

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Isenor, 2007 NSPC 48

Date: September 20, 2007

Docket: 1649882

Registry: Halifax

Her Majesty the Queen

v.

Brett Isenor

DECISION

Judge: The Honourable Judge Anne S. Derrick

Heard: June 14, 15, 18, 19, 21, 22, 25, 26, 28, 29 and July 3, 5, 6 and 20, 2007 in Shubenacadie Provincial Court.

Decision: September 20, 2007

Charge: Criminal Code Section 236(b)

Counsel: Crown - Richard Hartlen and Jill Nette
Defence - David Bright, Q.C. and Jan Murray

By the Court:

[1] Christopher Moore died on May 7, 2006. He never regained consciousness after suffering a massive head injury on April 30, 2006 when he was punched outside Whistlers Pub in Stewiacke and fell backwards onto pavement. On May 18, 2006, Mr. Isenor was charged with manslaughter in Mr. Moore's death.

[2] There is no dispute that Brett Isenor delivered the fatal punch to Mr. Moore. Mr. Isenor made two statements to police, one on April 30, 2006 and the other on May 18, 2006 in which he admitted he had punched Mr. Moore outside Whistlers on April 30. These statements were found to be voluntary following a four-day *voir dire*. (*R. v. Isenor*, [2007] NSPC 36) Eye witnesses gave evidence at trial to seeing Mr. Isenor punch Mr. Moore, knocking him to the ground. Mr. Isenor testified at trial that he had punched Mr. Moore once, in self-defence.

Cause of Death

[3] The Defence has accepted that Mr. Moore's death was the result of blunt force head injury, as determined by Dr. Martin Bullock, a forensic pathologist who performed the autopsy on Mr. Moore and was qualified at trial by consent to give expert opinion evidence on the cause of death. Dr. Bullock's autopsy examination of Mr. Moore identified extensive subarachnoid bleeding as evidence of blunt force head injury. In Dr. Bullock's opinion the injuries to Mr. Moore's brain were consistent with a fall to the ground. Dr Bullock testified that a man, the height of Mr. Moore, falling straight back on to concrete would hit with enough force to cause death.

The Nature of the Trial Evidence

[4] Evidence was heard in Mr. Isenor's trial over 13 days between June 14 and July 6, 2007. Final submissions were made by counsel on July 20. Police officers testified at the *voir dire* and evidence was given about the paramedic response to Mr. Moore's injuries and his treatment at the Colchester Hospital in Truro. As I have noted, cause of death is not disputed nor is Mr. Isenor's identity as the person who punched Mr. Moore.

[5] Photographs of Whistlers Pub, both inside and outside, were taken on April 30, 2006 at 9:45 a.m. by Sgt. MacKay of the Truro Forensic Identification unit. Photograph #6 of Exhibit 8 (a booklet of photographs) shows George Street outside of Whistlers with a yellow evidence marker displaying the number 1. This was placed in the street by the police to show the location where investigators found reddish material that responded positively to a hemastick test for blood. Evidence was led by both Crown and Defence through civilian witnesses of events at Whistlers on the night of April 29 and the early morning hours of April 30. Considerable reference was made by these witnesses to photographic evidence, Exhibits 8 through 13, introduced to show Whistlers from the outside as well as various views from inside the pub. Witnesses were asked to use red sticky dots and coloured push pins to indicate where they had been standing outside the pub when they observed certain events, and where Mr. Moore was at various times including when he was punched. There was considerable variation amongst the witnesses as to what they had seen, both inside Whistlers and later on, out in the parking lots and street, and it will be necessary for me to review this evidence in some detail.

[6] However it is of some assistance to begin with a description of the physical setting where the relevant events took place and a general summary of these events.

Whistlers Pub

[7] Whistlers Pub and Grub faces on to George Street in the town of Stewiacke. On April 29 and 30, 2006 it could be entered through a front door or a side door. The side door opens into the side parking lot. There is a patio area extending off the main pub building into the side parking lot. Out in front of Whistlers, along George Street, there are six lateral parking spaces. A sidewalk runs along the front of the building between Whistlers and the lateral parking spaces. Moving to the right, the first lateral parking space lies opposite the side parking lot, the second space is opposite the Whistlers' patio and the third and fourth spaces are directly outside the front of Whistlers. Near the corner of the patio by George Street, there is a telephone pole/lamp post. This is situated, facing the front door of Whistlers, to the left of that door and just before the entrance to the side parking lot. Further to the left, past the entrance to the side parking lot, is located the town hall. Running up to the sidewalk, just below the side parking lot and bisecting George Street, is a zebra crossing (crosswalk) in which a manhole is located. There is a shorter crosswalk to the left of the main crosswalk, running perpendicular to it. The main crosswalk, the shorter crosswalk, and the entrance to the side parking lot are all to the left of Whistlers, in the direction of the town hall. Other reference points mentioned in the evidence included, a black hole in the side parking lot, that may have been a pot hole, a wet spot on George Street and patches of grass by the lamp post. Across the street from Whistlers are grass medians, a laundromat and additional areas for parking.

[8] Photographs taken by Sgt. MacKay (Exhibit #8, photographs 14 through 17)) show the inside of Whistlers pub. The entrance door off George Street is by the family dining area at the front of the pub. A half-wall, designed to resemble a fence, cordons off the family dining area on the right: on the left is the dance floor and disc jockey booth. Toward the back of the pub is a solid half-wall behind which is the bar. An ATM stands near the bar and across from it are two pool tables and then the washrooms. The door leading into the side parking lot is next to the bar and across from the pool tables. The pool tables are quite close together although witnesses testified there was space to move around them.

The Trial Witnesses and a Summary of Alleged Events at Whistlers on April 30

[9] Whistlers is located in close proximity to the Iron Forge, Stewiacke's other pub. On April 29, certain of the witnesses, including Mr. Isenor and his girlfriend, Erin Duffy, went first to the Iron Forge, heading over to Whistlers when it closed.

[10] There is no real consensus amongst the various witness as to the events that transpired following the arrival of Mr. Isenor and Ms. Duffy at Whistlers. All or some of the following incidents are said to have occurred: Mr. Moore, who was at Whistlers already, called Ms. Duffy a whore, Ms. Duffy pushed Mr. Moore, a verbal altercation arose between Mr. Moore and patrons at Whistlers, including Mr. Isenor, Mr. Moore left Whistlers at closing time and once outside, tried to get into a taxi, an agitated crowd in front of Whistlers continued to have an acrimonious verbal back-

and-forth with Mr. Moore, Ms. Duffy, very upset, came up to Mr. Moore and slapped him and was extricated from the confrontation with Mr. Moore by Mr. Isenor. Some witnesses, testifying for the Crown, say the extrication involved Mr. Isenor grabbing Ms. Duffy, pushing her aside and punching Mr. Moore, sending him over backwards onto the street. Other witnesses, testifying for the Defence, say they saw Mr. Isenor guiding Ms. Duffy down the street away from Mr. Moore with Mr. Moore following and taunting them. These witnesses say that Mr. Isenor, pushing Ms. Duffy ahead, turned, and with a single punch knocked Mr. Moore down.

[11] A determination of what happened at Whistlers Pub on the night of April 29 and early morning hours of April 30 requires an examination of the testimony of the witnesses and an assessment of it with regard to the witnesses' states of sobriety, their ability to observe the evening's events, the circumstances in which the events occurred and other factors that bear on the reliability of the evidence. I want to note that in my assessment of the evidence in this case, I am not obliged to accept everything a witness says or conversely if I feel I cannot accept part of what a witness says, I am equally not obliged to reject the whole of that witness' testimony. I may accept the whole, none or part of a witness' evidence. (*R. v. Comer*, [2006] N.S.J. No. 291 at paragraph 94 (N.S.S.C.))

The Alcohol Consumption of the Witnesses, Mr. Isenor and Mr. Moore

[12] Events began their tragic trajectory on April 29 as both Mr. Isenor and Mr. Moore independently made their decisions to head over to Whistlers. Mr. Isenor had been “four-wheeling”

during the afternoon and evening at Coldstream with his friend, Michael Leighton, and Ms. Duffy. Mr. Isenor drank some beer but he was not intoxicated. Later, Mr. Isenor, Ms. Duffy, Mr. Leighton and his wife went out to the Iron Forge and then to Whistlers. When they arrived at the Iron Forge, sometime around or somewhat after midnight on April 30, Mr. Moore was already across the street at Whistlers with his cousin, Claudia Priess and her husband, Troy Priess. Earlier Mr. Moore had been at the Priess home, drinking and playing cards. Mr. Moore drank a pint of rum there and three to four doubles of rum and maybe a beer as well at Whistlers. Ms. Priess testified that by the end of the night at Whistlers, Mr. Moore had “a pretty good buzz on.”

[13] Alcohol appears not to have had a subduing effect on Mr. Moore. He was known to be “noisy” with a tendency to “mouth off” when drinking. Mr. Moore’s friend, Mr. Priess, testified that he was “pretty comical” when drinking and “liked to carry on, get people laughing.” Todd Paley, the doorman, also described Mr. Moore as someone who liked to joke around and drink a lot. He also said Mr. Moore could be “very, very loud.” The evidence from other witnesses suggests Mr. Moore was dis-inhibited when drinking, with a tendency to be rude and obnoxious. Rodney Clarke who knew Mr. Moore through friends said he would “needle people and get chippy [and] try to instigate things.” Ms. Priess confirmed that Mr. Moore was being loud at Whistlers on April 30 and Mr. Leighton said Mr. Moore used his arm to push him out of his way at the pool tables.

[14] Mr. Moore’s behaviour at Whistlers on April 30 and other indicators point to him having consumed a significant amount of alcohol before Whistlers closed. It was doorman Todd Paley’s opinion that at the time of last call Mr. Moore was intoxicated and could be heard slurring his words.

Blood was taken from Mr. Moore at the Colchester Hospital on April 30 and tested for its blood alcohol content (BAC). The Defence expert toxicologist, Dr. Peter Mullen, who analyzed these records, concluded that Mr. Moore's BAC at 2 a.m. on April 30 was between 210 and 223 milligrams of alcohol in 100 millilitres of blood. He testified that a BAC at this level would result in disorientation, decreased reaction time, behavioural changes and adverse cognitive effects. Other effects would be slurred speech and short term memory deficits. Dr. Mullen said a person's aggressive tendencies would likely be amplified with a BAC this high. He acknowledged that a person who was habituated to alcohol use would seem less intoxicated to observers than a novice drinker with as high a blood alcohol content.

[15] The witnesses gathered at Whistlers on April 30 in the final hour and a half or so before it closed at about 1:50 a.m. were in varying states of intoxication or sobriety and located in various parts of the pub. Stephanie Caines, Laura Burke and Rodney Clarke were seated in the family dining area as were Christina Parker and Nancy Scothorn. None of these witnesses had been drinking heavily: Ms. Caines was "feeling good" or according to Ms. Burke "had a pretty good buzz on." As for herself, Ms. Burke said she did not have enough to get her "buzzing" or "drunk." Mr. Clarke recalls having a couple of drinks of rye although Ms. Burke remembers him drinking as many as 4 - 6 beers.

[16] Christina Parker, who had a couple of drinks before going to Whistlers, had a rum and coke while she was there. Ms. Scothorn, as the designated driver, drank pop. The evidence does not suggest that Ms. Parker or Ms. Scothorn were intoxicated.

[17] Tracy Hill, who went to Whistlers with her friend Nancy Brown and Ms. Brown's husband, had 4 - 5 liqueurs there, with the effect that she was "feeling good" but not drunk although she would not have driven a car.

[18] Mr. Isenor, according to his own testimony, and that of Michael Leighton, drank enough on the night of April 29 to be "feeling good" but was not intoxicated. He was in a great mood. Mr. Leighton was "feeling good, chipper" after about four White Russians (vodka, Kahlua and milk) at the Iron Forge and Whistlers. Mr. Nicholson, who recalls walking over to Whistlers from the Iron Forge with Mr. Isenor and Ms. Duffy, had not been drinking earlier in the evening. He had 3 - 4 bottles of beer at the Iron Forge and a couple more at Whistlers. He was not intoxicated but testified that it was "likely" he was starting to "feel good."

[19] It was Ms. Duffy who had more to drink than either Mr. Isenor or Mr. Leighton. The evidence clearly established that by the time the Isenor party arrived at Whistlers, Ms. Duffy was intoxicated.

[20] Ms. Priess, who had not been drinking before going to Whistlers, had a couple of cocktails made with cranberry juice, orange juice and vodka. Mr. Priess, who had 4 - 5 beers at home, drank 2 - 3 beers at Whistlers as well as a drink or two of rum.

[21] There is no evidence that Mr. Paley, working as one of two doormen that night at Whistlers,

was drinking at all. Jeff Turple, the disc jockey, and the other Whistler's employee who testified, had adopted a protocol for himself at work, one beer an hour while on the job. He said he would not have had his first beer on April 29 until 10 - 11 p.m.

[22] Other witnesses had been drinking heavily. By the time Mark Cogger got to Whistlers at about 11:30 p.m. on April 29, he had been drinking since 10 a.m. that morning. Cross-examination of Mr. Cogger about his drinking at each venue during the course of the day brought out that he had between 19 - 26 beers before he got to Whistlers and 4 White Russians at Whistlers. Mr. Cogger acknowledged that all this alcohol made him drunk.

[23] Corey Palmer had only started drinking around 8 - 9 p.m. on April 29 but managed to drink as much as a dozen beer as well as a couple of rums and cokes in the course of the evening.

The Scene Inside Whistlers

[24] Witnesses' recall of the numbers of patrons at Whistlers toward the end of the night differed quite dramatically. While the fact of these discrepancies does not strike me as a significant issue, the most reliable estimate likely comes from Todd Paley. As the doorman he not only had the experience, he had the interest in estimating as accurately as possible the number of people at the pub. After all, he, with the other doorman, James Frizzle who did not testify, had the responsibility of managing the crowd as the pub's business wound down for the night. Mr. Paley estimated there to have been 50 - 55 people at Whistlers around midnight, that number swelling to 80 - 90 by the

end of the night. There was talking, drinking and dancing as the music played. The spat that erupted between Mr. Moore and other patrons near closing time happened in the midst of all the other noise and activity on a relatively busy Saturday night.

The Whore Comment

[25] When Mr. Isenor arrived at Whistlers, Mr. Moore was playing pool with Claudia and Troy Priess at the pool table over by the far wall. Mr. Isenor testified that he stopped near the ATM by the half wall abutting the family dining area. He noticed Mr. Moore, whom he recognized from Stewiacke, standing by the table and chair next to the pool table and said he heard a “ruckus” in the area. Mr. Isenor could hear cursing and swearing and arguing. Mr. Moore, who was standing by the brick corner near the entrance to the bar, was arguing with Corey Palmer, Mark McBurnie and Mark Cogger. Mr. Isenor could tell Mr. Palmer was getting quite agitated. Ms. Duffy, whom Mr. Isenor said had gone to the bar to get them drinks, came over to him, crying. She said Mr. Moore had called her a “whore”. Mr. Isenor recalls that he told Ms. Duffy to ignore him. His view at the time was that Mr. Moore enjoyed getting people upset and that it was best to let the matter go.

[26] Ms. Duffy kept crying, an emotional reaction Mr. Isenor was unaccustomed to as she was someone who did not show her emotions. He had never seen her cry before so he knew her feelings had been really hurt by Mr. Moore’s comment. The fact is she was also drunk. She left and Mr. Isenor thought she went straight to the washroom or over to friends. He recalls next seeing her outside.

[27] Ms. Duffy confirmed in her evidence that she did in fact go to the washroom after Mr. Isenor told her not to pay any heed to Mr. Moore. She testified that after last call she had walked past Mr. Moore by the pool tables with drinks for herself and Mr. Isenor. He looked at her as she went past and said with a smirk: "She's a whore." While it was Ms. Duffy's recollection that this comment was directed at Mr. Isenor who was a few steps ahead of her but did not hear it, the evidence indicates that Mr. Isenor had not gone up to the bar with her.

[28] Ms. Duffy could not understand what would motivate Mr. Moore, whom she did not know, to say such a thing. He did not appear to be angry and laughed at her when she asked him why he said it. There is no evidence that Mr. Moore was acting aggressively toward either Ms. Duffy or Mr. Isenor.

[29] Todd Paley recalls seeing Ms. Duffy, about 10 minutes after last call was announced, walk by Mr. Moore, who was by the side of the bar, and push him. When Mr. Paley went over to see what was going on, Ms. Duffy told him she had been called a whore by Mr. Moore. Mr. Paley tried to calm her down and she left the bar area. Mr. Paley testified that Mr. Isenor was not in the vicinity at the time. When pushed, Mr. Moore put his hands up and protested that he hadn't said or done anything.

[30] Claudia Priess, who was sitting close to where Mr. Moore was standing, did not hear him call Ms. Duffy a whore, although she recalls he was being quite loud. She observed Ms. Duffy push

Mr. Moore who ignored her. After pushing him, Ms. Duffy took off. Ms. Priess did not see Mr. Isenor.

[31] No other witnesses observed a physical interaction between Ms. Duffy and Mr. Moore at this time although Mr. Nicholson, standing near the ATM, testified that as it was getting nearer closing time he noticed Mr. Moore having words with Ms. Duffy down by the pool tables. He also testified that he saw Mr. Isenor, whom he had been standing with and chatting to, go and remove Ms. Duffy. Michael Leighton also testified to observing Mr. Isenor go and “pull Ms. Duffy out of there.” Significantly, neither Mr. Isenor nor Ms. Duffy described such an intervention inside the pub.

The Confrontation With Mr. Moore Inside Whistlers

[32] Mr. Isenor decided to go and ask Mr. Moore about the comment he had apparently made to Ms. Duffy. He agreed with Todd Paley’s recollection that he went over to Mr. Moore and confronted him with the words: “Did you call my old lady a whore?” Claudia Priess testified she did not hear Mr. Isenor confront Mr. Moore, but said she observed Mr. Moore tell Mr. Isenor he did not say this and offer to shake hands which Mr. Isenor refused. Mr. Priess said he witnessed this as well.

[33] It seems likely that Mr. Moore was already embroiled in a heated exchange with others at this point, as Mr. Isenor observed before Ms. Duffy spoke to him, and that this continued as Mr. Isenor approached him. Mr. Paley observed people crowding around Mr. Moore and assumed it had

to do with the incident involving Ms. Duffy. He identified Mark Cogger, Corey Palmer and Brett Isenor as part of a gathering crowd, standing shoulder to shoulder, talking loudly and accusing Mr. Moore of calling Ms. Duffy a whore. Mr. Moore denied knowing what they were talking about. The crowd was milling about and pushing although Mr. Paley did not observe Mr. Isenor being involved. Mr. Moore made no physical movements toward the group although he was getting upset and swearing.

[34] Troy Priess testified that he observed a verbal confrontation between Mr. Isenor and Mr. Moore that came to nothing. He identified Corey Palmer as being involved as well.

[35] Jeff Turple noticed Mr. Moore, as the focal point of a verbal altercation, being obnoxious and “mouthing off” at a lot of people who were “mouthing off” back at him. Mr. Moore was not holding back if someone said something to him and there was “foul language” being traded back and forth. Mr. Turple did become concerned around closing time that a fight might break out as someone “seemed to be trying to get at Mr. Moore real bad and he seemed to be trying to get to them.” If this was the case, although Todd Paley did not refer to it in his testimony, there is nothing in the evidence to suggest that Mr. Isenor was trying to start a fight with Mr. Moore or *vice versa*.

[36] There may have been the potential for a physical flare-up between Corey Palmer and Mr. Moore if Mr. Palmer’s memory is correct that Mr. Moore was being aggressive and intimidating around the pool tables. Mr. Palmer testified that while he had been at the pool table next to Mr. Moore, he had put up with Mr. Moore’s overbearing conduct for awhile and then had words with

him, telling Mr. Moore to give him some room and get “out of [his] face.” He testified that he told Mr. Moore to keep his distance or “we’re going to have problems” or “something like that.” Mr. Palmer remembers the atmosphere getting tense with people in the vicinity getting angry and starting to swear at Mr. Moore. Mr. Palmer thought a fight might break out. He was surprised by Mr. Isenor’s evidence that he had been yelling at Mr. Moore and jostling Mr. Isenor out of the way when Mr. Isenor came over to speak to Mr. Moore. It is reasonable to conclude that given the amount Mr. Palmer had to drink, he does not have total recall of what occurred that night.

[37] Mr. Cogger acknowledged he was part of a group crowding in around Mr. Moore and “chirping” back and forth with him, cursing and swearing. Tempers were getting hot and Mr. Cogger said to Mr. Moore: “Why do you always have to start shit up?” Mr. Paley told him to shut up. It could have been Mr. Cogger or Mr. Palmer who were observed by Mr. Leighton to be “in a scuffle” with Mr. Moore that was resolved by the bouncers just before closing time.

[38] Laura Burke, in the family dining section, was the only witness in that area who noticed anything happening by the pool tables. She testified that the half wall blocked the view of that area although she did hear loud voices that she recalled lasting only a minute or two. Just before closing time she noticed people arguing by the pool tables.

[39] Mr. Isenor testified that he felt the situation by the pool tables was volatile and ready to ignite. He thought that Corey Palmer and Mark Cogger might get “into it” with Mr. Moore. He thought a fist fight might break out although he did not expect to be part of it. He said he had simply

wanted to let Mr. Moore know that he knew Mr. Moore had called Ms. Duffy a whore. He testified that he was not trying to “save face” or provoke a fight but just wanted to hear what Mr. Moore had to say. Mr. Isenor said that despite his presence, Mr. Moore never stopped arguing with Mr. Palmer and Mr. Cogger. Mr. Isenor was essentially pushed to one side and went back to where he had been by the ATM and then to the washroom.

[40] The kerfuffle by the pool tables was most likely triggered by Corey Palmer and Mr. Moore having words and then amplified by Mr. Moore calling Ms. Duffy a whore, which, given his level of intoxication, he may well have done, to be crudely provocative for the purpose of getting a rise out of people. Even if Mr. Moore did not call Ms. Duffy a whore, he said something in her presence that caused her to believe he had used this word in reference to her and consequently, she felt insulted and hurt. The evidence does not suggest that Mr. Moore was trying to provoke a physical confrontation as he was not physically aggressive or threatening to anyone inside Whistlers, just rude and aggravating. Tempers flared and words were thrown back and forth but the tension did not erupt into fighting. There is also no persuasive evidence that Mr. Moore was trying to antagonize Mr. Isenor.

Closing Time and The Scene Outside Whistlers

[41] Todd Paley waded into the hostile crowd around Mr. Moore, trying to calm everyone down. Mr. Paley’s evidence was that someone said a cab had arrived and so he escorted people, including Mr. Moore, out the side door. Mr. Paley did not go outside. Mr. Moore left with Claudia and Troy

Priess. Mr. Paley saw Mr. Isenor subsequently go out the side door as well. Mr. Isenor's evidence was that he did so after first going to the washroom.

[42] A large number of people, disgorged from Whistlers, spilled out into George Street and the side parking lot. Still in the company of Claudia and Troy Priess, Mr. Moore was followed outside by a small group who had sustained their agitated mood. Mr. Moore and the Priesses headed toward George Street. From the side parking lot, Mr. Cogger observed "chirping" back and forth between Mr. Moore and others. Corey Palmer admitted to being one of the people who was "beaking off" at Mr. Moore, calling out profanities at him. People were milling about. Some witnesses observed Mr. Moore trying to get into a taxi cab that was already taken. Presumably witnesses who did not see this emerged from Whistlers a little after the witnesses who saw the cab. Ms. Priess recalls that the cab had pulled into the first or second lateral parking space. After it left, Ms. Priess waited with Mr. Priess and Mr. Moore for another one to arrive.

[43] The atmosphere outside Whistlers remained charged. People were yelling and there was a lot of noise. Ms. Priess recalls Mr. Moore, facing toward Whistlers, with his back to the street, "yakking" at people who were still "pretty unhappy" with him. Mr. Moore was agitated as well and Ms. Priess thought people were spoiling for a fight. Ms. Scothorn, waiting with Ms. Parker in her car out in front of Whistlers, noticed an agitated crowd and was concerned a fight might break out.

The Attack on Mr. Moore by Ms. Duffy

[44] In the midst of the verbal sparring outside Whistlers, Ms. Duffy emerged from the crowd to slap Mr. Moore on the face. Accounts vary as to certain details but there seems to be no doubt that Ms. Duffy confronted Mr. Moore outside Whistlers, still upset over what he had said to, or about her inside, and either hit or tried to hit him. Ms. Duffy recalls trying to hit Mr. Moore as he was getting into the taxi. People were surrounding Mr. Moore, hollering at him. As he had done inside, Mr. Moore continued to deny that he had said anything.

[45] Witnesses saw Ms. Duffy go after Mr. Moore. Ms. Priess, standing in the side parking lot, could see Ms. Duffy swinging at Mr. Moore. Mr. Priess also saw Ms. Duffy come out of the crowd, he thought in the general vicinity of the front door, and hit Mr. Moore. Mr. Moore had his arms up in a defensive position while Ms. Duffy “whaled away” at them. Jeff Turple saw Ms. Duffy slap Mr. Moore in his right cheek. Laura Burke said Ms. Duffy came from the side parking lot, screaming at Mr. Moore and slapping him in the face. She testified that Mr. Moore tried to step away from Ms. Duffy, moving backwards as she was walking toward him, slapping him. Stephanie Caines said she saw Ms. Duffy come up to Mr. Moore and shove him, once, in the chest. Although the push did not cause him to lose his balance, Ms. Caines said it made him stagger to the curb. Rodney Clarke testified he saw a woman slap Mr. Moore and then push him down the street. He said that Ms. Duffy got hold of Mr. Moore’s left arm and was pulling him down which had the effect of causing Mr. Moore to lean forward.

[46] Other witnesses observed Ms. Duffy to be in a volatile exchange with Mr. Moore: Corey Palmer described her as “hysterical, crying, yelling”; Dale Nicholson observed “heated squawking”

and Michael Leighton testified to having seen “an argument.”

[47] Mr. Isenor noticed Ms. Duffy confronting Mr. Moore, hollering and screaming and flailing her arms as “hard and fast as she could.” He testified that Mr. Moore had his back up against the patio deck and was batting her hands down as she went at him.

[48] It is curious that two disinterested witnesses, Christina Parker and Nancy Scothorn, who did not know Mr. Isenor, Ms. Duffy or Mr. Moore, saw no altercation between Ms. Duffy and Mr. Moore even though they were seated in a car parked right in front of Whistlers. When Whistlers closed, Ms. Parker left with Ms. Scothorn by the front door and recalls seeing a taxi cab driving off as she went outside. As they waited and talked in the car, neither of them observed any yelling or screaming by the telephone pole/lamp post near the corner of the patio. Ms. Parker recalls the car being parked in the second lateral parking space outside Whistlers on George Street. Ms. Scothorn testified she had parked right in front of Whistler’s front door in the third lateral parking space.

[49] It is hard to reconcile how Ms. Parker and Ms. Scothorn saw nothing of the Duffy-Moore encounter when they were so well situated to do so. They were sufficiently aware of the crowd in the area that Ms. Scothorn was concerned there might be a fight. Ms. Scothorn had not been drinking at all and Ms. Parker had had only one drink at Whistlers. However the car’s engine was running to defrost the windows, which were closed, and Ms. Parker, in the rear passenger seat, and Ms. Scothorn, in the driver’s seat, were chatting back and forth with each other. The only explanation can be that they just did not notice Ms. Duffy’s set-to with Mr. Moore and that it did

not occur right alongside the car which it would have if the car had been in the second lateral parking space opposite the telephone pole/lamp post. Most probably then the car was parked, as Ms. Scothorn recalls, opposite Whistler's front door, in the third lateral parking space. It is also likely that Ms. Scothorn's recollection of the car's location is the most reliable as she was the driver.

[50] I am satisfied the evidence establishes that when Whistlers closed on April 30, Ms. Duffy was not in a frame of mind to follow Mr. Isenor's advice to ignore Mr. Moore. Over-wrought and intoxicated, she launched herself at Mr. Moore outside, infuriated by the insult and his denials. A petite woman, she was little more than a nuisance to the much larger, heavier man, who parried off her assault. There is no evidence Mr. Moore was aggressive toward Ms. Duffy nor that he threatened or assaulted her.

Jason Levy

[51] There was evidence at trial that Jason Levy may have got in between Ms. Duffy and Mr. Moore. Ms. Duffy recalls him being there as does Tracy Hill. Laura Burke said she saw a man, with his back to her, trying to block Ms. Duffy's blows. She could not see who it was. If it was the case that Mr. Levy inserted himself between Ms. Duffy and Mr. Moore, then he could have offered valuable evidence as to the critical events that occurred shortly after that confrontation. However Mr. Levy's testimony contained nothing of any value at all.

[52] Jason Levy is a longtime friend of Mr. Isenor's from childhood. On April 29 he had been

drinking since 1 - 2 p.m. and by the time he left Whistlers he estimated he had downed 15 beers and a pint of rum. He also acknowledged drinking six tequila shots at Whistlers. Despite the amount he had to drink, he was able to give a statement to police on the morning of April 30. He acknowledged, when cross-examined by the Crown after a successful section 9(2) *Canada Evidence Act* application, that on the audiotape of the statement he was responsive to the questions posed and did not sound intoxicated.

[53] In the witness box, Mr. Levy had great difficulty remembering events outside of Whistlers. He claimed that reviewing his statement to the police did not assist in refreshing his memory. In his testimony, he recalled seeing Ms. Duffy exchanging words with Mr. Moore and acknowledged he had not told the police that when they interviewed him because, he said, the police did not ask him about Ms. Duffy. He said he had no recollection however of seeing any physical contact between Ms. Duffy and Mr. Moore and maintained that he does not remember who punched Mr. Moore.

[54] I have concluded that Mr. Levy's evidence at trial, such as it was, is essentially worthless. He has either suffered a genuine loss of memory since April 30, 2006 or, as I suspect, he was simply unwilling to be forthcoming at trial about what he witnessed and recalls. His selectively fragmented memory and his combative and resistant demeanor on the stand make the latter scenario the more probable one. As a consequence no use can be made of his testimony.

The Extricating of Ms. Duffy From the Confrontation With Mr. Moore

[55] The atmosphere outside Whistlers after closing continued to heat up and was tense. The crowd “beaking off” at Mr. Moore was unfriendly and agitated. Mr. Moore was trading insults with them. Todd Paley, who had not gone outside, was concerned enough about the angry demeanor of the crowd that had spilled out of Whistlers at closing time that he had instructed James Frizzle to call 911. After all the yelling and swearing inside, Mr. Paley wanted the police to come by and make sure everyone was alright.

[56] Ms. Duffy wasted no time going after Mr. Moore once she got outside. Her recollection is that while she was still confronting Mr. Moore, Mr. Isenor grabbed her by her shoulder and turned her around. She did not describe a scenario of being guided down the street by Mr. Isenor toward the town hall, with Mr. Moore following behind and swearing at them which is what Mr. Isenor testified to in his evidence.

[57] Jeff Turple, standing in the side parking lot, observed Mr. Isenor react immediately to Ms. Duffy slapping Mr. Moore, pulling her “ a good distance away so she couldn’t hit Mr. Moore and he couldn’t hit her.” Thinking the incident was over, Mr. Turple spoke to someone and then went back inside. Dale Nicholson, also in the side parking lot, witnessed Mr. Isenor head down to remove Ms. Duffy from the situation, guiding her ahead of him down the street toward the crosswalk. She was very upset. Michael Leighton also testified to seeing Mr. Isenor grab Ms. Duffy and push her down toward the town hall where he and his wife were standing.

[58] Some witnesses testified to seeing no attempt by Mr. Isenor to extricate Ms. Duffy from her

confrontation with Mr. Moore. Claudia Priess, Troy Priess, and Stephanie Caines did not describe seeing Mr. Isenor intervene with Ms. Duffy. Laura Burke testified that after confronting him, Ms. Duffy walked away from Mr. Moore on her own. Tracy Hill did not see Ms. Duffy at all although she saw Mr. Moore and Mr. Isenor yelling at each other. Corey Palmer testified he did not see Mr. Isenor, saying that his attention was drawn to Ms. Duffy who was hysterical and crying and yelling at Mr. Moore.

Locating the Duffy-Moore Altercation and the Punch

[59] No consensus emerged from the evidence of the witnesses as to where Mr. Moore was standing when Ms. Duffy confronted him, triggering Mr. Isenor's involvement. Witnesses variously described the location as being by the telephone pole/lamp post (Erin Duffy, Claudia Priess, Rodney Clarke, Michael Leighton and Brett Isenor), although, as noted, Christine Parker and Nancy Scothorn, seated in the car near that location saw nothing happening there; in the vicinity of the first and second lateral parking spots (Mark Cogger, Dale Nicholson and Jeff Turple); and in the area just above the sidewalk (Stephanie Caines) or just below, near the curb (Corey Palmer). Troy Priess recalled the Duffy-Moore interaction occurring half-way between the telephone pole/lamp post and the front door of Whistlers.

[60] What can be drawn from the witnesses' recollections is that they did not witness the Duffy-Moore encounter occurring in the vicinity of where the human blood was found.

[61] Witnesses had differing recollections as to where Mr. Moore was located when he was punched. The fixing of this location is assisted by the discovery of the human blood on George Street, just below the first lateral parking space. In photographs #5 and #6 in Exhibit 8, the marker identifying the location of the blood appears to be directly to the right of the manhole.

[62] There is no dispute on the evidence that Mr. Moore was felled by a single punch, landing on his back with his head hitting hard on the pavement. He did not get up or move again and was found in this location by those who rushed to his aid and, later, the paramedics. The presence of human blood at this location indicates it is where Mr. Moore's head hit the ground; there is no evidence that anyone else was bleeding at the scene. Although no measurements were made by investigators, which would have been helpful, an examination of the evidence photographs indicates the location of the blood to be some steps away from any of the locations identified as being the site of the Duffy-Moore confrontation. It is also some steps from the manhole cover where Mr. Isenor testified that he stopped and turned to face Mr. Moore, which I will discuss shortly.

[63] What is significant about the blood evidence in relation to any of the witnesses' locations for the Duffy-Moore confrontation is that it indicates Mr. Moore must have moved, before he was punched, from where he was standing when Ms. Duffy went at him, toward the direction of the town hall. This is consistent with Mr. Isenor's testimony that Mr. Moore followed him when he was guiding Ms. Duffy away from where she had confronted him..

[64] I have asked myself if the evidence reveals any other explanation for how Mr. Moore ended

up near the crosswalk and some feet away from where Ms. Duffy confronted him. I have considered that a few witnesses testified that Ms. Duffy either pushed or shoved Mr. Moore outside Whistlers. The majority of witnesses who witnessed the Duffy-Moore incident, including Claudia and Troy Priess, saw Ms. Duffy trying to hit or hitting Mr. Moore with him having no difficulty warding her off. Three witnesses claimed to see the events somewhat differently. Mr. Clarke said he saw Ms. Duffy push Mr. Moore causing them both to go down the street. Laura Burke testified that Mr. Moore tried to step away from Ms. Duffy and moved backwards as she was walking toward him and slapping him. She said Ms. Duffy then left. Stephanie Caines described seeing Ms. Duffy push Mr. Moore who staggered to the curb as a result.

[65] These descriptions by Rodney Clarke, Laura Burke and Stephanie Caines of Mr. Moore being pushed by Ms. Duffy or moving away from her do not accord with the observations of other witnesses at the scene. The other witnesses who saw the Duffy-Moore incident witnessed Mr. Moore deflecting Ms. Duffy's assault and seeming to be unperturbed by it. Furthermore it does not seem likely that petite Ms. Duffy would have been able to move the much bigger Mr. Moore or that he would have felt any need to back away from her when he had not retreated from anyone else that night.

[66] There is eyewitness evidence that Mr. Moore did move from where Ms. Duffy confronted him. Tracy Hill, Dale Nicholson and Michael Leighton all saw some movement by Mr. Moore toward Mr. Isenor before the punch. I found nothing in the testimony or demeanor of any of these witnesses that gave me a basis to conclude this evidence should be regarded with suspicion.

[67] Of these witnesses, only Mr. Leighton was more than an acquaintance of Mr. Isenor and I did not form the view that he was tailoring or crafting his evidence to assist a friend. I found Mr. Leighton to be a careful and thoughtful witness. Cross-examination did not establish that the essential aspects of Mr. Leighton's trial testimony were inconsistent with his April 30 police statement which was given while Mr. Isenor was in police custody and before there would have been any opportunity for collusion. Presumably therefore, the statement Mr. Leighton gave shortly after the incident contained the same version of events that he testified to in court or the Crown would have brought out and emphasized the inconsistencies.

[68] It was the Crown's submission that Mr. Nicholson "had an agenda" and was "somewhat argumentative without reason" during cross-examination. This was not the impression I formed. Mr. Nicholson was unwilling to agree with propositions put to him by the Crown and held to his own version of events. His steadfast presentation seemed credible to me. His evidence indicates he was wary of the crowd that night, particularly those individuals he thought were with Mr. Moore: what is relevant about this is not whether he was in error in identifying who was with Mr. Moore but whether his observations that night were made under distracted conditions. The evidence indicated to me that, to some extent, Mr. Nicholson's attention was drawn away from events both inside and outside Whistlers.

[69] As for Ms. Hill, the fact that she did not go to the police, which the Crown argued was a blow to her credibility, is of no consequence in my opinion. The friend she went with to Whistlers on April 30 gave the police Ms. Hill's name and they never contacted her to take a statement. Her

answer on cross-examination as to why she did not approach the police herself was that she “didn’t want to get involved.” That may not be noble but it is not unusual or incomprehensible. Ms. Hill was under no obligation to contact the police; they knew she had been there that night but did not elect to interview her.

[70] The evidence of these eyewitnesses and the human blood on George Street satisfies me that before being punched by Mr. Isenor, Mr. Moore moved under his own power from where he was standing when Ms. Duffy confronted him.

[71] Mr. Isenor has testified that when he went to get Ms. Duffy away from Mr. Moore, Mr. Moore advanced on them in a combative and threatening manner. He testified that he turned and punched Mr. Moore who had relentlessly pursued him 20 - 25 feet down the street toward the town hall. The Crown’s theory is that Mr. Isenor did not remove Ms. Duffy a distance away and instead emerged from the crowd and punched Mr. Moore once, knocking him down and causing the fatal head injury. A number of witnesses at the scene testified to seeing Mr. Isenor emerge from the crowd and punch Mr. Moore while he was standing still. They did not describe Mr. Moore advancing on Mr. Isenor and Ms. Duffy as they moved down the street away from him. Also relevant to what Mr. Moore was doing when punched is what witnesses estimated as the time frame in which events happened. It is necessary to summarize all this crucial evidence and examine it carefully.

The Circumstances of The Punch

[72] Ms. Duffy was certainly drunk when Whistlers closed and her evidence has to be considered in light of that fact. She did not describe being guided down the street by Mr. Isenor, rather that he grabbed her shoulder and turned her around. The next thing she knew Mr. Moore was on the ground. She recalled this all happening in a matter of seconds. This description is consistent with Mr. Isenor coming out of the crowd and slugging Mr. Moore. However it is inconsistent with Mr. Moore having moved any distance from where Ms. Duffy confronted him. As I have concluded he must have, the reliability of Ms. Duffy's evidence of the circumstances of the punch is thrown into serious question. It was also disputed by Mr. Isenor in his testimony and his statement to the police on April 30. (3:50:14; 3:50:39) Ms. Duffy's level of intoxication may well have affected her recall.

[73] Todd Paley saw nothing of the events outside Whistlers as he remained inside after everyone had cleared out but it was his evidence that five minutes after Mr. Moore and his party had left through the side door, Jeff Turple came in to tell him Mr. Moore was on the ground. This evidence suggests that whatever happened outside, including Mr. Moore's attempt to get into the cab, the "beaking off" with the angry crowd, the confrontation by Ms. Duffy, the intervention of Mr. Isenor and the punch, all happened very quickly. It is a time estimate from a sober employee with no allegiances and provides a very compressed window for Mr. Moore to have been advancing on Mr. Isenor. Notably, Mr. Isenor himself said in his evidence that the time between his extracting Ms. Duffy and the punch was "just a few seconds."

[74] Mark Cogger was one of the witnesses who says he saw Mr. Isenor punch Mr. Moore while Mr. Moore was standing in the parking spot with his hands down. Mr. Cogger did not describe a

scenario that resembled what Mr. Isenor related as the events leading up to the punch. Mr. Cogger had also had a very significant amount to drink, a factor that could well have influenced his perceptions that night and memory of what he saw. However, Claudia Priess, Rodney Clarke, Troy Priess, Laura Burke, Stephanie Caines, Christina Parker and Nancy Scothorn all described seeing Mr. Isenor come out of the crowd, make a bee-line for Mr. Moore and punch him. All these witnesses claimed to have had a view of Mr. Moore to have seen him go down.

[75] Ms. Priess testified that she saw Mr. Isenor, half-running, go up to Mr. Moore and hit him. Ms. Duffy was still standing there. It was her recollection that Mr. Moore was standing with his back to the road and his head turned toward the side parking lot, which was where Mr. Isenor came from. Rodney Clarke said Mr. Isenor went by him on the sidewalk toward Mr. Moore out on the street and hit him while Ms. Duffy had Mr. Moore pulled down toward her. Mr. Clarke's description is called in to question by the fact that he recalls Mr. Moore taking 3 - 4 staggering steps before falling over backwards. Mr. Clarke marked the location of where Mr. Moore was standing when hit by Mr. Isenor as the middle of the third lateral parking space, which is likely not accurate as that is more probably where Christina Parker and Nancy Scothorn were parked. Not only does the staggering not accord with the preponderance of the evidence that Mr. Moore went straight over backwards like a felled tree, the direction of it described by Mr. Clarke is *away* from the blood found on George Street and not proximate to it.

[76] Laura Burke also testified to seeing Mr. Isenor come out from the side of Whistlers, past where she was standing near the telephone pole/lamp post and "smoke" Mr. Moore who was

standing in the second lateral parking spot near the pole. Ms. Burke marked this location with a red push pin on Exhibit #12. Again this is not located by the blood on George Street which throws the reliability of this recollection into question.

[77] Troy Priess also located Mr. Moore near the telephone pole/lamp post when he was punched. He testified that Mr. Moore was almost half-way between the pole and the front door of Whistlers when Ms. Duffy started slapping him. When asked to point this out on the aerial view shown in Exhibit #9, he indicated Mr. Moore was standing in the area identified by the blue push pin, by the pole. It was Mr. Priess' evidence that while Ms. Duffy was laying into Mr. Moore, Mr. Isenor "jumped out of the crowd" saying "I'll take care of this fucker", pushed Ms. Duffy out of the way and threw "a straight-ahead punch" at Mr. Moore. Mr. Moore had his back to George Street. Mr. Priess observed that he fell backwards, hit his head on the ground with an audible crack, and lay motionless.

[78] Mr. Priess marked the location of where Mr. Moore fell with a red sticky dot on photograph #13 in Exhibit 8. He placed the dot in the second lateral parking space by the telephone pole/lamp post. When asked about the "pool of liquid" on George Street (the blood) he said that was "pretty much" where Mr. Moore's head landed.

[79] The red dot Mr. Priess placed on photograph #13 is by the telephone pole/lamp post and not near the blood on the street. His placement of the red dot is inconsistent with Mr. Moore having moved from the pole in the direction of the crosswalk. On the other hand he also testified that the

blood pool was “pretty much” where Mr. Moore’s head hit the ground. This testimony conflicts with the placement of the red dot. It has to be acknowledged that if Mr. Priess’ evidence about the location of the punch is unreliable then his evidence about the circumstances of the punch may also be unreliable. He admitted it was “a little hard to see” as it was dark and “everyone was packed close together.”

[80] An assessment of Mr. Priess’ evidence must also take into account that of all the witnesses, he expressed the most animosity toward Mr. Isenor, agreeing on cross-examination that he didn’t like him and thought he should “pay for what he did.” He was also testy with Defence counsel and admitted that he resented answering his questions. He and Mr. Moore were “absolutely” the best of friends. Mr. Priess identified Mr. Isenor as “pretty much” the ringleader of the group crowded around Mr. Moore inside Whistlers which does not accord with the preponderance of the evidence and suggests a negative bias toward Mr. Isenor. He also incorrectly and emphatically recalled (“no question in my mind”) Todd Paley being out in front of Whistlers after it closed when it is clear Mr. Paley remained inside. Considering all this, I conclude it is unsafe for me to rely upon Mr. Priess’ evidence concerning the punching of Mr. Moore by Mr. Isenor.

[81] Stephanie Caines also testified that Mr. Isenor came running from the side and punched Mr. Moore in the face, noting with a red sticky dot marked SC2 on Exhibit #9 this to have occurred just behind the curb in the first lateral parking space. Ms. Caines said she came out the side door and was standing on the sidewalk when Mr. Isenor came around from her right and “charged” Mr. Moore. She said that the Duffy-Moore altercation occurred in front of her in the side parking lot

across from the corner of the patio and some distance from the telephone pole/lamp post, a location she marked with a red sticky dot SC1 on Exhibit #9. She testified that Ms. Duffy was not present when Mr. Moore was punched. This contrasted to her police statement where she said Ms. Duffy was “standing there too.” When this inconsistency was pointed out to her, she was unable to recall whether Ms. Duffy was there or not. It was Ms. Caines’ evidence that Mr. Moore, who was 3 - 4 feet away from her, was not in a defensive stance and made no threats or aggressive moves toward Mr. Isenor. The punch knocked Mr. Moore backwards onto the pavement. Ms. Caines testified she heard Mr. Isenor say: “There is more where that came from.”

[82] Ms. Caines agreed on cross-examination that she had incorrectly told the police in her statement of November 27, 2006 that she had witnessed Mr. Isenor, Ms. Duffy and Mr. Moore arguing. She admitted at trial that she was probably “going by hearsay” as she had not actually seen this but had not clarified that when she was interviewed. She did not recall seeing or hearing two groups of men yelling as though they wanted to have a fight. Her evidence too has to be regarded as somewhat unreliable.

[83] Christina Parker and Nancy Scothorn, seated in Ms. Scothorn’s car, each testified to seeing Mr. Isenor run at Mr. Moore from the side parking lot. Ms. Parker said Mr. Moore was punched in the crosswalk bisecting George Street, locating his position with a red sticky dot marked CP1 on Exhibit #11. She said this was 10 - 15 feet from where she and Ms. Scothorn were parked. Mr. Moore was just standing in the street, facing into the side parking lot, making no aggressive movements. Ms. Parker did not see people milling about or yelling or, as I

indicated earlier, the Duffy-Moore confrontation. She was not focused on Mr. Moore and it was the movement of Mr. Isenor out of the crowd that drew her attention. She saw him as he came into view past the fixed headrest of the car that partially blocked her view from where she was sitting in the back seat.

[84] Ms. Scothorn testified that Mr. Isenor seemed to come around the side of the crowd clustered in the entrance to the side parking lot, an area marked on Exhibit #9 by red sticky dots SC1 and SC2. She said she saw Mr. Isenor “jump up and throw a punch.” Mr. Moore, who was facing the side parking lot, fell straight back out toward George Street, suggesting to Ms. Scothorn that he was not expecting the hit. She said it all happened “so fast.” Ms. Scothorn was also not focused on Mr. Moore. She noticed him because of his height and glanced at him, glanced at the crowd, and was talking to Ms. Parker. Parked in the third lateral parking space, she estimated that she and Ms. Parker were 10 - 15 feet from Mr. Moore. She said Mr. Moore was standing by the yellow line that delineates the end of the first and the start of the second lateral parking spaces. She marked, with a yellow push pin in Exhibit #9, Mr. Moore’s position when punched. Ms. Scothorn indicated that she and Ms. Parker discussed what they had seen and agreed on the location of where it happened. Even with this sharing of their observations, they testified to being parked in different parking spaces and located Mr. Moore at very different places when he was punched.

[85] Dale Nicholson, Michael Leighton, and Tracy Hill testified to observing events similar to Mr. Isenor’s description of the circumstances of the punch. Mr. Nicholson said he saw Mr. Isenor, guiding Ms. Duffy in front of him, turn and punch Mr. Moore who was in pursuit. Just before the

punch Mr. Isenor was, in response to Mr. Moore, “running his mouth back over his shoulder.” Mr. Moore was still coming toward Mr. Isenor when he was punched “so they sort of stepped into each other.” Mr. Moore was not in a fighting stance, and hadn’t balled up his fists or taken a swing at Mr. Isenor. Mr. Leighton said he saw Mr. Moore following Mr. Isenor and Ms. Duffy, “with his mouth going.” He estimated the walking, turning and punching all took about six seconds as he said in his police statement, although he testified he probably should have said that the distance covered by Mr. Moore and Mr. Isenor was “what you can walk in six seconds.” When Mr. Isenor delivered the punch, there was “maybe five feet” between them. Mr. Leighton could not say how much Mr. Isenor would have had to move in toward Mr. Moore as it “happened so fast and there was just confusion and so much to concentrate on all at once.” When Tracy Hill saw the punch, Mr. Moore and Mr. Isenor were walking towards each other in the vicinity of the second lateral parking space. She testified that Mr. Moore took a couple of steps toward Mr. Isenor.

[86] Jeff Turple and Corey Palmer did not see the punch but they heard Mr. Moore hit the ground. They both described a very short time between when Ms. Duffy was confronting Mr. Moore and when Mr. Moore got hit. It is apparent from all the evidence that while the time frames cannot be estimated with any precision, everything from the Duffy-Moore altercation to the punch happened very quickly. If Mr. Moore did advance after Mr. Isenor, he did not do so for long before Mr. Isenor stopped him with the deadly punch.

[87] In summary, on the issue of where Mr. Moore was when he was punched and how he got there, the blood evidence on George Street establishes where Mr. Moore’s head hit the pavement.

This is where he dropped when he was punched by Mr. Isenor and it indicates that he had moved down the street toward the town hall after the encounter with Ms. Duffy. This casts a doubt on the evidence of witnesses who described Mr. Isenor suddenly emerging from the crowd to punch Mr. Moore at the time he was being confronted by Ms. Duffy in the area of the telephone pole/lamp post/lateral parking spaces. As there were people milling about, either spectating or “beaking off”, any witness’ perspective of the punch could have involved seeing Mr. Isenor emerge out of a crowd to punch Mr. Moore. It has to be considered that the witnesses who saw Mr. Isenor come out of a crowd of people to punch Mr. Moore could have been seeing what Mr. Isenor, Mr. Nicholson and Mr. Leighton described, without having noticed or been able to observe or remember all the details of the events, such as the movement of Mr. Moore in the direction of Mr. Isenor and Ms. Duffy. Everything was happening very rapidly. The differing accounts and descriptions are to be expected in a case of this nature where something unexpected happens suddenly and witnesses try to recall over a year later what they saw in the dark amidst the shifting movements of a large crowd. Discrepancies in witness’ accounts are commonplace: witnesses see and hear things differently. (*R. v. Chase*, [1997] N.S.J. No. 141 at paragraph 33 (N.S.S.C.); *R. v. Comer, supra* at paragraph 94)

Summary of Certain Factual Findings

[88] At this point in my recital of the facts I can indicate I have reached certain conclusions. I am satisfied that Mr. Moore was being rude and aggravating inside Whistlers and had riled up a number of people, including Ms. Duffy, but not Mr. Isenor. I accept that Mr. Isenor viewed the incident with Ms. Duffy as best ignored and had advised Ms. Duffy to see it that way as well. Although I find that

Mr. Isenor went over to speak to Mr. Moore inside Whistlers, I conclude that Ms. Duffy was not in the vicinity at that time and was not removed by Mr. Isenor. I am satisfied that Mr. Isenor was not looking for or anticipating any trouble with Mr. Moore when Whistlers closed. Likewise, Mr. Moore was not focused on having anything out with Mr. Isenor. I find on the evidence that outside Whistlers Mr. Isenor went over to where Ms. Duffy was confronting Mr. Moore for the purpose of getting her away from there and that he did start guiding her away. Mr. Isenor was not a scrapper or a hot head and was wary of Mr. Moore, a much taller, heavier man whom he knew could be belligerent when drinking. This did not stop Mr. Isenor from having a heated verbal exchange with Mr. Moore. While Mr. Isenor's May 18 statement indicates that he came to think Mr. Moore had been trying to get to him on April 30 with his remarks about Ms. Duffy, I do not find there is evidence that Mr. Isenor had that view at the time.

[89] I also find on the evidence that the Duffy-Moore altercation occurred somewhere closer to Whistlers than where Mr. Moore was when he was punched. The presence of the human blood on George Street supports the conclusion that Mr. Moore moved toward the town hall after Mr. Isenor retrieved Ms. Duffy, which lends an air of reality to Mr. Isenor's description, supported by Mr. Nicholson's and Mr. Leighton's evidence, that he was guiding Ms. Duffy away and that Mr. Moore followed them. While Jeff Turple did not see Mr. Moore following Mr. Isenor and Ms. Duffy, he did see Mr. Isenor moving Ms. Duffy "a good distance away" from Mr. Moore, out of hitting range. The evidence indicates these events - the Duffy-Moore confrontation, the extrication and the punch - all occurred in a very compressed time frame. Everything happened in a matter of minutes. The question I must examine most carefully now is whether, on all the evidence, the Crown has

established through proof beyond a reasonable doubt that Mr. Isenor was not acting in self-defence when he punched Mr. Moore. This requires me to consider the relevant law and to analyze the critical facts in relation to it.

Law - Presumption of Innocence and Burden of Proof

[90] It is not the responsibility of Mr. Isenor to demonstrate, establish, or prove his innocence or to explain away the allegations made against him. He is presumed to be innocent until proven guilty beyond a reasonable doubt. The Crown bears this onus throughout the trial and it never shifts to Mr. Isenor. The central issue is whether the Crown has proven beyond a reasonable doubt that Mr. Isenor was not acting in self-defence when he punched Mr. Moore outside Whistlers Pub on April 30, 2006. If the Crown fails to satisfy its burden of proof, then Mr. Isenor must be acquitted of manslaughter.

[91] The onus resting upon the Crown to prove Mr. Isenor's guilt beyond a reasonable doubt is inextricably linked to the presumption of innocence. (*R. v. Lifchus*, [1997] 3 S.C.R. 320 at paragraph 27) A reasonable doubt is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence. Its application must be in relation to an essential element of the offence, not in respect of an unessential matter. A reasonable doubt is not a doubt

based on sympathy or prejudice, or one that is imaginary or frivolous. Proof establishing the probability of guilt is not sufficient to establish guilt beyond a reasonable doubt. It is not proof beyond a reasonable doubt when guilt is suspected. Proof beyond a reasonable doubt falls much closer to absolute certainty than to proof on a balance of probabilities: *R. v. Lifchus*, *supra* at paragraph 36; *R. v. Starr*, [2000] S.C.J. No. 40 at paragraph 242.

Law - Manslaughter and Self-Defence

[92] Under s. 222 of the *Criminal Code* a person commits homicide when, directly or indirectly, by any means, he causes the death of a human being. Homicide may be culpable or not culpable. It is only culpable or “blameworthy” homicide which is an offence. In this case, the applicable *Criminal Code* provision is section 222(5)(a) which states that a person commits culpable homicide when he causes the death of a human being by means of an unlawful act. Manslaughter is not expressly defined in the *Criminal Code*. It is a residual category that covers an almost infinite array of circumstances, ranging from near accidental killing to near murder.

[93] In this case, there is no issue that Mr. Moore’s death was a homicide resulting from the punch by Mr. Isenor. The issue is whether any criminal liability attaches to Mr. Isenor for punching Mr. Moore and causing his death.

[94] The requisite blameworthiness for manslaughter in this case is grounded, says the Crown, in the commission by Mr. Isenor of an unlawful act, an assault on Mr. Moore, that resulted in his death.

[95] Mr. Isenor has claimed that when he punched Mr. Moore he was acting in self-defence, not committing an unlawful assault. The onus is on the Crown to prove beyond a reasonable doubt that self-defence under section 34 is not available to the accused. (*Latour v. R.*, [1951] S.C.R. 19; *R. v. Nadeau*, [1984] 2 S.C.R. 570; *R. v. Westhaver*, [1992] N.S.J. No. 511 (N.S.C.A.)) Mr. Isenor can only be found to have committed a culpable homicide if the Crown proves beyond a reasonable doubt that he was not acting in self-defence when he delivered the lethal punch. Homicide that is not culpable is not an offence.

[96] Under section 34(1) of the *Criminal Code* Mr. Isenor would have been justified in repelling an unprovoked assault if the force he used, even if lethal, was not intended to cause death or grievous bodily harm and was no more than was necessary to enable him to defend himself. (*R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (Ont. C.A.)) A defence under section 34 can only be utilized if all the statutory elements have been met. (*R. v. Hebert*, [1996] 2 S.C.R. 272 at paragraph 23) The Crown only has to establish beyond a reasonable doubt that one of the elements is not present to defeat a defence of self-defence. (*Hebert, supra*, at paragraph 25) Each of the elements has a subjective (Mr. Isenor's perception) and an objective (the reasonableness of Mr. Isenor's belief) aspect. The question to be asked in relation to applying section 34(1) is whether Mr. Isenor reasonably believed in the circumstances that he was being unlawfully assaulted. (*R. v. Petel* (1994),

87 C.C.C. (3d) 97 at page 8 (S.C.C.) Mr. Isenor was entitled to have made an honest but reasonable mistake about the existence of an assault by Mr. Moore. (*Petel, supra*, at page 8)

[97] Mr. Isenor would also have been justified in causing death or grievous bodily harm in repelling an unlawful assault by Mr. Moore if he caused it under a reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made and Mr. Isenor believed, on reasonable grounds, that he could not have otherwise preserved himself from death or grievous bodily harm. (Section 34(2) (a) and (b), *Criminal Code*) These elements also each have a subjective and an objective component. The degree of force used must be no more than was necessary to prevent the assault or repetition of it. (Section 37, *Criminal Code*) An accused, defending himself against an attack, reasonably apprehended, is not expected “to weigh to a nicety, the exact measure of necessary defensive action.” (*Baxter, supra*, at page 15 (Ont. C.A.); *R. v. Chase, supra*, at paragraph 45 (N.S.S.C.))

[98] As Wilson, J. noted in *R. v. Lavallee*, [1990] 1 S.C.R. 852 at paragraph 37, the feature common to both subsections (a) and (b) of section 34(2) is the imposition of an objective standard of reasonableness on the apprehension of death and the need to repel the assault with deadly force. Wilson, J. observed that the Supreme Court of Canada considered the interaction of the objective and subjective components of section 34(2) in *Reilly v. The Queen*, [1984] 2 S.C.R. 396, at p. 404:

...[the accused's] apprehension must be a reasonable one and his belief must be based upon reasonable and probable grounds. The subsection requires that

the [trier of fact] consider, and be guided by, what [she] decide[s] on the evidence was the accused's appreciation of the situation and his belief as to the reaction it required, so long as there exists an objectively verifiable basis for his perception.

Since s. 34(2) places in issue the accused's perception of the attack upon him and the response required to meet it, the accused may still be found to have acted in self-defence even if he was mistaken in his perception. Reasonable and probable grounds must still exist for this mistaken perception in the sense that the mistake must have been one which an ordinary [person] using ordinary care could have made in the same circumstances.

[99] Mr. Isenor testified to his belief that Mr. Moore was engaged in an unlawful assault of him and Ms. Duffy by advancing on them as they were retreating. Although Mr. Isenor said that Mr. Moore pursued him because he wanted to fight, there is nothing in the evidence, other than Mr. Isenor's testimony and police statements, to indicate that Mr. Moore had shown any interest in fighting Mr. Isenor, either in Whistlers or once everyone went outside.

[100] Mr. Isenor asserts that he did nothing to provoke Mr. Moore's conduct. Witnesses indicated that Mr. Isenor was engaged in a verbal back-and-forth with Mr. Moore when he retrieved Ms. Duffy although they did not hear what was being said. Mr. Isenor testified that he and Mr. Moore were simply trading insults. It may be that Mr. Moore was provoked to advance in Mr. Isenor's direction

by the exchanges with Mr. Isenor, however the more critical issue is whether he unlawfully assaulted Mr. Isenor justifying Mr. Isenor's use of force.

[101] Unlike the accused in *R. v. Flowers*, [2006] N.B.J. No. 402 (N.B.C.A.), Mr. Isenor is relying on more than whatever insults Mr. Moore may have directed at him as the basis for claiming he was subject to an assault against which he had to defend himself. Mr. Isenor would not have been entitled to respond violently to a verbal provocation from Mr. Moore. (*R. v. White* (2004), 188 C.C.C. (3d) 317 at paragraph 22 (B.C.C.A.)) "Taunting" and "verbal harassment" which were terms used by Michael Leighton to describe Mr. Moore's conduct and the "verbal assaults" to which Mr. Isenor referred would not justify the use of violence against Mr. Moore.

[102] The Crown has argued that there is no air of reality to Mr. Isenor's claim to self-defence. However I am satisfied, on a consideration of all the evidence and assuming, for the purpose of this analysis, the evidence relied on by Mr. Isenor to be true, that there is a real issue to be decided. (*R. v. Cinous*, [2002] 2 S.C.R. 3 at paragraph 53.) This determination is not aimed at deciding the substantive merits of the defence. (*Cinous, supra*, at paragraph 54) The air of reality test is concerned only with whether Mr. Isenor's claim of self-defence should be "put into play." (*Cinous, supra*, at paragraph 52; *R. v. Chan*, [2005] N.S.J. 134 at paragraph 20 (N.S.C.A.)) The evidence of Mr. Isenor cannot be ignored in gauging the appropriateness of considering whether his claim of self-defence should be assessed substantively. (*R. v. Talbot*, [2007] O.J. No. 427 at paragraph 58 (Ont. C.A.))

[103] Mr. Isenor testified at trial that, upon retrieving Ms. Duffy, he observed Mr. Moore to be

angry and wanting to fight him. Mr. Isenor said he was anticipating “the fight of his life” and thought he was going to be beaten up. He knew Mr. Moore could handle himself having seen him in several fights in the past and did not expect he would be able to get the better of him, given their respective sizes. The evidence establishes that Mr. Moore was a significantly bigger man: the Report of the Postmortem Examination (Tab 2 of Exhibit #13) recorded Mr. Moore’s height and weight as 192 centimetres and 104 kilograms, in other words, six feet three inches and 229 pounds. Mr. Isenor is five feet seven or eight and weighs 165 pounds.

[104] Mr. Isenor’s trial testimony suggests that he believed Mr. Moore might subject him to grievous bodily harm, that is, “serious hurt or pain” or “serious bodily harm.” (*R. v. Bottrell* (1981), 60 C.C.C. (2d) 211 (B.C.C.A.; *Chase, supra*, at paragraph 38 (N.S.S.C.)) It was Mr. Isenor’s evidence that Mr. Moore kept coming at him as Mr. Isenor, guiding Ms. Duffy in front of him, retreated in the direction of the town hall. Mr. Isenor testified that Mr. Moore was gaining ground and was angry and aggressive. Mr. Isenor concluded he had no option but to turn and “stop [Mr. Moore] from coming at me to fight with me.” Mr. Isenor testified that he made the decision “to take a beating” and saw no option but to fight Mr. Moore who was relentlessly pursuing him. Mr. Isenor was not expecting to knock him down. This is consistent with what he said during his interview with Cpl. Richardson on April 30. (3:45:32; 4:07:43; 4:25:31)

[105] Mr. Isenor’s subjective belief that he was in imminent danger of death or grievous bodily harm requiring him to defend himself with force must have been based on reasonable grounds. (*R. v. Deegan*, [1979] A.J. No. 839 (Alta. S.C., App. Div.); *Baxter, supra*.)

[106] Mr. Isenor's awareness of Mr. Moore's aggressive tendencies is relevant to the issue of the reasonableness of Mr. Isenor's fear that Mr. Moore was going to be violent toward him. (*R. v. Scopelliti* (1981), 63 C.C.C. (2d) 481 (Ont. C.A.); *R. v. Mulligan*, [1997] O.J. No. 2191 (Ont. C.A.))

[107] Mr. Isenor pointed to the testimony of Dale Nicholson and Michael Leighton concerning their observations of Mr. Moore advancing on him just before the punch as evidence of the reasonableness of his belief. Mr. Leighton testified that he thought there was going to be trouble for Mr. Isenor if Mr. Moore caught up to him.

[108] The fact that an accused did not retreat, or in this case, on the evidence for the Defence, did not continue to retreat, from a confrontation does not preclude him from relying on the provisions of s. 34: (*Deegan, supra; Westhaver, supra.*) Nor is an accused required to wait until he has been struck "before using any force against his attacker." (*R. v. Antley*, [1964] 2 C.C.C. 142 (Ont. C.A.)) If an accused has reasonable grounds for apprehending an assault, he is justified in law in striking the first blow, if he reasonably deems it necessary for his own protection. *Petel* establishes there is "no formal requirement that the danger be imminent." Imminence is only one of the factors to be weighed in determining whether Mr. Isenor had a reasonable apprehension of danger and a reasonable belief that he had to punch Mr. Moore. (*Petel, supra*, at page 8; *Lavallee, supra*, at paragraphs 41 and 43)

[109] The Crown's position is that Mr. Isenor is not entitled to the benefit of either sections 34(1) or (2). The Crown maintains that at no time on the night of April 30, including immediately following

the Duffy-Moore confrontation, were Mr. Isenor or Ms. Duffy unlawfully assaulted by Mr. Moore within the meaning of assault under section 265 of the *Criminal Code*. The Crown has submitted that Mr. Moore applied no intentional force to Mr. Isenor or Ms. Duffy nor did he attempt or threaten, by act or gesture, to apply force to them or cause Mr. Isenor to believe on reasonable grounds that he had present ability to do so. The Crown points to Mr. Isenor's acknowledged willingness to exchange in a verbal back-and-forth with Mr. Moore as evidence that Mr. Isenor was not fearful of him. The Crown argued that Mr. Isenor did not have to use any force against Mr. Moore; he could have stopped the verbal exchange with Mr. Moore and kept retreating away from him to the safety of his friends in the crowd.

[110] At no time did Mr. Moore take a swing at Mr. Isenor. Although it is not argued that Mr. Isenor intended to cause Mr. Moore's death (or the charge would have been murder, not manslaughter) and no proof has been made that he intended to cause Mr. Moore grievous bodily harm, the Crown asserts that it has proven beyond a reasonable doubt that the other three elements of section 34(1) are not present in this case, and most significantly, that there was no unlawful assault by Mr. Moore of Mr. Isenor.

[111] The Crown's submission is that in order to "save face" Mr. Isenor "sucker-punched" Mr. Moore when he was neither fearful of him nor without options for getting away from a charged situation. The Crown, inviting me to draw the inference that the punch was thrown when Mr. Isenor turned to engage Mr. Moore in a fight, argued that these circumstances also would disentitle Mr. Isenor from relying on self-defence. Presumably the Crown's submission in this regard was intended

to address how I should treat Mr. Isenor's evidence if I accepted it, as the "turning to face the fight" scenario is not how the scene was described by the Crown witnesses. Self-defence under section 34(1) would not be available to either combatant in a consensual fist fight "because neither could be heard to say that he has been the innocent victim of an unprovoked assault when he has consented to the fight." (*R. v. Paice*, [2005] S.C.J. No. 21 at paragraph 4)

[112] However, on this point, I do not find, even on Mr. Isenor's evidence that the punch was the first blow in a consensual fight. Where the Crown evidence is that the victim was "sucker-punched" and the accused says he hit the victim because he feared he was about to be attacked, there is nothing to suggest a consensual fight scenario. (*Talbot, supra* at paragraph 60) Mr. Isenor has not said that he turned to accept an invitation to fight Mr. Moore; his testimony is that he turned to face Mr. Moore because he felt he had no other option and landed a blow before he could be hit.

[113] As for section 34(2), the Crown has argued that not only were Mr. Isenor and Ms. Duffy not assaulted by Mr. Moore, it was not reasonable for Mr. Isenor to have concluded that Mr. Moore was going to beat him up.

[114] The evidence I must assess most closely in evaluating the issue of self-defence is that of Mr. Isenor. It is an error to choose between whether to believe the Crown's evidence or that of the accused. (*Nadeau, supra*) Putting the resolution of the matter as an either/or proposition excludes the third alternative, namely, that even not accepting an accused's evidence, after considering it in the context of the evidence as a whole there may still be a reasonable doubt as to guilt. (*R. v. W.(D.)*)

(1991), 63 C.C.C. (3d) 397 at page 409 (S.C.C.))

[115] The decision in *R. v. W.(D.)* makes it clear that where credibility is a live issue the principle of reasonable doubt applies to that issue. I must assess the credibility of Mr. Isenor's testimony according to *W.(D.)*'s three step direction:

First, if I believe the evidence of the accused, I must acquit.

Secondly, if I do not believe the testimony of the accused but I am left in reasonable doubt by it, I must acquit.

Thirdly, even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[116] The task of evaluating Mr. Isenor's evidence is more challenging than simply deciding whether I believe it or not. To put it plainly: Mr. Isenor's trial testimony and his statements to police, even accepted as truthful, must still be assessed to determine if the Crown has established beyond a reasonable doubt that Mr. Isenor was not acting in self-defence. Mr. Isenor's testimony is not to be evaluated in a vacuum. (*R. v. Lake*, [2005] N.S.J. No. 506 at paragraph 22 (N.S.C.A.)) It must be assessed in the context of all the evidence at trial, which includes Mr. Isenor's statements to the

police on April 30 and May 18, 2006. In those statements, Mr. Isenor did not talk about a pursuit by Mr. Moore as he and Ms. Duffy retreated. He did talk about having felt that if he did not hit Mr. Moore, Mr. Moore was going to hit him. He said this on April 30 at the very start of the interview with Cpl. Richardson. (3:34:15)

[117] I accept that what Mr. Isenor told Cpl. Richardson in his statements was the truth. He has never suggested otherwise. I note that Mr. Isenor made specific reference on April 30 to trying to be honest with police. (3:35:54) Towards the end of the interview, Mr. Isenor told Cpl. Richardson: “I have been a hundred percent honest with you.” (4:00:12) He also told him he was “not withholding anything” and was “not trying to make anything up.” (4:04:54) But when Cpl. Richardson laid out his analysis of the factors that led to the punch, Mr. Isenor responded by saying that was “not all of it.”(4:06:04) On May 18, he told Cpl. Richardson that his lawyer “has to have a few things” to use for his defence that have not been revealed to police and that the whole story of what happened will come out in court. (9:25:29)

[118] On April 30 in particular, Mr. Isenor expressed reluctance about saying too much to police, a fact which I found in my decision on the statement *voir dire*. (*R. v. Isenor*, [2007] NSPC 36) He told Cpl. Richardson on May 18 that when he had been interviewed on April 30, “I was trying not to tell you anything.” (8:51:40) As I said at paragraph 79 of the *voir dire* decision, Mr. Isenor struggled with treading the fine line of saying enough to help him but not saying too much. He told Cpl. Richardson on May 18 that during the April 30 interview he had felt “like he wanted to say what happened and tell my side of the story...” (8:51:53)

[119] Cpl. Richardson encouraged Mr. Isenor to shed light on what caused him “to take things one step further and strike” Mr. Moore. (April 30 interview - 3:31:52) He asked him whether Mr. Moore had made threats and told him this was his opportunity to explain himself and what caused him to react to Mr. Moore the way he did. (3:32:27; 3:33:55) Mr. Isenor did talk to Cpl. Richardson about his state of mind when he punched Mr. Moore. What he did not tell Cpl. Richardson was what he testified to in court, that Mr. Moore was pursuing him aggressively when he turned and delivered the punch in self-defence. Perhaps this is what he held back for trial although it is very hard to understand why he would not have disclosed this during the police interviews. Indeed, when Cpl. Richardson remarked on “...the information that you’re withholding from us is something that you feel is gonna benefit you...”, referring to Mr. Isenor having said he did not want to disclose everything before he went to court, Mr. Isenor responded by saying: “I’m not withholding anything...there’s nothing...” (April 30 - 4:03:50)

What did Brett Isenor Tell Cpl. Richardson on April 30?

[120] On April 30, Mr. Isenor told Cpl. Richardson he was standing in front of Mr. Moore, about five to six feet away from him when Mr. Moore was “beaking off” outside of Whistlers. Mr. Isenor said he was yelling at Mr. Moore, “Did you call her a whore?” When Cpl. Richardson asked him how Mr. Moore responded, Mr. Isenor said he thought “within seconds it was gonna escalate into a fight.” (3:41:07) Mr. Isenor could hear Mr. Moore calling Ms. Duffy a whore outside while she was “pushing him.” (3:49:24) There was a big crowd of people with a “couple of young fellows” who

were arguing with Mr. Moore too. (3:59:12)

[121] Mr. Isenor told Cpl. Richardson he disagreed with Ms. Duffy's recollection of him coming from behind her and punching Mr. Moore while she was confronting him. (3:50:14; 3:50:39)

[122] Mr. Isenor said he never expected Mr. Moore to fall down when he hit him. (3:45:32) He was expecting to get "pounded." (3:46:22) He hit Mr. Moore "on the button" and Mr. Moore was "knocked out immediately." (3:46:52) Mr. Isenor saw him fall (3:53:22) and turned and walked away. (3:53:26) Mr. Isenor told police he did not come at Mr. Moore from an angle as they had been told. (3:47:39) Mr. Moore was not in a fighting stance with his fists up. (3:48:14) Mr. Isenor said he did not see Mr. Moore's hands at all (4:09:26 - 32) other than when Mr. Moore was shaking his forefinger at him, a gesture Mr. Isenor had demonstrated to Cpl. Richardson. (3:48:14) He said it was a "few seconds" after he saw Ms. Duffy "shove" Mr. Moore that he went over and hit him. (4:28:28)

[123] Mr. Isenor indicated in his April 30 statement a wariness about Mr. Moore and his capacity for escalating a situation, saying he had had words with him once in the past "...that would have progressed if I hadn't left...he's a big individual who...you watch what you're doing around." (4:23:52)

[124] Mr. Isenor denied that he was provoked into hitting Mr. Moore because he insulted Ms. Duffy or because of any pre-existing animosity toward him. He talked about Mr. Moore being a fighter when he was growing up and said he was "not a very nice person at all." (4:08:33) He also said, when

asked by Cpl. Richardson on April 30 if Mr. Moore calling Ms. Duffy a whore was one of the reasons he hit him:

A. That would be one of the reasons. (4:22:14)

Q. One of the reasons, O.K. But not the only reason, is that true?

A. Probably some truth to that yea. (4:22:22)

[125] When asked about his intentions, Mr. Isenor said “maybe save face” but denied that the insult to Ms. Duffy had been “eating” at him and quickly disavowed “saving face” as a complete description of what had caused him to punch Mr. Moore. He told Cpl. Richardson, “...you can’t point it on one little thing and say that’s what you reacted on...” He explained: “Can you not see that there would be a bit of saving face in there, like you know, you have a guy hollering and screaming at you and, verbally assaulting your girlfriend, verbally assaulting me...” (4:27:52)

[126] In the May 18 interview, Mr. Isenor continued to deconstruct his initial use of “saving face” as an explanation for punching Mr. Moore. He told police that it was “not so much saving face” and that he had no trouble walking away from “somebody hollering and screaming at me.” (8:43:08) He said: “On that particular night, I just, like, enough was enough was enough...he said enough, long enough that I wasn’t gonna listen to it anymore.” (8:43:37) Mr. Isenor told police: “He deserved, after what he was doing and saying, to get a punch in the mouth. He didn’t deserve to die, he didn’t

deserve to go to the hospital...” (8:52:22 - 25) Mr. Isenor said to police he never thought Mr. Moore was going to die or even get “hurt bad.”

[127] On May 18, Mr. Isenor said about his thought processes before he punched Mr. Moore:

...I kinda made my mind up, and when I made my mind up, I expected to take a pounding and I fully expected, like, I said, that’s fine, I’ll take a pounding but I’m not listening to this no more, I’m just not. Like, my friend said to me, or...my friends, they said...we’ve known you your whole life, you will take things to a certain point and then it doesn’t matter after that, like that’s my personality... (8:52:37-8:53:00)

[128] Mr. Isenor indicated he can only be pushed so far. His limit seems to have been reached outside as he was content inside to have confronted Mr. Moore about the insult and having done so, regarded it as “issue over.” (8:50:56) Mr. Isenor told Cpl. Richardson that when he went outside he “...wasn’t mad. I wasn’t mad about nothing. I wasn’t upset, I wasn’t saying I was gonna get him, I didn’t want to fight him, I didn’t want to fight anybody, I wanted to go home.” (8:54:57) In his May 18 statement, Mr. Isenor said: “I didn’t want nothing to do with him because he’s a big guy...he’s an idiot...I didn’t want nothing to do with him.” (9:02:08)

What did Mr. Isenor Say In His Testimony At Trial?

[129] Brett Isenor left Whistlers at the end of the night through the side door into the side parking lot. He was looking for Ms. Duffy. It is apparent from the evidence that he was not focused on Mr. Moore or anticipating any trouble from him. While standing in the side parking lot he saw Ms. Duffy confronting Mr. Moore by the corner of the patio, and rushed over to her, hollering: "What are you doing?" Mr. Moore and Ms. Duffy were hurling insults at each other and Ms. Duffy was saying: "You don't know me, how can you call me a whore?" There was a big crowd of people down by the sidewalk. Grabbing Ms. Duffy, Mr. Isenor moved her to one side of him, admonishing her by saying he thought he had told her "to leave this asshole alone; let's get out of here." Mr. Isenor testified that he and Mr. Moore started swearing at each other and the situation was "pretty intense."

[130] It was Mr. Isenor's evidence that Mr. Moore was angry and it seemed that he wanted to fight. Mr. Isenor did not want to fight with Mr. Moore. He thought there was going to be a fight "by the telephone pole" and decided he had to get out of there. Mr. Isenor had both his hands on Ms. Duffy, and positioned himself between her and Mr. Moore. He placed his right hand on the small of Ms. Duffy's back and started to move away from Mr. Moore, with Ms. Duffy in front of him. She was bawling. He and Mr. Moore were still trading insults. Mr. Isenor was looking at Mr. Moore over his left shoulder as he guided Ms. Duffy down the street toward the town hall. He saw Mr. Moore starting to advance toward him, impeded by the throng of people. Mr. Moore was trying to move around people which was slowing him down. Mr. Isenor testified that Mr. Moore was "making motions toward me, running his mouth off, moving his hands. He was taking steps to bridge the distance, his hands were up around his chest height, he was mad, being aggressive."

[131] When Mr. Isenor reached the first lateral parking space, Mr. Moore was still dogging him and mouthing off. Mr. Isenor got almost to the crosswalk and stopped before the manhole. Turning, he watched as Mr. Moore kept coming, still mouthing off at him. It seemed to him that Mr. Moore was getting closer. Mr. Isenor testified there was “no doubt” in his mind that there was going to be a fight because Mr. Moore kept coming after him. He thought Mr. Moore was going to beat him up. When asked on cross-examination if Mr. Moore was threatening him, Mr. Isenor paused, and then recalled that inside Whistlers Mr. Moore had said: “Let’s go”. He had not related this in his police statements or his direct testimony, which casts some doubt on this evidence. If Mr. Moore did say this to Mr. Isenor, there is no evidence that Mr. Moore showed any signs of wanting to have “a go” at Mr. Isenor when he left Whistlers at closing time. Mr. Isenor did not describe any threats by Mr. Moore before the punch.

[132] Mr. Isenor testified that, believing Mr. Moore was about to fight him, he shifted Ms. Duffy out of the way and swung and hit Mr. Moore as soon as Mr. Moore got close enough. He delivered the punch with his right fist to the side of Mr. Moore’s face. As soon as he did, Mr. Moore dropped to the ground and Mr. Isenor turned and walked away. He had no idea Mr. Moore was badly hurt and assumed he had succeeded only in knocking Mr. Moore down momentarily. He believed Mr. Moore would be “up and about” by the time he and Ms. Duffy were being driven home. When he later saw what were the headlights of the police coming up his driveway, he thought it was Mr. Moore looking to settle the score.

[133] Mr. Isenor estimated the distance between where he retrieved Ms. Duffy by the telephone

pole/lamp post to the punch as being 20 - 25 feet. He also estimated the time between these events as “just a few seconds.” Mr. Moore was only a few steps behind the whole time. It was pointed out to him on cross-examination that he had not mentioned this in his police statements. Mr. Isenor responded that he had been trying to limit what he told police although it remains hard to accept that Mr. Isenor would not have described being menaced by Mr. Moore when explaining why he had punched him.

[134] Mr. Isenor maintained in his trial testimony that he had not been trying to save face when he went to extricate Ms. Duffy from her confrontation with Mr. Moore. He said at that point he was mad at Ms. Duffy for not letting the matter go as he had counselled and that she was the one “trying to save face.” He said about the reference in his April 30 statement to “saving face” that “the more I thought about it, the more I didn’t think it was applicable.” Mr. Isenor went on to say: “I think there’s a little bit of it that does apply; I think we were picked out and he was abusing us.” Mr. Isenor said his purpose in hitting Mr. Moore was to “stop him from coming at me to fight with me.” He testified that when he punched Mr. Moore “I absolutely thought he was going to fight me.” He acknowledged that given their respective sizes, he anticipated getting into the fight of his life, never expecting to knock Mr. Moore down or out. Mr. Isenor said he had made a decision to “take a beating”, that he didn’t see any other choice but to fight Mr. Moore who showed no signs of abandoning his pursuit of him. “I turned around”, said Mr. Isenor, “because he kept advancing on me.” Mr. Isenor testified: “I was trying to defend myself.” Mr. Isenor’s testimony indicates he knew he was at a disadvantage against Mr. Moore but he turned to face him anyway, using surprise and speed to compensate for being out-matched in size and strength.

[135] As I have said, I am satisfied that Mr. Isenor told the truth to Cpl. Richardson in his April 30 and May 18 statements. At trial he related details about the events outside of Whistlers, notably the description of Mr. Moore following him, that he had not told the police. As I noted earlier, Mr. Isenor had told Cpl. Richardson he wanted to hold back some information for use at trial. That information may have been the description of Mr. Moore's advancing on him after he pulled Ms. Duffy away. Given that Mr. Isenor was apparently trying to answer Cpl. Richardson's questions honestly, and wanted to give his side of the story, it is difficult to understand why he made no mention of an aggressive pursuit. He was given opportunities by Cpl. Richardson to explain what occasioned the punch. He described the punch as happening within seconds of him confronting Mr. Moore about insulting Ms. Duffy which is when he thought Mr. Moore might hit him. He told Cpl. Richardson:

A. When I went into that crowd where he was, I was only there for a few seconds...I hit him...it was over and done with...I seen her shove him and I went over there and...asked him again...what are you doing, what are you saying? (4:28:05)

Q. Is that when you hit him?

A. A few seconds later. (April 30, 4:28:28)

[136] In talking to Cpl. Richardson on May 18 when he was facing a manslaughter charge even Mr. Isenor's answer to what he might do differently if he could turn back the clock did not identify Mr.

Moore as a threat. He said to Cpl. Richardson that other than anybody coming after him, to harm him, a scenario he did not describe as applying to the incident with Mr. Moore, anyone could say anything they wanted to him now, he would walk away. (9:03:04) He told Cpl. Richardson he had learned “a lot, a big lesson..” (9:02:34)

[137] Mr. Isenor told Cpl. Richardson that he hit Mr. Moore because he had reached the outer limits of his tolerance for Mr. Moore’s obnoxious behaviour. He explained to Cpl. Richardson that he was known to be someone who had his breaking point. In his trial evidence he agreed he did not back down from too many people. With Mr. Moore he had had enough and concluded he “deserved to get a punch in the mouth.” He expected the consequence of delivering this punch to be a pounding from Mr. Moore so he gave it his best shot. The unexpected result was that Mr. Moore was knocked unconscious and tragically, fatally hit his head.

[138] At trial, Mr. Isenor described Mr. Moore’s aggressive demeanor and his relentless stalking through the crowd to get at him. I am prepared to accept that Mr. Moore did move toward Mr. Isenor as Mr. Isenor turned away with Ms. Duffy. But what happened after that, happened fast, even on Mr. Isenor’s account. Mr. Isenor turned and punched Mr. Moore before either of them had gone very far. Mr. Isenor testified the punch was a matter of seconds after he retrieved Ms. Duffy, a time frame supported by Michael Leighton’s evidence. He achieved his objective - to stop Mr. Moore’s advance and shut him up. He was not facing an imminent threat from which he had no escape. Present at the scene was Mr. Isenor’s cousin, Corey Palmer, whom Mr. Isenor had described as “very capable” of handling himself. Mr. Leighton testified that if a fight had broken out between Mr. Moore and Mr.

Isenor he would have broken it up and quite possibly other people there would have intervened as well. There seems to be no question that Mr. Isenor would have been the sympathetic favourite of any intervention: Mr. Leighton observed that from his point of view, "...everyone that night wanted to punch that guy", referring to Mr. Moore.

[139] Mr. Moore had not assaulted Mr. Isenor and there is no evidence that he was threatening to. There is evidence he was being loud and offensive. It appears he took a few steps in Mr. Isenor's direction. He was not in a fighting stance and at worst, according to what Mr. Isenor told Cpl. Richardson, shook his forefinger at him. It was not reasonable for Mr. Isenor to conclude, if he did at the time, that he was at risk of death or serious bodily harm. According to what he said to Cpl. Richardson, Mr. Isenor's apprehension outside Whistlers that Mr. Moore might hit him arose from his confrontation of Mr. Moore over what was being said to Ms. Duffy. Notwithstanding his knowledge of Mr. Moore, he was obviously not so apprehensive of him that he shied away from confronting Mr. Moore both inside Whistlers and again outside when tensions were running even higher. There was verbal sparring that Mr. Isenor could have stopped participating in. Mr. Isenor was not cornered. The evidence does not establish that Mr. Moore was in striking distance of Mr. Isenor when he was punched. Witnesses observed Mr. Isenor step toward Mr. Moore. There was still a distance between them that Mr. Isenor had to bridge to deliver the punch. To spectators, this would have been the moment when they saw Mr. Isenor emerging from the crowd and landing the fatal blow.

[140] Mr. Isenor's evidence has to be considered with regard to the testimony of witnesses at the

scene. I cannot ignore the evidence of the witnesses who observed him emerge from the crowd and punch Mr. Moore. Even if I discount the evidence of witnesses who were intoxicated (Erin Duffy, Mark Cogger), of questionable reliability (Rodney Clarke, Stephanie Caines), or potentially biased against Mr. Isenor (Claudia and Troy Priess) that still leaves Laura Burke, Christina Parker and Nancy Scothorn who testified to seeing him come out of the crowd and, in Ms. Burke's words, "smoke" Mr. Moore. The evidence of these three witnesses cannot be dismissed wholesale on the basis that they seem not to have accurately recalled where Mr. Moore was located when punched or were in error in respect of some other details. The evidence of these witnesses undermines Mr. Isenor's claim of having acted in self-defence and is more consistent with him putting a stop, even if in his mind only temporarily, to Mr. Moore's drunken, offensive behaviour.

[141] The evidence established that everything that happened after Mr. Isenor pulled Ms. Duffy away from Mr. Moore happened so fast. Even witnesses who did not see the actual punch - Todd Paley and Jeff Turple, both of whom were sober - testified that all the events outside Whistlers happened in only a matter of minutes. Mr. Paley estimated only five minutes passed from when Mr. Moore went out the side door to Jeff Turple coming in to tell him that Mr. Moore was on the ground. Mr. Turple had only just turned away from watching the Duffy-Moore confrontation when he heard Mr. Moore go down. Mr. Leighton estimated that Mr. Moore and Mr. Isenor had been walking for only six seconds before Mr. Moore was punched. The time estimate evidence indicates that Mr. Isenor acted precipitously in punching Mr. Moore and in circumstances where it was not reasonable for him to resort to physical force.

[142] Whether Mr. Isenor punched Mr. Moore because he had been pushed past his limit by Mr. Moore's verbal abuse, as he told Cpl. Richardson, or because he decided to stop his brief advance, or some combination of both (which I do not find constituted "saving face"), the evidence, including that from Mr. Isenor's statements and testimony, establishes to my satisfaction beyond a reasonable doubt that Mr. Isenor was not acting in self-defence. While I accept Mr. Isenor was apprehensive that the situation with Mr. Moore might escalate once he confronted him again outside, I do not accept that his decision to punch Mr. Moore was an act of self-defence. He presented it that way at trial and may have come to believe that he was acting in self-defence but what he said to Cpl. Richardson, which I accept as true, and what witnesses at the scene observed, indicate otherwise. I find that Mr. Isenor made a decision, within seconds of the Duffy-Moore confrontation, to stand up to Mr. Moore's verbal harassment by punching him. Mr. Isenor knew that decision could go badly for him if Mr. Moore hit back. Notwithstanding this risk, Mr. Isenor concluded that Mr. Moore had earned himself a punch in the mouth. That punch was an unlawful assault, the tragic consequences of which Mr. Isenor did not intend or foresee.

[143] As a consequence of my findings on the evidence I find Mr. Isenor guilty as charged of manslaughter in the death of Christopher Moore.

Anne. S. Derrick

Provincial Court Judge