circumstances" (*House of Commons Debates*, vol. 146, No. 109, at p. 7065 (Robert Goguen)). The factors listed are not exhaustive, and this allows the law to develop.

[69] The "act committed" is the act that constitutes the criminal charge — in this case, the shooting. Given s. 34(1)(c), the question is not the reasonableness of each factor individually, but the relevance of each factor to the ultimate question of the reasonableness of the act. There is thus no requirement for the Crown to show that a

“person’s role in the incident” was itself unreasonable before it may be considered as a factor under s. 34(1)(c). As long as “the person’s role in the incident” is probative as to whether the act underlying the charge was reasonable or unreasonable it may be placed before the trier of fact. Once a factor meets the appropriate legal and factual standards, it is for the trier of fact to assess and weigh the factors and determine whether or not the act was reasonable. This is a global, holistic exercise. No single factor is necessarily determinative of the outcome.

[70] As previously explained, Parliament’s choice of a global assessment of the reasonableness of the accused’s otherwise unlawful actions represents the most significant modification to the law of self-defence. While new to the law of self-defence, this is not the first time Parliament has asked judges and juries to assess the reasonableness of an accused’s conduct or used a multifactorial legal test. The clear and common methodology which applies in such instances also operates under s. 34(2). The parties can be expected to make submissions about the legal interpretation of the factors, which apply, the evidence that may support or refute them and the weight to be assigned to each applicable factor. Indeed, whether a certain factor needs to be considered at all or the weight to be given to it will often be contested in final argument and/or when counsel makes submissions concerning what should be left to the jury.

[71] The parties agree with this overall framework but divide over the meaning and scope of one of the listed factors. It is to that issue that I now turn.

D. *The Meaning of the Accused's "Role in the Incident" in Section 34(2)(c)*

[72] The correct interpretation of “the person’s role in the incident” lies at the heart of this appeal. Mr. Khill argues that it is a very limited concept: it only captures conduct that also qualifies as unlawful, provocative or morally blameworthy. In substance, Justice Moldaver accepts this submission but also proposes a new test. In his opinion, this factor would only apply when the accused has engaged in conduct that is sufficiently wrongful, including conduct that is “excessive.”

[73] Imposing either the appellant’s or my colleague’s additional unwritten conditions onto s. 34(2)(c) creates an unnecessary and unduly restrictive threshold before a person’s “role in the incident” can be considered by the trier of fact. In drafting the provision, Parliament could have, but did not, use the words “the person’s wrongful role in the incident”. By requiring conduct to be wrongful before it can be considered by the trier of fact, Justice Moldaver essentially imports a reasonableness assessment onto the factor of the accused’s conduct throughout the incident (under s. 34(2)(c)), instead of focusing the reasonableness inquiry on a global assessment of the accused’s act (under s. 34(1)(c)), as Parliament directed.

[74] In my view, based on accepted principles of statutory interpretation, Parliament deliberately chose broad and neutral words to capture a wide range of conduct, both temporally and behaviourally. Parliament’s intent is clear that “the person’s role in the incident” refers to the person’s conduct — such as actions,

omissions and exercises of judgment — during the course of the incident, from beginning to end, that is relevant to whether the ultimate act was reasonable in the circumstances. It calls for a review of the accused's role, if any, in bringing about the conflict. The analytical purpose of considering this conduct is to assess whether the accused's behaviour throughout the incident sheds light on the nature and extent of the accused's responsibility for the final confrontation that culminated in the act giving rise to the charge.

[75] Properly interpreted, this factor includes, but is not limited to, conduct that could have been classified as unlawful, provocative or morally blameworthy under the prior provisions or labelled “excessive” under my colleague’s framework. I acknowledge that claims of self-defence may often involve wrongful conduct that could be described in those terms. Those examples of conduct clearly concern the reasonableness, even the moral culpability, of the accused’s conduct, and are certainly included in Parliament’s new widely-worded phrase. But there is simply no indication that Parliament intended to constrain a “person’s role in the incident” so narrowly. Instead, a “person’s role in the incident” was intended to be much broader to ensure the trier of fact considers how all relevant conduct of the accused in the incident contributed to the final confrontation.

[76] In this next section I first outline why this is what Parliament intended by a “person’s role in the incident”. I then articulate why it is not so limited to only certain conduct. I also explain why giving these words their natural meaning provides

sufficient direction and safeguards for the trier of fact's assessment and why the arguments against this proper interpretation are unfounded.

(1) What Parliament Intended by “the Person’s Role in the Incident”

[77] The proper interpretation of s. 34(2)(c) emerges from following the basic principles of statutory interpretation: reading the words of the statute in their entire context, in their grammatical and ordinary sense, harmonious with the scheme and object of the statute (*R. v. Zora*, 2020 SCC 14, at para. 33; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87).

[78] In the 2013 amendments, Parliament made a deliberate choice to use little of the statutory language from the previous regime. It carried forward certain concepts from the old provisions and the jurisprudence developed under them, like “proportionality”, “imminen[ce]” and “relationship between the parties.” However, it also expressly introduced original phrases, which tend to be stated in more open-ended, general and generic terms. For example, the phrase “other means available to respond” under s. 34(2)(b) captures a broader range of alternatives than “quitted or retreated” found in the previous s. 35 (Technical Guide, at p. 24).

[79] The phrase “the person’s role in the incident” in s. 34(2)(c) is another such innovation. It has no equivalent in the previous statute or case law and lacks a generally

accepted meaning in the criminal law. The plain language meaning of a person's "role in the incident" is wide-ranging and neutral. It captures both a broad temporal scope and a wide spectrum of behaviour, whether that behaviour is wrongful, unreasonable or praiseworthy.

[80] The inclusive temporal reach of s. 34(2)(c) is evident from the word "incident", which has a broad and open-ended meaning. It is defined as "an event or occurrence" by the *Canadian Oxford Dictionary* (1998). Barring statutory definition or evidence of technical use, judicial treatment of the term has relied on its ordinary meaning within the context of the statute and according to a common-sense application to the facts (*R. v. Soltys* (1980), 8 M.V.R. 59 (B.C.C.A.); *Soerensen v. Sood* (1994), 123 Sask. R. 72 (C.A.), at para. 15; *State Farm Mutual Insurance Company v. Economical Mutual Insurance Company*, 2018 ONSC 3496, 80 C.C.L.I. (5th) 283, at para. 68).

[81] In the context of these provisions, the "incident" incorporates a broader temporal frame of reference than the specific threat the accused claims motivated them to commit the act in question. That "incident" is broader than "act" is evident in how "incident" is used in s. 34(2)(c), (d), (e), (f) and (f.1) as distinct from "act" in s. 34(1)(b) and (c). And, if "incident" was interpreted to mean the actual "act" of self-defence, s. 34(2)(c) would be redundant of s. 34(2)(g), which examines the nature and proportionality of the accused's response to the use or threat of force.

[82] As such, in choosing the broad phrase “the person’s role in the incident”, Parliament signaled that the trier of fact should consider the accused’s conduct from the beginning to the end of the “incident” giving rise to the “act”, as long as that conduct is relevant to the ultimate assessment of whether the accused’s act was reasonable. This expansive temporal scope distinguishes the “person’s role in the incident” under s. 34(2)(c) from other factors listed under s. 34(2), some of which are temporally bounded by the force or threat of force that motivated the accused to act on one end and their subsequent response on the other. For example, s. 34(2)(b) considers what alternatives the accused could have pursued instead of the act underlying the offence, such as retreat or less harmful measures, relative to the imminence of the threat. The question of proportionality under s. 34(2)(g) similarly juxtaposes the force threatened and the reaction of the accused. Both of these factors ask the trier of fact to weigh the accused’s response once the perceived threat has materialized. In this way, s. 34(2)(c) was intended to serve a distinctive, balancing and residual function as it captures the full scope of actions the accused could have taken *before* the presentation of the threat that motivated the claim of self-defence, including reasonable avenues the accused could have taken to avoid bringing about the violent incident.

[83] This broad temporal frame allows the trier of fact to consider the full context of the accused’s actions in a holistic manner. Parliament made a choice not to repeat the freeze-frame analysis encouraged by such concepts as provocation and unlawful assault. Rather than a forensic apportionment of blows, words or gestures delivered immediately preceding the violent confrontation, the “incident” extends to an

ongoing event that takes place over minutes, hours or days. Consistent with the new approach to self-defence under s. 34, judges and juries are no longer expected to engage in a step by step analysis of events, artificially compartmentalizing the actions and intentions of each party at discrete stages, in order to apply the appropriate framework to the facts (see, e.g., *R. v. Paice*, 2005 SCC 22, [2005] 1 S.C.R. 339, at paras. 17-20). For example, where both parties are engaged in aggressive and confrontational behaviour, s. 34(2)(c) does not demand a zero-sum finding of instigation, provocation, cause or consent (paras. 21-22). Parliament has now selected a single overarching standard to weigh the moral blameworthiness of the accused's act in context: reasonableness. This reflects the complexity of human interaction and allows triers of fact to appropriately contextualize the actions of all parties involved, rather than artificially fragmenting the facts.

[84] Just as “role in the incident” may cover an expansive time frame, it also has the potential to sweep up a wide range of conduct during that time frame. The dictionary definition of “role” refers to “a function or part performed especially in a particular operation or process” (Merriam-Webster’s Collegiate Dictionary (11th ed. 2003), at p. 1079). The notion of an accused’s “role” reflects a contribution towards something, without necessarily suggesting full responsibility or fault. Parliament has selected a phrase at a high level of abstraction, creating a single capacious category to cover the widest possible range of circumstances. As indicated by the wording, the question under s. 34(2)(c) is what kind of role the accused played in the sequence of events leading to the subject matter of the charge. The phrase “role in the incident”



includes acts and omissions, decisions taken and rejected and alternative courses of action which may not have been considered. It captures the full range of human conduct: from the Good Samaritan and the innocent victim of an unprovoked assault, to the initial and persistent aggressor, and everything in between (see, e.g., *R. v. Lessard*, 2018 QCCM 249). Thus “role in the incident” encompasses not only provocative or unlawful conduct, but also hotheadedness, the reckless escalation of risk, and a failure to reasonably reassess the situation as it unfolds. As the Crown submits, this does not mean that the reasonableness assessment is “unbounded” or overly subjective. The inquiry is broad, not vague.

[85] The analytical purpose of considering the person’s “role in the incident” is its relevance to the reasonableness assessment where there is something about what the accused did or did not do which led to a situation where they felt the need to resort to an otherwise unlawful act to defend themselves. Only a full review of the sequence of events can establish the role the accused has played to create, cause or contribute to the incident or crisis. Where self-defence is asserted, courts have always been interested in who did what. The fact that the victim was the cause of the violence often weighed heavily against them. As this Court explained in *R. v. Hibbert*, [1995] 2 S.C.R. 973, at para. 50:

In cases of self-defence, the victim of the otherwise criminal act at issue is himself or herself the originator of the threat that causes the actor to commit what would otherwise be an assault or culpable homicide (bearing in mind, of course, that the victim’s threats may themselves have been provoked by the conduct of the accused). In this sense, he or she is the

author of his or her own deserts, a factor which arguably warrants special consideration in the law. [Emphasis deleted.]

The phrase “role in the incident” captures this principle and also ensures that any role played by the accused as an originator of the conflict receives special consideration. In this way, the trier of fact called upon to evaluate this factor will determine how that person’s role impacts the “equities of the situation” (Paciocco (2014), at p. 290).

[86] This interpretation is consistent with the guidance on s. 34(2)(c) in the Department of Justice’s Technical Guide, at p. 26:

This factor in part serves to bring into play considerations surrounding the accused’s own role in instigating or escalating the incident. Under the old law, the distinction between section 34 and 35 was based on the defender’s role in commencing the incident, creating higher thresholds for accessing the defence where the accused was the provoker of the incident, as opposed to an innocent victim. As the new law contains only one defence that does not distinguish between conflicts commenced by the accused and those commenced by the victim, this paragraph signals that, where the facts suggest the accused played a role in bringing the conflict about, that fact should be taken into account in deliberations about whether his or her ultimate response was reasonable in the circumstances. [Emphasis added.]

Section 34(2)(c) therefore draws attention to a key question: who bears what responsibility for how this happened? The extent to which the accused bears responsibility for the ultimate confrontation or is the author of their own misfortune may colour the assessment of whether the accused’s act was reasonable. For example, an accused’s reckless or negligent decisions preceding a violent encounter may shed

light on the ultimate reasonableness of their acts (H. Parent, *Traité de droit criminel*, t. I, *L'imputabilité et les moyens de défense* (5th ed. 2019), at p. 778).

[87] Parliament intended decision makers to turn their minds to causation when asking whether the accused played a “role” in the unfolding of events. The ultimate reasonableness of the act will be coloured by whether the accused caused or contributed to the very circumstances they claim compelled them to respond. This is not the same as a simple “but for” causative test, as Mr. Khill suggests. The same framework is applied even if the accused initiated the assault or manufactured the crisis they sought to escape (*Bengy*, at paras. 45-48; *R. v. Borden*, 2017 NSCA 45, 349 C.C.C. (3d) 162, at para. 101; *R. v. Mateo-Asencio*, 2018 ONSC 173, at paras. 172-73 (CanLII)).

[88] There are clear and convincing policy rationales for ensuring the accused’s role in bringing about the conflict is before the trier of fact in determining whether the accused’s conduct should be sheltered from criminal liability. I agree with Justice Paciocco that the rationale underpinning the former law is still compelling:

... accused persons should not be able to instigate an assault so that they can claim self-defence. ... [T]hose who provoke an assault are causally responsible in a real sense for the violence that ensues even if they did not intend to provoke an attack and ... this should diminish their right of response.

(Paciocco (2014), at p. 290)

But while those rationales are most obvious and pressing where the accused played a role as a provocateur or initial aggressor, they also underlie the need to consider other conduct that falls short of provocation and contributes to the development of the crisis.

[89] Self-defence is not meant to be an insurance policy or self-help mechanism to proactively take the law — and the lives of other citizens — into one's hands. As the Nova Scotia Court of Appeal suggested in *Borden* at para. 101, by including the person's "role in the incident" in s. 34(2)(c), "a protection is hopefully present to prevent self-defence from becoming too ready a refuge for people who instigate violent encounters, but then seek to escape criminal liability when the encounter does not go as they hoped and they resort to use of a weapon." The law should encourage peaceful resolution of disputes. It should not condone the unnecessary escalation of conflicts.

[90] When such escalations do occur, particularly in the heat of the moment, the opportunity for mistake and disproportionate responses only grows. This is recognized in former s. 35 and its imposition of a duty to retreat where the accused was an initial aggressor or provocateur, reflecting the need to balance the accused's bodily integrity, that of the victim and the wider societal interest in controlling the application of force. Failure to consider the accused's role in creating or escalating the conflict will invite moral paradoxes, where both attacker and defender may rightly appeal to the new permissible scope of self-defence and yet also find themselves the legitimate target of attack (H. Stewart, "The constitution and the right of self-defence" (2011), 61 *U.T.L.J.* 899, at p. 917; F. Muñoz Conde, "Putative Self-Defence: A Borderline Case Between

Justification and Excuse” (2008), 11 *New Crim. L. Rev.* 590, at p. 599). Where an accused opts to stand their ground or, as in this case, advance while armed towards a perceived threat rather than de-escalating or reassessing the situation as new information becomes available, a trier of fact is entitled to account for this role when assessing the reasonableness of the accused’s ultimate act.

(2) “Role in the Incident” Includes But Is Not Limited to Provocative, Unlawful and Morally Blameworthy Conduct

[91] There are many reasons for which I do not accept Mr. Khill’s argument that the phrase “role in the incident” applies only to certain categories of conduct, such as “unlawful, provocative or morally blameworthy conduct on the part of the accused” (A.F., at para. 19). For similar reasons, I am not persuaded that creating a new precondition that the conduct must first be sufficiently wrongful before it can be considered by the trier of fact is either in line with or necessary to give effect to Parliament’s stated intention.

[92] First, narrowing the scope of “role in the incident” to specific categories of conduct would be inconsistent with the broad and neutral wording chosen by Parliament. Provocation had a well-established meaning in self-defence and had been a component of the law since the provisions were first codified in 1892. It was an express statutory term in the previous legislation, defined in former s. 36 to include “provocation by blows, words or gestures”. If Parliament wanted to limit consideration

of a person's "role in the incident" to actions which qualified as "provocation", it could have continued to rely on provocation as a statutory precondition or even listed it as an enumerated factor under s. 34(2). It did neither. Instead, it chose to remove this word entirely from all parts of the new provisions. To constrain "role in the incident" by reference to a repealed statutory term like provocation is to rewrite the statute.

[93] Relying on *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 80, the intervener Criminal Lawyers' Association of Ontario submits that, had Parliament intended to refer to conduct beyond provocation, this change in the law would have received attention in Parliamentary debates. However, unlike in *D.L.W.*, Parliament has chosen to refrain from using a word with a well-understood legal meaning and has replaced it with a novel and much broader phrase. When Parliament employs accepted language it is thought to have chosen to carry that meaning forward. The corollary is also true: when Parliament rejects established language and instead creates new terms, it intends new meaning (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at paras. 43-45).

[94] Further, the phrase it chose is clear. Simply put, the words mean what they say: the trier of fact must consider the accused's role throughout the incident to the extent it informs the reasonableness of the act underlying the charge, regardless of whether that role involved good, "pro-social" conduct, or conduct that was provocative, aggressive, unlawful, reckless, risky or otherwise fell below community standards.

[95] There is no ambiguity and no reason to narrowly read “role” under s. 34(2)(c) to mean blows, words or gestures specifically intended to provoke violence. To treat both terms as functionally equivalent would ignore the ordinary meaning of the language chosen and would not only restrict, but change the meaning of the open-ended phrase Parliament did enact (R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at pp. 59-60).

[96] Nor should a person’s “role in the incident” be limited to only unlawful or blameworthy conduct. Legality is also an unhelpful tool in assessing reasonableness. Whether an act is lawful or not shines little light on whether it was reasonable. Lawful conduct may be unreasonable and vice versa. Further, had Parliament wished to limit “role in the incident” to these kinds of conduct, it could have done so expressly as it did with the partial defence of provocation under s. 232 of the *Criminal Code*. The previous text of s. 232 defined provocation in terms of a “wrongful act or insult”, which was a question of fact regarding the victim’s conduct that bore a clear moral tenor. Amendments in 2015 replaced “wrongful act or insult” with “[c]onduct of the victim that would constitute an indictable offence under this Act that is punishable by five or more years of imprisonment” (*Zero Tolerance for Barbaric Cultural Practices Act*, S.C. 2015, c. 29, s. 7). Were illegality or moral blameworthiness a necessary threshold for conduct to be considered under s. 34(2)(c), it stands to reason Parliament would have made its intention known explicitly. Instead, it selected a commonly understood term which is consistent with the shift to a flexible consideration of reasonableness

under s. 34(1)(c), complements the other factors in s. 34(2), and ensures that the moral character of the accused's otherwise unlawful act is appropriately contextualized.

[97] Second, the incongruity between the *mens rea* attached to the former preliminary conditions to accessing the defence and the *mens rea* attached to Parliament's new reasonableness standard provides a further reason why it chose not to carry these concepts forward as such into s. 34(2). Provocation and assault each have a subjective intention component (Paciocco (2008), at pp. 54-56; *Nelson*, at pp. 370-72). This does not fit easily, or at all, into the new overarching standard of reasonableness, which is meant to be judged holistically and objectively. Inserting these intention-based concepts to weed out what can be considered in the reasonableness analysis would only operate to keep the full range of the accused's actions from the trier of fact.

[98] Third, the new unified framework was designed to obviate the need for complex jury instructions. Mr. Khill's interpretation would require judges to instruct the jury to consider the accused's "role in the incident" only if it is morally blameworthy or meets the legal criteria of concepts like provocation or unlawful assault. This invites a degree of complexity at odds with Parliament's stated purpose. It is reminiscent of the unnecessary complexity typifying the old regime, with its thicket of preliminary and qualifying conditions. This Court should not reintroduce repealed filters through which the accused's conduct must pass — such as a requirement that their conduct be provocative, morally blameworthy or unlawful — before being left



with the jury. Taking “role in the incident” at face value — that is, as a broad and value-neutral expression — is most consistent with Parliament’s aim of pruning away unnecessary complication. Parliament did not intend the judge to conduct a preliminary assessment of the overall wrongfulness of the accused’s conduct leading up to the confrontation before leaving it with the jury under this factor.

[99] Fourth, there is no need for judges to impose new preconditions as the phrase chosen by Parliament includes previous concepts, like provocation or unlawfulness, but is clearly not limited to or circumscribed by them. Aggressive or antagonistic conduct that would have met the definition of provocation under the previous s. 36 will still be highly probative under the present s. 34(2)(c) (*Borden*, at para. 101; *R. v. Sylvester*, 2020 ABQB 27, at para. 266 (CanLII); *R. v. Merasty*, 2014 SKQB 268, 454 Sask. R. 49, at para. 192). The same is true for acts which would qualify as an unlawful assault or made the accused into the initial aggressor. When the accused intended to provoke the violence or commit an assault for the purpose of responding with force, the moral disqualification is at its highest. That sentiment was well expressed in *Nelson*, at p. 371, citing J. C. Smith and B. Hogan, *Criminal Law* (6th ed. 1988), at p. 244: “Self-defence is clearly not available where [the accused] deliberately provoked the attack with the intention of killing, purportedly in self-defence.” The way that the previous law treated provocation illustrates a fundamental principle which remains true today: “The need to act must not have been created by conduct of the accused in the immediate context of the incident which was likely or was intended to give rise to that need” (*R. v. Browne*, [1973] N.I. 96 (C.A.),

at p. 107). However, while it is to be expected that certain provocative or unlawful conduct would weigh heavily and support a finding of unreasonableness, under the new regime it is open to the jury to find otherwise. Thus, while on this record, it may or may not be possible to find that Mr. Khill provoked the violence and was the initial aggressor, there is now simply no need to place these legal labels on his conduct before the jury may consider his actions in deciding whether the act was reasonable in the circumstances.

[100] I agree with Doherty J.A. that the inquiry under s. 34(2)(c) not only subsumes provocative conduct, but also extends to the other ways the accused might contribute to the crisis through conduct that colours the reasonableness of the ultimate act underlying the charge (C.A. reasons, at paras. 75-76). The move from the language of provocation to the broader language of “role in the incident” means the trier of fact is “freer . . . to consider the causal role the accused played in the assault he sought to defend against, whether he intended to provoke the assault or even foresaw that it was likely to happen” (Paciocco (2014), at p. 290).

[101] Fifth, “role in the incident” is also not limited to conduct that would weigh against the reasonableness of the accused’s act. Contrary to my colleague’s suggestion, the question of whether “pro-social” conduct could rightly be captured by s. 34(2)(c) is before us in this appeal and was explicitly addressed by Mr. Khill. At trial, Mr. Khill’s defence directly appealed to the reasonableness of his proactive actions both as a means of protecting his partner and consistent with his military training. Where the accused

plays a praiseworthy role in the incident, this may be a compelling factor supporting the conclusion that their ultimate act was reasonable. The accused's role in the incident may be morally blameless, such as the accused who has been subjected to a pattern of abuse by the other party to the incident. Where relationships are defined by ongoing cycles of violence, anger and abuse, the nature of the accused's role may be significantly coloured by the rituals and dynamics between the parties (*R. v. Ameralik*, 2021 NUCJ 3, 69 C.R. (7th) 161; *R. v. Rabut*, 2015 ABPC 114; *R. v. Knott*, 2014 MBQB 72, 304 Man. R. (2d) 226). In addition, where an accused had no prior interaction with the victim and was subject to an unprovoked assault, the very absence of the accused's role in the confrontation may militate strongly in favour of the accused (*R. v. Vaz*, 2019 QCCQ 7447, at para. 31 (CanLII); *R. v. Trotman*, 2019 ONCJ 591, at para. 225 (CanLII); *R. v. Lewis*, 2018 NLSC 191, at para. 66 (CanLII); *R. v. S(H)*, 2015 ABQB 622, at para. 73 (CanLII); *R. v. Fletcher*, 2015 CM 1004, at para. 40 (CanLII); *R. v. Williams*, 2013 BCSC 1774, at para. 98 (CanLII)).

[102] As a result, I do not accept that the accused's "role in the incident" is necessarily or inherently a "pro-conviction factor" which should be read narrowly. The words Parliament chose are not only wide, they are deliberately neutral. On a plain language reading, "the person's role in the incident" neither evokes strong emotion nor carries the normative stigma of conduct which is unlawful, provocative or morally blameworthy. As written, it is not more suggestive of guilt than any of the other factors listed under s. 34(2), such as "whether there were other means available to respond" (s. 34(2)(b)), the "size, age, gender and physical capabilities" (s. 34(2)(e)) or "the

nature and proportionality of the person's response" (s. 34(2)(g)). Section 34(2)(c) is neutral and its application will depend entirely on the conduct of the accused and whether their behaviour throughout the incident sheds light on the nature and extent of their responsibility for the final confrontation that culminated in the act giving rise to the charge.

[103] Sixth, a broad and comprehensive approach to an accused's "role in the incident" is a familiar exercise for courts. Under the previous law, courts canvassed all of the accused's actions to determine whether they reasonably believed no other alternative existed but to resort to deadly force and whether the defence as a whole bore an air of reality. This reasonableness inquiry was not limited to provocative conduct or the strict timeframe of the attack, but could encompass the larger incident as a whole (*R. v. Ball*, 2013 ABQB 409, at para. 128 (CanLII); see also *Szczerbaniwicz*, at para. 20). The conduct of the accused during the incident — including the accused's precipitation of the conflict or failure to take other steps — could colour the reasonableness assessment and thus foreclose the ultimate success of the defence (*Cinous*, at para. 123; *R. v. Boyd* (1999), 118 O.A.C. 85, at para. 13; *Dubois v. R.*, 2010 QCCA 835, at paras. 22-23 (CanLII)).

[104] Indeed, this broad understanding of "role in the incident" is even more important in light of the potential for the new self-defence provisions to apply more generously to the accused than the old provisions. Under the present law, for instance, an accused no longer must wait until they reasonably apprehend death or grievous

bodily harm before resorting to deadly force. The nature of the threat of force is merely one factor to be weighed among others under s. 34(2). As noted above, the new s. 34 also extends to a broader range of offences, including those potentially impacting innocent third parties (*House of Commons Debates*, vol. 146, No. 109, at p. 7066 (Robert Goguen)). These changes highlight the need to widen the lens to ensure the trier of fact is able to consider how the accused found themselves in a situation where they felt compelled to use force or commit some other offence.

[105] Seventh, the muddying of the water on whether self-defence should be viewed as a purely justificatory defence or something closer to an excuse also militates in favour of a broad interpretation of “role in the incident”. The structure of s. 34 leaves room for a trier of fact to conclude that self-defence is not disproved even though the accused escalated the incident that led to the death of the victim, was mistaken as to the existence of the use of force and used disproportionate force. In such cases, which lie far from the core of justification, the widest possible review of the accused’s conduct and contribution to the ultimate confrontation is required. An accused who played a pro-social role throughout the incident would increase their chances of justifying or excusing their act in the eyes of society. By contrast, society is more likely to view the accused’s ultimate act as wrongful or inexcusable where their conduct was rash, reckless, negligent or unreasonable. This is particularly critical in the instance of the putative defender who acts on mistaken belief, and whose actions cannot be said to be morally “right”. In assessing the overall lawfulness of the act, the trier of fact must weigh the risks they took, and steps that could have been taken to properly ascertain

the threat, against objective community standards of reasonableness (Fehr, at pp. 113-14; Muñoz Conde, at p. 592).

[106] The Court's approach to the defence of necessity, which is conceived of as an excuse, is instructive on this point. Indeed, given the expansion of potential motives to act and excusable responses, the line between self-defence and the defences of necessity or duress has been blurred (see Coughlan). As explained by senior counsel from the Department of Justice at committee, the language to allow for such alternatives was deliberately expanded and recognizes that self-defence operates as a subset of the necessity defence (Standing Committee on Justice and Human Rights, at p. 9 (Joanne Klineberg)). An accused invoking necessity must show their conduct was morally involuntary and, as explained in *Perka v. The Queen*, [1984] 2 S.C.R. 232, at p. 256, any contributory fault of the accused will factor into the analysis:

If the necessitous situation was clearly foreseeable to a reasonable observer, if the actor contemplated or ought to have contemplated that his actions would likely give rise to an emergency requiring the breaking of the law, then I doubt whether what confronted the accused was in the relevant sense an emergency. His response was in that sense not "involuntary". "Contributory fault" of this nature, but only of this nature, is a relevant consideration to the availability of the defence.

Where an accused appeals to the moral involuntariness of their actions in self-defence, their role in creating such peril is relevant. The accused may or may not be able to show the requisite level of moral involuntariness where the "emergency" is of their own making.

[107] My reading of “role in the incident” is consistent with the expanded scope and shifting foundation of the new self-defence provisions. In contrast, a new test of sufficiently wrongful conduct, which includes conduct that is “excessive”, relies exclusively on the justification principle and may not therefore accurately reflect the moral underpinnings of the new self-defence provisions (see above, at paras. 47-48).

(3) The Proposed Wrongfulness Test Should Be Rejected

[108] My colleague and I agree that “role in the incident” goes beyond provocation and unlawful aggression. However, overlaying a standard of wrongfulness or imposing a novel application of “excessiveness” onto the clear words “role in the incident” is unwarranted. The threshold of wrongfulness is not derived from the text, context or scheme of the provisions. It imposes an additional reasonableness assessment onto the “role in the incident” factor, rather than focusing the assessment on the overall reasonableness of the accused’s act. Further, while provocation had a settled meaning in the jurisprudence, the category of “excessive” conduct, insofar as it applies to the consideration of the accused’s behaviour in the sequence of events leading up to the purportedly defensive act, is a novel addition to the law of self-defence and is not grounded in either the Parliamentary record or scholarship in this area. Although the term “excessive” finds its roots in the former s. 37(2), the phrase “excessive” as it was used in the prior regime was concerned with the proportionality of the accused’s ultimate act of force (*R. v. Grandin*, 2001 BCCA 340, 95 B.C.L.R. (3d) 78, at paras. 39 and 45; *Billing*, at para. 18). Under the present regime developed

by Parliament, the proportionality of the accused's response is already one of the considerations that forms part of the overall reasonableness assessment by virtue of s. 34(2)(g). Invoked in this novel way, the use of the term "excessive" as a means of assessing an accused's conduct in the events leading up to the act is a metric without measure and will invite litigation by adjective rather than providing meaningful assistance to trial judges and jurors.

[109] The imposition of a wrongfulness threshold reinstates an unnecessary hoop or filter, which will introduce complexity and operate like the repealed preliminary and qualifying conditions. This generates further problems when an accused's role may be contested and relied on by both the Crown and defence to reach different conclusions. In this case, Mr. Khill suggests that his prior conduct was good or pro-social, while the Crown argues that this same conduct undermined the reasonableness of his ultimate act and could have led the jury to convict. To suggest that the Crown's reliance on s. 34(2)(c) must reach a certain threshold of wrongfulness before being put to the jury equally begs the question of whether the accused may be subject to similar threshold inquiries. If separate thresholds apply to the defence and the Crown, this will only exacerbate confusion and may even create unfairness where both sides seek to rely on prior conduct to show that the accused's act was either unreasonable or reasonable.

[110] There is no "clear and consistent" extrinsic evidence to support the interpretation that "role in the incident" necessitates a wrongfulness threshold or the suggestion that Parliament did not intend to change the law. As discussed, the



consensus among courts and scholars is that the new provisions have substantively changed the law (see para. 49, above). At third reading, the Parliamentary Secretary to the Minister of Justice explained that the jurisprudence under the old regime would continue to be relevant, but also stated that the changes to the law of self-defence are “fundamental in that they completely replace the existing legal provisions with new and simpler ones” (*House of Commons Debates*, vol. 146, No. 109, at p. 7064 (Robert Goguen)). Further, the question of whether “role in the incident” represented too great a departure from the previous law was addressed at second reading and in committee (*House of Commons Debates*, vol. 146, No. 58, at p. 3841 (Hon. Irwin Cotler); see also House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Human Rights*, No. 25, 1st Sess., 41st Parl., March 8, 2012). Concerns about the breadth of the phrase were before Parliament, but it chose not to act on them.

[111] Moreover, extrinsic evidence is not more important than the legislative text. Extrinsic aids are just that, and their role should not be overstated. This Court has repeatedly warned against placing too much weight on Hansard evidence (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 508-9; *Rizzo & Rizzo Shoes*, at para. 35; *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715, at para. 39; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at paras. 44-47; *MediaQMI inc. v. Kamel*, 2021 SCC 23, para. 37). This is even more important where general statements from Parliamentary debates are relied on to override specific text in legislation. In this case, the extrinsic evidence at issue amounts to little more than general statements about the

continuing relevance or applicability of the previous jurisprudence. These statements were made with reference to s. 34(2) as a whole and cannot be used to ignore Parliament's decision to introduce a new and much broader phrase in s. 34(2)(c).

[112] It is common ground that Parliament has placed considerable discretion in the hands of decision makers, whether judges or juries, by its shift to a three-pronged inquiry for all self-defence claims in which the reasonableness of the accused's act plays a crucial role. Parliament structured this discretion by setting out the nine factors in s. 34(2) and saw no problem with allowing decision makers to assign weight to them under its multifactorial legal test. A "person's role in the incident" remains but one factor in the overall assessment of the reasonableness of the accused's act. And while this factor was meant to be broad temporally and behaviourally, it nevertheless contains threshold requirements and is therefore not without limits. The conduct must relate to the incident and be relevant to whether the ultimate responsive act was reasonable in the circumstances. The relevance inquiry is guided by both the temporal and behavioural aspects of "the person's role in the incident" — namely, the conduct in question must be both temporally relevant and behaviourally relevant to the incident. This is a conjunctive test. Evidence will be relevant where it has a tendency, as a matter of logic, common sense, and human experience, to make the act underlying the charge more or less reasonable in the circumstances (*R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 140 (per Binnie J., dissenting, but not on this point)). Thus, the type of conduct that would not meet the "relevance" threshold is conduct during the

incident that has no bearing on whether or not the act was reasonable. As previously mentioned: this factor is broad, not vague.

[113] The many obligations trial judges have when instructing a jury also operate as sufficient safeguards or guardrails. The trial judge must first set out the law that the jury must apply when assessing the facts (*R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 32). The trial judge must then guide the jury by connecting the relevant evidence to the factors the jury is called upon to consider (*Daley*, para. 29), such that they are in a position to “[fully] appreciate the value and effect of [the] evidence, and how the law is to be applied to the facts as they find them” (*Azoulay v. The Queen*, [1952] 2 S.C.R. 495, at p. 498). Irrelevant evidence put to the jury on the basis that it reflects the accused’s “role in the incident” may provide a basis for appellate review subject to the facts and circumstances of each individual case (see *R. v. Rodgeron*, 2015 SCC 38, [2015] 2 S.C.R. 760, at para. 30). In some cases, the judge may need to instruct the jury on impermissible inferences or lines of reasoning. A trial judge’s decision on what to include in, or exclude from, the jury charge may itself be subject to appellate review.

[114] As a result, the trial judge continues to play a gatekeeping role in instructing the jury to consider the accused’s “role in the incident” under s. 34(2)(c) as defined. In the charge to the jury, the trial judge must explain what the law requires under each of the subsections in s. 34, the legal significance of the reasonableness standard and how each of the factors listed under s. 34(2) contribute to the assessment

of reasonableness. As Parliament has established a legal standard or threshold in each of paragraphs (a) to (h), the judge will be mindful of the proper interpretation, meaning and scope of each factor. Informed by the submissions of the parties, the judge will assess which paragraphs are at play and ask whether, in the circumstances of the case and the proof presented at trial, there is an evidentiary basis to support the consideration of a particular factor. In relation to a “person’s role in the incident” the trial judge will inquire into whether the accused bears some responsibility for the final confrontation and whether their conduct affects the ultimate reasonableness of the act in the circumstances. The trial judge must also provide guidance by directing the jury to the relevant evidence in respect of the accused’s “role in the incident” and each of the other relevant factors. Throughout the trial and in crafting the charge, the judge will be guided by the usual rules of evidence, including the question of whether the evidence should be inadmissible because its prejudicial effect outweighs its probative value. As trial judges are routinely required to assess the relevance of evidence (in instructing juries and otherwise), and they will be assisted by counsel’s submissions with respect to what should be included in the charge, this is a task they are well equipped for. Together, these crucial steps respect Parliament’s intention of widening the net of relevant conduct for the jury to consider while providing appropriate guardrails and ensuring the determination is not shielded from appellate scrutiny.

[115] Parliament has chosen to trust juries with the task of assessing the reasonableness of the accused’s act having regard to the non-exhaustive list of factors in s. 34(2), including the accused’s “role in the incident”. Juries are regularly asked to

apply the reasonableness standard to a number of offences and defences by asking what a reasonable person would have done in like circumstances. Dangerous conduct offences, careless conduct offences, offences based on criminal negligence, and duty-based offences all require the jury to engage in a reasonableness assessment to determine if the Crown has made out the objective fault requirement (*R. v. A.D.H.*, 2013 SCC 28, [2013] 2 S.C.R. 269, at paras. 55-63). Likewise, the s. 25 defence for persons acting under authority and the s. 35 defence of property provisions require juries to undertake a reasonableness assessment in their determination of whether the defence is available.

[116] This Court’s jurisprudence expresses “faith in the institution of the jury and our firmly held belief that juries perform their duties according to the law and the instructions they are given” (*R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 177). As Dickson C.J. explained in *R. v. Corbett*, [1988] 1 S.C.R. 670, at pp. 692-93 that:

The jury is, of course, bound to follow the law as it is explained by the trial judge. Jury directions are often long and difficult, but the experience of trial judges is that juries do perform their duty according to the law. We should regard with grave suspicion arguments which assert that depriving the jury of all relevant information is preferable to giving them everything, with a careful explanation as to any limitations on the use to which they may put that information. . . .

It is of course, entirely possible to construct an argument disputing the theory of trial by jury. . . . But until the paradigm is altered by Parliament, the Court should not be heard to call into question the capacity of juries to do the job assigned to them.

[117] Nor does my interpretation of “the person’s role in the incident” imperil appellate review. This is amply demonstrated by the fulsome reviews conducted by the Court of Appeal for Ontario and in these reasons. If Parliament’s choice of a reasonableness requirement and a multifactorial analysis for self-defence may make appellate review more difficult in certain cases, that consequence is not a result of how I approach s. 34(2)(c); it is a by-product of the overall scheme it enacted — a regime it chose despite this possible externality. It must have concluded that any such risk was so small it did not call for any different legislative approach. The concern for appellate oversight is all but moot in judge alone trials owing to the judicial duty to give reasons (*R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869). Appellate courts remain fully able to review the reasons for judgment in respect of self-defence given that judges are required to explain how the decision was reached and how s. 34 was applied, including why certain factors were considered, what evidence supported those factors and how they were weighed and balanced to reach a conclusion about the ultimate reasonableness of the accused’s act.

[118] Parliament would also have appreciated that it is different for jury trials. As juries render a verdict without reasons, and their deliberations are secret, there is never a way for the public, the sentencing judge or the appellate courts to determine exactly why a jury reached its collective conclusion. In a case of self-defence, for example, depending on the verdict, an appellate court would often not know whether the jurors ever reached the third inquiry to consider the reasonableness of the act in s. 34(1)(c); or which factors they used or what weight they assigned to each. This is,

however, a known function of how all jury trials operate across Canada. Any limited ability of appellate courts to review a jury verdict is not a new issue unique to claims of self-defence under the present legislation.

[119] Even appreciating this general limitation, appellate courts retain a supervisory role to assess the reasonableness of the verdict and they are equipped to ensure that the trial judge provided adequate instructions to the jury. For example, under s. 34(1)(c), I agree that the appellate courts maintain the ability to review that:

- the trial judge has correctly interpreted the factors, including “the person’s role in the incident” under s. 34(2)(c);
- the trial judge has correctly determined that there is evidence of the accused’s prior conduct capable of amounting to a “role in the incident” within the s. 34(2)(c) — meaning evidence of the accused’s conduct in the course of the incident that is relevant to the reasonableness of the act in the circumstances;
- the jury has been directed to the evidence of the accused’s particular conduct in the course of the entire incident relevant to the reasonableness of the act committed that it may consider under s. 34(2)(c); and
- the jury has been instructed that in considering the accused’s “role in the incident” and any of the other relevant s. 34(2) factors to which it has been

directed, the weight it chooses to give to any particular factor in assessing the ultimate reasonableness of the accused's responsive act is for it to decide.

These standard protections operate to guide both trial judges and juries and ensure the jury's deliberations are appropriately circumscribed, while also respecting the Parliamentary design of a multifactorial regime.

[120] Finally, my colleague has taken my reading of the law to suggest an accused could be convicted of murder or other serious crimes of violence based exclusively on negligent or careless conduct leading up to a violent confrontation (Moldaver J.'s reasons, at para. 209). I disagree. First, a jury cannot properly convict an accused based solely on their prior conduct, even if it was unreasonable or "wrongful". Instead, the Crown must prove beyond a reasonable doubt that an accused's act in response to force or a threat thereof was unreasonable, with reference to all of the relevant factors listed under s. 34(2). Accordingly, trial judges are expected to instruct the jury that self-defence is not available only if the accused's ultimate *act* was unreasonable.

[121] Secondly, and more fundamentally, a life sentence for murder does not automatically flow from the Crown defeating an accused's claim of self-defence. As the trial judge explained at length, if self-defence is not made out, the jury then had to consider whether Mr. Khill acted with the requisite level of intent for murder rather than manslaughter. Where the trier of fact is satisfied the accused acted with intent to



kill or was reckless to that probability, then the burden for murder will have been met. It will not, however, be met based on merely negligent or careless behaviour — and a failure to instruct the jury otherwise would be a clear error open to appellate review. Instead, the jury must consider the cumulative effect of all the relevant evidence to decide if the requisite level of fault has been established beyond a reasonable doubt (*R. v. Flores*, 2011 ONCA 155, 274 O.A.C. 314, at paras 73-75; *R. v. Levy*, 2016 NSCA 45, 374 N.S.R. (2d) 251, at para. 148).

[122] Justice Moldaver is correct to be mindful of the potential life sentence the accused may face. But human life is at stake on both sides of the equation and we should be cautious as to how readily we legally sanction the actions of those who take the lives of others.

#### (4) Summary

[123] In sum, the ultimate question is whether the act that constitutes the criminal charge was reasonable in the circumstances. To answer that question, as Parliament's inclusion of a "person's role in the incident" indicates, fact finders must take into account the extent to which the accused played a role in bringing about the conflict or sought to avoid it. They need to consider whether the accused's conduct throughout the incident sheds light on the nature and extent of the accused's responsibility for the final confrontation that culminated in the act giving rise to the charge.

[124] The phrase enacted is broad and neutral and refers to conduct of the person, such as actions, omissions and exercises of judgment in the course of the incident, from beginning to end, that is relevant to whether the act underlying the charge was reasonable — in other words, that, as a matter of logic and common sense, could tend to make the accused’s act more or less reasonable in the circumstances. The conduct in question must be both temporally relevant and behaviourally relevant to the incident. This is a conjunctive test. This includes, but is not limited to, any behaviour that created, caused or contributed to the confrontation. It also includes conduct that would qualify under previous concepts, like provocation or unlawfulness, but it is not limited to or circumscribed by them. It therefore applies to all relevant conduct, whether lawful or unlawful, provocative or non-provocative, blameworthy or non-blameworthy, and whether minimally responsive or excessive. In this way, the accused’s act, considered in its full context and in light of the “equities of the situation”, is measured against community standards, not against the accused’s own peculiar moral code (Paciocco (2014), at p. 290; *Phillips*, at para. 98).

## VII. Application

[125] The trial judge provided extensive and detailed instructions to the jury, particularly with respect to the three essential elements of self-defence that the Crown had to disprove beyond a reasonable doubt. In explaining the first element of the defence — namely, that Mr. Khill had a reasonable belief that Mr. Styres was using or threatening force against him and Ms. Benko — the trial judge spent 26 pages

thoroughly reviewing the evidence presented at trial. The trial judge next described the second element of self-defence, which is whether Mr. Khill committed the act for a defensive purpose. At this stage, he included a similar but much shorter review of the evidence. Finally, the trial judge explained the third element of self-defence: whether the act was reasonable in the circumstances. The trial judge told the jury he would not review the evidence in respect of the various reasonableness factors. Instead, he emphasized the need to consider all of the evidence and all of the circumstances with reference to the factors listed under s. 34(2):

Your answer to this question requires you to consider all the evidence and will depend on your view of that evidence. Consider all of the circumstances including, but not limited to, the nature of the force or threatened force by Jonathan Styres – not only what you find to be the actual peril facing Mr. Khill, but also what his honest perception of the peril was provided that if [his] perception of the peril was mistaken, his mistake was reasonable.

Consider the extent to which the use of force or threatened use of force by Jonathan Styres was imminent and if Mr. Khill's perception of the imminence of the force or threat was mistaken, was his mistake reasonable?

Were there other means available to Peter Khill to respond to the actual or potential use of force by Jonathan Styres? . . . Consider whether Jonathan Styres used or threatened to use a weapon, the size, age, gender and physical capabilities of each of Peter Khill and Jonathan Styres, the nature and proportionality of Peter Khill's response to Jonathan Styres' use or threat of force. Use your common sense, life experience and knowledge of human nature in your assessment of the evidence to answer this question.

(A.R., vol. I, at pp. 88-89)

Absent from this instruction was any reference to Mr. Khill's role in the incident under s. 34(2)(c). The jury therefore received no instructions on how this factor should have informed their assessment of reasonableness and there was no linking of the evidence to this specific factor.

[126] The key question is whether this omission was a reversible error. According to well-established principles, appellate courts must take a functional approach to reviewing a jury charge. The standard of review is not perfection, but instead assuring that the jury is properly instructed (*R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at para. 9). As affirmed by this Court in *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at paras. 14-17, an acquittal cannot be overturned because of an abstract or hypothetical possibility the error could have resulted in a different verdict. "Something more" is required (para. 14). The Crown must show that the error "might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal" (*ibid*).

[127] The factors listed in s. 34(2) are not elements of the defence and, while s. 34(2) states that the listed factors "shall" be considered, it is not an automatic error of law if one such factor is not brought to the attention of the jury. As I have explained, the judge, whether instructing a jury or adjudicating, will decide which factors in s. 34(2) are relevant, applicable, and/or worthy of consideration based on the evidence actually adduced in the particular trial. For this reason, it is unnecessary to reference a factor where there is no factual basis to inform it. For example, where there is no prior

relationship between the parties, as in this case, referring to the factors under paragraphs (f) or (f.1) of s. 34(2) would only serve to confuse or misdirect the jury. Thus, the omission of a factor under s. 34(2) may not, in every instance, represent an error.

[128] Mr. Khill argues any reference to s. 34(2)(c) was unnecessary and so its oversight was harmless. Even if the omission was an error, he argues the trial judge's extensive review of events prior to the shooting and his direction for the jury to consider the totality of the circumstances was functionally equivalent to referring to his role in the incident. He points to the Crown's failure to object to the charge as evidence the omission was insignificant and actually served the Crown's tactical interest. The Crown asserts that s. 34(2)(c) is a mandatory factor and the jury was obliged to consider whether Mr. Khill, even if acting legally, played a role in instigating or escalating the confrontation. Without specific direction, the jury was not equipped to appreciate the relevance of the accused's actions to the reasonableness of his response in the circumstances.

[129] In my view, Mr. Khill's role in the incident leading up to the shooting was potentially a significant factor in the assessment of the reasonableness of the shooting and one that satisfied legal and factual thresholds of "the person's role in the incident". The trial judge's failure to explain the significance of this factor and to instruct the jury on the need to consider Mr. Khill's conduct throughout the incident left the jury

unequipped to grapple with what may have been a crucial question in the evaluation of the reasonableness of Mr. Khill's shooting of Mr. Styres.

[130] The instruction on s. 34(2)(c) should have directed the jury to consider the effect of the risks assumed and actions taken by Mr. Khill: from the moment he heard the loud banging outside and observed his truck's illuminated dashboard lights from the bedroom window to the moment he shot and killed Mr. Styres in the driveway. The importance of s. 34(2)(c) is obvious where an accused's actions leading up to a violent confrontation effectively eliminate all other means to respond with anything less than deadly force. Where a person confronts a trespasser, thief or source of loud noises in a way that leaves little alternative for either party to kill or be killed, the accused's role in the incident will be significant.

[131] Mr. Khill acknowledges that he had a significant role in the incident. As concisely stated in his factum, "[Mr. Khill] was the only one doing anything in that narrative" (A.F., at para. 63). It was Mr. Khill who approached Mr. Styres with a loaded firearm. And it was Mr. Khill who, upon addressing Mr. Styres, pulled the trigger. According to Mr. Khill's own testimony, *before* he decided to leave the house and initiate the confrontation, he had allayed his initial fears by confirming that there were no intruders in the house itself (A.R., vol. V, at pp. 302, 351 and 359-61). Specifically, Mr. Khill acknowledged having exposed himself to a potentially dangerous situation:

Q. All right. And you go out there by yourself armed and exposed to the guy in the truck, correct?

A. Yes.

Q. And the - that plan is entirely yours, right? You have brought this state of affairs about. There's a guy stealing your truck, but you have decided, on your own, to go out by yourself and expose yourself to what you believe could be serious danger?

A. Yes.

(A.R., vol. V, at p. 368)

On these admitted facts he had a central role in creating a highly risky scenario.

[132] Accordingly, the threshold was met and there was a clear evidentiary basis for a jury to draw inferences from Mr. Khill's role in the incident that might lead to the conclusion that the act of shooting Mr. Styres was unreasonable. Without a clear direction to consider Mr. Khill's role in the incident from beginning to end, the jury would not have known that it was a factor to be considered in assessing the reasonableness of the shooting itself. Since no such direction was given, the jury may not have understood the connection between Mr. Khill's role in the incident leading up to the shooting and the reasonableness of the shooting itself. The exclusion of s. 34(2)(c) from the instructions was therefore a clear oversight which amounts to an error of law.

[133] Because of this error, the jury was left without instructions to consider the wide spectrum of conduct and the broad temporal frame captured by the words “role in the incident”. As I have explained, Mr. Khill’s conduct need not meet the criteria for concepts such as provocation or unlawfulness to be left with the jury — rather, the jury was to consider any facts that might shed light on his role in bringing about the confrontation. The instructions did not convey the need to factor in the extent to which Mr. Khill’s actions initiated, contributed to or caused the ultimate encounter, and the extent to which his role in the incident coloured the reasonableness of his ultimate act.

[134] Moreover, the charge failed to communicate that the jury had to consider all of Mr. Khill’s actions, omissions and exercises of judgment throughout the entirety of the “incident”. That word signals Parliament’s intent to broaden the temporal scope of the inquiry to include the time period before the threat or use of force that motivates the accused to act. The charge may have left the misleading impression that the reasonableness inquiry should focus on the mere instant between the time Mr. Khill perceived an uplifted gun and the time that he shot Mr. Styres. Clarity as to the temporal scope of the inquiry was particularly important in light of defence counsel’s closing argument. The defence repeatedly told the jury that self-defence was not at issue when Mr. Khill decided to leave his home to confront the intruder. Instead, the jury was urged to focus its attention on the split second before Mr. Khill shot Mr. Styres:

So let’s return to the issue, the specific point in time where self-defence must be considered and it is in those very brief seconds between the shouted command, “hey, hands up” and the shots being fired. That’s the



point in time where you'll have to consider the issue of self-defence precisely and it's a lot to have to think about in such a short period of time with so much happening, but yet happening so quickly.

(A.R., vol. VII, at p. 7; see also p. 41)

[135] Rather than correcting or counteracting defence counsel's repeated emphasis on this final "split second" of the incident, the trial judge reinforced it in his instructions on s. 34(2) by omitting any reference to the accused's "role in the incident" and giving express instructions on the imminence of the threat of force — that is, the perceived uplifted gun in the moment before Mr. Khill shot Mr. Styres — and potential alternative means to respond to it. As testimony from both Mr. Khill and Ms. Benko suggested, the time between Mr. Khill's shouts and the subsequent gunshots was near-instantaneous. The opportunity to call 911, shout from the doorway or fire a warning shot — alternatives raised by the Crown in cross-examination — had long passed at this juncture. Had the jury been instructed to consider Mr. Khill's "role in the incident", their minds would necessarily have had to resolve how the accused's initial response to a loud noise outside his home suddenly placed him in a situation where he claims he felt compelled to kill Mr. Styres. In contrast to s. 34(2)(b)'s emphasis on the imminence of force, the "incident" referred to under s. 34(2)(c) is intended to place greater weight on the viable alternatives open to Mr. Khill before leaving his home, proceeding through the darkness and then relying on deadly force.

[136] There was ample evidence in this appeal to support a finding Mr. Khill played a role in bringing about the very emergency he relied upon to claim self-defence.

This larger context was potentially a key factor in assessing the reasonableness of his act in the moment of crisis. The trial judge ought to have reminded the jury to consider how Mr. Khill's conduct and assumption of risk associated with this confrontation impacted the reasonableness of his subsequent actions. They needed to understand their obligation to incorporate the wider time frame into the reasonableness assessment, not simply with respect to Mr. Khill's belief he and Ms. Benko were being threatened with force under the first element of self-defence, but also with respect to the shooting itself based on Mr. Khill's actions in approaching Mr. Styres with a loaded firearm and announcing his presence at the very last moment. In assessing the reasonableness of the shooting, the jury needed to question how the incident happened: how the parties and pieces were put into motion and how a person breaking into a truck parked outside a home ended up being shot dead within a matter of minutes.

[137] Examined as a whole, the trial judge's instructions were not functionally equivalent to an explicit direction on Mr. Khill's role in the incident. The charge directed the jury to consider the five following factors: s. 34(2)(a) ("the nature of the force or threatened force by Jonathan Styres"); s. 34(2)(b) ("the extent to which the use of force or threatened use of force by Jonathan Styres was imminent and . . . [w]ere there other means available to Peter Khill to respond"); s. 34(2)(d) ("whether Jonathan Styres used or threatened to use a weapon"); s. 34(2)(e) ("the size age, gender and physical capabilities of each of Peter Khill and Jonathan Styres"); and s. 34(2)(g) ("the nature and proportionality of Peter Khill's response to Jonathan Styres' use or threat of force").

[138] None of these factors expressly or functionally directed the jury to consider the significance of Mr. Khill's role in bringing about the deadly confrontation. First, the "nature of the force or threat" considered Mr. Khill's perception of the threat presented by Mr. Styres immediately after Mr. Khill shouted "hands up", not the unknown knocking outside his house and his response to it. Second, 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" considered the imminence of an attack by Mr. Styres and other options available to Mr. Khill, but not the effect of Mr. Khill's actions in escalating the incident or eliminating non-lethal alternatives. Third, the question of "whether any party to the incident used or threatened to use a weapon" focused exclusively on Mr. Khill's perception that Mr. Styres was armed but not the significance of Mr. Khill introducing a firearm into the incident and its effect on his perception of Mr. Styres. Fourth, the "size, age, gender and physical capabilities of the parties to the incident" considered the relevant physical characteristics of the parties, but again did not consider Mr. Khill's conduct. Fifth and finally, the "nature and proportionality of the person's response to the use or threat of force" considered the proportionality between Mr. Khill's response and the perceived threat presented by Mr. Styres; it did not consider more broadly whether Mr. Khill's conduct precipitated the need to rely on force at all.

[139] Nor do I accept Mr. Khill's position that the trial judge's reference to the totality of the circumstances and general review of the evidence was functionally equivalent to a direction under s. 34(2)(c). Recognizing that trial judges are not required

to recite the legislative text of each factor under s. 34(2) verbatim, it is still necessary to equip the jury with the instructions they require to discharge their obligations. It is significant that almost all of the evidence was reviewed immediately following the instruction on the first element of self-defence under s. 34(1)(a). In contrast, the trial judge provided only limited reference to the evidence after directing the jury on the element of a defensive purpose under s. 34(1)(b), and none at all in explaining how they should assess the reasonableness of Mr. Khill's response in the circumstances under s. 34(1)(c).

[140] There is an important distinction between simply reviewing the evidence to assist the jury and relating the evidence to the legal issues they must decide. As this Court has consistently affirmed, "the task of the trial judge is to explain the critical evidence and the law and relate them to the essential issues in plain, understandable language" (*R. v. Jack* (1993), 88 Man. R. (2d) 93 (C.A.), at para. 39, aff'd [1994] 2 S.C.R. 310; see also *Daley*, at para. 57; *Rodgers*, at para. 31). The jury may require concrete potential "scenarios" based on the evidence that bring home the relationship between the law and the evidence. It is not sufficient to leave the evidence "in bulk for valuation"; the jury must be correctly instructed on the applicable law and how to apply that law to the facts (*Azoulay*, at p. 498, quoting *Rex v. Stephen*, [1944] O.R. 339, at p. 352). In other words, the jury must be in a position to "fully appreciate the value and effect of the evidence" (*Azoulay*, at p. 499 (emphasis deleted); see also *R. v. Barreira*, 2020 ONCA 218, 62 C.R. (7th) 101, at paras. 40-41). Without a clear direction that Mr. Khill's role in the incident was relevant to the reasonableness of his response, the

jury may have been singularly focused on the moments immediately prior to Mr. Khill opening fire. They would not have known they were also to weigh how Mr. Khill's actions may have contributed to the deadly confrontation with Mr. Styres in the driveway in assessing his conduct against a reasonableness standard.

[141] The error is significant and might reasonably have had a material bearing on the acquittal when considered in the concrete reality of the case. In the end, even if the jury considered Mr. Khill to have played a major role in instigating the fatal confrontation between him and Mr. Styres, this fact alone would not necessarily render his actions unreasonable or preclude him from successfully making a claim of self-defence. A "person's role in the incident", like any factor listed under s. 34(2), merely informs the overall assessment of reasonableness of a person's response in the circumstances. Ultimately, once the threshold was met, Parliament decided that it was for the jury to determine the implications of these facts for the reasonableness of Mr. Khill's response in the circumstances. However, the jury needed to know they were obliged to consider his role in the incident.

[142] On the available record, if properly instructed, the jury could well have arrived at a different conclusion based on Mr. Khill's role in the incident and its effect on the reasonableness of his act in the circumstances. From one perspective, the jury may well have found that Mr. Khill's conduct increased the risk of a fatal confrontation with Mr. Styres outside the home. They may also have measured Mr. Khill's decision to advance into the darkness against other alternatives he could have taken, including

calling 911, shouting from the window or turning on the lights. Those courses of conduct may have prevented his mistaken belief that Mr. Styres was armed and about to shoot, and thus avoided the need to use deadly force altogether. If the jury determined that Mr. Khill had provoked the threat, was the initial aggressor or had behaved recklessly or unreasonably, his role in the incident could have significantly coloured his responsibility and moral culpability for the death of Mr. Styres. Far from a reasonable response, the jury may have instead considered Mr. Khill to be the author of his own misfortune — with Mr. Styres paying the price for this failure of judgment.

[143] The jury could have also taken a different view. It was open for the jury to conclude that Mr. Khill had a genuine concern for his safety and that of Ms. Benko. Further still, the jury may have accepted that a reasonable person in the circumstances would have perceived the risk of waiting for an armed intruder to enter his home to be greater than confronting that person or persons outside. The jury may have also accepted that the available alternatives open to Mr. Khill may have only been partially successful or may have actually compromised his ability to regain control of the situation if the intruder was armed and aggressive. Under the open-ended and flexible assessment of reasonableness under s. 34(1)(c), once the threshold was met and the trial judge instructed on the legal test and the evidence that related to Mr. Khill's "role in the incident", it was entirely for the jury to determine how much or little weight to place on Mr. Khill's role when assessing the reasonableness of his decision to shoot Mr. Styres. But it was essential that his role in the incident be considered.

[144] Neither Crown nor defence asked the trial judge to include an instruction on Mr. Khill's role in the incident. Mr. Khill says that should weigh against the Crown. However, the Crown's failure to object to a jury charge does not, on its own, waive the public interest in correcting otherwise deficient jury instructions (*Barton*, at para. 48). On the record before us, I cannot discern any tactical advantage gained by the Crown by avoiding the inclusion of s. 34(2)(c) in the jury instructions. To the contrary, the rash, impulsive and unreasonable quality of Mr. Khill's actions was central to the Crown's presentation of the evidence and theory of the case. Although trial counsel must assist the court in its obligation to properly instruct the jury, the ultimate responsibility for the correctness of the instructions remains with the judge and the judge alone (*R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 37; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, at para. 44; *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 49).

[145] In summary, Mr. Khill's role in the incident should have been expressly drawn to the attention of the jury. The absence of any explanation concerning the legal significance of Mr. Khill's role in the incident was a serious error. Once the initial threshold is met, a "person's role in the incident" is a mandatory factor and it was clearly relevant in these circumstances. Without this instruction the jury was unaware of the wider temporal and behavioural scope of a "person's role in the incident" and may have improperly narrowed its attention to the time of the shooting. These instructions were deficient and not functionally equivalent to what was required under s. 34(2)(c). This non-direction had a material bearing on the acquittal that justifies

setting aside Mr. Khill's acquittal and ordering a new trial. I can say with a reasonable degree of certainty that, but for the omission, the verdict may not necessarily have been the same (*R. v. Morin*, [1998] 2 S.C.R. 345, at p. 374).

#### VIII. Disposition

[146] For the above reasons, a new trial is necessary to ensure the jury is appropriately instructed with respect to the principles of self-defence and the significance of Mr. Khill's role in the incident as a mandatory factor under s. 34(2).

[147] I would accordingly dismiss the appeal.

The reasons of Moldaver, Brown and Rowe JJ. were delivered by

MOLDAVER J. —

[148] In the early morning hours of February 4, 2016, around 3 a.m., Peter Khill shot and killed Jonathan Styres, a young man who, at the time, was breaking into Mr. Khill's truck. The truck was parked in the driveway of Mr. Khill's home, which was located in a rural area on the outskirts of Hamilton, Ontario. Prior to the shooting, Mr. Khill and his fiancée had been sleeping when they were suddenly awakened by loud noises coming from the driveway adjacent to their bedroom window. Looking out



the window, Mr. Khill saw that the dash lights of his truck were on, indicating that someone was, or had been, in the truck. At that point, he retrieved his shotgun and, after ensuring that there were no other intruders in the house, he went outside and confronted Mr. Styres. Moments later, according to his testimony, acting under the mistaken belief that Mr. Styres was holding a gun, Mr. Khill fired two shots, killing his potential assailant.

[149] When the police arrived, Mr. Khill was arrested and later charged with second degree murder. Following a trial by judge and jury, in which Mr. Khill maintained that he had been acting in lawful self-defence, he was acquitted. By its verdict, it is clear the jury believed, or had a reasonable doubt, that when Mr. Khill fired the fatal shots, he did so in the reasonable, but ultimately mistaken belief, that Mr. Styres was holding a gun and that his life was in danger.

[150] The Crown appealed the acquittal. The Court of Appeal for Ontario set it aside. In the court's opinion, the trial judge failed to properly instruct the jury on the provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, governing the law of self-defence as revised by Parliament in 2012. In particular, the court found that in instructing the jury on whether Mr. Khill's act of firing the fatal shots was reasonable in the circumstances, as required under s. 34(1)(c) of the *Code*, the trial judge failed to direct the jury that it should consider, among other factors, Mr. Khill's "role in the incident" under s. 34(2)(c). In the opinion of the court, this error was serious and it

might reasonably have had a bearing on the jury's verdict. Accordingly, the court ordered a retrial on the charge of second degree murder.

[151] Mr. Khill appeals to this Court from that order. He seeks to set it aside and have the verdict of acquittal reinstated.

[152] For the reasons that follow, I would dismiss Mr. Khill's appeal. With respect, however, I am unable to fully endorse the Court of Appeal's interpretation of s. 34(2)(c). In particular, I believe added guidance should be given to triers of fact charged with deciding whether an accused's prior conduct amounts to a "role in the incident". Relatedly, the court's interpretation renders consideration of an accused's prior conduct a matter of discretion for triers of fact that is effectively appeal-proof. These problems call for a more circumscribed approach to discern the types of prior conduct that an accused's "role in the incident" is meant to encompass, and how triers of fact are to assess such conduct in working through the "reasonableness analysis" mandated by s. 34(1)(c).

[153] Prior conduct of an accused can conceivably play a variety of roles in a self-defence trial. In this case, the Crown seeks to challenge Mr. Khill's entitlement to self-defence on the basis that his conduct leading up to the fatal shooting was unjustified and thereby rendered his use of lethal force unreasonable in the circumstances. Mr. Khill does not counter that his conduct leading up to the final confrontation was prosocial — like taking on the role of Good Samaritan — such that

it could render his use of lethal force reasonable. Rather, he simply maintains that his decision to confront Mr. Styres instead of pursuing other alternatives did not amount to the kind of prior conduct encompassed by s. 34(2)(c) that “can defeat a self-defence claim”. My analysis is focused exclusively on this context. I leave for another day how s. 34(2) of the *Criminal Code* could apply in cases where an accused seeks to argue that their positive or prosocial prior conduct should be considered as a factor favouring the reasonableness of their use of force under s. 34(1)(c). Those issues, which are not without their own complexities, simply do not arise on the facts before us.

[154] For reasons that will become apparent, I am respectfully of the view that where the Crown seeks to use an accused’s prior conduct to challenge their entitlement to self-defence, in order to come within s. 34(2)(c), the prior conduct must reach a threshold of wrongfulness capable of negatively impacting the justification for the use of force which undergirds the accused’s claim of self-defence. Examples of conduct that meet the threshold of wrongfulness include provocation and unlawful aggression. I would also include prior conduct that is excessive in the circumstances as the accused reasonably perceived them to be.

[155] In this case, I am satisfied that a properly instructed jury could find that Mr. Khill’s prior conduct, leading up to his use of lethal force, was excessive, such that it could constitute a “role in the incident”. Accordingly, the trial judge was required to instruct the jury to determine, under s. 34(2)(c), whether Mr. Khill had a “role in the incident” and, if so, how that role may have affected the reasonableness of Mr. Khill’s

use of lethal force. The failure to provide an instruction of this kind necessitates a new trial.

I. Facts

[156] At the time of the events giving rise to this appeal, Mr. Khill was 26 years old. He and his then-fiancée lived in a single-story house in a rural area on the outskirts of Hamilton. Mr. Khill was employed as a millwright working on jet engines. He was also a former army reservist and had previously received military training on tactics for threat assessment and proactively responding to danger.

[157] In the early hours of February 4, 2016 — testimony placed the events at about 3:00 a.m. — Mr. Khill's fiancée woke him and told him that she heard banging noises outside. Once awake, Mr. Khill heard them too. From their first-story bedroom window, Mr. Khill observed that the dash lights of his pickup truck, which was parked in the driveway, were on. He concluded that someone was there, but could not determine how many people had broken into the truck, nor whether other people had entered or were planning to enter his house. Such a possibility, he knew, was real in the rural area where he and his fiancée lived. Mr. Khill knew of numerous recent break-ins in the region. Moreover, in the week prior, his fiancée had heard someone trying to break into the house during the night, an event which led Mr. Khill to change the entry code on the house locks. Despite the new code, his truck contained an opener that would allow access to the garage. The garage was connected to a breezeway, which

contained a boarded-up window from which entry into the basement of the house could be gained.

[158] Mr. Khill testified that he had learned from his military training to be proactive in dealing with threats. Further, living as he did in a rural area, he could not expect the police to arrive quickly. Accordingly, Mr. Khill loaded the shotgun he kept in the bedroom closet and proceeded to investigate the intrusion himself. He testified that he planned to disarm and detain any intruders, but was prepared to use deadly force if necessary. With that in mind, Mr. Khill searched the inside of the house, finding no one. He then left the house through the back door and moved quietly to the breezeway. From the breezeway, he could see into the garage. It was empty. He also confirmed that the window connecting the breezeway to the basement of the house remained boarded up. In short, no one had come inside.

[159] Still armed, Mr. Khill crossed the breezeway and went outside by the front door. He was now near the back of the truck, which was facing away from the house. The dashboard lights were on, the passenger door was open, and someone was leaning into the truck.

[160] Mr. Khill moved toward the intruder with his shotgun raised. When he was a distance of somewhere between 3 and 12 feet away from the intruder, Mr. Khill shouted, "Hey, hands up". According to Mr. Khill, the intruder turned toward him and started moving his hands downward toward his waist, only to then raise them and point

at Mr. Khill. Believing the intruder had a firearm and that he was facing a life or death situation, Mr. Khill removed the safety of his shotgun and fired. In keeping with his military training, he aimed the shot at centre mass, racked the gun, and fired again. Both shots hit the intruder, who fell to the ground.

[161] Mr. Khill then approached the intruder and determined that he was, in fact, unarmed. He returned the shotgun to the house. By then, his fiancée was on the phone with the 911 operator. After speaking with the 911 operator himself, during which he stated that he had been acting in self-defence, Mr. Khill went outside to perform CPR on the intruder, who was later identified as Jonathan Styres. Mr. Styres died shortly thereafter, despite Mr. Khill's efforts to resuscitate him.

[162] When the police arrived, they arrested Mr. Khill and eventually charged him with second degree murder. He maintained that he was acting in self-defence because he believed Mr. Styres was about to shoot him when he fired his shotgun.

## II. Relevant Legislation

[163] Before I turn to outline the prior proceedings, I consider it useful to reproduce the relevant provisions of the *Criminal Code*.

### **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 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.

**Factors**

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

(a) the nature of the force or threat;

(b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;

(c) the person's role in the incident;

(d) whether any party to the incident used or threatened to use a weapon;

(e) the size, age, gender and physical capabilities of the parties to the incident;

(f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;

(f.1) any history of interaction or communication between the parties to the incident;

(g) the nature and proportionality of the person's response to the use or threat of force; and

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

III. Prior Proceedings

A. *Ontario Superior Court of Justice (Glithero J., Sitting with a Jury)*

[164] Mr. Khill conceded that he killed Mr. Styres. As such, the only two issues at trial were whether he acted in self-defence or, if he did not, whether he lacked the requisite intent for second degree murder and should only be convicted of manslaughter.

[165] The trial lasted two weeks and focused on the defence of self-defence. The Crown took the position that Mr. Khill acted rashly by going outside to confront the intruder rather than calling the police, especially after learning that he and his fiancée were not facing any imminent threat from the intruder. On Mr. Khill's behalf, defence counsel took the position that Mr. Khill reasonably, albeit mistakenly, believed that he was facing a life or death situation when he used lethal force. As for why he went outside, the defence insisted that Mr. Khill was afraid for himself and his fiancée, especially given the recent history of break-ins nearby. The defence also emphasized Mr. Khill's military training, which involved responding proactively and instinctively to threats, thereby rendering Mr. Khill's conduct reasonable for someone with his background. On this point, the Crown countered that Mr. Khill acted contrary to his training, which had included lessons on distinguishing combat scenarios from civilian scenarios.

[166] In his charge, the trial judge instructed the jury on the three elements of self-defence under s. 34(1) of the *Criminal Code*: did Mr. Khill reasonably believe that



he faced a threat of force (s. 34(1)(a)); did he act for the purpose of defending himself (s. 34(1)(b)); and was his use of force reasonable under the circumstances (s. 34(1)(c)). He reminded the jury that the burden lay with the Crown to prove beyond a reasonable doubt that Mr. Khill did not satisfy at least one of those three elements. If the Crown did not meet its burden, then Mr. Khill was entitled to be acquitted.

[167] Instructing on the first element — whether Mr. Khill reasonably believed he faced a threat of force — the trial judge emphasized that the question was not whether Mr. Khill actually faced a threat of force, but whether he believed on reasonable grounds that he faced such a threat. To aid the jury in deciding that question, the trial judge summarized most of the evidence presented at trial, highlighting Mr. Khill's testimony about what happened and his state of mind throughout the incident, as well as the statements he made to the 911 operator immediately after the shooting.

[168] On the second self-defence element — whether Mr. Khill acted for the purpose of defending against the threat of force — the trial judge decided against walking through all of the evidence again. Instead, he referred to his prior summary, emphasizing how Mr. Khill proceeded outside after finding the house empty and his evidence that Mr. Styres was turning and raising his hands when Mr. Khill fired his shotgun.

[169] The final element of self-defence concerned whether Mr. Khill's use of lethal force was reasonable in the circumstances. The trial judge explained that the question was not whether Mr. Khill believed he had no choice other than to use the force he did, but instead whether his use of force was reasonable in the circumstances as he "knew or believed them to be" (A.R., vol. I, at p. 87). Again, the trial judge decided not to repeat all of the evidence he had summarized. Instead, he instructed the jury to "[c]onsider all of the circumstances including, but not limited to" the nature of the threatened force, the imminence of that threat, other means available to Mr. Khill to respond to the threat of force, and the relative size and physical capabilities of Mr. Khill and Mr. Styres (p. 88). He further invited the jury to "[u]se . . . common sense, life experience and knowledge of human nature" in assessing whether Mr. Khill's act of firing his shotgun was reasonable in the circumstances (p. 89).

[170] Neither counsel objected to the charge. After a day of deliberating, the jury returned a verdict of not guilty. The Crown appealed from that verdict.

B. *Court of Appeal for Ontario, 2020 ONCA 151, 149 O.R. (3d) 639 (Strathy C.J.O. and Doherty and Tulloch J.J.A.)*

[171] The Court of Appeal for Ontario unanimously allowed the Crown's appeal and ordered a retrial. The key error lay in the trial judge's instruction regarding the third element of self-defence: whether Mr. Khill's use of lethal force was reasonable in the circumstances. Under the governing self-defence provisions, as revised in 2012,

s. 34(2) enumerates a non-exhaustive list of factors that “the court shall consider” when determining “whether the act committed is reasonable in the circumstances”. One of those factors is found in s. 34(2)(c) — “the [accused] person’s role in the incident”. The court explained that while trial judges need not repeat the language of the enumerated factors in s. 34(2) word-for-word, they do need to “ensure the jury appreciates the parts of the evidence relevant to the reasonableness inquiry” (para. 69). In the court’s view, the trial judge did not do that with respect to Mr. Khill’s “role in the incident”.

[172] According to the court, s. 34(2)(c) introduced a factor for the jury’s consideration that was not present in the prior self-defence legislation. Whereas that legislation focused on prior conduct that was unlawful or provocative, Parliament’s use of the words “role in the incident” invited a broader consideration of conduct throughout the “incident” leading up to the accused’s ultimate use of force. In the court’s view, this new factor called for a general assessment of the accused’s prior conduct to decide if it “sheds light on the nature and extent of the accused’s responsibility for the final confrontation” (para. 76). If it did, then the weight to be given to the accused’s prior conduct in determining the reasonableness of the accused’s use of force was essentially a matter for the jury and the jury’s assessment would “be largely beyond the reach of appellate review” (para. 63).

[173] Applying that interpretation, the court held that the jury could have found that by going outside while armed rather than calling the police, and then sneaking up

on Mr. Styres and startling him, Mr. Khill acted recklessly and failed to take measures that could have avoided the confrontation. According to the court, such findings could have led the jury to conclude that Mr. Khill was responsible for the confrontation that ended in the death of Mr. Styres. To properly decide whether his use of force was reasonable, then, “Mr. Khill’s behaviour from the moment he looked out his bedroom window and saw that the dash lights in his truck were on, until the moment he shot and killed Mr. Styres, had to be examined” (para. 75). As such, the trial judge was required to instruct the jury to consider this conduct.

[174] In that respect, the court found that the trial judge’s instruction was deficient. When instructing on s. 34(1)(c) — whether Mr. Khill’s use of force was reasonable in the circumstances — the trial judge focused the jury on the moment in which Mr. Khill shot Mr. Styres, without advising the jury that Mr. Khill’s decision to arm himself, leave his home, and sneak up on Mr. Styres could be relevant to that issue. The court held that was an error. Moreover, in the court’s opinion, the error was material to the acquittal. Given that the jury enjoyed “virtually unfettered discretion” to analyze and weigh the various s. 34(2) factors, including the accused’s “role in the incident” in conducting its s. 34(1)(c) analysis (para. 86), it was entirely for the jury to decide whether, and to what extent, Mr. Khill’s prior conduct made him responsible for the confrontation. As such, the failure to instruct the jury to consider that prior conduct was serious and it might reasonably have had a bearing on the jury’s verdict.

[175] On this basis, the court allowed the Crown's appeal and ordered a new trial. Mr. Khill now appeals to this Court from that order.

#### IV. Analysis

[176] As I will explain, I would dismiss Mr. Khill's appeal. A new trial is necessary.

[177] While I ultimately agree that the trial judge erred in law, I am unable to fully adopt the Court of Appeal's interpretation of s. 34(2)(c), as it gives triers of fact virtually unfettered discretion to consider an accused's prior conduct in a manner that is largely shielded from appellate review. With respect, I cannot endorse such an interpretation.

[178] Instead, I am of the opinion that in cases such as this one, *where the Crown seeks to use an accused's prior conduct to challenge their entitlement to self-defence*, s. 34(2)(c) must be construed narrowly: under s. 34(2)(c), an accused has a "role in the incident" only when their conduct is sufficiently wrongful as to be capable of negatively impacting the justification for the use of force which undergirds their claim of self-defence. Examples of prior conduct that meet the threshold of wrongfulness include: (a) provocation; (b) unlawful aggression; and (c) conduct that is excessive in the circumstances as the accused reasonably perceived them to be.

[179] A trial judge sitting with a jury has the responsibility of deciding whether there is an evidentiary foundation upon which a jury could find that the accused's prior conduct was sufficiently wrongful so as to amount to a "role in the incident".<sup>1</sup> If this foundation exists, then the trial judge must instruct the jury to:

- i. determine whether the prior conduct was sufficiently wrongful to amount to a "role in the incident" under s. 34(2)(c); and
- ii. if so, weigh the accused's "role in the incident" along with the other factors in s. 34(2) in determining whether, under s. 34(1)(c), the act that constitutes the alleged offence — purportedly committed in self-defence — was reasonable in the circumstances.

[180] This case presents the Court with its first opportunity to address the relationship between the prior self-defence provisions and the changes that Parliament introduced in 2012, which came into force on March 11, 2013 (*Citizen's Arrest and Self-defence Act*, S.C. 2012, c. 9). Commentators and other courts have grappled with this issue at length. While such commentary and judicial analysis warrants careful consideration, none of it is binding. It now falls to this Court to provide its own analysis. After briefly canvassing the relationship between the prior provisions and the revised ones, I will identify the types of prior conduct that, in my view, come within the "role

---

<sup>1</sup> This, of course, assumes that there is an air of reality to the defence of self-defence (*R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 51).

in the incident” factor under s. 34(2)(c) when the Crown seeks to use the conduct of the accused leading up to the final confrontation to challenge the accused’s entitlement to self-defence. I will then explain why, in my respectful view, a jury could find that Mr. Khill’s conduct fell within this factor, making an instruction on it necessary.

A. *Prior Conduct Under the Revised Self-Defence Law*

[181] When Parliament revised the *Criminal Code*’s self-defence provisions, it changed a framework that had remained largely in place since the enactment of the first *Code* in 1892. That framework was notoriously difficult to apply and had attracted significant criticism for several decades. As I will explain, Parliament had two goals in mind. First, it looked to bring a measure of simplicity to the law of self-defence; second, it sought to retain the core principles and considerations which informed the prior law.

(1) Parliament Intended to Simplify the Law of Self-Defence Without Changing Its Core Principles

[182] Before the enactment of the revised self-defence provisions, the *Criminal Code*’s self-defence regime consisted of several core provisions and interlocking subsections (ss. 34 to 37), which are reproduced in the Appendix to these reasons. Instructing a jury on these provisions was no easy task. Trial judges had to bear in mind a variety of technical prerequisites that determined whether any given provision was available, including: whether the accused provoked their assailant; whether the accused initiated the assault; whether the accused intended to cause death or grievous bodily

harm; and whether the accused attempted to retreat. They then had to instruct the jury on the divergent standards of proportionality or necessity against which the accused's conduct would ultimately be measured under each provision. The result was that trial judges were faced with the "unenviable dilemma" of having to either instruct on multiple provisions, which could "complicate and protract the charge and risk producing confusion and distraction", or instruct on a single provision, which "risked an appeal on the basis that the defence was too narrowly restricted" (*R. v. Bengy*, 2015 ONCA 397, 325 C.C.C. (3d) 22, at para. 23).

[183] Given these problems, the provisions were a frequent subject of criticism and law reform proposals (see *R. v. McIntosh*, [1995] 1 S.C.R. 686; *R. v. Pintar* (1996), 30 O.R. (3d) 483 (C.A.), at p. 492; *R. v. Siu* (1992), 71 C.C.C. (3d) 197 (B.C.C.A.); *R. v. Lei* (1997), 123 Man. R. (2d) 81 (C.A.); *R. v. Finney* (1999), 126 O.A.C. 115; Law Reform Commission of Canada, Working Paper 29, *Criminal Law — The General Part: Liability and Defences* (1982), at p. 98; D. Stuart, *Canadian Criminal Law: A Treatise* (2d ed. 1987), at p. 413; G. Ferguson, "Self-Defence: Selecting the Applicable Provisions" (2000), 5 *Can. Crim. L. Rev.* 179; D. M. Paciocco, "Applying the Law of Self-Defence" (2008), 12 *Can. Crim. L. Rev.* 25).

[184] Parliament responded to these critiques by replacing ss. 34 to 37 with a single, unified provision that removed the technical prerequisites which made one self-defence provision available in the circumstances rather than another. Under the revised law, a claim of self-defence involves three elements:



- a) the accused must believe on reasonable grounds that force, or a threat of force, is being used against them or another person (s. 34(1)(a));
- b) the accused must have acted for the purpose of defending themselves or others from that use of force or threat of force (s. 34(1)(b)); and
- c) the accused's act, purportedly committed in self-defence, must be reasonable in the circumstances (s. 34(1)(c)).

[185] The Court of Appeal helpfully framed these elements as “the trigger”, “the motive”, and “the response”, respectively (para. 42; see also D. Ormerod, *Smith and Hogan's Criminal Law* (15th ed. 2018), at pp. 381-82). Section 34(2) requires triers of fact to consider a non-exhaustive list of factors that inform the “relevant circumstances” for deciding whether the act, purportedly committed in self-defence, which forms the basis of the charge or charges against the accused, was reasonable under s. 34(1)(c). In order to defeat a self-defence claim, the burden rests with the Crown to prove beyond a reasonable doubt that at least one of the three elements has not been met.

[186] Although the revised law alters the analytical structure of the defence, the legislative history makes clear that Parliament did not intend to change the basic principles governing the law of self-defence. To the contrary, on Second Reading in the House of Commons, the Parliamentary Secretary to the Minister of Justice

explained that the amendment had the two-fold purpose of preserving the substance of the prior law while simplifying its application:

It is important to be clear . . . that the criticisms of the law do not pertain to its substance but rather to how it is drafted. . . .

Parliament has a duty to ensure that laws are clear and accessible to Canadians, criminal justice participants and even the media. That is exactly what we are proposing to do in Bill C-26, even though the actual rights of Canadians are robust and upheld in Canadian courts on a daily basis. . . . Bill C-26 therefore proposes to replace the existing Criminal Code provisions in this area with clear, simple provisions that would maintain the same level of protection as the existing laws but also meet the needs of Canadians today. [Emphasis added.]

(*House of Commons Debates*, vol. 146, No. 58, 1st Sess., 41st Parl., December 1, 2011, at p. 3834)

This dual purpose is confirmed by a “Technical Guide for Practitioners” which the Department of Justice published to promote “a common understanding of the purpose and effect of the reforms” to the law of self-defence (Department of Justice, *Bill C-26 (S.C. 2012 c. 9) Reforms to Self-Defence and Defence of Property: Technical Guide for Practitioners*, March 2013 (online) (“Technical Guide”), at p. 1). The Guide explains that Parliament intended for the new law to “simplify the legislative text itself, in order to facilitate the application of the fundamental principles of self-defence without substantively altering those principles” (p. 8 (emphasis added; emphasis in original deleted)).

[187] The revised provisions reflect this dual purpose. Much of the old law's complexity stemmed from the relation between the various self-defence provisions and the highly technical preconditions determining which provision applied on the facts. The revised law removed these preconditions and created a single, three-part self-defence test, with a list of factors for the jury to consider in assessing the ultimate reasonableness of the accused's conduct under the third component, s. 34(1)(c). While this multifactorial analysis is new, the factors contained in s. 34(2) are largely drawn from considerations recognized under the previous self-defence provisions and developed through this Court's jurisprudence interpreting and applying them. By maintaining those considerations, Parliament intended that they continue to inform the self-defence analysis, albeit with respect to the single question of whether the accused's act was reasonable in the circumstances. As the Parliamentary Secretary to the Minister of Justice explained when describing the list of factors contained in s. 34(2) on Third Reading in the House of Commons:

This list accomplishes several purposes. It is intended to signal to the judges that existing jurisprudence should continue to apply even though the elements of self-defence have been simplified. It should also assist judges in their duty to instruct juries about how to apply the law in a given case. [Emphasis added.]

(*House of Commons Debates*, vol. 146, No. 109, 1st Sess., 41st Parl., April 24, 2012, at p. 7065)

The Technical Guide similarly explains that the s. 34(2) factors “indicate that previously recognized self-defence considerations continue to apply wherever relevant” (p. 11) even if they are no longer “determinative requirements” (p. 24).

[188] In sum, as indicated, Parliament had two goals in mind in revising the law of self-defence. First, it aimed to make the law less complex to apply. Second, it intended to retain the core principles and jurisprudence underlying the prior self-defence law. These goals inform the proper interpretation of the new self-defence provision.

(2) Scope of the Accused’s “Role in the Incident”

[189] The central question in this appeal is whether the trial judge was obliged to direct the jury, under s. 34(2)(c), to consider Mr. Khill’s “role in the incident” leading up to his use of lethal force. To answer this question, it is first necessary to determine what types of prior conduct are capable of amounting to a “role in the incident” where the Crown seeks to use an accused’s prior conduct to challenge their entitlement to self-defence. Only if the conduct in question is capable of amounting to a “role in the incident” must it be left for the jury to consider as part of its “reasonableness analysis” under s. 34(1)(c).

[190] In my view, the scope of s. 34(2)(c) turns on the principle of justification — the *raison d’être* of any claim of self-defence. As this Court has explained,

self-defence absolves an accused of criminal liability on the ground that the circumstances justified the accused's use of force (*Perka v. The Queen*, [1984] 2 S.C.R. 232, at p. 246; *R. v. Ryan*, 2013 SCC 3, [2013] 1 S.C.R. 14, at para. 24). In claiming self-defence, the accused "asserts the essential rightfulness of his aggressive act" (*Perka*, at p. 269, per Wilson J., concurring) and thereby "challenges the wrongfulness of an action which technically constitutes a crime" (p. 246, per Dickson C.J.). In circumstances where an assailant initiates a confrontation, the assailant becomes "the author of his or her own deserts" and will accordingly bear responsibility for the consequences of the accused's justified use of force (*R. v. Hibbert*, [1995] 2 S.C.R. 973, at para. 50).

[191] The prior law codified this principle of justification by limiting the availability of some self-defence provisions if the accused's prior conduct amounted to provocation or unlawful aggression. As force is justified where the assailant is "the author of his or her own deserts", an accused could lose that justification by "wrongfully" provoking the assailant's attack or by acting unlawfully as the initial aggressor. In those circumstances, the accused could no longer be said to be an innocent victim and therefore bore some responsibility for the consequences of defending against the attack. In some circumstances, the accused's wrongful conduct precluded access to one or more of the previous provisions (see, e.g., s. 34(1) and 34(2)). In other cases, the accused's prior wrongful conduct created higher thresholds for an accused to access the defence (see, e.g., s. 35).

[192] Under the revised law, s. 34(2)(c) retains the concern about prior wrongful conduct of this kind. Consistent with the goals of the revised law, Parliament simply changed the prior law's consideration of such conduct from a threshold determinant in some cases into a factor relevant to whether the accused's use of force was reasonable.

The Technical Guide confirms this interpretation of s. 34(2)(c):

This factor [s. 34(2)(c)] in part serves to bring into play considerations surrounding the accused's own role in instigating or escalating the incident. Under the old law, the distinction between section 34 and 35 was based on the defender's role in commencing the incident, creating higher thresholds for accessing the defence where the accused was the provoker of the incident, as opposed to an innocent victim. As the new law contains only one defence that does not distinguish between conflicts commenced by the accused and those commenced by the victim, this paragraph signals that, where the facts suggest the accused played a role in bringing the conflict about, that fact should be taken into account in deliberations about whether his or her ultimate response was reasonable in the circumstances. [Emphasis added; p. 26.]

[193] This brings us to the doctrinal challenge on this appeal, and the root of my disagreement with my colleague, Justice Martin. It is common ground between us that conduct falling under s. 34(2)(c) — an accused's role in the incident — includes, but is not limited to, prior conduct that under the former regime amounted to provocation or unlawful aggression. Had Parliament intended otherwise, it could have expressly provided for triers of fact to consider “conduct that amounts to provocation or unlawful aggression”. It did not do so. Having used the term “role in the incident”, Parliament has signalled that other types of prior wrongful conduct can be relevant to the reasonableness analysis as well.

[194] The question arises, what other types of prior wrongful conduct did Parliament have in mind? In particular, what types of conduct did Parliament mean to include within the phrase “the [accused’s] role in the incident”, where, as in this case, the Crown seeks to use an accused’s prior conduct to challenge their entitlement to self-defence? This is where I part company with my colleague. In particular, we disagree on the type of conduct that Parliament meant to include within the phrase “the [accused’s] role in the incident”.

[195] Justice Martin would include virtually all conduct of the accused leading up to the final confrontation, leaving it for the triers of fact to decide the extent to which the prior conduct “colours the reasonableness of the ultimate act underlying the charge” (para. 100). The only type of conduct that would not meet the “relevance” threshold is “conduct during the incident that has no bearing on whether or not the act was reasonable” (para. 112). Respectfully, such an interpretation is fundamentally at odds with the extrinsic evidence I have recounted, which reiterates time and again that Parliament did not intend for its revision of the law of self-defence to alter the core principles of self-defence. And yet, although my colleague acknowledges this extrinsic evidence (see para. 38), she apparently finds it to be of little or no use in interpreting s. 34(2)(c).

[196] Of course, extrinsic evidence cannot take precedence over the text of the statutory scheme, but the text must still be read in light of Parliament’s objectives in enacting the legislation (see, e.g., *R. v. Rafilovich*, 2019 SCC 51, at para. 38, per

Martin J.) — especially where, as here, the evidence is both clear and consistent. Accordingly, in what follows, I interpret the scope of s. 34(2)(c) in line with the core principles of self-defence — principles which Parliament did not intend to displace.

[197] Accounting for Parliament's revised approach and its stated intention to maintain the core principles of the previous law, I interpret s. 34(2)(c), in cases where the Crown seeks to use an accused's prior conduct to challenge their entitlement to self-defence, as entailing a threshold of wrongfulness. Specifically, I would limit its reach in such cases to prior conduct that is sufficiently wrongful as to be capable of negatively impacting the justification for the use of force which undergirds the accused's claim of self-defence. I refrain from attempting to define all of the ways in which an accused's conduct could reach this threshold. I am, however, satisfied that prior conduct leading up to the ultimate use of force that is excessive in the circumstances as the accused reasonably perceived them to be would come within s. 34(2)(c). Like provocation and unlawful aggression, prior conduct leading up to the final confrontation, which can be characterized as excessive in the circumstances as the accused reasonably perceived them to be, simply illustrates prior conduct that is sufficiently wrongful to warrant an inquiry into whether the accused should potentially bear responsibility for the final confrontation. As such, it is relevant under s. 34(2)(c) and should be considered by the jury, along with other relevant factors in s. 34(2), in assessing whether the accused's ultimate use of force was reasonable in the circumstances. Conversely, prior conduct falling short of this threshold of wrongfulness is not capable of making the use of force unjustified and is not among the types of conduct that fall under s. 34(2)(c).



[198] I am therefore unable to fully endorse the Court of Appeal's interpretation of s. 34(2)(c). While the court rightly recognized that s. 34(2)(c) is ultimately concerned with whether the conduct makes the accused responsible for the confrontation, I respectfully believe that triers of fact require added guidance to identify the types of conduct that can, as a matter of law, make an accused responsible — conduct that reaches a threshold of wrongfulness such that it could negatively impact the justification for their use of force. Without guardrails to ensure that the jury focuses only on prior conduct that is legally capable of affecting justification, there is nothing preventing a jury from rejecting a self-defence claim on the basis of prior conduct that, while imperfect, is not sufficiently wrongful as to be capable of negatively affecting justification. This is especially troubling in a murder trial, where dire consequences — the difference between an acquittal and life imprisonment — hang in the balance. With respect, I am unable to discern any legislative intent for such a fundamental change to the basic principles of self-defence.

[199] In keeping with those basic principles, in addition to provocation and unlawful aggression, I am of the view that the threshold of wrongfulness capable of affecting justification is met where an accused's conduct leading up to the final confrontation is excessive in the circumstances as the accused reasonably perceived them to be. This approach is one that effectuates Parliament's intent to capture the types of prior conduct that were relevant under the previous legislation, namely provocation and unlawful aggression, and to include other kinds of similarly wrongful conduct within the new "role in the incident" factor. Whatever the type of conduct, the jury

must understand that conduct falling short of this threshold of wrongfulness cannot negatively affect justification and is therefore not included under s. 34(2)(c) where the Crown seeks to use it to challenge the accused's entitlement to self-defence. However, in criticizing the sufficiently wrongful test that I propose, my colleague effectively sidesteps the vital distinction that warrants this threshold, namely: it *only* applies when the Crown seeks to use an accused's prior conduct to challenge their entitlement to the defence.

[200] The term "excessive" has a long pedigree in the law of self-defence. Historically, it has been used to circumscribe the amount of force that may be used in repelling an attack. To be precise, if the force used was excessive in the circumstances, the justification that would otherwise have supported a claim of self-defence will have been lost (see, e.g., the former s. 37(2), reproduced in the Appendix to these reasons).

[201] My colleague takes issue with the use of the term "excessive" in the context of s. 34(2)(c). She observes that, historically, it only applied to the amount of force used in the ultimate act, and that this use of the term has been preserved under s. 34(2)(g) of the present legislation. She steadfastly maintains that it has no place in the interpretation of s. 34(2)(c), where the Crown seeks to use an accused's prior conduct to remove the justification that would otherwise have supported a claim of self-defence. With respect, this misses the point. Whether the term "excessive" references the ultimate act or the prior conduct, it goes to conduct that is sufficiently wrongful to

negate the justification for the use of force that undergirds the accused's claim of self-defence. And that is precisely how I am using the term in the present context.

[202] Similarly, declining to place guardrails around the jury's evaluation of an accused's prior conduct risks inappropriately limiting appellate review in self-defence cases. In conducting its reasonableness analysis, the Court of Appeal rightly noted that s. 34(1)(c) gives the jury discretion to weigh the different factors set out in s. 34(2), largely shielded from appellate review. But if appellate courts are to have no role in reviewing how the jury may have weighed s. 34(2)(c) along with other factors, I consider it essential that they retain a supervisory role in ensuring that:

- the trial judge has correctly determined that the accused's prior conduct was capable of amounting to a "role in the incident" under s. 34(2)(c);
- the jury has been directed to the prior conduct they may consider under s. 34(2)(c) and the threshold of wrongfulness it must meet before they can include it as a factor in their "reasonableness analysis" under s. 34(1)(c); and
- the jury has been instructed that if, in their view, the accused's prior conduct amounts to a "role in the incident", they are to consider it along with other relevant factors under s. 34(2) in conducting their "reasonableness analysis" under s. 34(1)(c), and that the weight they choose to give to any particular factor is for them to decide.

[203] With respect, I am concerned that the Court of Appeal's interpretation of s. 34(2)(c) does not allow for this appellate role. To the contrary, it puts no guardrails on the type of conduct that can amount to a "role in the incident" where the Crown seeks to use the accused's prior conduct to challenge their entitlement to self-defence. By contrast, recognizing that prior conduct falls under s. 34(2)(c) only when it is sufficiently wrongful as to be capable of negatively affecting justification places legal constraints on what conduct can amount to a "role in the incident". That interpretation thereby allows appellate courts to retain their critical role in ensuring that the jury understands how to use prior conduct in a legally permissible way.

[204] More generally, where the Crown seeks to use the accused's prior conduct to challenge their entitlement to self-defence, interpreting s. 34(2)(c) as limited to sufficiently wrongful conduct capable of negatively affecting justification better fits with two important policy considerations that underlie the self-defence analysis.

[205] First, the practical reality is that "those in peril, or even in situations of perceived peril, do not have time for full reflection and that errors in interpretation and judgment will be made" (Paciocco, at p. 36). Given this reality, the self-defence analysis has always recognized that "a person defending himself against an attack, reasonably apprehended, cannot be expected to weigh to a nicety, the exact measure of necessary defensive action" (*R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (Ont. C.A.), at p. 111; *R. v. Hebert*, [1996] 2 S.C.R. 272, at para. 18). Prior conduct potentially falling within s. 34(2)(c) should be assessed in a similar fashion. It should not, in my view, be

interpreted in a manner that allows triers of fact to second-guess the accused's every move leading up to the final confrontation. Section 34(2)(c) should apply only where conduct is sufficiently wrongful to overcome the room for error that self-defence necessarily affords to an accused.

[206] Second, I am mindful that self-defence arises regularly in life or death situations involving lethal force. In such circumstances, the chances of a manslaughter verdict tend to be more illusory than real, since in most cases the accused will have expressly intended to neutralize the threat posed by the assailant. As such, the self-defence claim will often be the sole determinant of whether the accused goes free or faces a life sentence (*Criminal Code*, s. 235(1)). In these circumstances, the accused may be left with the Hobbesian choice of deciding whether to use lethal force and thereby risk life imprisonment because others would perhaps have acted differently in the lead-up to the final confrontation, or to hold off and run the risk of being killed or suffering grievous bodily harm. Given the severity of these outcomes, I would not rush to infer that in enacting s. 34(2)(c), Parliament intended with the revised legislation to give triers of fact unguided and unappealable discretion in evaluating the relevance of an accused's prior conduct. Had Parliament intended such a drastic revision to the law of self-defence, I would have expected something more explicit than a simple instruction requiring the triers of fact to consider the accused's "role in the incident".

[207] Justice Martin takes a different view of s. 34(2)(c). As indicated, she construes this provision as requiring triers of fact to examine the totality of the

accused's actions, from the beginning of the incident to its end. Included in this is conduct that is both temporally and behaviourally connected to the final incident. Only conduct that "has no bearing on whether or not the act was reasonable" will be excluded from consideration (para. 112). In her view, the provision gives triers of fact wide latitude to decide what aspect or aspects of that prior conduct are capable of undermining the reasonableness of the accused's use of force, including conduct that she variously describes as "rash", "negligent," "unreasonable," "hotheaded", "risky" or "otherwise [falling] below community standards" (paras. 84, 94 and 105). She would put the accused's prior conduct in the "minutes, hours or days" leading up to the final confrontation under a microscope, parsing their every move (para. 83).

[208] Under her interpretation of s. 34(2)(c), triers of fact are invited to look at the accused's entire course of conduct in the lead up to the final confrontation with a view to determining whether any part of it *created, caused, or contributed* to the incident or crisis (para. 124). Was there something the accused could have done, but failed to do, which may have prevented the final confrontation? Was there something the accused did that could have been done differently, or avoided altogether, which may have prevented the final confrontation? On my colleague's approach, these and similar questions would inevitably end up being left to the jury for its consideration — and this creates at least two problems.

[209] First, any instruction the trial judge might give the jury to circumscribe the nature, scope, or breadth of the prior conduct would be all but meaningless. In

circumstances giving rise to extreme fear, panic, and anger — where emotions are running high and the adrenalin is flowing — there will always be things that, upon detached reflection, a calm and rational person might have done differently. But we do not convict people of murder or other serious crimes of violence for prior conduct in the lead up to the final confrontation that would, upon detached reflection, be considered careless, negligent, impulsive, or simply an error in judgment.

[210] Under the previous legislation, prior conduct amounting to carelessness, negligence, impulsivity, or a lack of judgment was simply not relevant because it was insufficiently wrongful. Conversely, provocation and unlawful aggression were included because they were wrongful and thus capable of undermining the justification that undergirds a claim of self-defence. My colleague's interpretation of s. 34(2)(c) misconstrues the role that prior conduct is meant to play in the analysis of a self-defence claim. Unlike those factors enumerated in s. 34(2) that go *directly* to the nature of the threat or the proportionality of the accused's defensive response (see, e.g., s. 34(2)(a), (b), (d), (g) and (h)), I find it difficult to explain how conduct such as carelessness, negligence, acting precipitously on impulse, or a lack of judgment exhibited by the accused before the threat giving rise to the act has materialized could somehow be used to deprive the accused of the right to defend against this threat. Given the justificatory nature of self-defence, if the prior conduct does not meet a threshold of wrongfulness, I fail to see its relevance to the accused's entitlement to a defensive response.

[211] Second, on my colleague's approach, no meaningful standard can be set which would provide the jury with the guidance it needs to circumscribe the nature, scope, or breadth of the prior conduct that would warrant depriving the accused of their entitlement to the defence of self-defence. As indicated, my colleague takes the position that any conduct that is temporally and behaviourally relevant to the incident in question is included in the person's role in the incident under s. 34(2)(c). The only type of prior conduct not included is conduct that had no bearing on whether the final act was reasonable.

[212] With respect, if this test is meant to provide a guardrail to guide the jury in its deliberations, then it is a guardrail that, for all intents and purposes, is meaningless. And that, more than anything else, is what separates my approach from my colleague's. On my approach, the jury is given meaningful guardrails, which ensure that if an accused is to be deprived from relying on the defence of self-defence based on prior conduct leading up to the final confrontation, the prior conduct must be sufficiently wrongful to warrant such a drastic result.

[213] With respect, I remain unconvinced that the new s. 34(2)(c) calls for a different interpretation, one that fails to focus on wrongfulness. And yet, that is precisely the interpretation that my colleague proposes. She invites a freewheeling inquiry into an accused's every move leading up to the final confrontation — an approach that effectively dispenses with the justificatory nature of self-defence despite legislative intent to preserve the core principles of self-defence. The drastic



consequence of her reasons is that accused persons who find themselves staring down the barrel of a gun could be left with no right to defend themselves, simply because, at some point along the way, they behaved carelessly or negligently or exhibited a lack of judgment. In sum, my colleague proposes an amorphous interpretation of s. 34(2)(c) that is all but limitless. For these reasons alone, her interpretation should be rejected.

[214] My colleague counters that, in focusing on the possibility that a jury will reject a self-defence claim based solely on prior conduct falling short of any meaningful threshold of wrongfulness, I have misinterpreted her reasons. I have not. Section 34(2) is clear that all relevant factors shall be considered. But, once a factor is deemed relevant under s. 34(2), the jury has total discretion to assign it as much weight as they consider appropriate. Without the sufficiently wrongful threshold, there is simply no guardrail preventing a jury from rejecting a self-defence claim based decisively on prior conduct that is not sufficiently wrongful — by asking whether the accused did *anything* to “create, cause or contribute to the incident or crisis” (para. 85). On her all but limitless interpretation of s. 34(2)(c), there are no meaningful directions for the trial judge to give, for the jury to apply, or for an appellate court to review.

[215] My colleague’s interpretation of s. 34(2)(c) would allow the jury to reject a self-defence claim, effectively guaranteeing a life sentence for an accused charged with murder, on the basis of an amorphous examination of whether their conduct in the lead up to the confrontation “sheds light on the nature and extent of the accused’s responsibility” for the final act (para. 123). Let there be no doubt about it: on this

approach, where an accused intentionally causes death in circumstances where they honestly and reasonably believe that their life is in peril, they could lose a valid self-defence claim because their conduct during the final confrontation was found to be unreasonable due to carelessness, negligence, impulsivity, or even a lack of judgment in the lead-up to it. Despite my colleague's protestations to the contrary, conduct of this sort — not just in the final defensive act but in the minutes, hours or days leading up to it — can make the difference between an acquittal and a murder conviction resulting in a life sentence. Surely this cannot be right. It raises the spectre of convicting accused persons who do not come anywhere close to the high degree of moral blameworthiness required to sustain a conviction for murder. As such, my colleague's approach runs the very real risk of contravening fundamental principles of criminal and constitutional law and for that reason alone, it should be rejected (see generally A. Brudner, "Constitutionalizing Self-Defence" (2011), 61 *U.T.L.J.* 867, at pp. 896-97).

[216] I recognize that my colleague is concerned about adhering to Parliament's goal of, among other things, simplifying jury instructions in self-defence cases, but that concern does not support an interpretation of s. 34(2)(c) that gives the jury complete authority to decide what prior conduct falls within s. 34(2)(c). With respect, there is no simplicity in leaving the jury to sift through the "minutes, hours or days" leading up to the final confrontation in search of conduct that could range anywhere from negligence to impulsivity, from risky behaviour to a mere lack of judgment. But even if the interpretation I have advanced leads to somewhat greater complexity, it is a far cry

from the tangled web of the prior self-defence provisions that Parliament sought to remove. Regardless, it is a crucial measure that enhances the jury's ability to carry out its task, and is justified by the need for certainty in obtaining a criminal conviction and the significant stakes in a self-defence case. My colleague's approach effectively sets these rule of law interests aside: it removes any meaningful role for the trial judge to guide the jury's inquiry under s. 34(2)(c) and leaves appellate courts with virtually nothing to review in protecting the accused from an improper conviction. In its attempt to simplify the self-defence provisions, surely Parliament did not seek an upheaval of such basic rule of law principles.

[217] Finally, I wish to be clear that the interpretation of s. 34(2)(c) that I advance is not motivated by a belief that jurors might disregard the instructions that bind them. I have tremendous faith in our jury system; I have no doubt that jurors take their job seriously, and I am fully confident that they can be trusted to follow the legal instructions they receive from the trial judge. I simply interpret s. 34(2)(c) more narrowly than my colleague, at least where the Crown seeks to use the provision to prevent an accused from claiming self-defence. That interpretation has nothing to do with mistrusting the jury. Rather, it has everything to do with providing a yardstick against which the jury can measure the accused person's prior conduct — one that, consistent with my analysis of the intrinsic and extrinsic evidence of the revised provisions' meaning, focuses the jury's attention on the wrongfulness of an accused's prior conduct and the principle of justification. To that end, the guardrails included in

my interpretation of s. 34(2)(c) seek to facilitate, and therefore promote, the crucial function that jurors perform.

[218] In sum, I am of the view that, in the context of this case, where the Crown seeks to use the accused's prior conduct to challenge their entitlement to self-defence, the prior conduct can only amount to a "role in the incident" within the meaning of s. 34(2)(c) when it is sufficiently wrongful as to be capable of negatively impacting the justification for the use of force which undergirds the accused's claim of self-defence. This includes conduct that amounts to provocation or unlawful aggression, as well as conduct that is excessive in the circumstances as the accused reasonably perceived them to be. As described in para. 179 above, if there is an evidentiary foundation for the jury to find that the prior conduct is sufficiently wrongful, the trial judge must instruct the jury to determine whether the conduct in question meets the threshold of wrongfulness required to amount to a "role in the incident". If so, the jury must then weigh this factor along with the other relevant factors identified in s. 34(2) to determine the ultimate question, namely whether the Crown has met its burden of proving beyond a reasonable doubt that the force used by the accused was unreasonable in the circumstances.

### (3) Application

[219] Applying this test, I am satisfied that a properly instructed jury acting reasonably could have found that Mr. Khill had a "role in the incident". Specifically,

there was an evidentiary basis upon which the jury could find that Mr. Khill's prior conduct was excessive in the circumstances as he reasonably perceived them to be.

[220] When Mr. Khill first awoke, he could hear loud noises. Looking outside, he could tell that someone had broken into his truck, although he could not determine how many people were present. He also knew that the truck contained a garage opener, by which one or more intruders could gain access to the garage and possibly the house. He knew that break-ins were common in the area and that his fiancée had experienced a break-in attempt at their home the week before. He also believed that, given the rural location of the house, the police might not be able to arrive quickly. Under these circumstances, and given his military training, Mr. Khill's decision to take his shotgun and proceed through the house to assess the level of threat facing him and his fiancée has not been seriously challenged by the Crown.

[221] The Crown does, however, challenge Mr. Khill's conduct as events progressed and he gained more information about the nature and extent of the threat. After searching the house and confirming that no one was inside, he checked the garage and found that it too was free of intruders. At that point, it is at least arguable that he had no reason to think that he and his fiancée faced any immediate threat, especially once it appeared that Mr. Styres was the lone intruder on the property. Appreciating the isolated nature of the threat, Mr. Khill could have called the police at this juncture. He might also have alerted Mr. Styres to his presence from beyond the range at which

lethal force would have been necessary. Instead, Mr. Khill chose to sneak up on Mr. Styres while armed with a lethal weapon.

[222] In my view, Mr. Khill's conduct provided an evidentiary foundation for the jury to consider whether he had a role in the incident under s. 34(2)(c). Given Mr. Khill's evolving understanding of the isolated threat, his decision to sneak up on Mr. Styres, and the alternative responses that may not only have been available but also have better corresponded with his understanding, the jury could reasonably have found that Mr. Khill's conduct leading up to the final confrontation was not simply careless, negligent, impulsive, or an error in judgment, but excessive such that it could negatively impact the justification for his use of force. That conclusion is, however, by no means a certainty. It was also open to the jury to find that his conduct fell below the excessive standard, in view of his military training and his perception that the situation was one of great danger for himself and his fiancée. Nevertheless, because there was an evidentiary foundation for the jury to consider Mr. Khill's prior conduct, the trial judge was obliged to instruct the jury to decide if that conduct, in fact, reached the threshold for including it in s. 34(2)(c) and, if it did, to consider that factor in the s. 34(1)(c) reasonableness analysis.

[223] Whether the trial judge provided this instruction is the question to which I now turn.

*B. The Trial Judge Failed to Instruct on Mr. Khill's Role in the Incident*

[224] Mr. Khill submits that even if the trial judge was obliged to instruct on the relevance of his prior conduct, a functional review of the charge reveals that the trial judge did in fact provide that instruction.

[225] With respect, I disagree. On numerous occasions, this Court has emphasized that appellate review of jury charges should be functional rather than focused on specific words (*R. v. Barton*, 2019 SCC 33, at para. 54; *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 62), and should examine alleged errors “in the context of the entire charge and of the trial as a whole” (*R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, at para. 32). As this Court recently explained, “the overriding question is whether the jury was properly equipped to decide the case” (*R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at para. 9).

[226] I am respectfully of the view that the jury was not properly equipped to decide whether Mr. Khill’s use of force was reasonable in the circumstances. Although the jury could have concluded that the prior conduct amounted to a “role in the incident”, as I have explained, the trial judge’s instruction on s. 34(1)(c) focused the jury’s attention exclusively on the moment of the shooting. The core of that instruction involved specifically directing the jury to consider a number of factors enumerated in s. 34(2). The accused’s “role in the incident” was not one of them. Instead, the factors included the nature and imminence of the threatened use of force that Mr. Khill faced, whether other means existed to respond to the force, the proportionality of Mr. Khill’s response, and the relative characteristics of Mr. Khill and Mr. Styres. In short, the

factors that the trial judge adverted to all concerned the circumstances at the time Mr. Khill fired his shotgun. As such, the charge suggested that the question of whether Mr. Khill's act was reasonable under s. 34(1)(c) involved looking only at the moment he shot Mr. Styres, without being coloured by his conduct leading up to the confrontation.

[227] In fairness, the trial judge did instruct the jury to “[c]onsider all of the circumstances” summarized for the first two self-defence elements (A.R., vol. I, at p. 88), which had included a brief mention of Mr. Khill's prior conduct. However, review of a jury charge must ask what the jury would have understood the charge to mean from a functional and holistic perspective (see *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at paras. 30 and 31). Taking that perspective, the s. 34(1)(c) charge overwhelmingly focused the jury's attention on the moment of the shooting. Moreover, any brief mention of Mr. Khill's prior conduct fell short of the kind of guidance called for by a circumscribed interpretation of s. 34(2)(c), as described above. As such, the instruction did not properly equip the jury to decide whether Mr. Khill's use of force was reasonable in the relevant circumstances.

[228] In the alternative, Mr. Khill argues that even if the trial judge focused on the moment of the shooting, the jury would have considered his “role in the incident” anyway because the parties adverted to it in their closing submissions. I accept that the parties did address the prior conduct in their closing submissions. However, the parties are not the jury's source of the governing law. They may fill occasional gaps left in the



charge (see *Daley*, at para. 58), but ultimately the obligation to instruct on the law falls to the trial judge (see *R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 692). For the reasons I have explained, I am respectfully of the view that he did not fulfill that obligation here.

[229] I appreciate that the trial judge did not have the benefit of these reasons at the time of the trial and that no counsel objected to the instruction he gave. It is nevertheless clear that any mention he made about Mr. Khill's prior conduct did not place the jury in a position of knowing how to evaluate Mr. Khill's prior conduct. As such, he failed to properly instruct the jury to consider Mr. Khill's "role in the incident" as part of the s. 34(1)(c) reasonableness analysis, and this constituted a legal error.

### *C. The Error Was Material to the Acquittal*

[230] Appellate courts should not be quick to set aside jury acquittals (*R. v. Sutton*, 2000 SCC 50, [2000] 2 S.C.R. 595, at para. 2). When seeking such a result, the Crown carries the heavy burden of demonstrating that the error might reasonably "have had a material bearing on the acquittal" (*R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14). However, that does not require proving that a conviction was inevitable but for the error. Rather, the acquittal should be set aside if the Crown can prove to "a reasonable degree of certainty" that the error was material to the verdict (*R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021, at para. 27; see also *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at para. 36). In the context of a trial judge's alleged failure to instruct on a particular s. 34(2) factor, the Crown must show that including

the omitted factor could realistically have changed the jury's verdict (see *Graveline*, at para. 14).

[231] I am satisfied that the Crown has met its burden. To enter an acquittal based on self-defence, a jury must find that the prosecution failed to prove beyond a reasonable doubt that at least one element of the defence is not satisfied (see *Hebert*, at para. 25). Therefore, by acquitting Mr. Khill, the jury at least had a reasonable doubt that his use of lethal force was reasonable in the circumstances.

[232] However, it is realistic to think that if the trial judge had provided the appropriate instruction on s. 34(2)(c), the jury's conclusion on whether Mr. Khill's use of force was reasonable may well have changed. In my view, the degree to which Mr. Khill might bear responsibility for Mr. Styres' death looks different when one views the moment of the shooting in isolation rather than looking at the full incident, lead-up and all. Considered narrowly, Mr. Khill's account of the events placed him in a kill-or-be-killed situation, facing an immediate threat of lethal force with no alternative other than to neutralize the threat. Considering the matter more broadly — that is, with regard to whether Mr. Khill had a "role in the incident" — does not necessarily take him out of that situation. However, it does raise the question of whether Mr. Khill should bear responsibility for the confrontation that led to Mr. Styres' death.

[233] It would, of course, be for the jury to decide whether Mr. Khill's prior conduct was, in fact, excessive and, if so, whether this factor, standing alone or in

conjunction with other relevant factors in s. 34(2), rendered his use of force unreasonable. Nevertheless, I can conclude with the necessary degree of certainty that a properly instructed jury could find that Mr. Khill had a “role in the incident” capable of rendering his use of force, though justified in the moment of the shooting, unreasonable. As such, the trial judge’s error “might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal” (*Graveline*, at para. 14). I am therefore satisfied that the Crown has met its burden: the acquittal should be set aside and a new trial ordered.

V. Disposition

[234] For the reasons given, I would dismiss the appeal.

The following are the reasons delivered by

CÔTÉ J. —

[235] I have had the benefit of reading the reasons of my colleague Justice Moldaver and those of my colleague Justice Martin. I share Moldaver J.’s views on the analysis and interpretation of s. 34(2)(c) of the *Criminal Code*, R.S.C. 1985, c. C-46, and agree with him that the trial judge erred in law by failing to properly instruct the jury to consider Mr. Khill’s “role in the incident” as part of the s. 34(1)(c)

reasonableness analysis. However, and with great respect, I am unable to agree with his conclusion that the trial judge's error was material to the acquittal, thus warranting a new trial. In my view, a functional review of the jury charge reveals that the jury was instructed to consider all of Mr. Khill's actions leading up to the shooting — the exact outcome that an explicit s. 34(2)(c) instruction would have accomplished. Ultimately, the jury had a reasonable doubt on the question of whether Mr. Khill had acted in self-defence. The Crown has not discharged its heavy burden to demonstrate that the trial judge's error was material to the verdict, and Mr. Khill's acquittal should stand.

[236] As my colleague Moldaver J. rightly notes, acquittals are not lightly overturned (see *R. v. Sutton*, 2000 SCC 50, [2000] 2 S.C.R. 595, at para. 2). The Crown has a heavy burden of demonstrating that “the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal” (*R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14). I agree that in the context of the trial judge's failure to instruct on a particular s. 34(2) factor, the Crown, to satisfy its burden, must show to a reasonable degree of certainty that including the omitted factor may have realistically changed the jury's verdict.

[237] This Court's jurisprudence has long held that an accused is entitled to a jury that is properly — not perfectly — instructed (*R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 31; *R. v. Jacquard*, [1997] 1 S.C.R. 314, at paras. 2 and 32). Trial judges are not held to a standard of perfection in crafting jury instructions; rather, in

reviewing the trial judge's charge, an appellate court is to take a functional approach (*R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at para. 8). In its review of the charge as a whole, "What matters is the substance of the instructions, not their adherence to or departure from some prescriptive formula. The language used and sequence followed fall within the firmly embedded discretion of the trial judge, to be exercised in accordance with the demands of justice in each case" (*R. v. Luciano*, 2011 ONCA 89, 273 O.A.C. 273, at para. 69; see also *Daley*, at para. 30).

[238] A functional review of the jury charge in the case at bar reveals that the Crown has not discharged its heavy burden. The trial judge gave lengthy and detailed instructions on self-defence spanning 25 pages of transcript. His instructions on the s. 34(1)(c) element of self-defence show that Mr. Khill's role in the incident would have been obvious to the jury and was essentially uncontradicted. In his review of the relevant evidence, the trial judge pitched the inquiry at a high level of generality and specifically stated:

The third self-defence question is, was Peter Khill's conduct in shooting Jonathan Styres with the shotgun reasonable in the circumstances? This question relates to Peter Khill's conduct and requires you to decide whether that conduct was reasonable in the circumstances as Peter Khill knew or believed them to be. Anyone who defends himself cannot be expected to know exactly how to respon[d] or to deal with the situation, or to know how much force to use to achieve his purpose. . . .

. . .

Your answer to this question requires you to consider all the evidence and will depend on your view of that evidence. Consider all of the circumstances including, but not limited to, the nature of the force or

threatened force by Jonathan Styres — not only what you find to be the actual peril facing Mr. Khill, but also what his honest perception of the peril was provided that if h[is] perception of the peril was mistaken, his mistake was reasonable.

Consider the extent to which the use of force or threatened use of force by Jonathan Styres was imminent and if Mr. Khill's perception of the imminence of the force or threat was mistaken, was his mistake reasonable?

Were there other means available to Peter Khill to respond to the actual or potential use of force by Jonathan Styres? Were there other reasonable options available to him? Consider whether Jonathan Styres used or threatened to use a weapon, the size, age, gender and physical capabilities of each of Peter Khill and Jonathan Styres, the nature and proportionality of Peter Khill's response to Jonathan Styres' use or threat of force. Use your common sense, life experience and knowledge of human nature in your assessment of the evidence to answer this question.

(A.R., vol. I, at pp. 87-89)

[239] I am of the view that the trial judge's reference to the totality of the circumstances and his review of the evidence were functionally equivalent to an additional direction to consider Mr. Khill's "role in the incident" under s. 34(2)(c). The jury was not told to focus on the moments immediately prior to Mr. Khill discharging his weapon; rather, the charge focused on Mr. Khill's actions before the shooting from the time he was awoken in his home. For instance, when directing the jury on the element of defensive purpose under s. 34(1)(b), the trial judge stated:

Now the evidence relevant to this question is pretty much the same as I've already reviewed. Mr. Khill had heard of vehicle thefts and break-ins in the neighbourhood. He was aware that Ms. Benko told him of the noises from the back door lock she had heard a few days earlier. On hearing the noise in the early morning of February 4th, he looked out the window and saw th[e] interior truck lights on, went and got the shotgun, loaded it, went

outside and was quiet in walking and closing the breezeway doors. He knew there was no one in the house, in the garage or in the breezeway. He went as quietly as he could behind the truck and was in a position between Mr. Styres and off to the left of Mr. Styres, as you can see as marked on Exhibit 6. “When I yelled, and Mr. Styres started to turn or raise his arms and hands, I fired.” You must consider whether his shooting was to defend himself from some threat of force or from Mr. Styres, or whether he reasonably believed he was responding to a threatened use of force by Mr. Styres.

(A.R., vol. I, at p. 86)

I do not view this, as my colleague Martin J. does, as a “limited reference” to the evidence, but rather as a representative section of a jury instruction that reviews the critical evidence in order to assist the jury in discharging their obligations.

[240] Mr. Khill’s actions prior to the shooting were front and centre for the jury, and they were told to take into account any alternative means that had been available to him to respond to the situation and the proportionality of his actions when deciding whether the act of shooting was reasonable under s. 34(1)(c). This is of course precisely the legal element of the defence for which they were supposed to consider this evidence.

[241] I come to this conclusion particularly because the content of the jury charge cannot be divorced from the greater context of the trial, including the submissions of counsel (*Daley*, at para. 28; *Jacquard*, at para. 33). The Crown’s closing submissions focused almost entirely on the alternative courses of conduct that Mr. Khill could have followed. The Crown noted that Mr. Khill could have called 911, which “would have

changed everything”, turned on the porch light, yelled out the window or fired a warning shot out onto the front lawn (A.R., vol. VII, at p. 46). The Crown maintained that once Mr. Khill had seen that the “overwhelming dangerous threat that he [had] talked about [did] not exist”, he could have reassessed the situation (p. 48). Indeed, the trial judge even summarized these points in the jury charge as part of his broader review of the parties’ positions.

[242] The Crown’s lack of objection to the jury charge further speaks to the overall satisfactoriness of the charge. As Bastarache J. noted in *Daley*, at para. 58:

[I]t is expected of counsel that they will assist the trial judge and identify what in their opinion is problematic with the judge’s instructions to the jury. While not decisive, failure of counsel to object is a factor in appellate review. The failure to register a complaint about the aspect of the charge that later becomes the ground for the appeal may be indicative of the seriousness of the alleged violation. See *Jacquard*, at para. 38: “In my opinion, defence counsel’s failure to object to the charge says something about both the overall accuracy of the jury instructions and the seriousness of the alleged misdirection.”

The same can of course be said when the failure to object is the Crown’s. In the instant case, the Crown’s strategy at trial was precisely to focus on Mr. Khill’s conduct leading up to the shooting and not simply on the moment prior to the shooting in order to argue that he had not been acting in self-defence. As the Crown noted in its closing address to the jury, “Mr. Khill engaged from the start in a deliberate plan to confront this intruder with overwhelming deadly force. He never deviated, deviated from that for a moment, he never spent a moment reassessing, never spent a moment thinking about



what his next step ought to be” (A.R., vol. VII, at p. 54). While it is not for this Court to pass judgment on the merits of this tactical decision, the Crown’s failure to object ought to be an additional consideration in this Court’s analysis.

[243] At bottom, the jury had a reasonable doubt as to whether Mr. Khill had been acting in self-defence when he shot Mr. Styres. They were told that in making that determination, they should consider all of Mr. Khill’s actions leading up to the shooting. They were also explicitly told to take into account, in deciding whether the act of shooting was reasonable under s. 34(1)(c), any alternative means that had been available to Mr. Khill to respond to what he perceived to be a threat and the proportionality of Mr. Khill’s acts. The trial judge summarized the law and the evidence in a way that was meaningful to the live issues the jury was required to decide, and it is difficult to discern what further instruction he could have given that may have possibly altered the outcome of the trial. The jury was clearly in a position to “fully appreciate the *value and effect* of the evidence” (*Azoulay v. The Queen*, [1952] 2 S.C.R. 495, at p. 499 (emphasis in original); see also *R. v. Barreira*, 2020 ONCA 218, 62 C.R. (7th) 101, at paras. 40-41).

[244] When the jury charge is read as a whole and in the context of the trial, it cannot be said that the jury did not understand that the entire narrative relied on by both parties was relevant to their assessment of the reasonableness of Mr. Khill’s response under s. 34(1)(c). As Binnie J. observed in *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245, at para. 2, “Caution must be taken to avoid seizing on perceived deficiencies in a

trial judge's reasons for acquittal to create a ground of 'unreasonable acquittal'."

Whatever perceived deficiencies there might be in the case at bar, I do not agree that they overcome the high threshold to overturn Mr. Khill's acquittal by a jury of his peers. In my view, the Crown has not discharged its heavy burden of demonstrating that the trial judge's failure to instruct on a particular s. 34(2) factor was material to the verdict. I would therefore allow the appeal and restore Mr. Khill's acquittal.

## Appendix

Prior to the 2013 amendments, the *Criminal Code*'s self-defence provisions read as follows:

### **Self-defence against unprovoked assault**

**34 (1)** Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

### **Extent of justification**

**(2)** Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

### **Self-defence in case of aggression**

**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.

**Provocation**

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

**Preventing assault**

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

**Extent of justification**

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

*Appeal dismissed, CÔTÉ J. dissenting.*

*Solicitors for the appellant: Brauti Thorning, Toronto; Ross McBride, Hamilton.*

*Solicitor for the respondent: Attorney General of Ontario, Toronto.*

*Solicitors for the intervenor Association québécoise des avocats et avocates de la défense: Desjardins Côté, Montréal.*

*Solicitors for the intervener the Criminal Lawyers' Association*  
*(Ontario): Fenton, Smith, Toronto.*