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### A Colonial Castle: Defence of Property in *R v Stanley*

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A Colonial Castle: Defence of Property in *R v Stanley*  
Alexandra Flynn and Estair Van Wagner\*

\*Abstract\*

In 2016, Gerald Stanley shot 22-year-old Colten Boushie in the back of the head after Boushie and his friends entered his farm. Boushie died instantly. Stanley relied on the defence of accident and was found not guilty by an all-white jury. Throughout the trial, Stanley invoked concerns about trespass and rural crime (particularly property crime), much of which was of limited relevance to whether or not the shooting was an accident. We argue that the assertions of trespass shaped the trial, yet were not tested by the jury through a formal invocation of the defence of property.

Keywords: criminal law, property, criminal justice, defences, statutory defences, air of reality, defence of property, trespass, jury instructions, castle doctrine, Indigenous lands, Treaty relations

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1. Introduction

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On August 9, 2016, at about 5 pm, on an otherwise unremarkable summer afternoon, five Indigenous youths from the Red Pheasant First Nation drove onto a rural Saskatchewan farm owned by 56-year-old Gerald Stanley, a White farmer.<sup>1</sup> The youths, aged 17–24, had spent the day drinking and swimming in the South Saskatchewan River, after which their grey Ford Escape SUV had sprung a leak. They had previously visited a nearby farm where they had allegedly tried to steal a truck. While their intentions are disputed, what is known is that after a series of events, including the windshield of the youths’ car being smashed with a hammer and the firing of a warning shot into the air, Stanley shot 22-year-old Colten Boushie in the back of the head.<sup>2</sup> Boushie died instantly.<sup>3</sup> At the ensuing trial, there was mixed evidence as to whether the youths were seeking help or were planning to steal when they entered Stanley’s farm.<sup>4</sup> The police and the media immediately adopted the language of trespass to describe the incident. According to the defence, Stanley drew his gun when Boushie and his friends drove onto his rural property to fire warning shots because he thought they were stealing his property. Stanley argued that while he meant to fire warning shots, the gun went off accidentally when Colton Boushie was killed.

Canadian law provides for defence of property through section 35(1) of the Canadian *Criminal Code*, which sets out the conditions for a statutory defence for otherwise unlawful actions taken to protect property.<sup>5</sup> Stanley did not expressly assert self-defence, or defence of property, and instead formally relied on the defence of accident. However, the defence repeatedly invoked concerns about trespass and rural crime (particularly property crime), much of which was of limited relevance to whether or not the shooting was an accident.<sup>6</sup> Ultimately, the jury accepted the argument that Boushie’s death was simply an accident, a by-product of reasonable conduct to address rural crime combined with a faulty weapon. As we argue below, this strategic decision to rely solely on the defence of accident meant that important elements of the defence’s narrative—including the status of the youths as “trespassers”, the “terrifying” nature of the situation, and the “reasonableness” of using a firearm to respond to the situation—went unexamined, while nonetheless being allowed to shape the account presented to the jury.<sup>7</sup>

The story of the Stanley case is more complicated than the tale of an innocent farmer’s unfortunate, -but-understandable accident that emerged at trial. Narratives about property, trespass, and rural crime, ran through the trial and the media coverage. Indeed, the logic of the defence rests squarely on the status of the youths as trespassers, and the right of Stanley to respond to trespass and the mere fear of property crime with a firearm. The following sections of this paper explore how these narratives were used to draw the unique and complex land-based tensions in rural Saskatchewan into the courtroom in consequential ways. As we outline below,

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<sup>1</sup> Guy Quenneville, “What happened on Gerald Stanley’s farm the day Colten Boushie was shot, as told by witnesses,” (6 February 2018), online: *CBC News* <[www.cbc.ca/news/canada/saskatoon/what-happened-stanley-farm-boushie-shot-witnesses-colten-gerald-1.4520214](http://www.cbc.ca/news/canada/saskatoon/what-happened-stanley-farm-boushie-shot-witnesses-colten-gerald-1.4520214)>.

<sup>2</sup> *Ibid.* This article does not provide a full description of the events related to the case. For more detail, see *R v Stanley*, 2019 SKQB 277 and *R. v. Stanley*, Trial Transcript [*Stanley Trial Transcript*].

<sup>3</sup> *Ibid.* Note that this article does not set out a full description of the events related to the case.

<sup>4</sup> *Stanley Trial Transcript* at 284–328 (Eric Meechance, evidence in chief & cross-examination).

<sup>5</sup> *Criminal Code*, RSC 1985, c C-46, s 35 [*Criminal Code*].

<sup>6</sup> *Stanley Trial Transcript*, *supra* note 2, at 606–07 (Defence’s opening address at 851–52 (Defence’s closing address)).

<sup>7</sup> *Ibid.*

these tensions played a troubling role in the trial, allowing fear, racist stereotypes, and assumptions about who does or does not belong in rural Saskatchewan to frame the defence’s story.

In section 2, we explore the concept of trespass in Canadian law, including the 2012 federal reforms of the defence of property in response to calls for increased protection for property owners who expel alleged trespassers from “their” land.<sup>8</sup> In section 3, we examine the presumptive story of trespass woven into the *Stanley* trial and consider the implications of the defence of property, which was not put to the jury for the shooting that led to Boushie’s death. In section 4, we examine trespass and the defence of property in the context of Treaty relations between Indigenous and non-Indigenous peoples in Canada. This paper does not present the evidence introduced to substantiate the defence of accident, which ultimately led to Stanley’s exoneration, although many other experts have questioned its scientific validity.<sup>9</sup> In our view it is crucial that the legal profession confront how property and trespass were invoked to intersect with, and compound, racism and colonialism in *R v Stanley*. As lawyers, scholars, and judges, we must critically consider the consequences for access to justice for Indigenous peoples and the future of relationships between Indigenous and non-Indigenous peoples in Canada.

## 2. *Invoking the Castle: Trespass and Defence of Property in Canadian Law*

The intersection of civil and criminal law, the defence of property, and the common law roots of the castle doctrine create a strange inconsistency in how Canadian law treats trespass and the protection of private property. Based on the same actions, an individual deemed a “trespasser”, can meet with consequences ranging from a civil award of damages, to a modest fine where trespass is proven by the Crown and enforced by the police, to the application of force, including the use of firearms by a private citizen prior to arrest, the involvement of the police or criminal justice system, and any form of trial. Notably, police responses to property crime are generally limited, including restrictions on the use of lethal force.<sup>10</sup>

In the context of the *Stanley* trial, the status of the youths as trespassers played a central role in the defence’s version of events. However, the farm was not enclosed with a fence. The youths were not asked to leave the farm before a firearm was retrieved, nor before shots were fired. Indeed, muddy shoe prints and a pair of shoes were found in the long driveway, suggesting that some of the youths were attempting to leave the property. No one called the police until after Boushie was killed. In contrast to Stanley’s actions, the police response to the alleged trespass would have been limited to charging the youths with a summary offence, carrying a fine of no more than \$2000. In our view, this case reflects serious problems related to the construction and application of the “right” to defend private property in Canada, as discussed below.

### *The civil law of trespass*

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<sup>8</sup> Steve Rennie, “Were Harper's comments on gun ownership misinterpreted?” (23 March 2015) online: *CTV News*, <[www.ctvnews.ca/politics/were-harper-s-comments-on-gun-ownership-misinterpreted-1.2292544](http://www.ctvnews.ca/politics/were-harper-s-comments-on-gun-ownership-misinterpreted-1.2292544)>.

<sup>9</sup> See e.g., Kent Roach, *Canadian Justice, Indigenous Injustice: The Gerald Stanley and Colten Boushie Case* (Montreal: McGill-Queen’s University Press, 2019); David M Tanovich, “Boushie’s family - and our justice system - deserves answers. So why no appeal?”, *The Globe and Mail* (8 March 2018), online: <[www.theglobeandmail.com/opinion/article-boushies-family-and-our-justice-system-deserves-answers-so-why/](http://www.theglobeandmail.com/opinion/article-boushies-family-and-our-justice-system-deserves-answers-so-why/)>.

<sup>10</sup> *Criminal Code*, *supra* note 5, ss 25–27.

Trespass is a longstanding concept in both criminal and civil law in Canada, and is defined as, “the act of entering upon land, in the possession of another, or placing or throwing or erecting some material object thereon without the legal right to do so.”<sup>11</sup> The essence of trespass is the protection of possession and control over the use of private land, as well as the privacy of the possessor.<sup>12</sup>

In civil law, trespass plays both a compensatory and deterrent role in protecting the possession and control of land.<sup>13</sup> It is a tort through which owners of private land can enforce their right to exclude others from their land. Courts can remedy the damage caused by trespass by awarding damages, requiring someone to pay for having accessed the land, or granting an injunction requiring the trespass to stop. In criminal law, trespass can be an offence, and it can also be the basis for a defence. The offence of trespass, s. 177 of the *Criminal Code*, applies in only limited circumstances, having been specifically introduced to capture “Peeping Tom” conduct and not “petty trespass.”<sup>14</sup> None of the required elements were present in *Stanley*.

Trespass is largely addressed as a regulatory offence under provincial statutes, such as Saskatchewan’s 2009 *Trespass to Property Act*.<sup>15</sup> Saskatchewan was the last common law province to enact specific trespass legislation. Prior to this 2009 legislative enactment, civil action was the main remedy for trespass in Saskatchewan, unless the trespass fell under specific circumstances covered by statute, such as snowmobiling, or where the police could intervene under the narrow *Criminal Code* provisions described below.<sup>16</sup> This legislative gap may have contributed to a sense that police enforcement against trespass and rural property crime was limited, because in many circumstances the police had few tools available to deal with situations of entry onto private land without consent.<sup>17</sup> Notably, the 1980 Ontario reform to provincial trespass laws (similar to the scheme in Saskatchewan’s 2009 *Trespass to Property Act*) was motivated by the need to “facilitate prosecutions and increase the protection of interests of rural landowners” and was a response to the perception that rural property was under-policed.<sup>18</sup>

At the time of the *Stanley* trial, the Saskatchewan’s *TPA* provided for police arrest powers and modest fines for entry onto private land without consent, where notice was given or the land was enclosed.<sup>19</sup> Until notice was given, entry onto unenclosed private land could not be deemed trespass until a request to leave had been made by the occupier and the person entering the premises had failed to leave within a reasonable period of time. Unlike some provincial

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<sup>11</sup> *Peter Ballantyne Cree Nation v Canada (AG)*, 2016 SKCA 124 at para 128, citing *Mann v Saulnier*, 19 DLR (2d) 130 at 132, [1959] NBJ No 12 (QL)(SC (AD)).

<sup>12</sup> Philip H Osborne, *The Law of Torts*, 4th ed (Toronto: Irwin Law, 2011) at 295–96.

<sup>13</sup> *Ibid.*

<sup>14</sup> *R v Priestap*, 79 OR (3d) 561, 2006 CanLII 12288 at paras 27–28 (CA).

<sup>15</sup> SS 2009, c T-20.2 [TPA (Sask)]. The amendments removed the requirements for notice or enclosure, effectively reversing the onus on landowners to those wanting to enter private property.

<sup>16</sup> See e.g., Saskatchewan, Legislative Assembly, *Debates and Proceedings*, 26:2, vol 51, no 31A (11 March 2009) at 2228 (Hon Buckley Belanger).

<sup>17</sup> *Ibid.*, vol 51, no 9A (5 November 2008) at 1594–95 (Hon Don Morgan).

<sup>18</sup> *R v Asante-Mensah*, 2003 SCC 38 at para 31, considering the 1980 *Occupiers’ Liability Act*, SO 1980, c 14.

<sup>19</sup> *TPA* (Sask), *supra* note 15, ss 5, 6, as it appeared on 9 August, 2016. Fines under the Act are capped at \$2,000, as they were before the amendment.

regimes, Saskatchewan’s *TPA* does not provide for citizen’s arrest.<sup>20</sup> Where such powers do exist, they require the person arrested to be delivered into the custody of law enforcement.<sup>21</sup>

In the aftermath of the *Stanley* trial, the Saskatchewan government amended the *TPA* to shift the onus from the landowner to those seeking to enter private property.<sup>22</sup> Now, it does not include a notice requirement in relation to entry in or on a lawn, a garden, a yard site, cultivated or grazing land, the broadly defined category of “enclosed land”, and lands designated by regulation.\* The government stated that the amendments “better balances the rights of rural land owners and members of the public” and cited the results of a public survey with 1601 respondents, which was later criticized as “heavily flawed” and not representative of the population.<sup>23</sup> The amended Saskatchewan legislation goes further than any other Canadian jurisdiction in requiring express permission to enter rural property.<sup>24</sup> In short, the effect is to deem any entrant onto rural property in the province as a “trespasser”. These amendments have been strongly opposed by Indigenous nations in Saskatchewan, who assert both that they are an unconstitutional restriction on their Treaty rights and that they will lead to more violent confrontations.<sup>25</sup> Combined with poorly informed ideas about the right to defend private property with violence, the new legislation raises concerns about vigilantism and property owners taking the law into their own hands to deal with trespassers.

In addition to recourse to police powers and civil action, common law has allowed landowners to lawfully defend their property against trespass. The duty to retreat from a threat rather than respond with lethal violence has been a core element of English law for centuries, upholding the role of the state in meting out justice in a “civilized” society.<sup>26</sup> However, the “castle doctrine” which emerged as a crucial exception, can be traced back to the comments of Lord Coke in the 1604 *Semayne’s Case*. He stated, “the house of every one [*sic*] is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose”.<sup>27</sup> The doctrine provides legal protections for those who defend their property from an intruder rather than retreat. Under common law, a person could use deadly force to defend their home, but only

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<sup>20</sup> See e.g., *Trespass Act to Property Act*, RSO 1990, c T.21, s 9(1) [*Trespass Act to Property Act (Ont)*].

<sup>21</sup> *Ibid*, s 9(2).

<sup>22</sup> *The Trespass to Property Amendment Act, 2019*, SS 2019, c 26, ss 4, 7.

<sup>23</sup> Government of Saskatchewan, “Legislation Ensuring Fair Balance on Trespass Rules Moves Forward” (8 May 2019), online: <[www.saskatchewan.ca/government/news-and-media/2019/may/08/trespass-act](http://www.saskatchewan.ca/government/news-and-media/2019/may/08/trespass-act)>; See Survey results, “Government Releases Results of Trespass Survey” (15 November 2018), online:

<[www.saskatchewan.ca/government/news-and-media/2018/november/15/trespass-survey](http://www.saskatchewan.ca/government/news-and-media/2018/november/15/trespass-survey)> [“Government Releases Results”]; See also S. Taylor, “Researcher says Sask. Government’s trespassing laws survey was ‘flawed’” (16 November 2019), online: *CBC Saskatchewan* <[www.cbc.ca/news/canada/saskatchewan/saskatchewan-trespass-survey-flawed-says-researcher-1.4909472](http://www.cbc.ca/news/canada/saskatchewan/saskatchewan-trespass-survey-flawed-says-researcher-1.4909472)>.

<sup>24</sup> See the comparative chart of express permission requirements provided in the Saskatchewan government’s Review of Trespass Related Legislation: [“Government Releases Results”, *supra* note 23 at 8, online: <[www.saskatchewan.ca/government/news-and-media/2018/november/15/trespass-survey](http://www.saskatchewan.ca/government/news-and-media/2018/november/15/trespass-survey)>.

<sup>25</sup> “FSIN leaders vote to oppose trespassing laws” (20 February 2019), online: *CTV Regina* <[regina.ctvnews.ca/fsin-leaders-vote-to-oppose-trespassing-laws-1.4305700](http://regina.ctvnews.ca/fsin-leaders-vote-to-oppose-trespassing-laws-1.4305700)>. See also Kelly Geraldine Malone, “Indigenous people worry Saskatchewan trespassing plan may stoke racial tensions” (4 November 2018) online: *Saskatchewan Leader Post* <[leaderpost.com/news/local-news/indigenous-people-worry-saskatchewan-trespassing-plan-may-stoke-racial-tensions/wcm/27bec009-3bcf-48bb-ad4d-bea0891da4f4](http://leaderpost.com/news/local-news/indigenous-people-worry-saskatchewan-trespassing-plan-may-stoke-racial-tensions/wcm/27bec009-3bcf-48bb-ad4d-bea0891da4f4)> [*FSIN leaders*].

<sup>26</sup> Sir William Blackstone, *Blackstone’s Commentaries on the Laws of England* (1796).

<sup>27</sup> *Semayne’s Case*, (1604) 5 Co Rep 91a, 77 ER 194 (KB) at 195.

after using every reasonable means to avoid the danger.<sup>28</sup> In the United States, use-of-force laws vary by state, as does their interpretation by police, prosecutors, and judges.<sup>29</sup> However, neither the castle doctrine, nor more recent American so-called ‘stand your ground’ legislation, which protects those who use force to protect their property, justify an attack without cause, and the law varies regarding the permissibility of lethal force.<sup>30</sup>

The castle doctrine, though simple in description, involves social and legal ambiguity. On one hand, no jurisdiction allows the express ability to kill another person for accessing or trespassing onto one’s property.<sup>31</sup> On the other hand, the castle doctrine suggests moral justification in protecting one’s property and defending against perceived threats to one’s person associated with an invasion of “home”.<sup>32</sup> This contradiction has led to considerable debate in the United States and elsewhere about the philosophical justification of the castle doctrine, where highly controversial killings of young — usually Black — men have escaped legal punishment based on the “reasonableness” of the perceived threat posed by the victim.<sup>33</sup> Caroline Light’s study of stand your ground laws in the United States exposes the castle doctrine as firmly rooted in racist and misogynist foundations of the White supremacist settler colonial state.<sup>34</sup> The “right” to honourably defend life and property, rather than retreat in the face of an intrusion, is grounded in the right to own property, which largely formally excluded all but White men in colonial North America, and informally continues to be linked to systemic inequality.<sup>35</sup> In the context of the unequal distribution of property rights, the Canadian Association of Elizabeth Fry Societies noted that the defence of property “prima facie reinforces inequalities”.<sup>36</sup> Jeannie Suk argues that the castle doctrine constructs trespass as a kind of boundary-crossing “beyond the protection of the law” and into a space in which “the state monopoly on violence” is suspended.<sup>37</sup> Both Suk and Light concluded that only certain types of homes and homeowners merit this type of protection. Other lives and bodies retain only a tenuous right to belong and inhabit.

In Saskatchewan, where the *Stanley* trial took place, the castle doctrine was invoked to justify the use of force to defend the agrarian idyll of the rural farm.<sup>38</sup> Some local news media coverage suggested that there is something sacred and defensible about the rural home, and that

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<sup>28</sup> See generally Stanley Yeo, “Killing a Home Invader” (2011) 57 Crim LQ 181.

<sup>29</sup> Mark Randall & Hendrik DeBoer, *The Castle Doctrine and Stand-Your-Ground Law* (Connecticut: Office of Legislative Research, OLR Research Report, 2012), (24 April 2012) online: *Connecticut General Assembly* <[www.cga.ct.gov/2012/rpt/2012-R-0172.htm](http://www.cga.ct.gov/2012/rpt/2012-R-0172.htm)>.

<sup>30</sup> *Ibid.*

<sup>31</sup> See Stanley Yeo, “Killing in defence of property” (2010) 36:2 Commonwealth L Bull 281.

<sup>32</sup> See Jeannie Suk, *At Home in the Law: How the Domestic Violence Revolution is Transforming Privacy* (New Haven: Yale University Press, 2009).

<sup>33</sup> *Ibid.*

<sup>34</sup> *Stand Your Ground: A History of America’s Love Affair with Lethal Self-Defense* (Boston, MA: Beacon Press, 2017).

<sup>35</sup> *Ibid* at 20.

<sup>36</sup> Canadian Association of Elizabeth Fry Societies, “Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property” (2013), online (pdf): [www.caefs.ca/wp-content/uploads/2013/04/Response-to-the-Department-of-Justice-re-Reforming-Criminal-Code-Defences-Provocation-Self-Defence-and-Defence-of-Property.pdf](http://www.caefs.ca/wp-content/uploads/2013/04/Response-to-the-Department-of-Justice-re-Reforming-Criminal-Code-Defences-Provocation-Self-Defence-and-Defence-of-Property.pdf) [CAEFS].

<sup>37</sup> Suk, *supra* note 32 at 59.

<sup>38</sup> Tammy Robert, “No, rural Prairie dwellers, you can’t shoot to protect your property” (8 February 2018), online: *Macleans’s* <[www.macleans.ca/news/no-rural-prairie-dwellers-you-cant-shoot-to-protect-your-property/](http://www.macleans.ca/news/no-rural-prairie-dwellers-you-cant-shoot-to-protect-your-property/)>.

laws should reinforce this sentiment.<sup>39</sup> Racial bias against Indigenous youths are apparent in many of these accounts, at times both implicitly and explicitly.<sup>40</sup> The presumed reasonableness of race-based fear and stereotypes was based on a construction of a peaceful productive White farmer and a savage Indigenous invader.

A. *Historical treatment of trespass in the defence of property*

The right to defend property is restricted under the *Criminal Code* and in common law.<sup>41</sup> Several sections of the *Criminal Code* excuse or justify what would otherwise constitute violations of prohibited conduct because of specified extenuating circumstances.<sup>42</sup> Canadian law has long recognized the right “of the occupier of land to use force to remove a trespasser”.<sup>43</sup> In the current *Criminal Code*, section 35 provides a justification where an accused’s actions were for the purpose of protecting property.

This section was amended in 2012 to consolidate several sections that were commonly criticized as confusing and overly complex. Defence of property requires an honest, but reasonable belief that the defendant is either in “peaceable possession” of the property or is assisting someone else in peaceable possession of the property.<sup>44</sup> It also requires a reasonable belief that the other person is entering the property unlawfully or for an unlawful purpose, such as theft or vandalism.<sup>45</sup> If both of these criteria are met, the defence provides for the use of force to prevent the unlawful act or to remove the person. However, the force used must be ‘reasonable’ in the particular circumstances of the event. Section 35 does not provide any guidance on what is reasonable.<sup>46</sup> This is in sharp contrast with the self-defence provision in s. 34, which enumerates specific factors.<sup>47</sup> Although there is no express limitation on the amount of

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<sup>39</sup> Jason Markusoff, “Alberta farm shooting is a new touchstone for rural gun owners” (10 March 2018), online: *Macleans*’s <[www.macleans.ca/news/canada/alberta-farm-shooting-is-a-new-touchstone-for-rural-gun-owners/](http://www.macleans.ca/news/canada/alberta-farm-shooting-is-a-new-touchstone-for-rural-gun-owners/)>.

<sup>40</sup> Kyle Edwards, “In Saskatchewan, the Stanley verdict has re-opened centuries-old wounds,” (5 March 2018), online: *Macleans*’s <[www.macleans.ca/news/canada/saskatchewan-racism-gerald-stanley-colten-boushie/](http://www.macleans.ca/news/canada/saskatchewan-racism-gerald-stanley-colten-boushie/)>.

<sup>41</sup> *Criminal Code*, *supra* note 5, s 8(3). The defence of property through operation of the common law is also preserved by s 8(3) of the *Criminal Code*.

<sup>42</sup> *R v Green*, 2017 ONCJ 705 at para 69 [*Green*].

<sup>43</sup> *R v Scopelliti*, 34 OR (2d) 524, 1981 CarswellOnt 814 (WL Can) at para 67 (SC (AD)) [*Scopelliti*], cited in *R v Gilley*, 332 NFLD & PEIR, 2013 CanLII 1 at para 20 (Prov Ct (Crim Div)) [*Gilley*]. See also Grant Smyth Garneau, “Law Reform Commission of Canada and the Defence of Justification” (1983) 26:1 *Crim LQ* 121.

<sup>44</sup> *Criminal Code*, *supra* note 5, s 35(1)(a).

<sup>45</sup> *Ibid*, s 35(1)(b).

<sup>46</sup> See e.g., *R v Cormier*, 2017 NBCA 10 at para 47 [*Cormier*]. See also Kent Roach, “A Preliminary Assessment of the New Self-Defence and Defence of Property Provisions” (2012) 16:3 *Can Crim L Rev* 275 at 296 [Roach].

<sup>47</sup> See *Criminal Code*, *supra* note 5, s 34(2), which states:

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

force that may be used to defend property from interference, Canadian courts have held that it is not reasonable to use deadly force in defence of property alone.<sup>48</sup> The use of deadly force is only reasonable in very exceptional circumstances, for example where it is necessary to protect a person from death or grievous bodily harm, and thus, where the defence of property overlaps with self-defence.

In *R v Gunning*, the Supreme Court of Canada (“SCC”) specified the elements of the defence, stipulating that the force used by a person in peaceable possession of a dwelling house to eject a trespasser “must have been reasonable in all the circumstances”.<sup>49</sup> In that case, the parties agreed, and the SCC accepted, that “the intentional killing of a trespasser could only be justified where the person in possession of the property is able to make out a case of self-defence.”<sup>50</sup> The Court set out the following criteria: the defendant must have been in possession of the dwelling-house; the possession must have been peaceable; there must have been a trespasser; and the force used to eject the trespasser must have been reasonable in all circumstances.<sup>51</sup> In other words, a response in defence of property must be objectively assessed as reasonable in the circumstances.<sup>52</sup>

In *R v McKay*, the SCC emphasized that it did not affirm various principles that the Manitoba Court of Appeal decision had declared emergent from early English case law.<sup>53</sup> The Court of Appeal, stated at para 14:

The self defence and defence of property provisions in the *Code*, which find their genesis in the common law defence of possession jurisprudence for both civil and criminal cases, have changed little since the first enactment of the *Code* in 1892. Thus, early English criminal and civil cases are often referred to in the decisions that consider these provisions. ... For example, where the removal of a mere trespasser in defence of property is concerned, only minor force such as a push, or gentle laying of hands, will be justified.<sup>54</sup> In defence of property alone, an accused will not be justified in beating or wounding a

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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.

<sup>48</sup> *R v Williams*, 2017 BCPC 230 at para 30 [*Williams*].

<sup>49</sup> *R v Gunning*, 2005 SCC 27 at para 25 [*Gunning*].

<sup>50</sup> *Ibid* at para 26. For this proposition, Justice Charron points to *R v Baxter*, 1975 CanLII 1510, (ON CA) at 114–15, 1975 CarswellOnt 54 at para 60 (WL Can) [*Baxter*]; *R v Clark* (1983), 44 AR 141, 1983 ABCA 65 (CanLII) at para 33 (CA); and *R c Bacon*, 1999 CanLII 13568, 1999 CarswellQue 67 (WL Can) at para 24 (CA).

<sup>51</sup> *Baxter*, *supra* note 50 at 113. Quoted with approval in *R v Szczerbaniwicz*, 2010 SCC 15 at para 19 [*Szczerbaniwicz*]: “The sections of the *Code* authorizing the use of force in defence of a person or property, to prevent crime, and to apprehend offenders, in general, express in greater detail the great principle of the common law that *the use of force in such circumstances is subject to the restriction that the force used is necessary*; that is, that the harm sought to be prevented could not be prevented by less violent means and that the injury or harm done by, or which might reasonably be anticipated from the force used is not disproportionate to the injury or harm it is intended to prevent” [emphasis added]. See also, *Gilley*, *supra* note 43 at para 20.

<sup>52</sup> *Williams*, *supra* note 48.

<sup>53</sup> *R v McKay*, 2007 SCC 16 at para 2 [*McKay*, 2007], referring to *R. v. McKay (A.J.)*, 2006 MBCA 83 [*McKay*, 2006].

<sup>54</sup> *Gregory v Hill* (1799), 110 ER 1400, 8 TR 299 (KBD) [*Gregory v Hill*]; *R v Sullivan* (1841), 1 Car & M 209 (CCC) [*Sullivan*].

trespasser,<sup>55</sup> kicking a trespasser,<sup>56</sup> using a weapon such as an axe,<sup>57</sup> or firing a pistol.<sup>58</sup> On the other hand, where an accused has been struck by the trespasser<sup>59</sup>, or there has been an attack or violence on the accused’s home [citations omitted] or the accused’s life is threatened [citations omitted], then more force, even force causing death, may be justified under the principles of self defence.

In its three-paragraph decision, the SCC expressly refused to endorse elements of the Court of Appeal’s review of the scope of the defence of property, and specifically rejected the establishment of categorical rules against “anything more than minor force” against a trespasser or “the intentional use of a weapon” in defence of property alone.<sup>60</sup>

In *Baxter*, the Ontario Court of Appeal concluded that the “firing at a mere trespasser is, of course, not justifiable.”<sup>61</sup> Additionally, an alleged trespasser must be given time to comply before an occupier can use force to expel them.<sup>62</sup> In *R c Harvey*, the Quebec Court of Appeal concluded that because the defendant did not give an alleged trespasser the necessary time to comply, the accused could not avail himself of the defence of property.<sup>63</sup> It further specified that “[t]he owner or possessor of property, before considering an individual a trespasser and having the right to remove the person, must first inform the trespasser that his presence is no longer desired, must order him to leave and finally, must give him the necessary time to do so.”<sup>64</sup> This is consistent with the common law, which gives an “implied licence to any member of the public coming on his lawful business to come through the gate, up the steps, and knock on the door of the house.”<sup>65</sup> Whether or not the trespasser was given an opportunity to leave without the use of force is considered to be an important part of the analysis regarding whether the force used was reasonable.<sup>66</sup>

### B. Defence of property under the Criminal Code

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<sup>55</sup> *Gregory v Hill*, *supra* note 54.

<sup>56</sup> *Wild’s Case* (1837), 168 ER 1132, 2 Lew 214 (CC).

<sup>57</sup> *Sullivan*, *supra* note 54.

<sup>58</sup> *Meade’s and Belt’s* (1823), 168 ER 1006, (1823) 1 Lew 184, [1823] 1 WLUK 19 (Ont CA) (WL Can); *R v Scully* (1824), 171 ER 1213, 1 Car & P 319 (N.P.).

<sup>59</sup> *Hinchcliffe’s Case*, 168 ER 998, (1823) 1 Lew 161, [1823] 1 WLUK 5. For discussion about this early English jurisprudence, the Manitoba Court of Appeal also points to James Fitzjames Stephen, *A History of the Criminal Law of England*, vol 3 (London: Macmillan & Co, 1883), and David Lanham, “Defence of Property in the Criminal Law” (1966) Crim L Rev 368.

<sup>60</sup> *McKay*, 2007 at para 2.

<sup>61</sup> *Baxter*, *supra* note 50 at 114.

<sup>62</sup> *R v Greenlees*, 2012 ABPC 174 at para 85, citing *R v Thomas* (1991), 91 Nfld & PEIR 341, 1991 CanLII 2736 (NL SC (AD)); *R v Bushman*, 63 WWR 346, 1968 CanLII 802 (BC CA). See also *R v Kirk*, [1934] DLR 641, 1934 CarswellOnt 34 at para 19 (WL Can)..

<sup>63</sup> *R c Harvey*, 2016 QCCQ 8713 at para 97 [*Harvey*].

<sup>64</sup> *Ibid* at para 64.

<sup>65</sup> *Robson v Hallett*, (1967) 51 Cr App R 307, [1967] 3 WLUK 31 at 311 (Eng Div Ct).

<sup>66</sup> *R v Blair*, 2001 BCPC 266 at para 25. See also *R v Bushman*, 1968 CanLII 802, 1968 CarswellBC 28 at para 15 (CA) (WL Can)..

In 2012, the defence of property in section 35 was amended through Bill C-26, which entered into force on March 11, 2013.<sup>67</sup> The new amendments were intended to simplify existing law and extract the core of the defence.<sup>68</sup> The Parliamentary Secretary cited the work of Professor Don Stuart, who wrote: “The defences of person and property in Canadian law are bedevilled by excessively complex and sometimes obtuse *Code* provisions.”<sup>69</sup> The amendments were intended to clean up legislation in order to remedy potential jury confusion, avoid unnecessary grounds of appeal, and help the public, police, prosecutors, and the court understand the legislation’s intent and application.<sup>70</sup> Courts have since been navigating its application.<sup>71</sup>

Some lawmakers have suggested that the reforms were more than simply an administrative clean-up. The Justice Minister affirmed that warning shots over the head of intruders on private property would be reasonable under the provisions of the amended law, even though this legal position had not yet been affirmed by the courts.<sup>72</sup> At a public event in 2015, then-Prime Minister Stephen Harper controversially linked gun ownership with security for rural property owners. His office subsequently sent out a communication referring to Harper’s comments that Jenni Byrne, the Conservatives’ national campaign manager paraphrased as “gun ownership is important for safety for those of us who live a ways from immediate police assistance” and continued, “Our Conservative party recognizes that guns play an important role in the livelihoods, recreation and safety of many Canadians.”<sup>73</sup>

Additionally, the amended provision omitted an important feature of the prior provision: the proportionality requirement. The SCC had previously endorsed a proportionality approach in *R v Szczerbaniwicz*. The majority and dissent disagreed about the application of proportionality. The majority cited the necessity restriction set out in *Baxter*, in which Justice Martin stated, “the harm sought to be prevented could not be prevented by less violent means and that the injury or

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<sup>67</sup> *Citizen’s Arrest and Self-defence Act*, SC 2012, c 9, in force March 11, 2013 by Proclamation in accordance with section 4 of the Act, see *Order Fixing March 11, 2013 as the Day on which the Act Comes into Force*, SI/2013-5, (2013) C Gaz II, 372.

<sup>68</sup> *Cormier* at para 97.

<sup>69</sup> Cited in *R v Vidovic*, 2013 ABPC 310 at para 82 [emphasis in original].

<sup>70</sup> *House of Commons Debates*, 41<sup>st</sup> Parl, 1<sup>st</sup> Sess, o 58 (1 December 2011) at 1015, 1040 (Hon Robert Goguen); House of Commons, *Standing Committee on Justice and Human Rights*, Meeting 18: see Evidence, 41<sup>st</sup> Parl, 1<sup>st</sup> Sess, No 18 (7 February 2012) at 1135 (Hon Rob Nicholson).

<sup>71</sup> See *R v Pandurevic*, 2013 ONSC 2978 at paras 9–16. For cases that compare in substance both versions of the defence of property (before and after the amendments), see especially *R v Penney*, 341 Nfld & PEIR 309, 2013 CanLII 47855 (NL PC); and *R v Harris*, 2014 ONCJ 401. For other cases addressing this defence in some capacity (in both its iterations before and after the amendments), regarding whether the amended sections apply retrospectively or only prospectively, and other broader considerations, see e.g., *R v ZJDS*, 2014 SKQB 267; *R v Fleming*, 2014 ONCJ 26; *R v Schubert*, 2016 SKQB 137; *R v Humpherville*, 2018 BCPC 55; *R v Pankiw*, 2013 SKPC 205, appealed in *R v Pankiw*, 2014 SKQB 381; *R v Evans*, 2013 BCSC 462; and *R v Mosgrove*, 2014 ONCJ 677. For cases that deal with the current defence of property in the *Criminal Code* but without explicit reference to the pre-amendments version, see e.g., *R v MEH*, 2016 BCPC 290; *R v Trudeau*, 2017 ONCJ 793; *R v Olson*, 2017 BCPC 383; *R v Woolridge*, 2017 CanLII 61027 (NL PC), [2017] NJ No 332 (QL); *R v Schmidt*, 2017 ONCJ 529; *R v Lopez-Quebedo*, 2016 BCPC 46; and *R v Reddick*, 2018 NSCA 85. For cases considering the defence of property preceding the amendments, in its now repealed s. 41 form in the *Criminal Code*, see e.g., *R v Gallie*, 2015 NSCA 50; and *R v Meszaros*, 2013 ONCA 682. For a case engaging with the defence of property by operation of common law of, see e.g., *R v Robinson*, 2014 BCSC 1463.

<sup>72</sup> House of Commons, *Standing Committee on Justice and Human Rights*, Meeting 18: see Evidence, 41<sup>st</sup> Parl, 1<sup>st</sup> Sess, No 018 (7 February 2012) at 1215 (Hon Rob Nicholson).

<sup>73</sup> *Ibid*.

harm done by, or which might reasonably be anticipated from the force used is not disproportioned [*sic*] to the injury or harm it is intended to prevent.”<sup>74</sup> The proportionality requirement has been characterized as an inquiry into whether the force used was “reasonable in all the circumstances.”<sup>75</sup> The reasonableness of “all the circumstances” necessarily includes the accused’s subjective belief as to the nature of the danger or harm, but an objective component of the defence is also required: the subjective belief must be based on reasonable grounds.<sup>76</sup> Professor Kent Roach expressed concern that the removal of the proportionality requirement in the 2012 amendment to section 35 could strengthen a “disproportionately violent” defence of property by an accused.<sup>77</sup> To date, there has been no jurisprudence regarding the effects of this removal.<sup>78</sup>

In short, under civil law, an individual who is deemed to be a trespasser can be met with consequences ranging from a civil remedy of damages, to an injunction, to a modest fine. Defence of property permits a person in peaceable possession of property, or a person assisting someone they believe to be in peaceable possession of property, to commit a reasonable act (including use of force) for the purpose of protecting that property from being taken, damaged, or trespassed upon. The next section sets out the manner in which trespass and defence of property were raised in *R v Stanley*, and how it came to be that although the defence itself was not asserted, trespass still shaped the outcome of the trial.

### 3. Raising Trespass without Defence of Property

#### A. ‘Air of reality’ and defence of property

In criminal law, unique tests are associated with different defences, and each and every prong of the test requires an evidential foundation (“air of reality”).<sup>79</sup> Defences must have an air of reality in order to be included by judges in their jury instructions.<sup>80</sup> It is the responsibility of defence counsel to establish the existence of an evidential basis for the defence.<sup>81</sup> In *R v Cinous*, the SCC stated:

The basic requirement of an evidential foundation for defences gives rise to two well-established principles. First, a trial judge must put to the jury all defences that arise on the facts, whether or not they have been specifically raised by an accused. Where there is an air of reality to a defence, it should go to the jury. Second, a trial judge has a *positive* duty to keep from the jury defences lacking an evidential foundation. A defence that lacks

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<sup>74</sup> *Baxter*, *supra* note 50 at p 113.

<sup>75</sup> Justice Charron confirmed in *Gunning*, *supra* note 49 at para 25, a case involving s 41(1). See also *R v George*, 49 OR (3d) 144, 2000 CanLII 5727 at para 49 (CA) [*George*]; *R v McKay (A.J.)*, 2009 MBCA 53 at para 23 [*McKay*, 2009].

<sup>76</sup> See *Szczerbaniwicz*, *supra* note 51 at para 2, 21; *McKay*, 2009, *supra* note 76 at paras 23–24; *George*, *supra* note 75 at paras 49–50; *R v Born with a Tooth*, 131 AR 193, 1992 ABCA 244 (CanLII) at paras 26, 35–36 [*Born with a Tooth*]; *R v Kong*, 2005 ABCA 255, at paras 6, 95–100, appeal allowed on other grounds in 2006 SCC 40.

<sup>77</sup> *Supra* note 46 at 297.

<sup>78</sup> See e.g., *R. v Harris*, 2014 ONCJ 401 at para 58.

<sup>79</sup> *R v Cinous*, 2002 SCC 29 at paras 49–60 [*Cinous*]. See also *R v Olson*, 2017 BCPC 383 at para 89, citing *R v Gill*, 2016 BCSC 438.

<sup>80</sup> *Ibid.*

<sup>81</sup> *R v Pappajohn*, [1980] 2 SCR 120, 111 DLR (3d) 1.

an air of reality should be kept from the jury [citations omitted]. This is so even when the defence lacking an air of reality represents the accused's only chance for an acquittal[.]<sup>82</sup>

Where the accused invokes the defence of property, the onus is on the Crown to prove beyond a reasonable doubt that the defendant did not act in defence of property.<sup>83</sup> However, the Court in *Gunning* found that “[i]t is not incumbent upon the Crown in every trial to negative [*sic*] all conceivable defences no matter how fanciful or speculative they may be”.<sup>84</sup> A minimum evidentiary threshold must be met before the issue is “put in play” —a defence will be in play whenever a properly instructed jury could reasonably, on account of the evidence, conclude in favour of the accused.<sup>85</sup>

In *R v Weare*, the Nova Scotia Court of Appeal concluded that even where a trial judge may find a victim to not be a trespasser, the trial judge must go on to consider whether there is any evidence that could rationally form the foundation for a reasonable belief that the complainant was a trespasser. If so, the defence of property must be considered.<sup>86</sup> If not, as in *R v Leggot*, “[t]here is no possibility the verdict would have been different had the trial judge specifically turned his mind to the question of whether the appellant believed she was a trespasser.”<sup>87</sup> Failure on the judge’s part in either of these determinations is an error of law.<sup>88\*</sup> An appellate court must determine if “there is any reasonable possibility that the verdict would have been different had the error at issue not been made.”<sup>89</sup> In other words, if the Crown does not object, the judge has a *positive* duty to intervene so that the jury does not illegitimately rely on an unavailable defence of property in its deliberations. As was upheld by the New Brunswick Court of Appeal, in *R v O’Brien*, a judge may put two defences to the jury, assuming there is evidence to support the objective and subjective elements of each component of the defences.<sup>90</sup> However, the instructions put to the jury must not be “contradictory” or “confusing.”<sup>91</sup>

### B. A ‘self-defence circumstance’

In *Stanley*, the judge addressed the air of reality even though the accused did not formally argue the defence of property, because it formed part of the defence’s case. In particular, the defence was used implicitly to justify Stanley’s use of the gun to respond to the presence of the youths on his property. Defence counsel asserted that the conduct of the young people contributed to the accident by creating a “self-defence circumstance.” Stanley’s lawyer, Scott Spencer, opened the

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<sup>82</sup> *Cinous*, *supra* note 79 at para 51 [emphasis added].

<sup>83</sup> See e.g. *Gunning*, *supra* note 49 at para 25; *Harvey*, *supra* note 63 at para 65. See also *R v KB*, 2012 BCPC 25 at paras 79, 164.

<sup>84</sup> *Gunning*, *supra* note 49 at para 32.

<sup>85</sup> *Ibid* at para 35.

<sup>86</sup> *R v Weare* (1983), 56 NSR (2d) 411, 1983 CanLII 3520 (SC (AD)). See also *R v Keating* (1992), 117 NSR (2d) 39, 1992 CanLII 2511 (CA).

<sup>87</sup> *R v Leggot*, 2008 SKQB 236 at para 13.

<sup>88</sup> *Gunning*, *supra* note 49 at paras 6, 7. See also *MacDonald, R v MacDonald*, 2009 NSPC 30 at para 35 where the Court held there was a sufficient “air of reality” to the potential additional defence of “defence of property” arising from the evidence and provided authorities.

<sup>89</sup> *R v Bevan*, [1993] 2 SCR 599 at 616–17, 104 DLR (4th) 180.

<sup>90</sup> 2003 NBCA 28 [*O’Brien*].

<sup>91</sup> *Ibid* at para 156.

trial by stating that Stanley and his son (who was also on the farm that day) were not “looking for trouble” when the grey SUV pulled up.<sup>92</sup> Spencer stated:

Colten Boushie’s death is a tragedy. There is no doubt about that. And we can never lose sight of that. No one will lose sight of that. And I’ll also say right now, this isn’t a justified death. This is not – it’s not – this death is not justified legally or morally. It is never, never right to take somebody’s life over property, but that’s not what this case is about. It is perhaps in the rarest of circumstances appropriate to use lethal force to defend you or your family. But this isn’t that case, either.<sup>93</sup>

Spencer argued that the case was not only about property or self-defence case, commenting “this is really not a murder case at all.”<sup>94</sup> Instead, he argued that “[t]his is a case about what can go terribly wrong when you create a situation which is in the nature of a home invasion.”<sup>95</sup> According to Spencer, Stanley did not have the luxury of waiting for police to arrive at his isolated farm. He acknowledged that the young people were not on trial, but alleged that they had created a ‘panic situation.’ As a result, Spencer argued it was ‘reasonable’ to fire warning shots at intruders. According to journalist Olivia Stefanovich, “[a]lthough he didn’t argue self-defence, Stanley testified that he drew his gun when Boushie and his friends drove onto his rural property to fire warning shots because he thought they were stealing.”<sup>96</sup>

Spencer explained the events leading up to the allegedly accidental deadly shot by invoking the castle doctrine and linking trespass to the fear of violent invasion. He argued that while the shooting was not justified in self-defence, “there is a self-defence factor” based on the “reasonableness” of “what can you do to protect yourself in those circumstances?”<sup>97</sup> Spencer acknowledged that “you can’t use lethal force,” but also asked, “is it reasonable to attempt to deal with the circumstance to defend you and your family? And it’s not about property. It’s about injury. That was the fear.”<sup>98</sup> He characterized the youths as “essentially intruders”: “[Y]ou have to view it from Gerry [Stanley]’s perspective, ... what he thought when he was faced with this sudden intrusion. The fear of the unknown.”<sup>99</sup> According to Spencer, a “self-defence circumstance” did not give rise to the defence of property, but rather to accident.<sup>100</sup> The defence successfully used the defence of property to separate the events leading up to the fatal shot from the shot itself. Spencer was able to justify the use of the gun by invoking Stanley’s right to defend his property without having to justify the tragic consequences.

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<sup>92</sup> Jason Warick, “I just wasn’t thinking straight’: Gerald Stanley cross-examined at his 2nd-degree murder trial,” (5 February 2018), online: *CBC News* <[www.cbc.ca/news/canada/saskatoon/gerald-stanley-trial-lawyer-defence-case-1.4519655](http://www.cbc.ca/news/canada/saskatoon/gerald-stanley-trial-lawyer-defence-case-1.4519655)>.

<sup>93</sup> *Stanley Trial Transcript*, *supra* note 2 at 606, lines 16–21 (Defence’s opening address).

<sup>94</sup> John Cairns, “Gerald Stanley testifies in his defence,” (6 February 2018), online: *The Tisdale Recorder* <[www.tisdalerecorder.ca/news/gerald-stanley-testifies-in-his-defence-1.23165468](http://www.tisdalerecorder.ca/news/gerald-stanley-testifies-in-his-defence-1.23165468)>.

<sup>95</sup> *Ibid.*

<sup>96</sup> Olivia Stefanovich, “‘What are we supposed to do?’ Confusion over defence rights in rural Sask,” (10 March 2018), online: *CBC News* <[www.cbc.ca/news/canada/saskatchewan/rcmp-rural-crime-town-hall-purdue-saskatchewan-1.4570920](http://www.cbc.ca/news/canada/saskatchewan/rcmp-rural-crime-town-hall-purdue-saskatchewan-1.4570920)> [Stefanovich].

<sup>97</sup> *Stanley Trial Transcript*, *supra* note 2 at 607, lines 27–32 (Scott Spencer, Defence’s opening address).

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid* at 606–07.

<sup>100</sup> Brian Zinchuk, “Opinion: There is so much wrong being said by both sides about the Gerald Stanley trial,” (13 February 2018), online: *The Battlefords News-Optimist* <[www.newsoptimist.ca/opinion/columnists/there-is-so-much-wrong-being-said-by-both-sides-about-the-gerald-stanley-trial-1.23171591](http://www.newsoptimist.ca/opinion/columnists/there-is-so-much-wrong-being-said-by-both-sides-about-the-gerald-stanley-trial-1.23171591)>.

### C. Consideration of the defence of property by the court

At trial, the Court considered Stanley’s firing of shots in the air in the context of self-defence and the defence of property.<sup>101</sup> The Court rightfully cautioned that in the jury charge the parties needed to be “very careful that we ground everything in the evidence that has been called thus far so there is a bit of an air of reality.”<sup>102</sup> Chief Justice Popescul struggled to make sense of how the evidence raised during the trial translated into a jury charge: “[T]o be as honest as I can with you, which is -- I am seeking guidance from very experienced lawyers to help me get the charge right so that I can present a fair, balanced, legally accurate charge to the jury.”<sup>103</sup>

The defence framed Stanley’s use of the gun as “[S]elf-defence is a justification, a lawful justification, for firing the warning shots.”<sup>104</sup> The Court disagreed, suggesting instead that:

[T]he evidence seems to suggest that if anything, he was trying to scare them off his property. His property had been tampered with. He was in peaceable possession of the property, and the question would be whether or not he took reasonable steps to scare them off his property. That would be defence of property[.]<sup>105</sup>

The Court referred to various scenarios that would explain Stanley’s firing of the gun in the air when the youths entered the farm without raising the defence of property. Spencer acknowledged there would be no justification for firing against someone for merely entering a property,<sup>106</sup> but agreed that in a situation where a trespasser was asked to leave, firing a gun would fall under the defence of property.<sup>107</sup> Chief Justice Popescul clarified the defence’s position that “up until a certain point ... he [was] justified in firing a few rounds in the air”, but also noted that “if somebody has a ... gun of any sort, and if it goes off and kills somebody, they’ve got some explaining to do.”<sup>108</sup>

The Crown asked whether the defence of property for Stanley’s firing of the weapon in the air should be put to the jury.<sup>109</sup> Senior Crown Prosecutor Bill Burge noted that putting the defence of property to the jury for this part of the legal story would get “pretty complicated.”<sup>110</sup> This is consistent with the case of *O’Brien*, where the Court found that raising both the defence of accident and the defence of property could be confusing to the jury.<sup>111</sup> Chief Justice Popescul proposed, “would it be fair to say that in the circumstances of this case, the Crown and defence agree that Mr. Stanley’s actions in getting the gun was -- was lawful, and that if you find he fired them in the air, that in and of itself is lawful, as well?”<sup>112</sup> Burge agreed to “make the concession

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<sup>101</sup> *Stanley Trial Transcript, supra* note 2 at 801, lines 18–40 (Discussion to inform the jury charge).

<sup>102</sup> *Ibid* at 804, lines 5–6.

<sup>103</sup> *Ibid* at 813, lines 31–35.

<sup>104</sup> *Ibid* at 802, lines 21–22 (Discussion to inform the jury charge).

<sup>105</sup> *Ibid* at 803, lines 27–32.

<sup>106</sup> *Ibid* at 804, line 35–37.

<sup>107</sup> *Ibid* at 806, line 19.

<sup>108</sup> *Ibid* at 810, lines 21–31.

<sup>109</sup> *Ibid* at 808, lines 4–6.

<sup>110</sup> *Ibid* at 807, lines 32–33.

<sup>111</sup> *O’Brien, supra* note 90.

<sup>112</sup> *Stanley Trial Transcript, supra* note 2 at 808, lines 18–22.

that this is -- this is within his right as a property owner.”<sup>113</sup> In doing so, the Crown implicitly condoned the defence’s racist trespass narrative and the presumptive reasonableness of Stanley’s fear-driven violent response, which simultaneously became both core elements of the case and immune from further questions or critiques.

The judge, prosecutor, and defence agreed to bifurcate the events on the farm, such that the firing of the gun in the air was lawful under each of the elements of section 35 of the *Criminal Code*, but the next set of events would need to be considered by the jury on the basis of defence of accident. They agreed that the charge would read, “Mr. Stanley was lawfully justified in the circumstances of this case to retrieve his firearm and to fire it into the air as a warning -- as warning shots, if you find that is what he did. Beyond that, it is up to you to determine if his acts were lawful.”<sup>114</sup> Chief Justice Popescul explained the charge as follows:

[W]hat we’re doing is *we are focussing the jury on the parts that matter*. So rather than the jury coming back with a question for me, well, was it lawful in the first place for him to have this gun and can he shoot it in the air, is that all right? We’re saying, yeah, that’s all fine up until this point. ... if he was firing them in the air, that that was lawful up to that point, and beyond then, that’s what we have to ... worry about.<sup>115</sup>

In the end, Chief Justice Popescul stated in his instructions to the jury:

I have already told you that it is not disputed that Mr. Stanley was legally justified in defence of his property, to retrieve his handgun and fire it into the air, if you find that that is what he did, in light of what had gone on in his farmyard. However, you must now closely analyze whether his actions between that point and the shooting of Mr. Boushie amount to careless use of that firearm and whether he had a lawful excuse.<sup>116</sup>

Put another way, Stanley’s act of shooting the gun in the air was justified by the Court on the basis of the defence of property without any consideration by the jury. Stanley’s fear of Indigenous youths and their status as trespassers was deemed presumptively reasonable. The lawfulness of his resort to violence without warning or a request for them to leave was deemed by the Court, with consent of the Crown, not to matter.

#### 4. *Dismantling the Castle: Indigenous Peoples and Trespass*

Gerald Stanley’s acquittal had an impact on the justice system more broadly, but it also has particularly negative consequences for Indigenous persons in the context of Treaty relations and trespass, as discussed below.

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<sup>113</sup> *Ibid* at 809, lines 6–7.

<sup>114</sup> *Ibid* at 818, lines 17–21.

<sup>115</sup> *Ibid* at 820, lines 5–12 [emphasis added].

<sup>116</sup> *Ibid* at 898, lines 17–21. See also “Full transcript of judge’s instructions to Colten Boushie jury: Put yourself in a juror’s shoes,” (14 February 2018), online: *National Post* <[nationalpost.com/news/canada/full-transcript-of-judges-instructions-to-colten-boushie-jury-put-yourself-in-a-jurors-shoes](https://nationalpost.com/news/canada/full-transcript-of-judges-instructions-to-colten-boushie-jury-put-yourself-in-a-jurors-shoes/)>.

A. *Trespass in the context of Treaty relations*

Despite the centrality of treaties to the foundation of Canada as a nation state, the legal construction of trespass in Canadian law does not acknowledge Treaty rights and relationships. Nor does it allow for the consideration of non-human, past, or future beneficiaries to whom legal duties may be owed under Indigenous law.<sup>117</sup> As Michael Asch noted, “one cannot have Confederation until there is a home on which to build it, and without treaties we have no home here.”<sup>118</sup> Settler claims to belonging, which is at the root of peaceable possession, therefore relies on the legitimacy and the honouring of the treaties, and “keeping those promises is inviolate, for to violate these promises is to invalidate our right to be here.”<sup>119</sup>

Boushie’s death and the *Stanley* trial took place on Treaty 6 territory.<sup>120</sup> This means that Stanley’s farm was located on contested land. Historian Sheldon Krasowski conducted a detailed examination of Indigenous and non-Indigenous accounts of the negotiations involved historic treaties. He demonstrated that official Canadian accounts refer to the negotiations for Treaty 6 cession and surrender of Indigenous land to the Crown, but that both eyewitness accounts and oral histories contradict these accounts.<sup>121</sup> Accounts of meetings leading up to the negotiations reveal that Treaty 6 Chiefs were mainly concerned with protection of Indigenous lands from encroachment, and as a result this was the main point of discussion.<sup>122</sup>

Cree lawyer Sharon Venne explained that all Indigenous nations in the Treaty 6 territory would have followed protocol requesting the Crown to enter into a Treaty before coming onto their land, in recognition of their jurisdiction over the area.<sup>123</sup> She explained that this was the only valid way for others, Indigenous nations or the Crown, to come onto the land.<sup>124</sup> Indeed, upon learning about the acquisition of land in their territory by the Hudson’s Bay Company, the Chiefs quickly asserted their jurisdiction and requested that the Queen resolve the issue, clearly

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<sup>117</sup> CED 4th (online), *Torts*, “Trespass” (II.1.) at § 29. For discussion of treaty relations in Saskatchewan, see Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized As Nations* (Calgary: University of Calgary Press, 2000) [Cardinal & Hildebrandt]. For a general discussion on treaty relations between the Crown and Indigenous people see, John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017); Sheldon Krasowski, *No Surrender: The Land Remains Indigenous* (Regina: University of Regina Press, 2019) [Krasowski]. For a discussion of Indigenous law and treaty relations with non-human nature and past or future generations, see John Borrows, *Canada’s Indigenous constitution* (Toronto: University of Toronto Press, 2010). See also Leanne Simpson, “Looking after Gdoo-naaganinaa: Precolonial Nishnaabeg diplomatic and treaty relationships” (2008) 23:2 *Wicazo Sa Review* 29.

<sup>118</sup> Michael Asch, “Confederation Treaties and Reconciliation: Stepping Back into the Future” in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 29 at 42 [Asch].

<sup>119</sup> *Ibid* at 45.

<sup>120</sup> Michelle Filice, “Treaty 6” in *The Canadian Encyclopedia* (11 October 2016), online: <[www.thecanadianencyclopedia.ca/en/article/treaty-6](http://www.thecanadianencyclopedia.ca/en/article/treaty-6)>.

<sup>121</sup> Krasowski, *supra* note 117 at 176.

<sup>122</sup> *Ibid*, at 193–94.

<sup>123</sup> Sharon H Venne, “Treaties made in good faith” (2007) 34:1 *Can Rev of Comparative Literature* [Venne, *Treaties*].

<sup>124</sup> Sharon Venne, “Treaty Indigenous Peoples and the Charlottetown Accord: The Message in the Breeze” (1993) 4:2 *Constitutional Forum* 43 at 45 (“Each treaty, for Indigenous Peoples, was a sacred undertaking made by one people to another which required no more than the integrity of each party for enforcement”).

asserting that the transactions were invalid under Indigenous law. In the lead-up to Treaty 6 negotiations, the Cree stopped surveyors and the construction of telegraph lines, demanding that the Crown recognize their authority over their lands.<sup>125</sup> When the Crown requested to make a Treaty in the lands that make up Treaty 6, the relevant Indigenous nations (Cree, Assiniboine, Saulteux, and Dene) formed an alliance and held several days of meetings to reach an agreement about their position. Only then did they meet with the Crown. The Indigenous parties selected the site and negotiations were conducted in accordance with Indigenous protocols, including the Cree Sacred Pipe Ceremony, which linked the partners in an unbreakable relationship “based on happiness, health, and respect.”<sup>126</sup>

The oral histories of Treaty 6 Elders assert there was no cede and surrender clause agreed to in the treaty negotiations.<sup>127</sup> As noted above, this has been confirmed by eyewitness accounts from non-Indigenous observers. Rather, the land was requested for shared use by settlers. Venne noted this was interpreted as a loan and not a sale, which would not have been agreed to either as a matter of logic or as a possibility in Indigenous law.<sup>128</sup> As Michael Coyle noted, “[b]ecause the historical land treaty was an institution established for the purpose of permitting the coexistence of two sets of peoples on treaty lands, it cannot be rationally interpreted as effecting an entirely improvident arrangement for one of the treaty parties.”<sup>129</sup> The Chiefs interpreted the agreement to mean that they could hold as much land for themselves as they wanted: according to Elders, reserves were not lands given to Indigenous peoples by the Crown, because the Crown had no jurisdiction over the land. In an exchange unrecorded in official accounts but recorded by the Chief’s translator, Peter Erasmus, Chief Poundmaker responded to the “audacity of the treaty commissioner to describe reserved lands as one of the benefits of the treaty.”<sup>130</sup> Chief Poundmaker commented, “This is our land it isn’t a piece of pemmican to be cut off and given in little pieces back to us. It is ours and we will take what we want.”<sup>131</sup> Sharing of the land was interpreted as ensuring the people “would never be in want as they had ensured their future good life by sharing their lands.”<sup>132</sup> According to Venne, the Treaty was also not understood as extending to the subsurface, to the waters, or to animals, including birds. Further, mountains and lands within four days walk could not have been included because of their spiritual significance.\* Venne also noted that the promise of police protection was a key part of the Treaty. Specifically, the Northwest Mounted Police were permitted into the territory for the protection of Indigenous Peoples against settlers.<sup>133</sup> Crucially, as Venne pointed out, the Treaty records the rights and obligations of non-Indigenous peoples in the territory—the rights to *share* the land and resources, to co-exist peacefully with Indigenous neighbours, and to care for the

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<sup>125</sup> Krasowski, *supra* note 117 at 192–93.

<sup>126</sup> *Ibid* at 200–03.

<sup>127</sup> Cardinal & Hildebrandt, *supra* note 117.

<sup>128</sup> Venne, *Treaties*, *supra* note 123

<sup>129</sup> Michael Coyle, “As Long as the Sun Shines: Recognizing That Treaties Were Intended to Last” in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 39at 63 [Coyle].

<sup>130</sup> Krasowski, *supra* note 118 at 209.

<sup>131</sup> Peter Erasmus Fonds, “Original Manuscript of Buffalo Days and Nights”, cited in Krasowski, *supra* note 117 at 209.

<sup>132</sup> Elder Fred Horse in Sharon H Venne, “Understanding Treaty 6: An Indigenous Perspective,” in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: University of British Columbia Press, 1998) at 193.

<sup>133</sup> *Ibid* at 195–98,

land.<sup>134</sup> All of these elements require fulfilling the promises fairly and honourably made to Indigenous Treaty partners.<sup>135</sup>

As described above, the concept of trespass assumes clear title. Indeed, the defence of property relies on the concept of peaceable possession, the old English legal concept requiring that there be no adverse claims to the lands in question.<sup>136</sup> Once one acknowledges the multiple and overlapping relationships with private land, as evidenced by the discussion of historic treaties above, the concept of peaceable possession becomes much more difficult to sustain. Certainly, it complicates Stanley’s quick resort to violence and the link between the “reasonableness” of his fears and the racist and colonial underpinnings of the trespass narrative woven into the *Stanley* trial by the defence. The next section builds on this discussion, and the troubling way that Indigenous attempts to invoke the defence of property and protect their own lands are managed.

### *B. Defence of property and Indigenous lands*

Canadian courts treat lands claimed by Indigenous communities and non-Indigenous people differently with regard to trespass and defence of property. For example, the courts have categorically rejected Indigenous title as a challenge to defence of property. The Ontario Court of Justice has stated that there are “two legalities ... the defendant has no right to the property, and the complainant has all the right to the property.”<sup>137</sup> In *R v Cormier*, the Court stated that “interference with “peaceable possession” of property” means someone is either: “about to enter, entering or having entered to the property, without lawful entitlement; ... about to take, taking or having just taken the property; or ... about to damage or destroy or in the process of damaging or destroying the property or making it inoperative.”<sup>138</sup>

Courts have found that these criteria do not apply to First Nations lands, either reserve or traditional territory. Some have adopted the definition of “peaceable possession” published in Black’s Law Dictionary: “... such as is acquiesced in by all other persons, including rival claimants, and not disturbed by any forcible attempt at ouster nor by adverse suits to recover the possession of the estate.”<sup>139</sup> The Alberta Court of Appeal elaborated on this definition, stating that the word “peaceable” is not synonymous with “peaceful.”<sup>140</sup> Instead, “peaceable” means possession that is “not seriously challenged by others”<sup>141</sup> and any challenge to the possession should be “unlikely to lead to violence.”<sup>142</sup> The Court stated:

The demand that the possession be “peaceable” greatly limits the defence. That word is not synonymous with peaceful ...<sup>143</sup>

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<sup>134</sup> Venne, *Treaties*, *supra* note 123 at 7.

<sup>135</sup> Coyle, *supra* note 129 at ; Asch, *supra* note 118 at 45.

<sup>136</sup> See *Born with a Tooth*, *supra* note 76 at paras 32–34; *Criminal Code*, *supra* note 5, ss 35(1)(a), 35(2).

<sup>137</sup> *Green*, *supra* note 42 at para 74.

<sup>138</sup> *Cormier*, *supra* note 46 at para 47.

<sup>139</sup> *George*, *supra* note 75 at para 40.

<sup>140</sup> *Born with a Tooth*, *supra* note 76 at para 28.

<sup>141</sup> *Ibid* at para 29.

<sup>142</sup> *Ibid* at para 30.

<sup>143</sup> *Ibid* at para 28 [emphasis in original].

As noted by the Canadian Association of Elizabeth Fry Societies, the use of the “peaceable possession” rule in the context of Indigenous land defenders who are attempting to protect lands unjustly ignores the violent and racist means by which Indigenous peoples have been dispossessed, and therefore are unable to satisfy the standard.<sup>144</sup>

In *George*, the case involved the occupation of a park by Indigenous persons. The park had originally been part of an Aboriginal land grant, but had been expropriated by the federal government.<sup>145</sup> When violence broke out between the occupiers and the police, the Court rejected the Indigenous defendant’s defence of property claim because the occupation of the park was clearly challenged from the outset. It stated that the defendant was aware of this challenge, and therefore did not have “an honest but mistaken belief in the nature of the Band members’ possession of the park.”<sup>146</sup> Peaceable possession, in contrast, is understood as possession that is not seriously challenged by others and is therefore unlikely to lead to violence. In *George*, the Court found that the Indigenous defendants were aware that their possession of the park was challenged from the outset. Indeed, it was noted that they had stockpiled sticks and rocks in contemplation of violence. The Court also found that their use of force against the police was not necessary, reasonable, or proportionate.<sup>147</sup>

In *R v Born with a Tooth*, members of the Peigan Nation had camped in a right-of-way area over which they did not have peaceful possession, even if they did have some rights.<sup>148</sup> Police officers and others attempted to gain access to the area in question. The Court noted:

An accused might, honestly but mistakenly, believe that he has a measure of control over the lands, or that his supposed control is unchallenged, or he might believe in a set of facts which, if true, makes the victim a trespasser. But honest mistake of fact appears not to be enough for the last element, because that requires that the reasonableness of the force meet an objective, not just a subjective, test.<sup>149</sup>

The Court concluded, “all citizens of Canada have a duty to inform themselves correctly about the law” and that failure to do so cannot be used as a defence.<sup>150</sup> As a result, in this case there could be no finding of peaceable possession, and therefore, no application of the defence of property.<sup>151</sup> This situation creates an imbalance in the application of the defence of property to Indigenous and non-Indigenous relationships with land.<sup>152</sup> It also fundamentally ignores the existence and tenets of treaties, most significantly the role of Indigenous legal orders—both internally for Indigenous nations, and externally in shaping Canadian property relations through

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<sup>144</sup> CAEFS, *supra* note 36.

<sup>145</sup> *George*, *supra* note 75.

<sup>146</sup> *Ibid* at para 46.

<sup>147</sup> *Ibid*, see especially paras 43–46, 50.

<sup>148</sup> *Born with a Tooth*, *supra* note 76 at para 20.

<sup>149</sup> *Born with a Tooth*, *supra* note 76 at para 36; cited therein, see *Scopelliti*, *supra* note 43.

<sup>150</sup> *Ibid* at para 37, citing *Criminal Code*, *supra* note 5, s 19.

<sup>151</sup> See also *R v Jamieson*, 2013 ONCJ 662.

<sup>152</sup> Interestingly, in section 35 of the *Criminal Code*, there is no requirement for actual peaceable possession. Rather, the section requires a reasonable belief in such peaceable possession. Roach notes the potential for this shift to open the door to claims where the question of possession is contested (Roach, *supra* note 46 at 294).

treaty partnerships. In other parts of Canada, it ignores the assertion of title and jurisdiction over land and resources in both Canadian and Indigenous law.

Failure to recognize Indigenous relations to land as a root of possession that can be lawfully exercised and defended leads to individual injustices for the Indigenous parties in cases such as these. It also perpetuates the colonial model of unitary Crown sovereignty, which leads to intractable conflicts about the governance of land and resources.<sup>153</sup> The Yellowhead Institute recently found that 76 percent of injunctions filed by corporations against First Nations—often deemed to be trespassing as they defend traditional territory from development—were granted, while less than 20 percent of those filed by First Nations against corporations or governments were granted.<sup>154</sup> It concluded that Indigenous law has not been accepted by the courts as a defensible basis for trespass.<sup>155</sup> As we write, Indigenous land protectors and allies are being arrested and forcibly removed by the Royal Canadian Mounted Police from unceded Wet’suwet’en territory in British Columbia to enforce an injunction allowing a private gas company to build a pipeline along “Crown” land, despite being evicted by the hereditary chiefs, who were recognized by the SCC as the land holders in the landmark *Delgamuukw v British Columbia* decision.<sup>156</sup> Protests throughout Canada continue to shut down highways, bridges, and rail corridors in solidarity.<sup>157</sup>

The differential treatment of Indigenous claims to property rights and the availability of the defence of property are compounded by the failure of the criminal justice system to ensure that Indigenous victims of crime are not themselves criminalized and dehumanized as a result of racial bias and stereotypes. As the SCC has observed “... it would be naïve to assume that the moment the jurors enter the courtroom, they leave their biases, prejudices, and sympathies behind.”<sup>158</sup> The next section explores the failure of the judge in the *Stanley* trial to address the intersection between Saskatchewan’s contested property relations and racial prejudice.

### *C. Jury instructions in cases of Indigenous victims and trespass claims*

In the *Stanley* trial, the jury was not cautioned about local claims of trespass allegedly caused by Indigenous youths nor the high level of discrimination against Indigenous peoples. Instead, in regard to witnesses, Chief Justice Popescul stated:

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<sup>153</sup> Dayna N Scott & Andree Boisselle “If There Can Only Be ‘One Law’, It Must Be Treaty Law. Learning from Kanawayandan D’aaki” 2019 UNB LJ (forthcoming) at 43.

<sup>154</sup> Shiri Pasternak & Hayden King “Land Back: A Yellowhead Institute Red Paper” (Yellowhead Institute: Toronto, October 2019), at 10, 30, online (pdf): *Yellowhead Institute* <redpaper.yellowheadinstitute.org/wp-content/uploads/2019/10/red-paper-report-final.pdf>.

<sup>155</sup> Marc Kruse & Carrie Robinson “Injunctions by First Nations: Results of a National Study” (19 November 2019) online: *Yellowhead Institute* <yellowheadinstitute.org/2019/11/14/injunctions-by-first-nations-results-of-a-national-study/>

<sup>156</sup> [1997] 3 SCR 1010, 153 DLR (4th) 193.

<sup>157</sup> Maryse Zeidler & Clare Henning, “Protestors block ports, streets and rails in support of Wet’suwet’en in B.C.” (9 February 2020) online: *CBC News British Columbia* <www.cbc.ca/news/canada/british-columbia/wetsuweten-protest-bc-sunday-1.5457629>.

<sup>158</sup> *R v Barton*, 2019 SCC 33 at para 196 [*Barton*], citing *R v Williams*, [1998] 1 SCR 1128, 159 DLR (4th) 493 [*Williams*].

Did the witness seem to be reporting to you what he or she saw and heard or simply putting together an account based on ... other sources[?] Did the witness’s testimony seem reasonable and consistent? Is it similar to or different from what other witnesses said about the same events? Did the witness say or do something different on an earlier occasion? ... Is the inconsistency about something important or a minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different or because he or she failed to mention something? Is there any explanation for it? Does the explanation make sense? What was the witness’s manner when he or she testified?<sup>159</sup>

Chief Justice Popescul gave only the following cautions:

“[D]o not jump to conclusions based entirely on how a witness has testified. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different abilities, values and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or most important factor in your decision.”<sup>160</sup>

In the context of Saskatchewan’s contested property relations, the judge could, and should, have gone further to expressly caution the jury about racial bias or biased associations with terms used by witnesses or other actors during the trial.

In Saskatchewan, rural residents and groups have advocated for looser laws around gun possession and stronger trespass laws to address alleged increases in “rural crime.”<sup>161</sup> As noted above, amendments to the *TPA* remove the requirements for notice and enclosure, therefore requiring explicit consent to enter private property. The changes mean that landowners can treat anyone entering their lands as trespassers, even prior to asking them to leave the property. The Federation of Sovereign Indigenous Nations has expressed serious concerns about the law and the lack of consultation, and in February 2019 voted to oppose the amendments. Vice Chief Heather Bear stated that the changes would cause more rural crime, rather than less.<sup>162</sup> The amendments came after a 2017 decision to arm conservation officers with semi-automatic carbine rifles, which FSIN also strongly opposed, suggesting it breached inherent and Treaty rights and would result in more Indigenous people in jail.<sup>163</sup>

Rural residents have openly discussed the availability of the defence of property online. In a March 15, 2016 post on the online journal Ammoland, an anonymous commenter wrote:

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<sup>159</sup> *Stanley Trial Transcript*, *supra* note 2 at 882, lines 10–21 (Chief Justice Popescul’s jury charge).

<sup>160</sup> *Ibid* at lines 21–27.

<sup>161</sup> Stefanovich, *supra* note 96. Her piece also noted that even though people fear increases in rural crime, “property crime in Saskatchewan RCMP districts decreased in 2017 by five per cent compared to 2016, according to the force. Break-ins are also down by 13 per cent, and thefts declined by two per cent over the same period of time, RCMP say”.

<sup>162</sup> *FSIN leaders*, *supra* note 25.

<sup>163</sup> Staff writer, “Plan to arm Sask. vehicle enforcement officers means for Indigenous people in jail”: FSIN” (23 August 2017), online: *CBC News* <[www.cbc.ca/news/canada/saskatoon/fsin-arm-vehicle-enforcement-officers-means-more-indigenous-people-jail-1.4258982](http://www.cbc.ca/news/canada/saskatoon/fsin-arm-vehicle-enforcement-officers-means-more-indigenous-people-jail-1.4258982)>.

Unless you’ve done something terribly wrong, the odds of you being convicted are on your side. The CSSA has dealt with many of these types of cases over the years, and in only one case was the individual convicted. To re-cap:

- Yes, you will be charged with a very serious crime.
- Yes, this will be the most stressful time of your life.
- Yes, this entire process will cost you a lot of money.

However, at the end of it all, justice will usually prevail and you will not go to prison.<sup>164</sup>

In *R v Barton*, the SCC examined the role of the trial judge in addressing “biases, prejudices, and stereotypes that lurk beneath the surface, thereby allowing all justice system participants to address them head-on — openly, honestly, and without fear.”<sup>165</sup> At trial, the Crown, the defence, and the trial judge had repeatedly referred to the Indigenous victim, Cindy Gladue, as a “prostitute,” “Native girl,” or “Native woman.”\* The majority of the SCC in *Barton* noted the “invasive,” “elusive,” and “corrosive” nature of racism against Indigenous people in the context of jury trials, as recognized in *R v Williams*.<sup>166</sup>

They specifically identified the language used to refer to Ms. Gladue at trial as “problematic”<sup>167</sup> and suggested that the use of such descriptors may give rise to situations where a trial judge should intervene to ensure all participants in the justice system are treated with “dignity, humanity and respect.”<sup>168</sup> The majority suggested trial judges consider the “additional safeguard” of “express instruction countering prejudice” beyond a generic jury instruction about impartiality, which they grounded in ss 15, 7 and 11(d) of the Charter.<sup>169</sup> In the context of an Indigenous victim, the majority specifically noted the relevance of explaining the history and ongoing effects of colonization and anti-Indigenous racism to jurors, to ensure they do not rely on stereotypes and racial prejudice during their deliberations.<sup>170</sup> Justice Moldaver, writing for the majority, did not go as far as the dissent, according to which the lack of such instructions rendered the whole trial unfair.<sup>171</sup> However, he concluded that by failing to ensure Ms. Gladue was given the law’s full protection, the criminal justice system “let her down — indeed, it let us all down.”<sup>172</sup>

It is very likely that references to Boushie and his friends as “trespassers” were compounded by systemic racism. The failure to address such references during the trial and the generic instruction to the jury, at best, failed to ensure the jury did not draw on “biases prejudices and stereotypes” about criminality and Indigenous youths and the “reasonable” nature of being fearful of young Indigenous men.<sup>173</sup> At worst, it invited “devastatingly prejudicial effects,”

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<sup>164</sup> “Canadian Self-Defense Law: Three Things You Absolutely Must Know,” (14 March 2016), online: *Ammoland Shooting Sports News* <[www.ammoland.com/2016/03/canadian-self-defense-law-three-things-you-absolutely-must-know/#ixzz5CyWkiGH3](http://www.ammoland.com/2016/03/canadian-self-defense-law-three-things-you-absolutely-must-know/#ixzz5CyWkiGH3)>.

<sup>165</sup> *Barton*, *supra* note 159 at para 197. See also the comments of the Alberta Court of Appeal, 2017 ABCA 216.

<sup>166</sup> *Ibid* at para 196, citing *Williams*, *supra* note 159 at 1142–43.

<sup>167</sup> *Ibid* at para 207.

<sup>168</sup> *Ibid* at para 210.

<sup>169</sup> *Ibid* at paras 200–02.

<sup>170</sup> *Ibid* at paras 203–04.

<sup>171</sup> *Ibid* at para 215 (opinion of Abella & Karakatsanis JJ, in dissent on this issue).

<sup>172</sup> *Ibid* at para 210.

<sup>173</sup> *Ibid* at para 197 (adopting the phrasing from *Barton*, *supra* note 159).

which may have rendered the entire process unfair.<sup>174</sup> The lack of caution by the judge was compounded by the lack of consideration as to whether the use of a gun in response to trespass is ever justifiable. The jury was not required to weigh the very real possibility that the Indigeneity of these youths, and the claim that they were trespassing on the Stanley farm, led to the verdict of not guilty.

## 5. Conclusion

The *Stanley* trial raised important issues related to the unique land-based tensions in rural Saskatchewan and how these may have affected the outcome of the trial. First, the defendant’s legal story was underscored by narratives of trespass. As defence counsel noted in the trial, “[f]or farm people, your yard is your castle.”<sup>175</sup> This kind of sentiment also emerged in local media coverage, and is linked to the reforms of the defence of property, which were introduced by the Government of Canada in response to vocal demands to increase protection for property owners who expel alleged trespassers from “their” land. These same sentiments also underpin recent reforms to Saskatchewan’s *T PA*.<sup>176</sup>

Second, the *Stanley* trial and the resulting precedent has particular consequence for Indigenous persons. It reflects the extent to which Treaty 6 and Indigenous relationships with land are generally ignored in criminal law tests for “peaceable possession”. Specifically, traditional territory is never peaceably possessed, so the defence of property is not available to Indigenous persons seeking to defend these lands. Moreover, although Treaty 6 is rooted in an agreement to share the land and does not recognize features of colonial law such as exclusive ownership, the “reasonableness” of Stanley’s violent defence of his farm did not account for Indigenous worldviews and laws.

Third, the judge’s failure to address how the defence’s invocation of trespass and rural crime could be linked with anti-Indigenous racism may have contributed to Stanley’s exoneration. As the SCC signaled in *Barton*, juries must be made aware of the ways in which biases and prejudice factor into decision-making. Stanley’s invocation of trespass, the castle doctrine, and the notion of a “self-defence circumstance” informed the Crown and the Court’s concession that his use of the firearm was lawful. As a result, neither the defence nor the jury were asked to grapple with how the reasonableness of his violent actions were grounded in racial bias and a fear of Indigenous youths. The symbolism of defence of property far outweighed its formal legal application in this case. The reasonableness of resorting to violence in defence of property was presumed and was separated from the tragic consequences. In the specific social context of rural Saskatchewan, Stanley’s invocations of trespass alongside the Indigeneity of Boushie and his friends, should have signalled to the trial judge that he should have included additional safeguards in his jury charge. He should have given express instructions countering prejudice beyond the generic jury instruction about impartiality. He should also have clarified the irrelevance of much of Stanley’s narrative Stanley to the determination of whether the third shot was in fact an accident.

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<sup>174</sup> *Ibid* at para 225 (adopting the language of the dissent).

<sup>175</sup> *Stanley Trial Transcript*, *supra* note 2 at 606, line 29 (Defence’s opening address).

<sup>176</sup> *Supra* note 15.

Full citation: Alexandra Flynn & Estair Van Wagner, “A Colonial Castle: Defence of Property in R v Stanley” (2020) 98:2 Canadian Bar Review 359-387.

The death of Colten Boushie was a tragedy. The *Stanley* trial was also a tragedy, because crucial issues remain unexamined and important questions remain unanswered. We will never know whether jury instructions that explicitly alerted the jury to the issue of racial bias in situations of trespass, and in the context of Indigeneity, would have made a difference. Judges and juries must carefully consider the use of force to defend property. They must not rely on presumptions and fear-driven biases about who belongs, and who matters, on the lands we call Canada. As Justice Moldaver concluded in *Barton*, “we can – and *must* – do better.”<sup>177</sup>

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<sup>177</sup> *Supra* note 159 at para 1.