on the appeal court carried the decision, granted the appeal, and gave a verdict of acquittal.

Greenspan notes that the defence of S. 34 may be available even to those people who were mistaken as to their perception as to how much danger they were in, nevertheless:

> "his apprehension of death or grievous bodily harm must be reasonable and his belief that he could not otherwise preserve himself must be based on reasonable and probable grounds. His mistake must therefore be one which an ordinary man using ordinary care could have made in the same circumstances."

Therefore, we have the right in Canada to hit the first blow without being reduced to a frenzy or being crazy with fear.

Bolyantu 29CCC 2nd 174:

The case of R. v. Bolyantu arose out of a fracas at the Detroit House Tavern in Windsor Ont. from which Bolyantu was tossed out. He later returned and started another disturbance, then ran away with a mob after him. Outside the pub he stabbed Martin Stimac with a knife. Judge Zalev ruled that since Stimac was not part of the attacking mob, S.35 self defence, could not apply and Bolyantu was convicted of assault causing bodily harm.

On appeal it was ruled that aside from the fact that some evidence tended to support the view that Stimac was indeed a member of the attacking mob that Bolyantu

> "was entitled to defend himself if he believed on reasonable grounds that Stimac was a part of the attacking mob, even though in fact, he may not have been."

This ruling got Bolyantu a new trial although it does not record how he fared at it. This clearly shows the respect Canadian law gives to the concepts of self defence based on reasonable grounds even if a mistake is being made.

Important Rulings of S.34:

No need to retreat
You are not necessarily required to retreat, especially if you are in your own home.

Precise force not necessary
You are not expected to weigh to a nicety the amount of force necessary to defend yourself but your actions will be considered for reasonableness to see if you are using self defence as a cover for seriously hurting someone for your own other reasons.

Stay cool
You need not be "reduced to a frenzy" before defending yourself.

You may strike first
You need not wait to be hit to defend yourself; you can actually strike the first blow in self defence if your attacker's actions warrant it.

Mistakes must be reasonable
If you hurt someone because you made a mistake as to the danger you were in, self defence may still apply if it was a reasonable or honest mistake and not a cover for an indulgence in violence.

Use only necessary force
The force you use must be no more than necessary to stop the attack and save yourself. You are not allowed to punish your opponent or trash him to teach him a lesson so he doesn't attack anyone else.

S. 35 – Self Defence in Case of Aggression

S. 35. **Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm or has without justi-**

fication provoked an assault upon himself by another may justify the use of force subsequent to the assault if

(a) he uses the force
  (i) from under reasonable apprehension of death or grievous bodily harm from the violence of the person 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 as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.

This essentially means that even if you provoke a fight, and your victim then tries to kill you, you may be justified to use force to defend yourself

IF you were not trying to kill him or to do him grievous bodily harm in your provoking; and,

IF you tried to get out of the fight and retreated as far as possible when he escalated to deadly force.

Conversely, if someone starts a fight with you and you do or say something such as boasting of your skills and telling him that now you are going to kill him or put him in a wheelchair forever, he may be justified in killing you if he tries to get away and can't, and if a jury believes a reasonable man would have been in fear of death in the same situation. Even if you are just mouthing off and not planning to seriously harm him and he is mistaken as to the danger he is in, the defence of S. 35 may prevail no matter how badly he damages you or even if he pulls a weapon and kills you.

Merson 4CCC 3d 251:

In New Westminster, B.C., Mrs. Dafoe left her boyfriend Michael Merson to return to her husband Allen Dafoe. At 5 AM. Merson entered the Dafoe house through a window and went to the bedroom to speak to his estranged paramour. When he saw her husband, he pulled a pistol from his pocket and covered Dafoe with it, allowing Mrs. Dafoe to leave. Trial evidence says the two men talked for a while. Merson swore at Dafoe who moved, so Merson kicked at him and the fight was on. During the struggle for the gun, Merson was shot once in the leg, then Dafoe was shot twice – once in the leg and once in the chest. Merson then fled while Dafoe died.

Merson's contention was that he only had the pistol to confront the deceased since he was afraid of him, that he had no intention to hurt or kill him and that he would have retreated once Dafoe attacked him, but was caught too suddenly and couldn't. He felt he had to resist Dafoe's efforts to get the gun so as to preserve himself from being shot by Dafoe. The Crown and at least one appeal Judge felt that he took the pistol to the house to kill Dafoe, that he was the aggressor throughout and Dafoe did no more than try to defend himself from an armed intruder. Merson was believed and acquitted, and the verdict was upheld by the appeal court.

It seems a certain likelihood that had Dafoe emerged from the struggle alive and Merson dead that he would have been acquitted, if he even came to trial, because of self defence. It would seem that the survivor has the benefit, not only of life, but of being able to present his side of the story as reasonable.

The legal nicety of the case is that appeal Judge Taggart put forth a definition of "further conflict" as per S. 35 (c) you must decline or retreat from further conflict as far as it is feasible to do so – so that it refers to "the conflict which is generated by the initial assault or provocation offered by the accused."

If feasible, you must retreat from, or decline to engage in this conflict for the defence of S. 35 to be appropriate, but in Taggart's words,

> "S. 35 does not require the accused to surrender himself to the mercy of the other combatant."

A definition of the word "provocation" as it is used in S. 34 and S. 35 is also provided in S. 36. Greenspan lets this section stand on its own without elaboration, but notice:

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

S. 37 – Preventing Assault

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

(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.

Lowther 26CR 150:
In February 1955, a man named Lowther was convicted of murdering Gilles Murray in Sherbrooke, Quebec. Evidence shows that Murray had threatened Lowther with physical harm and death for about a year and a half previously, and had attacked and wounded him as part of his campaign of terrorism. Lowther had gone to the police to no avail, and so shot Murray with a shotgun. The Judge refused to allow self defence and in part, for this, Lowther won a new trial after his conviction. Judge J. Hyde of the Quebec Court of Queen's Bench stated that S. 37 must be read as an extension of S. 34 and added that

> "It was for the jury to decide whether the use of force by the appellant was necessary to protect himself from assault and if they decided that in the affir-

mative they would then have to consider whether the force used was excessive, having regard to the nature of the assault that the force used was intended to prevent."

It is evident by this case that what the law says and what actually is done in a case is open to dispute between judges, and a jury may agree with your defence and description of your case, or maybe not.

Appeal allowed – new trial ordered.

Quite contrary to this is:

Whynot 9CCC 3d 449:
When Jane Stafford shot her rough and abusive common law husband Billy while he slept in the car near Bangs Falls, Nova Scotia in 1983, she was acquitted for first degree murder on the strength of S. 37 that she feared for the life of her son Allan whom Billy had previously threatened to harm. The Crown appealed the acquittal for various reasons and the pertinent rulings were written by Judge Hart:

"A person who seeks justification for preventing an assault against himself or someone under his protection must be faced with an actual assault, something that he must defend against, before the provisions of S. 37 can be invoked, and that assault must be life-threatening before he can be justified in killing in defence of his person or that of someone under his protection…In my opinion, no person has the right in anticipation of an assault that may or may not happen, to apply force to prevent the imaginary assault."

On the basis of such reasoning the verdict was set aside and a new trial was ordered in which S. 37 would not be placed before the jury as a defence and in which Jane Stafford was convicted of manslaughter.

This has been amended by the following:

Lavalee 55CCC 3D 97:
In 1990 the Supreme Court of Canada heard of the case wherein a twenty-two year old woman named Lavalee shot her live-in boyfriend in the back of the head with a .303 rifle as he was walking away from her after threatening to kill her after other visitors to the home had left. Much evidence was presented about his previous violence toward her but her claim of self defence failed because she was in no imminent danger of death or grievous bodily harm when she pulled the trigger on him. She was convicted but appealed.

At the appeal, evidence from a psychiatrist concerning "battered-wife syndrome was considered by the Court to be relevant and necessary in the context of the case."
It was ruled that:

> "where evidence exists that an accused is in a battering relationship, expert testimony can assist the jury in determining whether the accused had a reasonable apprehension of death when she acted by explaining the heightened sensitivity of a battered woman to her partner's acts."

It was ruled that the battered woman's syndrome "mitigated the need for immanence" to be a necessary part of self defence. 1990 is a long way from 1983, as in Jean Stafford's case.

S. 38 – Defence of Personal Property

S. 38. (1) Every one who is in peaceable possession of personal property, and every one lawfully assisting him, is justified

(a) in preventing a trespasser from taking it, or
(b) in taking it from a trespasser who has taken it, if he does not strike or cause bodily harm to the trespasser.

(2) Where a person who is in peaceable possession of personal property lays hands upon it, a trespasser who persists in attempting to keep it or take it from him or from anyone lawfully assisting him shall be deemed to commit an assault without justification or provocation.

This section applies to personal property only and in law that refers to anything except land and houses. So even if you catch the guy with your lawnmower or brand new mountain bike, you can't legally just haul off and waste him. You can grab him or the stolen object and you can touch his shoulder and tell him he is under arrest as per S.27 but you can't fight him unless he resists as per S.37 and then you may only stop his attack, not beat him up.

Weare 4CCC 3d 494:
Greenspan limits his comments on S.38 to R. v. Weare. In August, 1981, Glen Hutchinson, an employee of Trans Canada Credit Corp., took Deputy Sheriff James Smith to the home of Mr. Weare in Caledonia, N.S. to reposses some furniture. When Weare saw them through his screen door he ordered them off his property. When they didn't go, he stepped out of the door and pointed a rifle at them. They left. Weare was convicted of pointing a firearm without lawful excuse contrary to S. 84 (1) of the Criminal Code. The Judge considered that the objective fact that he actually pointed the rifle at the men was more important than the subjective reasons for why he did what he did. In his words:

> "just look at what's there, not what's in the minds of these people, just look at the facts that's there."

Two separate appeal court judges disagreed with this, arguing that Weare's state of mind was important:

- Mr. Weare had just gone into bankrupcy and his furniture was now owned by the bankrupt receiver and not by him nor the credit company.

- He considered both men to be employees of the credit company and Smith did not identify himself as a Deputy Sheriff nor try to serve the court order he carried.
- Weare considered them to be trespassers and whether they were in fact or not, his belief was reasonable.
- Weare had just undergone a massive surgical operation for bowel cancer and felt he needed to display the rifle to frighten them off his property.

In their deliberations, the judges considered Colet v. the Queen (1981), 57 C.C.C. (2nd) 105, for the ruling that the police cannot enter and search on the basis of an order to seize certain property. Also considered was Southam v. Smout (1964), 1 Q.B. 308, for the dictum that in a civil process (although not in criminal cases) a court officer may forcibly enter a house only after announcing their presence, their authority and their lawful reason. In Weare's case no such identificaton was offered and it was concluded that he "used no more force than he, on reasonable grounds, believed was necessary to expel those whom he reasonably considered to be tresspassers." The Weare case then has two important aspects:

- S. 38 could constitute a defence to the charge of pointing a firearm contrary to S. 84; and,
- the thought processes of a person are pertinant in deciding such issues, not just his actions. All circumstances will be judged as reasonable or not.

S. 39 – Defence With a Claim to Right

S. 39 (1) Every one who is in peaceable possession of personal property under a claim of right, and every one acting under his authority is protected from criminal responsibility for defending that possession, even against a person entitled by law to possession of it, if he uses no more force than is necessary.