

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Cite as: R. v. Boutilier, 2006 NSPC 64

Date: December 4th, 2006

Docket: 1471895, 1471897

Registry: Sydney , NS

Between:

Her Majesty the Queen

v.

Andrew Boutilier

Judge: The Honourable Judge Anne S. Derrick

Heard: December 4th, 2006, in Sydney, Nova Scotia

Oral decision: December 4th, 2006

Counsel: Stephen Drake, Crown
Alan Stanwick, Defence

Introduction

[1] Andrew Boutilier is charged with eight offences arising out of events that occurred on October 10, 2004. These offences are:

Threats to cause death or bodily harm to Paulette Murphy (s. 264.1(1)(a))

Assault of Kevin Murphy s. 266(b)

Assault of Kevin Murphy using a weapon, an axe (s. 267(a))

Damage to Ms. Murphy's car (mischief) s. 430(4)

Possession of a weapon, an axe, for a purpose dangerous to the public peace (s. 88)

Causing a disturbance near a public place, the Reserve Mines Legion, by shouting (s. 175(1)(a)(i))

Breaching a recognizance dated Oct. 4/04 to keep the peace and be of good behaviour (s. 811) and;

not to have or initiate any direct or indirect contact with Kevin Murphy, Jason Murphy, Paulette Murphy or Corey Murphy (s. 811)

[2] There is no dispute that on the night of October 10, 2004, Paulette Murphy's car was very badly damaged. Its front and rear windshields were smashed out, the roof was damaged as was the hood. Ms. Murphy's evidence was that the car was "totaled" and that she paid to have it repaired herself, as it only had liability insurance and she needed it for work. The appraised damage was \$5274.71. I heard no evidence to contradict this amount. The undisputed evidence is that Ronnie Boutilier, Andrew Boutilier's brother, took an axe to the car. The issue for

this trial is whether Andrew Boutilier was involved in causing the damage to the Murphy car and whether he is guilty of the other offences with which he is charged.

[3] Andrew Boutilier is presumed innocent until he proven guilty beyond a reasonable doubt. The presumption of innocence never shifts and Mr. Boutilier is required to do nothing but raise a doubt with respect to the Crown's case. Any reasonable doubt must be resolved in an accused's favour and as Mr. Boutilier has testified I will have to apply the principles from *R. v. W(D)*, [1991] 1 S.C.R. 742 (S.C.C.), most recently considered by our Court of Appeal in *R. v. Lake*, [2005] N.S.J. No. 506.

[4] The events of the evening of October 10, 2004 occurred outside the Reserve Mines Legion Hall. They are very much in dispute. The Crown's case, simply put, is that Andrew and Ronnie Boutilier destroyed Ms. Murphy's car with axes and in the course of doing so, Andrew threatened Ms. Murphy, chased Mr. Murphy (Ms. Murphy's husband) with an axe, bit Mr. Murphy hard on the finger, caused a disturbance and committed the other offences which arose from the ones I have mentioned.

[5] The relationship between the Murphys and the Boutilier brothers, all of Reserve Mines, is very strained. The Murphys testified that there has been bad blood between the Boutilier brothers and their son, Jason, which Andrew Boutilier acknowledged although he blamed the hostility on Jason. Andrew Boutilier testified that he caused no damage to Ms. Murphy's car, did not threaten

her or assault Mr. Murphy, other than when he bit him which he says was in self-defence. He also testified that he did not have the axe in his possession for a purpose dangerous to the public but for defensive purposes, to protect his brother who was hell-bent on undertaking a rampage against Ms. Murphy's car. There are issues of credibility I will have to decide in evaluating whether the Crown has proven its case beyond a reasonable doubt on each of the charges.

The Events Preceding the Car-Trashing

[6] Certain events, relevant to this trial, preceded the trashing of Ms. Murphy's car. In the early morning hours of October 10, 2005, two Cape Breton Regional Police officers, Cst. Hall and Cst. Livingstone, responded separately but at approximately the same time to the Boutilier residence in Reserve Mines. This was around 12:40 a.m. Cst. Livingstone had just ten minutes earlier responded to a panic alarm call at the Reserve Mines Legion, just up the road from the Boutiliers' home. He went to the Legion, spoke to a woman there, assessed that everything was fine but then stayed in the area as he had a bit of concern. When he was dispatched to the Boutilier residence soon after, he met Andrew and Ronnie Boutilier in the driveway. He noted blood on the brothers' faces, arms and fists. Cst. Livingstone said he suggested they get medical treatment for their injuries "as they were covered in blood." The brothers were highly intoxicated according to Cst. Livingstone, and very agitated, yelling and hollering. They reported that they had been in a fight at the Legion with Kevin, Jason and Ronnie Murphy (Cst. Livingstone said Ralph Murphy but Andrew Boutilier corrected this when he testified) and George Deveau. The brothers wanted the police to go up to the

Legion and arrest the Murphys. Cst. Livingstone said he proposed they let the matter go for the evening and come and see him the next day at 7 p.m. when he was next on shift. Janet Boutilier, Andrew 's and Ronnie's mother, came out and persuaded the boys to go inside. Cst. Livingstone saw them all go around the back of the Boutilier home.

[7] There does not appear to be any real dispute about the discussion with Cst. Livingstone in the driveway of the Boutilier residence. Cst. Hall, arriving after Cst. Livingstone, observed the intoxicated and upset Boutilier brothers talking to Cst. Livingstone and understood they were complaining about an incident involving the Murphys at the Legion, although which Murphys Cst. Hall did not know. Andrew Boutilier confirms that he and Ronnie spoke with police at their home and that they were complaining about being "jumped" by Kevin, Jason, and Ronnie Murphy and George Deveau. He said this was why they were so agitated and angry and confirmed that their mother had tried to cool things out and get them to go inside which they did, at least temporarily. I will come back to that.

[8] In his evidence, Kevin Murphy denied being in a fight with the Boutilier brothers on the night of October 10 before the car trashing occurred. He said he did not know the police had been called and was not aware that Andrew and Ronnie were seen covered in blood.

[9] Kevin Murphy testified that he, Paulette and Jason were all at the Legion on the night of October 10, 2004. He said they were there attending a members' barbeque upstairs. Someone came in and said there was a fight on the step. When

Mr. Murphy went outside he found Jason with his shirt torn and his glasses knocked off. He did not see what had happened to his son and no evidence was led to explain what had occurred. Mr. Murphy took Jason inside. He did not see any injuries on Jason and went back upstairs while Jason stayed downstairs talking to some other people by the bathroom.

The Subsequent Events At the Legion

[10] Mr. Murphy was still upstairs when a girl came running in to say that someone was outside beating up a car with axes. Mr. and Mrs. Murphy both testified that when they went downstairs and looked outside they saw Andrew and Ronnie attacking Mrs. Murphy's car with axes. It was the front of the car and the smashed out front windshield that Mr. Murphy could see. He also testified to seeing a hole in the roof of the car.

[11] When Mr. Murphy went down the outside steps of the Legion toward the car, he said Ronnie Boutilier took a run at him with the axe. He said Andrew Boutilier then passed Ronnie, swinging the axe over his right shoulder. Mr. Murphy said he thought Andrew Boutilier was going to kill him with the axe. Andrew was hollering at Mr. Murphy that he was going to kill him. Mr. Murphy retreated to the Legion and shut the door, hollering for the bartender to call the police. Mr. Murphy said that Andrew Boutilier did not advance up the Legion steps but went back to hitting the car with the axe.

[12] Mr. Murphy said that mostly everyone stayed inside the Legion until the police came. He testified that when the police came he went outside and saw that Andrew had been handcuffed. He said Andrew Boutilier got away from the police officer and ran toward him, trying to butt him with his head as his arms were restrained. Mr. Murphy threw Andrew to the ground at which point Andrew bit him hard on the finger. The bite required 3 - 4 stitches and a tetanus shot. It left a permanent mark.

[13] Andrew Boutilier admitted to biting Mr. Murphy but said the circumstances were quite different. He said that after being handcuffed, while he was with Cst. Hall, Jason Murphy came up and punched him in the face, knocking him down. Kevin Murphy then jumped on him, pinning his legs and throwing punches at his face. To get Mr. Murphy off him, Andrew Boutilier says he bit his finger hard as he could not defend himself any other way with his hands cuffed behind him and his legs immobilized.

[14] Andrew Boutilier's description of being punched by Jason Murphy was confirmed by the evidence of Cst. Hall. He said Jason Murphy appeared from the crowd and punched Andrew Boutilier in the nose while Cst. Hall was transporting him to the patrol car. Cst. Hall did not see Kevin Murphy at this time. He tried to get Jason down; with the crowd pressing around them he lost contact with Andrew Boutilier and next saw him in the backseat of the patrol car. He was unable to say how Mr. Boutilier got there or what happened in the 60 seconds he lost contact with him.

[15] Kevin Murphy testified that he did not see Jason punch Andrew Boutilier and was not aware that he had done so.

[16] Of the witnesses for the Crown, only Kevin and Paulette Murphy testified to seeing who wielded the blows against the car. They both identified Andrew Boutilier as being involved in the damage to the car, as well as his brother, Ronnie. When Cst. Hall arrived on the scene at about 12:55 a.m., Andrew and Ronnie Boutilier were standing on the sidewalk with the axes in their hands down by their sides. A large noisy crowd was gathered and people were yelling and cursing at the brothers, telling them to drop the axes. The crowd was angry and the police evidence strongly suggested it was on the verge of getting out of control. Cst. Livingstone said it seemed that the crowd was trying to get at the Boutiliers. When told by Cst. Hall to drop the axes, both brothers did so and Cst. Hall moved them a safe distance from the crowd. In dealing with them he formed the opinion they were intoxicated, which does not seem to be in dispute.

[17] Kevin Murphy's evidence about the formation of the crowd outside the Legion differed from what was described by the police. He said that significant numbers of people only came out of the Legion when the police arrived, however the police officers testified to a large crowd of angry people already being assembled outside the Legion when they got there. Cst. Hall also testified that when he got to the Legion, he saw Kevin Murphy already outside, yelling at the Boutilier brothers. Cst. Hall's evidence was that Mr. Murphy was extremely agitated. He also spoke to Paulette Murphy who was very agitated as well. She told Cst. Hall how upset she was about the damage to her car.

[18] Mr. Murphy's evidence and that of Cst. Hall was also divergent on the issue of the arrest of the Boutilier brothers outside the Legion. Mr. Murphy said that when the police arrived, Andrew and Ronnie Boutilier took off and were chased and apprehended. Cst. Hall's evidence was quite different: he said he approached the brothers, with pepper spray, and directed them to drop the axes which they did immediately. Mr. Murphy did say he did not have a very good recollection of everything that night but maintained that he remembered what he saw the Boutiliers do.

[19] Mr. and Mrs. Murphy's evidence did not agree on all points either: for example, Mr. Murphy said he saw Andrew Boutilier trying to pull the axe out of the car hood whereas Mrs. Murphy said it was Ronnie Boutilier she saw doing this. Mrs. Murphy saw the arrest of the brothers as described by the police, not involving a chase as Mr. Murphy testified. She testified that when she was outside on the steps of the Legion before the police came, other people were outside as well, milling about.

[20] Mrs. Murphy described Andrew Boutilier beating on the car with the axe and smashing out the back windows. She said she was screaming at them to stop and then Andrew ran at her with the axe held in his right hand over his head. She ran up the steps of the Legion and remained there, not going back inside. She said she was afraid that Andrew would assault her with the axe. She said "they", meaning the Boutilier brothers, swung their axes at Mr. Murphy as well.

[21] Andrew Boutilier testified that on the night of October 10, 2004, for a period of about 2 hours or so between 9 and 11 approximately, he, brother Ronnie, a cousin and a friend had gone that evening to The Main Event, a bar in Glace Bay where they drank some pitchers of beer and played some pool. Andrew got “a drunk on” and said Ronnie was drinking “heavy”. Certainly the friend was very intoxicated as he got ejected from the bar although Andrew and Ronnie left of their own accord. The cousin went home. Andrew and Ronnie took a taxi to the Ultramar near their home in Reserve Mines to get cigarettes. According to Andrew, it was on their walk home from there that they passed by the Legion and were set upon by a group of men, 10 to 12 or more, including Kevin, Jason and Ronnie Murphy and George Deveau. They were beaten and kicked with 5 - 6 men on each of them. This beating led to the events that happened soon after, following the Boutilier brothers’ complaint to Cst. Livingstone.

[22] Andrew Boutilier does not dispute that he was outside the Legion on the night of October 10 when Mrs. Murphy’s car was damaged. He said he returned to the Legion with Ronnie after the police did nothing in response to his and Ronnie’s complaint about being jumped by Kevin and Jason Murphy. After talking to the police in their driveway, Andrew and Ronnie did go into the Boutilier home with their mother. Andrew was in his room watching television when he heard Ronnie leaving the house. Andrew followed him to the garage and when Ronnie grabbed an axe, Andrew grabbed a second one. They were both intoxicated and Ronnie would not listen to reason. He was seeking revenge said Andrew and was determined to go up to the Legion with the axe. Andrew accompanied him he says, because he couldn’t let him go alone and couldn’t have

lived with himself if anything had happened to him. He took the axe, he said, to protect his brother: he was going up to the Legion he said to look after Ronnie and make sure he didn't "wind up dead." Andrew was concerned enough about his brother's anger that he warned him not to hurt anyone, "don't kill anybody, don't get us put in jail for murder" was his evidence of what he said to Ronnie. Once they reached the Legion, Andrew Boutilier stood with the axe down at his waist and did not have to hold it in an offensive way. He would have defended himself he said, if anyone had attacked them. Andrew said he had his back to Ronnie a lot of the time as he was facing the crowd while Ronnie demolished the car. Andrew said he did not hit the car or participate in damaging it in anyway. He also said he did not approach anyone with the axe. He agreed with Cst. Hall's version of how the arrest occurred, saying they dropped their axes as soon as the police directed them to do so. He denied threatening Paulette Murphy but said she made threats to him that she would send people up to his house to shoot him and his whole family. Andrew Boutilier said he was aware he was violating his recognizance but had to look out for his brother.

[23] Andrew Boutilier's evidence was substantially supported by his brother, Ronnie and his mother, Janet. Drunk after the evening at The Main Event, Ronnie Boutilier described walking home with Andrew from the Ultramar past the Legion where they encountered Jason Murphy who started shouting "stuff" and then called inside for his father who came out and shouted at the Boutilier brothers as well. Ronnie Boutilier said that he and Andrew were then set upon by the Murphys and some others: Ronnie estimated more than six but less than 15, at least four people on him alone. He said he was punched in the head and then when

he was knocked down, kicked. The attackers backed off after a few minutes and Ronnie and Andrew continued on their way home. Ronnie Boutilier was very angry about this altercation and went into the garage to call the police. At this point, according to Janet Boutilier's evidence, she woke up, got dressed and went downstairs to see what was going on. She noticed that Ronnie had been roughed up with blood on his head. He was drunk she said and in worse shape than Andrew. She didn't notice Andrew to have been injured to the same extent. Mrs. Boutilier confirmed Ronnie's evidence that the police came quite quickly, and advised Ronnie and Andrew that they would not be dealing with their complaint that night. Ronnie Boutilier testified that the police officer he spoke with said they were not going up there (to the Legion) that night. Mrs. Boutilier was encouraged to get her sons to bed. Ronnie was, by his own account, enraged at these events: beaten up and then rebuffed by the police. He was determined to take matters into his own hands and freely admitted that he did so. He went into the house only briefly, and then to the garage where he got an axe. Andrew Boutilier followed him and also picked up an axe. They set off down the road together although Ronnie Boutilier said there was no discussion about what was going to happen. Mrs. Boutilier encountered them on the road as she had gone out to look for the cousin Ronnie had lost track of. She tried to persuade Andrew to get into the car but he refused. She said there was no reasoning with Ronnie given his state of mind, so she didn't try to intervene with him.

[24] Ronnie Boutilier testified that when he got to the Legion he immediately set to smashing Paulette Murphy's car with his axe. He said he hit the car about ten times in 30 seconds to a minute. He testified that he alone damaged the car and

that Andrew never hit it once with the axe he was carrying. Mrs. Boutilier had parked across the street from the Legion in the school parking lot and had an unobstructed view of the Murphy car and Andrew . She said Andrew never hit the car. She called 911 a second time, having called them on her way to the Legion. The police arrived quite quickly and Ronnie and Andrew Boutilier were arrested as they each described in their evidence, without incident. Mrs. Boutilier watched as Andrew and Ronnie were handcuffed and Andrew was seated on the curb with his hands secured behind his back. She said Jason Murphy came out of the crowd and hit Andrew and she then saw Kevin Murphy emerge from the crowd and although she could not see what he was doing, she said it appeared to her that he was attacking Andrew along with Jason. She left the scene when the police did, taking Ronnie and Andrew with them in two cars.

[25] Ronnie Boutilier pleaded guilty to damaging the Murphy car. He candidly acknowledged in his evidence that he was determined to get revenge for the beating he received on the walk home past the Legion that night. He said that Andrew Boutilier didn't help him by holding off the crowd as the crowd was not advancing and Andrew was further away from them than he was anyway. Ronnie and Mrs. Boutilier both testified that Andrew did not swing his axe at anyone and did not run at Mr. Murphy.

[26] There are a number of facts that I find have been established on the evidence I accept: that Andrew and Ronnie Boutilier were very intoxicated on October 10, 2004; that they complained to the police that "the Murphys" had jumped them when they were on their way home past the Legion; that the police

did not go up to the Legion to investigate this complaint; that Andrew and Ronnie Boutilier went back to the Legion armed with axes; that Andrew Boutilier was on a recognizance not to initiate contact with named Murphys and was bound to keep the peace and be of good behaviour; that Paulette Murphy's car was very badly damaged; that a crowd gathered while the Boutilier brothers were outside the Legion; that the crowd was angry and volatile when the police arrived; that Andrew and Ronnie Boutilier were arrested at the scene; that Jason Murphy punched Andrew Boutilier in the face; that Paulette Murphy was yelling at Andrew ; that there has been bad blood between Andrew and Ronnie Boutilier and Jason Murphy at least for a considerable period of time.

[27] On October 10, 2004, in the driveway of the Boutilier home, Cst. Livingstone saw that Andrew Boutilier and his brother Ronnie had blood on them. This is consistent with what Andrew Boutilier says he and Ronnie complained to the police about, that they had been jumped outside the Legion. I accept that occurred. I find that a number of individuals attacked Andrew and Ronnie Boutilier, both of whom are tall, solidly-built men. There is no other reasonable explanation for their injuries, independently verified by Cst. Livingstone. I also accept that their attackers were as Andrew Boutilier described, Kevin and Jason Murphy, Ronnie Murphy and George Deveau. Andrew and Ronnie Boutilier, bloody and agitated, told the police this is who beat them up. I accept that the refusal by the police to go and investigate that night led to Ronnie Boutilier taking matters into his own hands that night by going back to the Legion himself. I therefore do not accept Kevin Murphy's evidence that he was not involved in a fight with the Boutilier brothers prior to the car trashing incident. The ambush of

the Boutilier brothers by the Murphys was the spark that lit Ronnie Boutilier's fuse.

[28] As I said at the start of this decision, Andrew Boutilier is presumed innocent of each of the charges until the Crown proves them beyond a reasonable doubt. As he testified, I must consider whether I believe his evidence because if I do, then he is entitled to be acquitted of being directly involved in the offences. (I would still have to deal with the accomplice issue which I will address later.) Even if I do not accept all of Andrew Boutilier's evidence, I must consider whether I have a reasonable doubt about it and finally, even if I reject his evidence, I still must assess all of the evidence to determine if I have a reasonable doubt on any of the charges.

[29] It could be said that Andrew Boutilier had a compelling reason to fabricate his evidence, to escape criminal liability. He also had the same reason as Ronnie Boutilier for wanting to strike back at the Murphys as he too was a victim of their attack. He had a motive for attacking the Murphy car with an axe, making threats and assaulting Mr. Murphy as Mr. and Mrs. Murphy have described and it is relevant for me to consider motive. However, on all the evidence I have a doubt about the Murphys' evidence implicating Andrew Boutilier in these offences. In important respects, both Andrew's and Ronnie's evidence about certain events on the night of October 10 was supported by the evidence of others, notably the police, as I have already indicated.

[30] I have determined I accept that evidence of Janet Boutilier notwithstanding the fact that she would not be considered an impartial witness. No doubt she does not want to see Andrew get into trouble for what happened to the Murphy's car. Having said that however, I do note that she called 911 twice on the night of October 10, first when her sons had headed off to the Legion and again while Ronnie Boutilier was attacking the car. She played an active role in getting the police to the scene with the effect that her sons were arrested. Mrs. Boutilier's evidence did not leave me with the impression that she was manufacturing a good case for her son. She related her observations without making any excuses for her sons or indulging in vindictive comments about the Murphys. She offered her evidence in a balanced and even-handed manner. She said she had Andrew in view all the time she was parked across from the Legion and he did not hit the car. She saw Jason Murphy punch Andrew but in describing the next event, Kevin Murphy emerging from the crowd toward her son, she said she could not see exactly what he was doing. I find her narrative about the events on that night to be worthy of belief. I do not believe she was trying to protect Andrew Boutilier through false testimony; I believe she was telling the truth about what she saw.

[31] I think Andrew Boutilier was telling the truth when he described what happened on October 10 and I also accept Ronnie Boutilier's evidence about the events. Neither of them tried to sugar-coat the events: they both seemed to be reporting, in a matter-of-fact way, what happened and why. I inferred from the evidence that it was Ronnie Boutilier who was hell-bent on a destructive settling of scores with the Murphys: Andrew Boutilier went along to look out for his enraged, intoxicated brother knowing he was powerless to stop him. His objective

was to protect Ronnie, not destroy the car. It is clear from the evidence that Andrew and Mrs. Boutilier knew they would not be able to stop Ronnie once his fuse was lit. I accept that Ronnie Boutilier was capable of inflicting, by himself, all the damage that was done to the car.

[32] On the basis of the evidence I heard from the police witnesses and the Boutiliers, I am left with a doubt that Andrew Boutilier damaged the Murphy car or ran toward Mr. Murphy with the axe. I also have a doubt that he threatened Mrs. Murphy. The doubt I have also arises from my scepticism about the evidence of the Murphys. Its conflict with evidence I have accepted makes me uncertain about its reliability. I also expressly reject Mr. Murphy's implausible description of Andrew Boutilier rushing at him with his hands cuffed behind his back and trying to butt him with his head in the presence of the police.

[33] I accept the evidence of the police on what occurred outside the Legion after the Murphys car was attacked. I accept that a large, volatile crowd had gathered and that the Boutilier brothers surrendered themselves to the police without incident. I do not accept Kevin Murphy's evidence that the brothers had to be chased. I also accept that Jason Murphy stepped out of the crowd and punched Andrew Boutilier in the face, as described by Cst. Hall. Cst. Hall testified that he then lost sight of Andrew Boutilier for about a minute and I find that in that time, Kevin Murphy could have attacked Andrew Boutilier as Andrew described. I accept Janet Boutilier's evidence that Kevin Murphy emerged from the crowd at this time. I accept that Kevin Murphy attacked Andrew Boutilier as Andrew has claimed he did and that Andrew , who was handcuffed and on the ground, bit Mr.

Murphy defensively. I find that in the circumstances this did not constitute an excessive use of force by Andrew Boutilier : he was handcuffed, had just been punched in the face, was down on the ground with his legs under him and was being attacked by Kevin Murphy for the second time that night. I find that the bite to Mr. Murphy's finger was a justified and proportionate response by Andrew Boutilier acting in self-defence.

[34] At this point in my decision I can indicate I have reached certain conclusions:

[35] I find Andrew Boutilier was not a principal in the damage to the Murphy car. I find him not guilty of threatening Paulette Murphy. I find him not guilty of assaulting Kevin Murphy using an axe. I find him not guilty of assaulting Mr. Murphy by biting him.

[36] I also find that the Crown has not proven beyond a reasonable doubt that Andrew caused a disturbance outside the Legion by shouting. The evidence discloses that there was a lot of shouting and yelling by members of the assembled crowd, including the Murphys. I do not find there was evidence that established Andrew Boutilier was causing a disturbance that night by shouting. I find Andrew Boutilier not guilty of the causing a disturbance charge.

[37] I have said I have a doubt about Andrew Boutilier's direct involvement in damaging the Murphy car but I still have to consider if he was an accomplice to the damage. I will do that in a moment. I also have to deal with the possession of

the axe for a purpose dangerous to the public peace and the recognizance breaches. In relation to these charges, there is no question that Andrew Boutilier had possession of an axe, that the Murphy car was damaged in his presence and that, still bound by a recognizance with a no-contact clause, he had contact with Kevin, Paulette and Jason Murphy on October 10. The issue is whether Andrew Boutilier has any criminal liability for any of this. On the issue of whether he breached his recognizance condition to keep the peace and be of good behaviour, I find that this rises and falls on what I conclude about the remaining charges. A conviction as a party to the damaging of the car or a conviction for being in possession of a weapon dangerous to the public peace, would I find, constitute a failure to keep the peace and be of good behaviour.

*Was Andrew Boutilier a Party to the Damage to Ms. Murphy's Car
(Mischief) Contrary to Section 430(4)*

[38] I have indicated that I have a doubt, based on my assessment of all the evidence, including that the Defence witnesses, Ronnie and Janet Boutilier and Andrew Boutilier, that Andrew hit the Murphy car with his axe. The questions remains whether Andrew Boutilier is guilty as a party to the damage to the car: did Andrew Boutilier aid and abet Ronnie Boutilier when he was smashing the car with the axe?

[39] This issue is raised on Andrew Boutilier's own evidence where he described going with Ronnie back to the Legion, armed with an axe to protect Ronnie if the crowd advanced on him. Andrew said he had the axe down by his side as he faced the crowd, keeping any eye on it, while Ronnie Boutilier trashed the car. Ronnie's

view of the situation according to his testimony was that Andrew 's presence with the axe didn't have any effect as the crowd wasn't trying to advance on him and he was closer to them in any event.

[40] Andrew Boutilier could be found to have been a party to the damage to the car if he did anything for the purpose of aiding Ronnie Boutilier to commit the offence. In order to satisfy the purpose requirement of the law, the Crown is required to prove only that Andrew Boutilier intended the consequences that flowed from his aid to Ronnie; the Crown need not show that Andrew desired or approved of the consequences. (*R. v. Greyeyes*, [1997] SCJ No. 17 (SCC) at paragraph 40) The Crown must however prove beyond a reasonable doubt that Andrew Boutilier's actions were for the purpose of aiding Ronnie Boutilier in carrying out the attack on the car. For Andrew Boutilier to be convicted of being a party, it must be established that Andrew Boutilier had in mind the same unlawful purpose as Ronnie Boutilier and that he assisted Ronnie Boutilier in carrying out that unlawful purpose. (*R. v. T.S.*, [2000] N.S.J. No. 180 (N.S.S.C.)) Andrew Boutilier cannot be found guilty as a party to the mischief charge just because he was present while Ronnie Boutilier trashed the car and did nothing to prevent it. (*R. v. Dunlop and Sylvester*, [1979] 2 S.C.R. 881 (S.C.C.))

[41] I find that Andrew Boutilier knew Ronnie Boutilier was up to no good when he set off for the Legion carrying an axe. Nothing Andrew Boutilier did indicates he was intending to assist Ronnie Boutilier further his plan: he even warned Ronnie not to hurt anyone although as it turns out that was not what Ronnie had in mind anyway. The evidence does not establish that Andrew Boutilier knew what

Ronnie intended to do. Andrew Boutilier testified that there was no way to stop Ronnie, he was “bull-headed” to use Andrew’s words, and once Ronnie Boutilier attacked the car, Andrew Boutilier said, “at that point I didn’t try to stop him anymore, there was nothing I could do.”

[42] I find that Andrew Boutilier’s intention in going with Ronnie to the Legion armed with an axe was to ensure his brother was not harmed and that he was either indifferent about what was happening to the Murphy car or felt helpless to stop Ronnie’s rampage. Andrew Boutilier did say in his evidence about his presence at the scene: “I kept the crowd back by pointing at people and saying, keep back, I am not joking. Everyone more or less kept their distance, we were both armed.” I have considered this evidence very carefully and asked myself whether this indicates that Andrew Boutilier’s purpose was to intimidate the crowd so that Ronnie Boutilier could finish the job on the car. It is very close to being a party to the offence but I am left with a doubt that Andrew Boutilier’s purpose was to aid Ronnie Boutilier’s efforts to trash the car. Andrew Boutilier testified that he went with Ronnie, even though he believed he was breaching his recognizance, because he had to look out for him. I find that Andrew Boutilier was at the scene to make sure Ronnie wasn’t hurt and that he intended to step in if anyone tried to attack Ronnie. Ronnie Boutilier had been attacked by the Murphys earlier when passing by the Legion and Andrew Boutilier had reason to be concerned about Ronnie returning there.

[43] No one approached Ronnie Boutilier, which is not surprising: Ronnie’s violent rampage with the axe was likely enough by itself to dissuade anyone in the

crowd from going anywhere near him. Even if Andrew Boutilier's presence at the scene had the effect that people did not advance, that is not enough to establish his role as a party. It is not sufficient if the acts done have the effect of aiding the commission of the offence. Guilt as a party has to be grounded in a finding that the accused's purpose was to assist the principal.

[44] I do not find that the Crown has proven beyond a reasonable doubt that Andrew Boutilier went with Ronnie Boutilier to trash the car or that Andrew's presence at the scene was for the purpose of enabling Ronnie Boutilier to carry out his car-trashing plan. I am left with a doubt, on the evidence, that Andrew Boutilier's purpose was to assist Ronnie Boutilier in his destructive rampage against the Murphy car.

*Breaching the Recognizance to Keep the Peace and Be of Good Behavior
and Have No Contact With the Murphys Contrary to section 811*

[45] The basis of the Crown's case for the charge that Andrew Boutilier breached his recognizance by having contact with Kevin, Jason and Paulette Murphy are the events that occurred outside the Legion. I have already acquitted Andrew Boutilier, on the basis of reasonable doubt, of the charges of assaulting Mr. Murphy and threatening Mrs. Murphy. Contact has been held to signify "some interaction between two individuals." (*R. v. H.B.T.*, [2004] N.S.J. No. 91 (N.S.S.C.)) To establish Andrew Boutilier's guilt, the Crown would have to have proven beyond a reasonable doubt that Andrew Boutilier intended to engage in the prohibited conduct, that is, that he intended to have contact with the named Murphys. I have indicated I have a doubt about whether the alleged contact

occurred, such as the assault on Mr. Murphy and the threatening of Mrs. Murphy. As for the biting of Mr. Murphy, I find that not to have been the type of contact prohibited by the recognizance. A person cannot be prohibited from lawfully defending himself against someone who is assaulting him. I find that Andrew Boutilier did not go to the Legion looking to have contact with the Murphys. He went, as I have said, to look out for Ronnie Boutilier. He did not initiate any contact with the Murphys at the Legion. The contact with Jason and Kevin Murphy was initiated by them: Jason Murphy punched Andrew Boutilier in the face and then Kevin Murphy went after him. I find Andrew Boutilier not guilty of the charge of breaching the no-contact provision of his recognizance.

*Possession of the Axe for a Purpose Dangerous to the Public Peace
Contrary to section 88*

[46] To secure a conviction for possession of a weapon for a purpose dangerous to the public peace, the Crown must establish that (i) the accused possessed a weapon, and (ii) that the purpose of that possession was one dangerous to the public peace. The law on this issue indicates that Andrew Boutilier's purpose is a factor, not the only factor, which must be assessed. The Ontario Court of Appeal stated in *R. v. Nelson (1972)*, 8 C.C.C. (2d) 29 inferences as to the accused's purpose can be drawn from the other factors to be considered: "...the nature of the weapon, the circumstances under which the accused had it in his possession, his own explanation for that possession, and the use to which he actually put it..." Actual use of the weapon is not an element of the crime. (*R v. Kerr, [2004] S.C.J. No. 39, paragraph 95*)

[47] In this case I have found that Andrew Boutilier was in possession of an axe for the purpose of defending his brother if anyone confronted him outside the Legion. However, it is not legitimate to arm oneself in potentially dangerous situations where the options exist to escape, ask for police protection, negotiate or avoid the situation altogether. Arming oneself in such situations reflects a willingness to engage, if confronted, in physical conflict using a weapon. (*Kerr, paragraphs 53 and 94*) This purpose, the Supreme Court of Canada has held, is contrary to the public peace.

[48] I find that Andrew Boutilier's possession of the axe was for a purpose dangerous to the public peace and therefore contrary to section 88 of the *Criminal Code*. He committed an offence by going back to the Legion with Ronnie Boutilier, armed with an axe. His express purpose was to defend Ronnie Boutilier whom he knew was going to avenge himself and he continued to possess the axe, which he displayed openly by his side, surrounded by an agitated and hostile crowd, while Ronnie Boutilier unlawfully destroyed the Murphy's car. Andrew Boutilier is not criminally liable for Ronnie Boutilier's actions, but he is responsible for his own, possessing the axe in the circumstances which he did.

Consequently I also find him to have breached his recognizance by not keeping the peace and being of good behaviour. I therefore enter convictions against you, Mr. Boutilier, on these two counts in the indictment, possession of a weapon for a purpose dangerous to the public peace and breaching your recognizance by failing to keep the peace and be of good behaviour.

Anne S. Derrick
Judge of the Provincial Court of
Nova Scotia