

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. MacLean*, 2016 NSPC 59

**Date:** 2016-10-18

**Docket:** 2788204

**Registry:** Pictou

**Between:**

Her Majesty the Queen

v.

Randall Edwin MacLean

***VERDICT***

**Judge:** The Honourable Judge Del W. Atwood

**Heard:** 18 October 2016 in Pictou, Nova Scotia

**Charge:** Sub-section 268(2) of the Criminal Code of Canada

**Counsel:** Patrick Young for the Nova Scotia Public Prosecution Service  
Joel Sellers for Randall Edwin MacLean

**By the Court:**

[1] A wake is meant to be a time for sober and solemn reflection of a life well lived. A celebratory air is often fitting on such occasions, a welcome counterbalance to grieving, and may assist family and friends in coping with the sense of loss that arises inevitably with the death of a loved one. Celebration may be accompanied by libation; when enjoyed in moderation, it may enhance the experience; but in immoderation, things can fall apart pretty quickly.

[2] Fall apart things did--and in a rather intense fashion--the evening of 10 October and morning of 11 October 2014, shortly after Randall Edwin MacLean arrived at the home of the late Howard Miller on Depot Street in Pictou. Mr. MacLean was a friend of the Miller family, and showed when the libation piece was in full swing. As will happen sometimes when a group of people have had too much to drink, someone got annoyed at someone else, that little annoyance got inflated grossly out of proportion, a brawl ensued, and a Mr. Paul Gaudet got bitten on the nose—quite badly, as a matter of fact. The biter was Mr. MacLean. The issue in this trial is whether Mr. MacLean’s actions were justified.

[3] Mr. MacLean has been charged with a single count of aggravated assault; he elected to have his trial heard in this court, and pleaded not guilty.

[4] The court heard from a number of prosecution witnesses.

*Evidence of Mary Jean Malloy*

[5] On direct examination, Mary Jean Malloy is the sister of the complainant, Paul Gaudet. She described the scene inside the Miller home on the evening of 10 October 2014. She said she was "feeling good 'cause I'm not a big drinker but I mean I wasn't drunk." She testified that she had had approximately a "half pint" by 9:00 p.m. Ms. Malloy testified that Randy MacLean arrived at about 10:00 p.m.

[6] Ms. Malloy told the court that when Mr. MacLean arrived at the house, he appeared to be "swaying and not clear minded". Mr. MacLean allegedly sat down directly across the kitchen table from Ms. Malloy and hollered at her to "get me a drink". According to Ms. Malloy, this comment caused her brother, Mr. Gaudet, who was sleeping ("kind of passing out") at the table, to lift his head and question who was talking to his sister like that. Ms. Malloy reassured her brother and laughed off the comment. The people at the table discussed past events but Mr. MacLean did not participate.

[7] At some point Mr. MacLean began to roll a joint but was asked not to by Jerry Miller. Jerry Miller is a son of the late Howard Miller. When Mr. MacLean continued to do so, Mr. Miller picked Mr. MacLean up by the stomach and

“headed him toward the door”. At this point, Paul Gaudet appeared to come to.

Paul Gaudet, Jason Thorne and "another fellow” tried to ease Mr. MacLean out the door. Mr. MacLean held onto the door frame and it took all three of them to get him to the door.

[8] No one hit Mr. MacLean

[9] As Paul Gaudet held the door, Mr. MacLean reached with one hand, grabbed Paul Gaudet by the back of head, pulled his head forward and bit his nose. Ms. Malloy jumped to her feet and hollered "let him go, let him go". The group at the door fell off the step on top of one another. Mr. MacLean got up and ran down the driveway.

[10] Ms. Malloy described graphically Mr. Gaudet’s nose as “bitten right off”, “it was just hanging there”, and “I pushed it back on and taped it back on.”

[11] Ms. Malloy was then cross examined.

[12] Ms. Malloy arrived at the Miller home on Depot Street at about 4:00 p.m. on 10 October. She described the side door to the house entering into the kitchen from a concrete landing at the top of three or four concrete steps. The landing had a railing.

[13] Mr. MacLean arrived at the house at approximately 9:30 pm or a little later; however, Ms. Malloy pointed out she wasn't paying particular attention to the time. She recalled that Mr. MacLean stayed at the house for approximately one hour.

[14] She understood the people in the home to drink alcohol quite regularly, smoke cigarettes and cannabis. Although she could not recall specifically if any one was smoking cigarettes or joints the evening of the blow up, she assumed that they were. She recalled that a number of people were drinking heavily. She described many in the home as being drunk, including her brother Paul, whom she described as "pretty full and passed out at the table". Jerry Miller and Howie Miller were also quite drunk.

[15] She recalled Paul Gaudet, Jerry Miller, Randy MacLean and Jason Thorne drinking 150 proof rum at the table. After this they were "really intoxicated". They were also knocking back bottles of beer.

[16] According to Ms. Malloy, there had been no tension at the table "until Randy pulled out the weed".

[17] Ms. Malloy said she was seated at the table with her back toward the living room. Jason Thorne was on her right. Paul Gaudet was to Jason's right. Jerry

Miller was to Paul's right. Randy MacLean was to Jerry's right. Randy was directly across the table from Ms. Malloy. No one was sitting to the left of Ms. Malloy.

[18] Ms. Malloy did not think there was any tension between Mr. MacLean and Paul Gaudet while they were discussing old times and drinking rum.

[19] Ms. Malloy described in detail Jerry Miller getting out of his chair, going behind Mr. MacLean, putting his arms around Mr. MacLean's waist, lifting him and saying, "you got to go".

[20] After lifting Mr. MacLean out of his chair, Mr. Miller "edged him" toward the door.

[21] Mr. MacLean was on the step outside the kitchen door, facing the kitchen, holding the door frame with his arms. Mr. Miller was inside the door frame pushing on Mr. MacLean's chest. Ms. Malloy observed all this from her chair in the kitchen.

[22] At this point, Paul Gaudet and Jason Thorne were still sitting at the table. Another male with dark hair, in his early 20s—whom Ms. Malloy did not know—appeared on the scene and began trying to pull Mr. MacLean's right arm from the door frame.

[23] It was then that Paul Gaudet arose from the table and went towards the door. Ms. Malloy saw that the screen door was open all the way onto the concrete landing. Mr. Gaudet staggered over to the left of Jerry Miller and held the screen door open. Mr. Miller, Mr. MacLean and the mystery person were all standing on the landing outside the house. Mr. Gaudet was standing inside the house holding the door.

[24] Ms. Malloy testified that Mr. MacLean at once let go of the door frame with one hand, grabbed Mr. Gaudet's head, pulled him forward and bit his nose. Jason Thorne and Ms. Malloy arose from the kitchen. Jason Thorne approached the door and began pushing Mr. MacLean while Mr. MacLean was still holding the door.

[25] Ms. Malloy stated with confidence that no one punched Mr. MacLean before Mr. MacLean bit Paul Gaudet.

[26] Ms. Malloy testified that Mr. MacLean remained clamped onto Mr. Gaudet's nose for "two or three minutes, if that" and "at least two [minutes] anyway".

[27] Ms. Malloy recalled Howie Miller being beside her in the kitchen when Mr. MacLean was biting Mr. Gaudet. She expected he would have been able to have seen what had happened.

[28] Ms. Malloy denied touching Mr. MacLean at any point during the altercation.

[29] Ms. Malloy recalled telling the police that she had seen Jerry Miller giving Mr. MacLean "a couple of pokes". When cross examined on her statement, Ms. Malloy could not say for sure that it was Jerry Miller who had done the poking; however, she did remember somebody having Mr. MacLean on the ground and giving him a couple of punches. After that she saw Mr. MacLean running away. This occurred after the biting. She saw no one else hitting Mr. MacLean that evening.

[30] Ms. Malloy confirmed under cross examination that she was aware people were smoking marijuana outside the house that evening.

[31] Ms. Malloy confirmed that, in addition to lifting Mr. MacLean from his chair, pushing on Mr. MacLean's chest in the doorway, and pulling on Mr. MacLean's left arm. Jerry Miller also got behind Mr. MacLean and held him in a bear hug from behind.

[32] Ms. Malloy recalled Jerry Miller, Jason Thorne and the mystery person being in the driveway with Mr. MacLean before Mr. MacLean ran off.



***Evidence of Dr. Marvyn Tolba***

[33] Dr. Tolba was the emergency-room physician at the Aberdeen Hospital the early morning of 11 October 2014. He examined Paul Gaudet. In direct testimony, he described the injury to Mr. Gaudet's nose as a partial amputation to the tip of the nose. The lacerations were deep enough to expose cartilage. In cross examination he confirmed that Mr. Gaudet was probably intoxicated when he examined him in the emergency room.

***Evidence of Gerald "Jerry" Miller***

[34] Mr. Miller lives in British Columbia; he was born in Pictou; he and Mr. MacLean had been friends when they were growing up. Mr. Miller had returned to Pictou from British Columbia when his father was near death. I infer from his evidence that he was the one in charge of his father's home after the funeral.

[35] Mr. Miller told me that he had not recognized Mr. MacLean right away after the latter's arrival. Mr. MacLean was sitting in the living room. Mr. Miller sat with him and talked to him for about twenty minutes; the conversation did not help jog his memory of Mr. MacLean. It was Mr. Miller's sister who revealed to Mr. Miller the identity of his long lost friend. Mr. Miller then returned to the living room and spoke to Mr. MacLean again.

[36] Mr. Miller and Mr. MacLean eventually worked their way into the kitchen and Mr. Miller sat at the table. Mr. MacLean sat against a window.

[37] Mr. Miller described tension erupting in the kitchen between Mr. Gaudet and Mr. MacLean. Mr. Miller described de-fusing the tension, but it did not last long.

[38] Mr. Miller denied seeing Mr. MacLean drinking.

[39] Mr. Miller confirmed that he, himself, was drinking beer and rum and that he was "too intoxicated to be driving".

[40] Mr. Miller described telling Mr. MacLean he had to leave due to the friction with Mr. Gaudet. Mr. Miller said he sensed a fight was ready to start.

[41] Mr. Miller described almost getting between Mr. MacLean and Mr. Gaudet and easing Mr. MacLean toward the door. Mr. MacLean apologized and was not aggressive. As Mr. MacLean stood at the entryway to the house, Mr. Miller held out his arms to block the doorway. He described Mr. MacLean coming "over my shoulder". He heard screaming, Mr. MacLean turned and ran out the door toward the ball field and "that was pretty well the end of it".

[42] Mr. Miller denied ever putting his hands on Mr. MacLean and denied seeing anyone else doing so.

[43] Mr. Miller denied seeing anyone hitting Mr. MacLean

[44] Mr. Miller admitted that he had smoked "two joints" of marijuana that evening.

[45] Mr. Miller was then cross-examined.

[46] He was confident about his memory.

[47] He guessed that Mr. MacLean had probably arrived at the house around 9:00 p.m.; however, that was a guess, as Mr. Miller had stopped at a tavern in Pictou before returning to his father's. Mr. MacLean was already inside the house when Mr. Miller got there.

[48] Mr. Miller had drunk approximately five beer before going to the tavern; he then drank four bottles of beer while at the tavern. After returning to his parents' home, Mr. Miller had beer and rum.

[49] Mr. Miller could not recall how long Mr. MacLean stood in the kitchen before sitting down at the table. It could have been ten minutes. It could have been an hour.

[50] Mr. Miller could not recall how much beer he had had to drink at the house after returning from the tavern—more than one drink, but probably less than ten.

[51] He recalled having one drink of rum; agreed that he had been intoxicated but denied that he was staggering or falling down.

[52] Mr. Miller estimated that he first observed tension between Mr. Gaudet and Mr. MacLean approximately 15 minutes after Mr. Miller and Mr. MacLean had entered the kitchen from the living room. He estimated this was approximately 45 minutes after he had arrived home after leaving the tavern. Mr. MacLean was standing on the dining room side of the kitchen table. He knew Mr. MacLean and Mr. Gaudet had exchanged words but did not know what the improvident words were. He heard raised voices and saw that Mr. MacLean and Mr. Gaudet had "locked eyes". He did not know what the problem was all about.

[53] Mr. Miller described the unwelcome tension as dissipating; after that, Mr. MacLean sat at the table by the exterior wall directly across from Mr. Gaudet

[54] Mr. Miller confirmed that he, Mr. MacLean, Mr. Gaudet, and Ms. Malloy were all seated at the kitchen table.

[55] Mr. Miller did not recall Mr. MacLean or Mr. Gaudet drinking rum but he did recall Ms. Malloy drinking rum.

[56] Mr. Miller had no recollection of Mr. MacLean smoking marijuana or getting ready to light one up. He confirmed people were smoking cigarettes in the

house and he had, himself, smoked marijuana in the house. He was not aware if other people were smoking marijuana. He agreed that it would not have been a big deal if people were smoking cigarettes or joints and he was not trying to stop anyone from doing so. He confirmed that the reason he asked Mr. MacLean to leave had nothing to do with smoking marijuana and was due entirely to the tension he sensed between Mr. MacLean and Mr. Gaudet.

[57] Mr. Miller estimated that it took approximately two minutes from the time he first asked Mr. MacLean to leave until Mr. MacLean had left his sight.

[58] Mr. Miller was asked to explain where everyone in the kitchen had been seated when he first asked Mr. MacLean to leave. He recollected that Mr. MacLean was sitting at the kitchen table with his back to the exterior wall. Mary Malloy was to Mr. MacLean's right. Mr. Gaudet was standing in the kitchen with his back toward the living room and his face towards Mr. MacLean. Mr. Miller was sitting at the end of the table opposite Ms. Malloy. He was not aware of anyone sitting across the table from Mr. MacLean. The back of Ms. Malloy's chair was angled toward the exterior wall so Mr. MacLean could not pass easily in that direction. Mr. Miller opened a space at his end of the table when he asked Mr. MacLean to leave.

[59] Mr. Miller denied ever picking up Mr. MacLean up from his chair. He described Mr. MacLean as getting up on his own and heading towards the back door. Mr. Miller guided him in that direction by holding out his arms. Although he hesitated, Mr. MacLean headed towards the door. As Mr. MacLean came around Mr. Miller's end of the table, Mr. Miller put a hand on Mr. MacLean's shoulder blade to guide him. Mr. MacLean then backed toward the door.

[60] Mr. Miller held his arms out by the door but did not touch Mr. MacLean. Mr. MacLean did not touch him. Mr. MacLean was standing in the doorway and they were chest to chest. Mr. MacLean was not trying to get past him and was not touching the door frame. Mr. Miller could not recall anyone on the landing behind Mr. MacLean.

[61] Mr. Miller denied adamantly that he ever had put Mr. MacLean in a bear hug. He denied placing his hands on Mr. MacLean's arms. He denied ever being on the landing behind Mr. MacLean.

[62] Mr. Miller described Mr. MacLean lunging over his right shoulder for no more than one second and then running away.

[63] Mr. Miller denied seeing anyone hitting Mr. MacLean and denied landing any blows himself. He denied seeing anyone else so much as laying a hand on Mr. MacLean.

[64] Mr. Miller denied any recollection of Mr. Thorne being involved in punching Mr. MacLean. When confronted with his statement to the police that Mr. Thorne had taken a swing at Mr. MacLean, Mr. Miller explained that his statement to police was "just drama".

[65] Mr. Miller denied falling down the outside stairs and denied that anyone else tumbled down the stairs with Mr. MacLean.

***Evidence of Christina Janet Chudley***

[66] Ms. Chudley did not see the biting, but saw the aftermath. She described Mr. Gaudet's nose as cut and bleeding.

***Evidence of Paul Gaudet***

[67] The complainant, Mr. Gaudet, gave evidence. His memory of events was somewhat hazy as he had been at the Miller's all day and had been drinking all day and all night.

[68] He thought the atmosphere in the house was "fine"

[69] He recalled Randy MacLean sitting at the kitchen table, but was unable to estimate how long that was. He recalled Mr. MacLean grabbing him. He could not recall how it had happened. He could not recall saying anything to Mr. MacLean and could not recall what Mr. MacLean might have said.

[70] He thought Jerry Miller might have asked Mr. MacLean to leave.

[71] He thought they were by the door and he thought he was holding the door. He could not recall what was said or done.

[72] He remembered that his nose was "near bitten off" but did not recall how it had happened. He remembered being evacuated to hospital and having it sewn back on.

[73] In cross examination Mr. Gaudet acknowledged being very intoxicated and that his recollections of the night were very blurry.

### ***Evidence of Jason Thorne***

[74] Mr. Thorne testified as best he could about having been at the Miller home on 10 October 2014; he admitted to having been drinking quite a bit, and was "pretty intoxicated". He could not recall the particulars of what he had drunk but knew it was "hard liquor".



[75] He recalled Paul Gaudet being passed out. He remembered Randy MacLean arriving, and then Mr. MacLean and Mr. Gaudet "getting into it" and wrestling at the table. He could not recall what had started it. He recalled Randy MacLean "leaning over and taking a bite out of Paul's nose"

[76] He saw no one hitting or pushing Mr. MacLean.

[77] Mr. Thorne was told later on that he might have hit Mr. MacLean; however, Mr. Thorne had no recollection of doing so.

[78] He specifically recalled wrestling at the table but said there was no incident by the door.

***Evidence of Catherine Chisholm***

[79] Ms. Chisholm testified briefly about being at the Miller home the evening of 10 October 2014. She was on the back deck when something began happening involving a Howie Miller, a Stephen Chudley and others. When Ms. Chisholm went inside the house, everyone was panicking. She rendered first aid to Mr. Gaudet.

***Evidence of Joyce Gaudet***

[80] Ms. Gaudet described briefly staying at home the evening of the gathering at the Miller's; a Karen Turple showed up at her door reporting that her husband, Paul Gaudet, had been hurt. Ms. Gaudet went to the hospital right away and saw her husband receiving medical treatment.

***Evidence of Csts. Bent, Burgess and Green***

[81] These officers testified about their involvement in the investigation. They testified about the arrest of Mr. MacLean outside his home the morning following the incident.

***Exhibit 1—booklet of photos of Mr. Gaudet's injuries***

[82] The prosecution tendered a booklet of ten colour photographs showing the injury to Mr. Gaudet's nose, taken before and after medical treatment. Prior to being stitched up, the soft tissue of Mr. Gaudet's nose around the nasal tip showed clear evidence of a major, penetrating trauma; the tissue was torn and still bleeding quite a lot at the time the pictures were taken in hospital. Even after getting stitched up, the wound remained clearly visible.

***Statement of Randall Edwin MacLean to Cst. Jason Green—Exhibits 2 and 3***

[83] The prosecution tendered as Exhibit 3 a transcript of a statement given by Mr. MacLean to police on 11 October 2014. An audio-video recording of that statement was tendered as Exhibit 2. Pursuant to *R. v. Park*, [1981] 2 S.C.R. 64, defence counsel waived a voluntariness *voir dire*.

[84] In his statement to police, Mr. MacLean said that the late Howard Miller had been a friend of his, and decided to go to his house on Depot St. to pay his respects to the family.

[85] Paul Gaudet started giving him an "attitude".

[86] A number of people wanted him to leave; he was upset about it.

[87] He tried to get an explanation from Mr. Gaudet, but "he wouldn't tell me".

[88] Of the key incident itself, Mr. MacLean stated: "I just remember biting him and that was it".

[89] There was no altercation, just "whatever was in his head".

[90] He had had too much to drink; in fact, he was still intoxicated the next morning.

[91] He had the impression that Mr. Gaudet did not like him, and he could not understand the reason. It was this that led up to "the altercation."

[92] Jerry Miller was the one who had asked him to leave.

[93] Mr. MacLean did not know why "this happened."

[94] He agreed with Cst. Jason Greene that biting Mr. Gaudet's nose was a pretty violent reaction to Mr. Gaudet not liking him, or for giving him "an attitude."

[95] Mr. MacLean stated repeatedly that did not know why he had been asked to leave.

### ***Evidence of Randall Edwin MacLean***

[96] The accused testified in his own defence.

[97] On the evening of 10 October 2014, he had had a couple of beer around 9:00 p.m. and then headed over to the Millers' on Depot Street; he believed he got there between 10 and 11:00 p.m.

[98] Upon arriving, he spoke with a number of people, including Paul Gaudet.

[99] He recalled sitting down and having a nice chat with Jerry Miller.

[100] He spent a fair bit of time in the living room with Jerry Miller and Howie Miller, Jr.

[101] He stated that he left the living room and entered the kitchen, where he asked for a drink of rum; he remembered Paul Gaudet admonishing him not to speak to his sister "like that" with "attitude".

[102] He took his drink back into the living room and a few minutes later he was asked by Jerry Miller to "leave right now". He began to walk towards the exit asking why he was being told to leave.

[103] He recalled Mr. Gaudet standing in the kitchen in front of him saying something; Mr. MacLean stated that he leaned closer to hear what Mr. Gaudet was saying.

[104] All of a sudden, he was "sucker punched" on the side of his head by another man.

[105] Mr. MacLean said he instinctively put his left arm around Paul Gaudet's head to cover up and shelter his body as other people began "pounding on him". He testified that he was scared and people were trying to pull him. He was getting weak and, "as a last resort" he "latched on" to Mr. Gaudet with his mouth. People kept beating him. As the beating stopped, someone pulled him up. As he was

pulled a gap in his teeth, where a tooth is missing, caught on Mr. Gaudet's nose and he felt the nose tear. Mr. MacLean testified that he was terrified and ran out of the house. He was chased and fell over a fence, where he laid until the people chasing him were gone.

[106] Mr. MacLean testified that he recalled giving a statement to the police as he had had the opportunity of observing the video recording of the statement being played in court. Mr. MacLean accounted for the vivid detail of his testimony in contradistinction to his vague and hazy recollection in the recording made just hours after the incident: he explained to the court that, at the time he had given the statement to Cst. Green, he was suffering from a massive headache, a severely sore back and ringing in his ears. For these reasons, he believed that his memory at the time of his testimony was more accurate than when he had made his statement to the police.

### ***Theory of the prosecution***

[107] The prosecution takes this view of the evidence in its brief to the court:

The accused attacked and wounded Paul Gaudet on 10 October 2014 at the Miller residence in Pictou, Nova Scotia, because Gerald Miller told him to leave the house. The accused refused to leave. He thought it was unfair that he was the one asked to leave, because it was not clear to him that it was for a valid reason. He especially resented being told to leave, considering the ungracious attitude Paul Gaudet had displayed towards him earlier in the evening. When Mr. Miller

nevertheless insisted that the accused had to go, the accused resisted. He was intoxicated and enraged; he lashed-out at Mr. Gaudet by savagely clamping on his nose. He caused severe and reasonably foreseeable injuries to the victim.

### *Theory of the defence*

[108] Defence counsel takes a differing view of the facts, and argues that Mr. MacLean was being attacked unjustifiably by Gerald Miller, Paul Gaudet, Jason Thorne and others. At one point, Mr. MacLean was afraid he might fall down, which would have exposed him to even greater violence. In order to maintain his balance—thereby protecting and defending himself from the further use of force by his assailants—he bit Mr. Gaudet’s nose in order to keep himself upright.

### *Analysis*

[109] In *R. v. Lifchus*, [1997] 3 S.C.R. 320 at para. 36, the Supreme Court of Canada provided a concise definition of proof beyond a reasonable doubt:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;

- a reasonable doubt is not a doubt based upon sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty -- a court which were to find only an accused probably guilty must acquit.

[110] In *R. v. Starr*, 2000 SCC 40 at paras. 96 and 242, the Court developed this definition by observing that the burden of proof placed upon the prosecution lies much closer to absolute certainty than to a balance of probabilities.

[111] Later, in *R. v. J.M.H.*, 2011 SCC 45 at para. 39, the Court stated that a reasonable doubt need not be based on the evidence; it might arise from an absence of evidence or a simple failure of the evidence to persuade the trier of fact to the requisite level of proof beyond a reasonable doubt.

[112] Mr. MacLean testified in this trial. Given that defence called evidence at this trial, I apply the law as set out in *R. v. W. (D.)*, [1991] 1 S.C.R. 742 at para. 28: if I were to believe Mr. MacLean, I must find him not guilty; even if were not to



believe him, but his evidence should leave me in a state of reasonable doubt, I must find him not guilty; even if I were not to believe Mr. MacLean and his evidence not leave me in a state of reasonable doubt, I must still ask myself whether, based on the evidence I do accept, I am satisfied that the prosecution has proven each and every element of the offenses beyond a reasonable doubt, and, if not, I must find Mr. MacLean not guilty.

[113] Mr. MacLean is charged with aggravated assault.

[114] “Assault” is defined in s. 265 of the *Criminal Code*; para. 265(1)(a) is the part pertinent to this case:

A person commits an assault when

(a) without consent of another person, he applies force intentionally to that other person directly or indirectly.

[115] The slightest touching without consent can constitute an assault within that definition. The Ontario Court of Appeal put it this way in *R. v. A.Z.*, [2000] O.J. No. 4080 at para. 6:

The "force" required for an assault may be no more than a touching of the person of the complainant in circumstances which interfere with the bodily integrity of the complainant. In the context of the definition of assault, "force" does not necessarily connote some minimum level of violence or any animus towards the complainant by the perpetrator: *R. v. Burden* (1981), 64 C.C.C. (2d) 68 (B.C.C.A.); *R. v. Cadden* (1989), 48 C.C.C. (3d) 122 (B.C.C.A.). A friendly but unwanted kiss may be an assault.

[116] Establishing the active or external element of the offence of aggravated assault requires proof that an assault occurred and that, as alleged in the information in this case, it resulted in the victim suffering a wound.

[117] What constitutes wounding? A breaking of the skin will do it: *R. v. Roach*, 2010 NSSC 342 at para. 74. There is no controversy in this case that Mr. Gaudet was wounded by being bitten by Mr. MacLean. There is no controversy about consent: Mr. Gaudet did not consent to being bitten; even if it were otherwise, one cannot consent to being wounded: *R. v. Jobidon*, [1991] 2 S.C.R. 714; *R. v. Gur* (1986), 27 C.C.C. (3d) 511 (N.S.C.A.).

[118] In dealing with *mens rea*—or the fault element—of assault, the Supreme Court of Canada stated in *R. v. George*, [1960] S.C.R. 871 at 890 that the intent element of assault is related exclusively to the application of force or to the manner in which force is applied, and would exclude criminality for things done by accident or through honest mistake. In *R. v. Palombi*, 2007 ONCA 486 at para. 35, the Ontario Court of Appeal discussed this point:

The force must have been applied intentionally. The touching that occurs due to the normal jostling that takes place in a crowded bus is a classic example of the unintentional or accidental application of force. Like reflex, unintentional or accidental application of force is of no practical application in this case.

[119] The added intent required for criminal liability for an aggravated assault was described by the Supreme Court of Canada in *R. v. Williams* 2003 SCC 41 at para. 22:

The *mens rea* for aggravated assault is the *mens rea* for assault (intent to apply force intentionally or recklessly or being wilfully blind to the fact that the victim does not consent) plus objective foresight of the risk of bodily harm . . . .

[120] As in *Palombi, supra*, Mr. MacLean does not assert that he bit Mr. Gaudet accidentally; rather, Mr. MacLean declares that he accidentally caused harm to Mr. Gaudet through the intentional application of defensive or self-protective force.

[121] Mr. MacLean has raised the defence of self-defence or self-protection.

Therefore, I turn my attention to s. 34 of the *Code*, which states:

34. (1) A person is not guilty of an offence if

- (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
- (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
- (c) the act committed is reasonable in the circumstances.

Factors

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

- (a) the nature of the force or threat;
- (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
- (c) the person's role in the incident;
- (d) whether any party to the incident used or threatened to use a weapon;

- (e) the size, age, gender and physical capabilities of the parties to the incident;
- (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
- (f.1) any history of interaction or communication between the parties to the incident;
- (g) the nature and proportionality of the person's response to the use or threat of force; and
- (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

No defence

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

[122] Section 34 describes a justification which would render the use of force as lawful. As the prosecution must prove an unlawful act, it is for the prosecution to negative a s. 34 defence beyond a reasonable doubt when there is an air of reality to that defence: *R. v. Cinous*, 2002 SCC 29 at para. 39.

[123] A defence will carry an air of reality if there is before the court evidence on the basis of which a properly instructed jury acting reasonably could base an acquittal if it were to believe the evidence to be true: *Cinous*, at para. 47.

[124] As defence counsel has pointed out, the witnesses called by the prosecution who were inside the home during this kerfuffle have offered varying accounts of

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<sup>1</sup> R.S.C. 1985, c. C-46, s. 34, as am. by S.C. 2012, c. 9, s. 2, in force 11 Mar 2013 in virtue of SI/2013-5.

this traumatic tableau. That is almost to be expected, given the fact that almost everyone present was inebriated, moderately and skyrocketing upward. The one exception was the youngest, Ms. Chudley, who did not drink or smoke anything, and seemed the most level-headed of the whole assembly. It is the elders who are supposed to be role models for youth; in this case, it was the inverse.

[125] I am unable to conclude whether Mr. MacLean brought cannabis with him. It is not clear whether the struggle happened mostly at the kitchen table, mostly at the back door, or mostly at points in between.

[126] Enough commonality emerges from the alcohol-thickened fog of this war that would allow me to find a number of facts.

[127] Mr. MacLean showed up at the Miller home in the later part of the evening on 10 October 2014. He had been drinking, and had more while at the home.

[128] At some point, Mr. Jerry Miller and Mr. Paul Gaudet got ticked off at something Mr. MacLean had done or said—or thought, in the haze of intoxication, he had done or said; it might very well have been that Mr. MacLean had not done anything untoward or uncivil at all; it might merely have been Mr. Miller and Mr. Gaudet's alcohol-impaired overreaction to or misinterpretation of events that led to the ensuing mêlée. Whatever the reason, I do not believe that Mr. MacLean had

done anything warranting him having been manhandled in the way that he was. He was not doing anything that was dangerous, and he was not saying or doing anything that was threatening of anyone's safety. Even if he had said or done something uncivil, the way to have removed him was to have asked him to go, and then to have called police if he refused.

[129] As it was, Mr. MacLean got manhandled. Had he just gone with the flow and let himself get led roughly out the door, he might well have had a valid complaint of excessive-force assault against Mr. Miller, Mr. Gaudet and Mr. Thorne.

[130] Unfortunately, Mr. MacLean went against the flow. He was determined not to leave, as he felt he had done nothing wrong and was entitled to an explanation. This is where Mr. MacLean got it wrong. I say this because one of the basic rights inherent in the ownership of property is the right to exclude others from it. This means that if you are in someone else's home and find yourself being told to get going, you pack up and leave—at once. There's no demanding of an explanation; you are not entitled to one. It is enough that the homeowner should want you out of there that you depart, post-haste.

[131] As it was, Mr. MacLean put it up, and, when it was clear that he was going to be ejected without the explanation to which he believed unreasonably in his alcohol-impaired mind he was entitled, he lashed out—and latched on to the closest target, sinking his teeth into the tissue of Mr. Gaudet’s nose.

[132] The proposition that Mr. MacLean was trying to keep himself balanced and upright to prevent falling and getting pummeled has no air of reality to it. Apart from acrobats such as the iron-jaw trapeze artist memorialized in the well known painting by Degas, nobody keeps his balance with his teeth. People will use their arms, hands and legs, or will otherwise contort themselves when they need to maintain balance. People do not bite into other people to maintain posture.

[133] And so it was under those circumstances that Mr. MacLean bit Mr. Gaudet’s nose. He intended to do so. He did not do it to defend himself or to protect himself. He did it because he was angered at being kicked out without being given a reason. He lashed out at the one directly in front of him, and that happened to be Mr. Gaudet. When someone bites someone else, latching on with no intermediate clothing to protect soft tissue, bodily harm is bound to follow; injury is readily and objectively foreseeable. This is particularly so when I observe that Mr. MacLean is an endomorphic body type; he is a big man, barrel chested and would weigh a

fair bit more than the very slight Mr. Gaudet. Mr. MacLean's jaw lock on Mr. Gaudet's nose meant that tissue was going to tear.

[134] I do not believe Mr. MacLean's explanation why he bit Mr. Gaudet; it is farfetched and fantastic, and I am not left in a state of reasonable doubt. Mr. MacLean was resentful and angry, and acted, not in self-defence, but in retaliation, in a way he knew—or ought reasonably to have known—would injure Mr. Gaudet seriously.

[135] There were plenty enough poor decisions made by many that evening and morning, and had Mr. MacLean gotten treated a little more gently, none of the bloodletting might have happened; nevertheless, I find that the prosecution has proven each element of the offence beyond a reasonable doubt, and the court would record a finding of guilt with respect to case number 2788204.

**JPC**