

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

R. v. MacNeil, 2012 NSPC 105

Date: November 20, 2012

Docket: 2356880 - 82

Registry: Halifax

**BETWEEN:**

**Her Majesty The Queen**

**v.**

**Ashton Thomas MacNeil**

**TRIAL DECISION**

**JUDGE:** The Honourable Anne S. Derrick

**HEARD:** November 6, 7, 8 and 9, 2012

**DECISION:** November 20, 2012

**CHARGES:** sections 268(1) x 2 and 175(1)(a)(i) of the *Criminal Code*

**COUNSEL:** Christine Driscoll, for the Crown

**DEFENCE:** Luke Merrimen, for Ashton MacNeil

**By the Court:***Introduction*

[1] The controversy in this case is not about who put Brett Myketyn and Jonathan Clarke in hospital on August 26, 2011 with serious head injuries. Ashton MacNeil admits that it was he who punched them both, scant minutes apart, knocking each of them down with a single blow. What is in issue is whether the Crown has proven beyond a reasonable doubt that Mr. MacNeil did not act in self-defence.

[2] There is a second issue to be resolved once self-defence has been addressed. Mr. MacNeil is charged that he unlawfully wounded, maimed, disfigured, or endangered the lives of Brett Myketyn and Jonathan Clarke, thereby committing aggravated assault. While he acknowledges that Mr. Myketyn's injuries were grave enough to constitute aggravated assault, if an unlawful assault is proven, Mr. MacNeil submits that Mr. Clarke's injuries do not amount to aggravated assault. On this issue I heard submissions from Crown and Defence on whether Mr. Clarke's injuries endangered his life, as I have noted, endangerment of life being one of the elements of aggravated assault. While the Crown does not suggest that aggravated assault is made out in Mr. Clarke's case on the basis of "maiming" or "disfiguring", an assault that produces "wounding" is an aggravated assault.

[3] While I was preparing these reasons I realized that neither Crown nor Defence had made any submissions on what, in law, amounts to "wounding." I made a request yesterday by email to counsel for their submissions on this issue. I have since been provided with some case law from the Crown and anticipate I may receive something from the Defence this week. In the meantime I can deal with the charges against Mr. MacNeil, but for this particular issue. Once I have rendered these reasons, I will canvas when and how counsel wish to address me on the "wounding" issue that is relevant to the charge in relation to Mr. Clarke.

[4] I will now address the facts in this case and the issue of self-defence.

### *Going Downtown*

[5] On August 25, 2011, Brett Myketyn and Jonathan Clarke, close friends since childhood, got together for some drinks before heading off to downtown Halifax. They were drinking rum. Mr. Clarke probably also smoked a joint. Although Mr. Myketyn does not remember doing the same, his urine, tested later at the hospital, showed the presence of cannaboids, by-products of cannabis. (Exhibit 10, Agreed Facts)

[6] Neither Mr. Myketyn nor Mr. Clarke recall clearly when they left to go downtown. Their destination was the Pogue Fado on Barrington Street where they met their good friend, Devon MacDonald, who had arrived earlier, around 10 p.m.

[7] Mr. Myketyn does not recall being with Ms. MacDonald that night. His last memory before waking up in the hospital with a fractured skull is of leaving the Pogue around midnight. Mr. Clarke's memory does not even extend that far into the evening. His last memory before finding himself at the hospital with a cut near his eye and fractured facial bones is of going into the Pogue with Mr. Myketyn.

### *Leaving the Pogue Fado*

[8] Mr. Myketyn recalls that he and Mr. Clarke decided to leave the Pogue because they had had enough to drink. They decided to call it a night and go home. No one is able to say with any precision how much Mr. Myketyn and Mr. Clarke had to drink but the evidence indicates they were intoxicated. This is borne out by Mr. Myketyn's urinalysis at the hospital which revealed "acute alcohol intoxication." (*Exhibit 10, Agreed Statement of Facts for Brett Myketyn*) The descriptor "acute" indicates that the intoxication was recent, as distinguished from a state of "chronic" intoxication.

[9] Ms. MacDonald was under the influence herself by the end of the evening. She would not have driven a car. Asked to rate herself on a scale of 0 – 10, zero being sober and 10 being intoxicated, she gave herself a 5. She thinks she had a couple of coolers before going to the Pogue and maybe a couple of glasses of beer once there. All she consumed was alcohol.

[10] Although Mr. Myketyn and Mr. Clarke do not remember this Devon MacDonald left the Pogue with them. The plan was to walk down to the Casino and catch a taxi there for Dartmouth and home. Ms. MacDonald testified that she, Mr. Myketyn and Mr. Clarke walked across Barrington Street from the Pogue and sat on some steps. The discussion concerned what should be done with the rest of the night. Ms. MacDonald confirmed that Mr. Clarke decided they should get a cab and go home because Mr. Myketyn was so intoxicated.

*On Sackville Street – The Evidence for the Crown*

[11] The three friends set out for the Casino to get a cab. As they crossed Barrington Street toward Sackville Street, a stranger grabbed Ms. MacDonald's arm. Mr. Myketyn reacted, but not aggressively according to Ms. MacDonald. He told the man he shouldn't do that and then, as Ms. MacDonald recalls, stopped and talked about cigarettes with him. Mr. Myketyn was civil and calm. Ms. MacDonald and Mr. Clarke kept walking. Ms. MacDonald agreed with Mr. Merrimen's suggestion that they didn't want the situation to escalate into a big scene although it does not sound as though that was likely.

[12] What Ms. MacDonald says she and Mr. Clarke encountered next was a small group of 2 – 3 young women who were clustered near a man and another young woman. Although the man and woman were unknown to Ms. MacDonald and Mr. Clarke, there is no dispute about the fact that this was Ashton MacNeil and his girlfriend, Yolanda Luka.

[13] It is also not disputed that Mr. MacNeil and Ms. Luka were standing by what has been identified as the back door of Reflections Cabaret. The main entrance to Reflections is a short distance further down the street. This back entrance area has been described as an alcove. The doors to the entrance were closed. What Ms. MacDonald says she observed about where Mr. MacNeil and Ms. Luka were located is not disputed: Ms. Luka was standing in the alcove facing the street with her back to the doors, and Mr. MacNeil was just at the edge of the alcove facing Ms. Luka.

[14] The cluster of young women were agitated and although Ms. MacDonald saw nothing physical occur between Mr. MacNeil and Ms. Luka in the doorway, the situation looked to her like a conflict.

[15] What Ms. MacDonald has described in her evidence about what happened after she and Mr. Clarke noticed Mr. MacNeil and Ms. Luka is very much in dispute. Ms. MacDonald was firm in her evidence that she and Mr. Clarke did not engage Mr. MacNeil and Ms. Luka in any conversation. Although another Crown witness, Nikala Reashor, whose evidence I will discuss shortly, testified that she heard male voices coming from the group gathered near the back door of Reflections, Ms. MacDonald was unshaken in her testimony that she and Mr. Clarke did not get involved in whatever was going on at the alcove. Her evidence about what she observed is as follows: Mr. MacNeil and Ms. Luka were having a discussion. Ms. Luka did not look at them. In response to concerns being expressed by the other young women, Ms. Luka was, in a general way, continually saying that she was alright. Ms. MacDonald and Mr. Clarke did not ask her if everything was alright. Ms. MacDonald testified that she never heard Mr. MacNeil speak. She and Mr. Clarke had stopped to listen to the young women who had first drawn their attention to the situation. She and Mr. Clarke did not talk to Mr. MacNeil and Ms. Luka. Ms. MacDonald testified that Ms. Luka was not having what she recognized as a conversation with either Mr. Clarke or herself.

[16] Ms. MacDonald and Mr. Clarke had stopped across from Mr. MacNeil and Ms. Luka and were about 2 – 3 feet distant from them. Standing on Ms. MacDonald's right side, Mr. Clarke was closer. Ms. MacDonald did not agree with the suggestion put to her on cross-examination that Mr. Clarke walked right up to Mr. MacNeil. She did not think that Mr. Clarke was going to pull Mr. MacNeil away from Ms. Luka. It was her evidence that Mr. Clarke made no movement with his right hand. According to Ms. MacDonald what happened was this: Mr. MacNeil turned to face her and Mr. Clarke. Turning toward them brought Mr. MacNeil within a foot of Ms. MacDonald's face. No words were exchanged but Mr. Clarke stepped closer to Ms. MacDonald at this point. He said to Mr. MacNeil, "Hey man" in a normal tone. Mr. Clarke had his hands by his sides. Ms. MacDonald testified that what occurred next came out of nowhere.

[17] Mr. MacNeil hit Mr. Clarke on his cheek with his fist. According to Ms. MacDonald this spun Mr. Clarke around 180 degrees and he went to the ground where he was standing, hitting face down on the sidewalk. Ms. MacDonald started screaming. Mr. MacNeil walked away up Sackville Street toward Barrington.

[18] Ms. MacDonald could see Mr. Clarke was bleeding from his head. She knelt down and placed his head in her lap. At this point, Mr. Myketyn came around the corner of Sackville Street. Ms. MacDonald stood up and called Mr. Myketyn over. She wanted help. Mr. Myketyn was about 15 feet away and in the street. Standing up, Ms. MacDonald could see him by looking over a parked car. He was in the street with Mr. MacNeil. They were in close proximity but Ms. MacDonald saw no signs of aggression on the part of either Mr. Myketyn or Mr. MacNeil.

[19] Ms. MacDonald observed that Mr. Myketyn's hands were down by his sides, not raised, with his palms facing out. She described this as a "calm down" stance. Ms. MacDonald acknowledged in her evidence that she was not watching Mr. Myketyn and Mr. MacNeil the whole time as she was dividing her attention between Mr. Clarke and trying to get Mr. Myketyn to come over to where she was on the sidewalk.

[20] Ms. MacDonald testified that she then saw a fist and Mr. Myketyn went down. She did not see him hit the ground. She ran over to him. His eyes were open and his breathing was slow. To her "he didn't look as though he was there." Judging from all the blood, Ms. MacDonald thought Mr. Myketyn had hit a car as he fell to the ground.

[21] Mr. Clarke regained consciousness not long after he was hit and according to Ms. MacDonald was screaming so she had to get back to him to try and calm him down. Cst. MacLaughlin who arrived on the scene at 12:20 a.m. saw that people were trying to get Mr. Clarke to lie back down. Mr. Clarke did not seem to be aware of what was going on and kept trying to get up.

[22] Brittany Thompson, another Crown witness, was walking down Barrington Street just after Mr. Clarke was hit. She saw a small crowd on Sackville Street and a woman, presumably Ms. MacDonald, crying and yelling. Mr. Clarke was lying

on the sidewalk, bleeding and not moving. Ms. Thompson called 911 as no one had at that point. She did not know any of the people involved.

[23] While on the call with 911, Ms. Thompson saw two men in the street, facing each other. One was backing the other man down the street. Ms. Thompson could not hear anything but it did not seem to her that the men were yelling at each other. Their body language indicated to her there was some conflict. She thought the advancing man was confronting the other man.

[24] Ms. Thompson was obviously observing Mr. Myketyan advancing toward Mr. MacNeil, which is captured in CCTV footage I will be discussing shortly. She testified that her observations of the two men on Sackville Street were momentary as her focus was on Mr. Clarke. She had been drinking earlier, having had approximately 2 – 3 beer since about 10 p.m. But the scene she had come upon was “sobering” and she did not describe herself as intoxicated. Cst. Colin Graves considered Ms. Thompson fit to give a statement on August 26 and took one from her.

[25] On August 26, 2011, Nikala Reashor was working at Reflections as the coat check. At work since 10 p.m., she went outside around midnight for her break. She had not been drinking nor had she taken any other intoxicants. She was on the sidewalk outside the main door to Reflections when she heard a commotion and people arguing. This was happening around the back door of Reflections, up towards Barrington Street. The commotion had started almost at the corner of Sackville and Barrington and had come down the street. Voices were raised.

[26] The next thing Ms. Reashor saw was a man fall face forward to the sidewalk. Although Ms. Reashor did not know any of the people on Sackville Street that night, we know this was Mr. Clarke. Although Ms. Reashor could not hear anything that was being said, she testified that just before the punch, the puncher, who had his back to the rear entrance to Reflections, and the man who was punched, standing with his back to the street, were talking. She does not recall observing any motion by Mr. Clarke just before he was punched. As she noted in her evidence: “Things happened pretty quickly.”

[27] As soon as Mr. Clarke was punched and fell, Ms. Reashor ran inside Reflections, and yelled for security to call an ambulance and to come and help. She was inside about 20 seconds before running back outside. The man on the sidewalk was unconscious. There was a woman next to Mr. Clarke on the ground, crying. It is reasonable to assume this would have been Ms. MacDonald.

[28] With security at the scene, Ms. Reashor had to work the door at Reflections to make sure people going in were ID'd. She then stayed inside and collected the cover charge. She had a spot by the windows that face Sackville Street and could look straight out, which she did once she finished taking the cover charges.

[29] What follows is a description of what Ms. Reashor testified she saw: Mr. MacNeil, walking down Sackville Street was being followed by Mr. Myketyn. It appeared to Ms. Reashor that Mr. Myketyn must have said something to cause Mr. MacNeil to stop. Mr. Myketyn walked up to and around Mr. MacNeil so he was facing him. He had his hands at waist level with his palms facing out, body language that Ms. Reashor interpreted as a signal to Mr. MacNeil to either calm down or stop.

[30] Ms. Reashor assumed from what she was observing that Mr. Myketyn and Mr. MacNeil knew each other. She could not hear them and thought they were talking. It did not appear to her from their body language that they were yelling. Ms. Reashor formed the impression that Mr. Myketyn wanted to talk to Mr. MacNeil. They faced each other about a foot apart for about 20 seconds. They seemed calm. Then Mr. MacNeil turned slightly. Mr. Myketyn was just standing there, watching him. Mr. MacNeil started to bring his hand up to punch and Ms. Reashor ran out into the street. Mr. Myketyn fell in the street, downed by the blow.

[31] Mr. MacNeil then walked down Sackville Street and turned toward Granville Street. Ms. Reashor yelled for security as she was fearful that Mr. Myketyn who was lying in the street would get hit by a car.

#### *The Forensic Evidence on Sackville Street*

[32] By the time Det/Cst. James Wasson arrived at 1:20 a.m. to take photographs of the scene, Mr. Clarke and Mr. Myketyn had been taken to hospital by ambulance. Det/Cst. Wasson found blood on the sidewalk – which he identified



with a yellow crime scene marker (CSM) #1, and blood on the street – which he identified with a yellow CSM #2. He took photographs 1 through 19 in Exhibit 1 that night and photographs 20 – 26 on August 30 during the daytime. The two crime scene markers can be seen in these photographs. CSM #1 marking the blood that came from Mr. Clarke is very close to and just below the eastern edge of the back door to Reflections. (*Exhibit 1, Photograph 5*) CSM #2 marking Mr. Myketyn’s blood is in the street, down from the main entrance to Reflections, close to the corner of Sackville and Granville Streets.

[33] Det/Cst. Wasson also made a scale drawing (*Exhibit 5*) on which he indicated the crime scene markers. Measured from a traffic light standard on the corner of Sackville and Barrington Streets, CSM #1 was on the sidewalk 15 meters down Sackville Street (east) and 2.45 meters south. CSM #2 was in the street 29.3 meters down Sackville Street and 3.55 meters north. The blood from Mr. Myketyn was found near a car that was parked close to the corner of Sackville and Granville Streets. Both bloodstains corresponded with what Crown witnesses have said about where the two punches were delivered.

#### *Mr. MacNeil Turns Himself In To Police*

[34] On September 1, 2011, Mr. MacNeil presented himself at the Halifax Regional Police Headquarters on Gottingen Street. He was arrested by Det/Cst. (now Sgt.) Christopher Thomas for aggravated assault. After speaking with duty counsel, Mr. MacNeil spent from about 3:35 p.m. to 4:11 p.m. talking to Sgt. Thomas. Mr. MacNeil’s interview was video and audio recorded and the CD was entered into evidence by consent (*Exhibit 6*), with no issue being taken by Defence to its voluntariness or its *Charter* compliance.

[35] In the interview Mr. MacNeil is obviously upset by what has happened. He says, for example: “This is shitty. Well, it’s obviously not as shitty for me as it is for those kids...” He is distressed by the effect his involvement will have on his family and talks about how he always seems to get into trouble when he goes out in downtown Halifax. He acknowledges that he punched both Mr. Clarke and Mr. Myketyn, whom he did not know. He confirms he had been having an argument with Ms. Luka, and that some young women were concerned it was going to escalate. He indicates that he viewed Mr. Clarke as “getting in his business”. He

says he and Mr. Myketyn talked and he apologized for hitting Mr. Clarke. “And I was like man I’m sorry for hitting your fucking buddy man but he got in my business.” According to Mr. MacNeil’s recollection of events during the interview with Sgt. Thomas, Mr. Myketyn then said, “all right as long as you don’t hit him again.” Mr. MacNeil described to Sgt. Thomas what happened then:

I said buddy, I’m not going to hit him again. I’m all good. And I started walking away. And then he comes up and he says what’s your name, where you from. And I think that’s when the next punch was thrown.

[36] Toward the end of the interview, at Sgt. Thomas’ invitation, Mr. MacNeil writes letters to his mother (*Exhibit 7*) and to the families of Mr. Clarke and Mr. Myketyn. (*Exhibit 8*) In his letter to his mother he says that what he has done “to these two guys is unexplainable and unexcusable.” To Mr. Clarke’s and Mr. Myketyn’s families he says he does not know their sons and “this is an accident that I caused to happen.” He goes on: “...I would like you to know that I had no intention of hurting your boys and have to face the fact of what I have done...I need you to understand that I have made a mistake in my life, and I accept full responsibility for my action.” He expresses remorse and wishes Mr. Clarke and Mr. Myketyn “the best of luck and a quick recovery.”

### *The Defence Evidence*

[37] Ashton MacNeil and Yolanda Luka both testified. Their descriptions of the encounter with Mr. Clarke differed from Devon MacDonald’s and Mr. MacNeil explained what led to him punching Mr. Clarke and then Mr. Myketyn. Taking a full view of this evidence requires me to start at the beginning.

[38] By August 2011, Ms. Luka and Mr. MacNeil had been in a boyfriend/girlfriend relationship for almost a year. They are presently still a couple.

[39] On August 25, Ms. Luka and her girlfriends decided to go to the Pogue Fado. She contacted Mr. MacNeil to meet her there. She arrived first, around 10 – 10:30 p.m. The Pogue was crowded and Ms. Luka and Mr. MacNeil socialized with their respective friends. After an hour or so, while Ms. Luka was walking

toward Mr. MacNeil, a man whose was not known to her, made a pass, offering to buy her a drink. Ms. Luka turned him down with a polite, “No thank you.” She recalls that she told the man she had a boyfriend.

[40] Mr. MacNeil watched this exchange occur. Both Mr. MacNeil and Ms. Luka agree that it made him upset. Mr. MacNeil felt Ms. Luka should have been more aggressive and used a harsher tone. It was apparent to me that Mr. MacNeil would have preferred Ms. Luka to have established more emphatically that she was spoken for already, that liberties were not to be taken with her. It was Mr. MacNeil’s evidence that the overture by the stranger “happens more often than not” because Ms. Luka is, in Mr. MacNeil’s words, “a beautiful girl.” Mr. MacNeil testified that Ms. Luka’s well-mannered response “didn’t sit well with him.” He didn’t like the “thank you” part.

[41] Mr. MacNeil made his views known to Ms. Luka. He testified that he said to her: “Why did you have to say no, thank you”? Apparently Ms. Luka could not see what the problem was, how her response had made Mr. MacNeil feel.

[42] Ms. Luka became upset at Mr. MacNeil’s reaction. She decided she wanted to leave the bar. She told her friends. Her mind made up, she went out into the street. Mr. MacNeil went with her.

[43] There is some difference in the evidence of Ms. Luka and Mr. MacNeil about what exactly was the focus of their discussion once they got themselves on to Sackville Street and stopped at the back entrance of Reflections. Ms. Luka testified that she and Mr. MacNeil were “hashing out what happened at the bar”, whereas Mr. MacNeil testified that he was trying to get her to stay and continue their evening. He also testified that he wanted “to make things right between us.” On cross-examination Mr. MacNeil’s version of the discussion was more in alignment with Ms. Luka’s. He said he got his views out. Ms. Luka did not like his reaction to what had happened at The Pogue.

[44] I am satisfied that something about the nature of the discussion between Mr. MacNeil and Ms. Luka caught the attention of some other people on the street. The fact that some passers-by started to pay attention to what was happening at the

alcove has been described by Mr. MacNeil, Ms. Luka, Ms. MacDonald, and Ms. Reashor.

[45] Mr. MacNeil and Ms. Luka each testified that they were absorbed in their discussion and did not need or welcome the intervention of anyone else. Ms. Luka was facing the street and Mr. MacNeil, with his back to the street, was facing her. Ms. Luka testified that Mr. MacNeil had not cornered her in the alcove and was not being physical with her.

[46] Ms. Luka is unable to describe with certainty the composition of the group out of which concerns were being expressed for her well-being. She testified that it was “2 – 3 males maybe” and “3 – 4 girls.” She cannot say if there were separate groups, which is what Ms. MacDonald testified to. Ms. Luka assumed that the people approaching the alcove were all together. The evidence has established they weren’t.

[47] As the group approached, Ms. Luka and Mr. MacNeil were saying everything was fine. Ms. Luka says this should have been obvious. This is what she described happened next: a man who was under the influence emerged from the group and stepped close to Mr. MacNeil. He asked, “Hey, man, what’s going on? What’s happening?” He was “pretty close” to Mr. MacNeil. Mr. MacNeil told him to “back off” and leave them alone. Ms. Luka testified that she is “pretty sure” Mr. Clarke lifted his right hand from his thigh to his waist. Mr. MacNeil then hit him and he went down.

[48] Ms. Luka acknowledges that Mr. Clarke never laid a hand on Mr. MacNeil. On cross-examination she agreed he could have been reaching for a cigarette or a cell phone.

[49] As other witnesses have described, pandemonium broke out. Ms. Luka just wanted to go home. She called her brother to come and get her and crossed Sackville Street. Mr. MacNeil was behind her. Ms. Luka testified that at this point Mr. Myketyn approached Mr. MacNeil. It was her evidence that Mr. Myketyn was angry and upset and yelling about Mr. MacNeil hitting his friend. She did not see Mr. Myketyn put his hands on Mr. MacNeil. She did not see Mr. MacNeil deliver the knock-out punch.

[50] Ms. Luka kept walking. She did not stay around to see what had happened to Mr. Clarke and Mr. Myketyn. Subsequently she did not give a statement to police. She testified that she did not want to get involved.

[51] Ms. Luka had not been drinking before she got to the Pogue. Once there she had 2 – 4 mixed drinks and no other substances.

[52] Mr. MacNeil was also drinking on August 25, 2011. He testified that he would have had 6 – 8 beers that night. The evening came to an abrupt end over Ms. Luka's handling of the drink-offer in the Pogue. Mr. MacNeil testified that he and Ms. Luka ended up at the alcove on Sackville Street. It was just the two of them at that point which was, as he described it, "all I cared about." Their discussion was interrupted by a "group of girls". Mr. MacNeil described them as overwrought, having misinterpreted what was going on between him and Ms. Luka. They started accusing him of being about to beat Ms. Luka up. In Mr. MacNeil's words; "They were telling me to get away from my girlfriend."

[53] It was Mr. MacNeil's evidence that Mr. Clarke then approached him, telling Mr. MacNeil to "get the fuck away" from Ms. Luka. Mr. MacNeil explained that Ms. Luka was his girlfriend and she was fine. This did nothing to cause Mr. Clarke to back off. Mr. MacNeil testified he turned and Mr. Clarke was "right by my face; he wasn't backing up from me." It was Mr. MacNeil's evidence that he had already told Mr. Clarke that "this was our business, leave us alone". Mr. Clarke was not listening. Mr. MacNeil saw him make a gesture, which he took as "a swinging motion." He reacted because he did not know what was going to happen. It was a gut instinct. He hit Mr. Clarke with one punch, using his left hand.

[54] As Mr. MacNeil described it, Mr. Clarke was in his "personal space." He felt Mr. Clarke was "obviously not scared" of him. Mr. MacNeil acknowledged in cross-examination that from what he could see Mr. Clarke did not have a weapon. It was Mr. MacNeil's evidence that Mr. Clarke was "animated with his hands", that he raised his right hand. Mr. MacNeil testified that when he punched Mr. Clarke he thought he was protecting himself.

[55] In cross-examination Mr. MacNeil put it this way: "The guy shouldn't have moved forward." Mr. MacNeil felt he had no obligation to move, to get away from

Mr. Clarke. In his words, “I stood my ground...I wasn’t about to leave my girlfriend.”

[56] After knocking Mr. Clarke down, Mr. MacNeil decided he and Ms. Luka better get out of there. Mr. MacNeil testified that he did not know how many more “guys” might come after him. He did not know how many friends Mr. Clarke was with, that could now pose a threat. As he started to walk away, Mr. Myketyn came after him demanding to know what he had done to his buddy. Sensing Mr. Myketyn gaining on him, Mr. Clarke turned to face him. He was not going to get punched from behind. He figured it was in his best interests to turn around.

[57] Mr. MacNeil testified that Mr. Myketyn was agitated and angry about what had happened to Mr. Clarke. He was not intimidated by Mr. MacNeil. Mr. MacNeil tried to calm the situation down, reassuring Mr. Myketyn he was not going to hit Mr. Clarke again. It was Mr. MacNeil’s evidence that he felt threatened by Mr. Myketyn, that he did not know what he was capable of. Mr. Myketyn kept following him. Mr. MacNeil was concerned for his safety. He turned to eliminate the threat and punched Mr. Myketyn once with his left hand. It was a punch, says Mr. MacNeil, to make sure he could “gain some distance on this guy.” After punching Mr. Myketyn, Mr. MacNeil ran.

#### *What Mr. MacNeil Says He Left Out of His Police Statement*

[58] Mr. MacNeil did not describe his fears of Mr. Clarke and Mr. Myketyn to Sgt. Thomas when he was interviewed on September 1. He says that he did not get into the details of why he acted as he did. He was preoccupied by the description Sgt. Thomas supplied of the serious injuries Mr. Clarke and Mr. Myketyn sustained. It was Mr. MacNeil’s evidence that he had come forward once he learned that Mr. Clarke and Mr. Myketyn were hospitalized and that his primary objective was to take responsibility for what had happened. He was not focused on explaining his reasons for punching both men. Mr. MacNeil noted in his testimony that Sgt. Thomas had not really asked him why he had. Based on what Sgt. Thomas told him, Mr. MacNeil thought the events had all been captured on video.

[59] A viewing of Mr. MacNeil’s police interview does satisfy me that he was not questioned closely about what may have been in his mind before he punched

Mr. Clarke and Mr. Myketyn. I am not satisfied to reject Mr. MacNeil's evidence about his subjective beliefs that night on the basis of what was not said in his police statement.

### *The Letters*

[60] Mr. MacNeil testified that he did not explain in the letters what led up to him punching Mr. Clarke and Mr. Myketyn because it would have been "stupid for me to try and get them to feel bad for me when they have bigger concerns." Mr. MacNeil explained what he was trying to get across in the letter to the families of Mr. Clarke and Mr. Myketyn: "I wanted them to know it wasn't retaliatory, it wasn't a beef. No one expected this; I didn't and they didn't either."

[61] I take the same view of the letters that I have taken of Mr. MacNeil's police interview. I would not expect to see in them a detailed explanation of Mr. MacNeil's subjective justification for his actions. The letters do not satisfy me that Mr. MacNeil is now fabricating what he was thinking before he punched Mr. Clarke and Mr. Myketyn. That is not to say that Mr. MacNeil's testimony is the only evidence that sheds light on what was in Mr. MacNeil's mind when he landed his blows.

### *The CCTV Video of Sackville Street*

[62] The CCTV video (*Exhibit 2*) does not capture Mr. MacNeil punching Mr. Clarke. Mr. MacNeil comes into the view of the camera very soon after Mr. Clarke goes down, before the Reflections security personnel start up the sidewalk toward the scene. In the 60 seconds that follow Mr. MacNeil first appearing on the video, he encounters and punches Mr. Myketyn. The times I will be referring to are from the video.

[63] At 23:07:33 Mr. MacNeil can be seen walking down the sidewalk on Sackville Street with Mr. Myketyn following him. Mr. MacNeil has his back to Mr. Myketyn but is plainly aware of his presence. At 23:07:36, Mr. MacNeil turns to his left and is about to step into Sackville Street. He has angled his face toward Mr. Myketyn who is still a few paces away. Mr. Myketyn's arms are out from his sides slightly, at the level of his hips. He is obviously trying to talk to Mr. MacNeil.

[64] At 23:07:41, Mr. MacNeil has disappeared from the camera's view and Mr. Myketyn steps into the street to follow him. He too disappears from the frame. They have been observed by two yellow-shirted Reflections security guards, one of whom is quite burly. The burly guard can be clearly seen watching Mr. MacNeil and Mr. Myketyn once they have stepped into the street. He turns his head away and continues his progress toward Mr. Clarke, with no indication of concern about what Mr. MacNeil and Mr. Myketyn are doing off screen.

[65] It is not until 23:07:59 that the camera catches a glimpse of Mr. MacNeil and Mr. Myketyn again. They are closer together now, just a sliver at the edge of the camera's lens. By 23:08:05 they have been off screen and are back, a slightly bigger sliver. Although over the next 10 seconds there is some body movement, Mr. MacNeil and Mr. Myketyn remain quite stationary during this time. Had they been still walking they would have come into the camera's view. Between 23:08:05 and 23:08:15 they seem suspended just at the edge of the frame, down toward the intersection between Sackville and Granville Streets. At 23:08:15, Mr. MacNeil starts to move further down Sackville Street, backwards, and Mr. Myketyn follows him. They are both very visible at 23:08:17, and look to be slightly more than an arm's length apart.

[66] Two seconds later, at 23:08:19, Mr. MacNeil is almost to the intersection with Granville Street. He has turned slightly toward Granville. Mr. Myketyn has not advanced much and there is still a bit of distance between them. A Reflections security guard is near the Reflections main entrance watching them. At 23:08:22 Mr. MacNeil continues to move away, his back to Mr. Myketyn. Mr. Myketyn continues to follow. He still looks to be talking to Mr. MacNeil. His body stance and posture have not changed. Mr. MacNeil turns to face Mr. Myketyn and takes 2 – 3 deliberate steps toward him. Mr. Myketyn steps back 2 – 3 paces. At 23:08:25, Mr. MacNeil leans in and drives a punch at Mr. Myketyn who instantly goes down. Mr. MacNeil wheels around and runs down Granville Street, heading north.

*The Presumption of Innocence and Burden of Proof*

[67] It is not the responsibility of Mr. MacNeil 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.

[68] The onus resting upon the Crown to prove Mr. MacNeil's guilt beyond a reasonable doubt is inextricably linked to the presumption of innocence. (*R. v. Lifchus*, [1997] S.C.J. No. 77, 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. 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 it does to a balance of probabilities. (*R. v. Lifchus*, paragraph 36; *R. v. Starr*, [2000] S.C.J. No. 40, paragraph 242)

#### *Section 34(1) of the Criminal Code*

[69] In this case, there is no issue that Mr. Clarke's and Mr. Myketyn's injuries resulted from being punched by Mr. MacNeil. The issue is whether any criminal liability attaches to Mr. MacNeil for the punches. The onus is on the Crown to prove beyond a reasonable doubt that self-defence under section 34 of the *Criminal Code* is not available to Mr. MacNeil.

[70] Mr. MacNeil has claimed that when he punched Mr. Clarke and then, Mr. Myketyn, he was acting in self-defence, not committing an unlawful assault. Under section 34(1) of the *Criminal Code* Mr. MacNeil would have been justified in repelling an unprovoked assault if the force he used 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] O.J. No. 1053 (C.A.)) A defence under section 34 can only be utilized if all the statutory elements have been met. (*R. v. Hebert*, [1996] S.C.J. No. 65, paragraph 23) That is to say, that for the defence to be successful I must be left with a reasonable doubt as to the existence of all the elements of the defence, namely, (1) that Mr. MacNeil was unlawfully assaulted; (2) that he did not provoke the assault; (3) that the force used by him was not intended to cause death or grievous bodily harm; and (4) that the force used was not more than necessary to enable him to defend himself. If the Crown establishes

beyond a reasonable doubt that one of the elements is not present, the defence is defeated. (*Hebert, paragraph 25*)

[71] Each of the elements has a subjective (Mr. MacNeil's perception) and an objective (the reasonableness of Mr. MacNeil's belief) aspect. The question to be asked in relation to applying section 34(1) is whether Mr. MacNeil reasonably believed in the circumstances that he was being unlawfully assaulted. Mr. MacNeil was entitled to have made an honest mistake about the existence of an assault by Mr. Clarke and Mr. Myketyyn, but his belief must have been reasonable. (*R. v. Petel, [1994] S.C.J. No. 1, paragraph 21*) Although in *Petel*, the Supreme Court of Canada was discussing the self-defence provisions in section 34(2) of the *Criminal Code*, the principles relating to the reasonableness of an accused's perception are applicable to an assessment of self-defence under section 34(1).

[72] In self-defence, 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, paragraph 45*)

[73] 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. (*R. v. Westhaver, [1992] N.S.J. No. 511(C.A.), page 2 (Q.L. version)*) Nor is an accused required to wait until he has been struck "before using any force against his attacker." 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. (*R. v. Antley, [1964] O.J. No. 853 (C.A.), paragraph 11*)

[74] The Crown's position is that Mr. MacNeil is not entitled to the benefit of section 34(1). The Crown maintains that at no time on the night of August 26, 2011, was Mr. MacNeil unlawfully assaulted by Mr. Clarke or Mr. Myketyyn within the meaning of assault under section 265 of the *Criminal Code*. The Crown has submitted that neither Mr. Clarke nor Mr. Myketyyn applied intentional force to Mr. MacNeil nor did they attempt or threaten, by act or gesture, to apply force to him or cause him to believe on reasonable grounds that either of them had the present

ability to do so. In the Crown's submission, Mr. MacNeil did not have to use any force against Mr. Clarke or Mr. Myketyn: they were not going to assault him and he could have simply walked away.

[75] Mr. MacNeil has testified to what he believed on the night of August 26 when he encountered first Mr. Clarke and then, Mr. Myketyn. It is his evidence he believed in both instances that he was about to be assaulted. Mr. Clarke was close enough to swing at him and Mr. MacNeil believed he was about to do so. As for the encounter with Mr. Myketyn, Mr. MacNeil has said he believed he had to hit Mr. Myketyn first before Mr. Myketyn hit him.

[76] Although I must consider Mr. MacNeil's evidence according to the requirements of *R. v. W.(D.)*, [1991] S.C.J. No. 26, acceptance of his evidence about what he subjectively believed would not end my analysis of the self-defence issue. What a reasonable person would have believed or done in the circumstances is a relevant consideration in deciding whether Mr. MacNeil's subjective belief was based upon reasonable grounds. (*Baxter*, paragraph 36) As I explained earlier in these reasons, Mr. MacNeil not only must have had an honest belief that he was about to be assaulted by Mr. Clarke and Mr. Myketyn, his belief must have been reasonable.

### *Factual Findings*

[77] Broadly speaking, there is a strong thread of consistency through the evidence about what happened on August 26. And while it is the evidence about the few moments just before each punch that I have had to scrutinize most closely, I will make some comments about the evidence as a whole.

[78] I accept that Mr. MacNeil did not go downtown on August 26 looking to get into an altercation with anyone. I also accept that he never intended to cause the severe injuries that Mr. Clarke and Mr. Myketyn suffered. The night started to slide in the wrong direction when Mr. MacNeil reacted to Ms. Luka's handling of the pass made at her in the Pogue. Whether he understands this or not, Mr. MacNeil's displeasure at Ms. Luka's polite refusal had a possessive quality. No doubt this explains why Ms. Luka was unhappy with Mr. MacNeil upbraiding her for how she had dealt with what was a casual, fleeting attempt at a pick-up.

[79] I find that the disharmony between Mr. MacNeil and Ms. Luka prevailed while they were having their discussion in the alcove on Sackville Street. This may not have been evident to people in the vicinity; perhaps the haranguing of Mr. MacNeil by bystanders was simply due to how Ms. Luka was situated in the alcove with Mr. MacNeil facing her. Whatever caught the attention of the group of young women, I find that Mr. MacNeil did not appreciate anyone intruding upon his “business” as he called it, with his girlfriend. As he said in his testimony, he didn’t feel he should have to explain himself to anybody. What was going on at the alcove was between him and Ms. Luka.

[80] In his interview with Sgt. Thomas, Mr. MacNeil indicated he had made a similar comment to Mr. Myketyn when he told him he was sorry for hitting Mr. Clarke. He went on to tell Mr. Myketyn about Mr. Clarke, “he got into my business...”

[81] It is clear from Mr. MacNeil’s evidence that he found Mr. Clarke’s presence intrusive. The testimony of Mr. MacNeil, Ms. Luka, and Ms. MacDonald all put Mr. Clarke in close proximity to the alcove. Mr. MacNeil says Mr. Clarke’s presence and verbal intervention escalated the tensions on the street. He thought Mr. Clarke was raising his right hand, about to assault him. He brought Mr. Clarke down before he could be hit.

[82] Mr. MacNeil testified that he has never been downtown when he hasn’t seen a fight. He described the need to be “ready for anything”, that Halifax is a violent place, and that he relies on what he feels is his “very good intuition.” On August 26 he says that intuition told him that he had to punch first in order to avoid being the person sent to the ground. He had, in his words, “one opportunity to keep myself from danger.” He testified that he used just enough force in both cases so he could get out of the situation. He reacted the way he did, he says, because he felt he had to.

[83] There is directly conflicting evidence about whether Mr. Clarke said anything to Mr. MacNeil before he was punched or moved his hands. Ms. MacDonald was adamant Mr. Clarke said nothing other than “Hey man” and had his hands by his sides. She presented as a credible witness with a good memory of the evening’s events. Ms. Luka and Mr. MacNeil said that Mr. Clarke intruded on

Mr. MacNeil's interaction with Ms. Luka in the alcove by moving toward them. Ms. Reashor, who knew none of the people involved, testified that Mr. Clarke and Mr. MacNeil were talking just before the punch. She observed no movement on Mr. Clarke's part before he was knocked to the street.

[84] Notably, only Mr. MacNeil describes Mr. Clarke being aggressive and even in his evidence, it was only his tone of voice. Ms. Luka's testimony did not indicate this. In her version of events, Mr. Clarke was intoxicated and asking what was going on.

[85] Whether Mr. Clarke said anything to Mr. MacNeil and Ms. Luka or not, the evidence is clear that he made no threatening gestures toward Mr. MacNeil. Even giving Mr. MacNeil the benefit of the doubt, that Mr. Clarke said something to indicate he thought Ms. Luka was in peril, I do not find that Mr. Clarke made a gesture or movement that any reasonable person would have interpreted as an imminent assault of Mr. MacNeil.

[86] I do not accept Mr. MacNeil's testimony that Mr. Clarke was "animated with his hands". That evidence is not credible. It is inconsistent with what both Ms. MacDonald and Ms. Luka described. Ms. Luka agreed in her evidence that the movement she claims to have seen of Mr. Clarke's right hand could have been for a completely benign purpose. I find that Mr. Clarke did not make a gesture that constituted an attempt or a threat to assault Mr. MacNeil, if he made any movement of his hand at all. And I find that Mr. MacNeil's perception, as he has described it, of Mr. Clarke as an imminent threat, was not a reasonable one.

[87] I find that Mr. MacNeil was already edgy. He had been having conflict with his girlfriend, he did not take kindly to any intrusion upon what he saw as "his business", and he was quick to react to Mr. Clarke's close proximity. Mr. MacNeil testified he felt under threat of an assault by Mr. Clarke. The law requires Mr. MacNeil's belief to have been reasonable. It was not. Even if Mr. MacNeil's evidence is to be given the benefit of the doubt, nothing he described about Mr. Clarke in those few seconds by the alcove could have reasonably been viewed as an imminent assault.

[88] In the case of Mr. Myketyn, I have had the additional benefit of the CCTV video. Earlier in these reasons I reviewed what that shows. It shows what Ms. Reashor described in her evidence: a non-threatening, calm, but persistent Mr. Myketyn following Mr. MacNeil down Sackville Street. Mr. Myketyn does nothing to indicate that he is about to assault Mr. MacNeil. His body language is not intimidating. He does not move rapidly and is not gesturing or obviously angry. Indeed, when Mr. MacNeil turns back toward Mr. Myketyn, Mr. Myketyn retreats a few steps. Mr. MacNeil takes a few steps forward and slugs him. Mr. MacNeil described the punch he delivered to Mr. Myketyn as a split-second “reaction.” In the video it looks to have been a split-second *decision*: a very deliberate, very effective decision to stop Mr. Myketyn from following him.

[89] I find that Mr. Myketyn, despite being intoxicated, was focused on wanting to speak to Mr. MacNeil. He does not appear the least bit aggressive in the video, just dogged. Mr. MacNeil’s testimony confirms that Mr. Myketyn was trying to identify him and that he was persistent in his inquiries. It was not reasonable for Mr. MacNeil to believe that Mr. Myketyn was about to assault him. No reasonable person would have formed this belief in the circumstances.

[90] I will add that Mr. MacNeil’s self-described “split-second”, “gut-instinct” decision-making was not so spontaneous that he failed to advert to his injured dominant hand. He hit both Mr. Clarke and Mr. Myketyn with his left hand. He was sufficiently focused to avoid using his injured right hand which he protected by landing left-handed punches.

[91] Given the evidence, I have some doubt about the honesty of Mr. MacNeil’s belief that either Mr. Clarke or Mr. Myketyn were about to assault him. Perhaps he has come to believe that now, that he thought himself to be in danger. That aside, and giving Mr. MacNeil the benefit of the doubt about his subjective beliefs, the Crown has nonetheless amply satisfied me, beyond any reasonable doubt, that the subjective belief Mr. MacNeil claims to have had just before punching Mr. Clarke and then Mr. Myketyn, was not reasonable. This is fatal to his claim of self-defence. His actions were not justified. They were criminal assaults.

[92] Mr. MacNeil’s assault of Mr. Myketyn was an aggravated assault. Mr. Myketyn’s injuries were life-threatening. I must determine how Mr. Clarke’s

injuries should be categorized according to the law. Do they make Mr. MacNeil's unlawful assault of Mr. Clarke an aggravated assault or an assault causing bodily harm?

*Brett Myketyn's Injuries*

[93] On admission to the ER, Mr. Myketyn was sent for an urgent CT scan. It revealed he had sustained "an acute, left-sided epidural hemorrhage and extensive non-pressed left parietal skull fractures. There was also a small amount of traumatic subarachnoid hemorrhage on the right side of the brain representing a possible countercoup injury." With these CT results, Mr. Myketyn was transferred to the Operating Room for "urgent neurological intervention." (Exhibit 9, Dr. Yoon's Report, page 2)

[94] Mr. Myketyn's injuries are set out in an Agreed Statement of Facts (Exhibit 10): an epidural hematoma with associated skull fracture; a contrecoup cerebral contusion; and a minor facial laceration. Dr. Ryan Henneberry, an Emergency Department physician, did not treat Mr. Myketyn but he was able to explain the meaning of the medical terms used to describe his injuries and did so without objection by the Defence. An epidural hematoma is a hemorrhage in the epidural space of the brain indicating the laceration of an artery or blood vessel in that space. Such an injury would result from a significant skull fracture. It is a more serious injury because the bleeding is under pressure. A contrecoup cerebral contusion is a bruising of the back of the brain caused when the brain "rattles" off the back of the skull as a result of a blow to the front.

[95] Mr. Myketyn also had a laceration on the right side of his mouth where his teeth had cut through his right cheek. (Exhibit 1, Photograph 34 and 35) He spent approximately 14 days in the hospital. Mr. Myketyn has a massive surgical scar on the left side of his head, from his temple in a large horseshoe shape to above his left ear. (Exhibit 1, Photographs 32 and 33) This indicates where a portion of his skull was removed to reduce pressure on his brain after the assault.

*Jonathan Clarke's Injuries*

[96] Jonathan Clarke was admitted to the Emergency with symptoms of a head injury. He was combative, aggressive, agitated and confrontational. He did not

have a full level of consciousness and was not cooperative with attempts to conduct a physical examination, or obtain a medical history and assess his vital signs. He had to be sedated and intubated to protect his airway and so that the necessary testing to assess his condition could be conducted.

[97] Dr. Henneberry testified that aggressive behaviour can be explained by alcohol consumption or not related at all to events such as those reported in relation to Mr. Clarke. In Dr. Henneberry's opinion however it was "a safe assumption" that Mr. Clarke's behaviour at the ER was due to a serious head injury given the history provided by EHS about what had happened.

[98] A CT scan indicated that Mr. Clarke did not have any bleeding in his brain from a major artery. Very small amounts of blood that had not pooled, were detected in several parts of his brain. There were areas of patchy, small bleeds throughout the brain and some blood in the ventricles. Dr. Henneberry testified that Mr. Clarke's brain showed signs of having been shaken, rattled, or bruised. These injuries were consistent with what was described about the events that had occurred downtown. A neurosurgery consult was arranged but it was determined that no neurosurgical intervention was required.

[99] Jonathan Clarke had fractured bones in his face. His right cheek bone and his eye bone had breaks in them. They did not require treatment and were left to heal on their own. He had a cut by the corner of his right eye and bruising around that eye. (Exhibit 1, Photographs 27 – 30) He was in hospital for three days. He now has a small but obvious scar by his right eye that corresponds to the injury shown in the photographs taken by police.

[100] Dr. Henneberry agreed that Mr. Clarke's injuries were not life-threatening.

*Aggravated Assault – Brett Myketyn*

[101] As noted earlier in these reasons, Mr. MacNeil has acknowledged that the injuries sustained by Mr. Myketyn fall within what is contemplated by the *Criminal Code* as aggravated assault. I have found that self-defence is not available to Mr. MacNeil to justify his actions and he is therefore guilty of the aggravated assault of Mr. Myketyn.



*Aggravated Assault – Jonathan Clarke*

[102] Mr. MacNeil is also charged with the aggravated assault of Mr. Clarke. My determination of the self-defence issue means that Mr. MacNeil is guilty of an unlawful assault against Mr. Clarke. The issue that remains to be resolved is what level of assault has been made out on the facts. To constitute aggravated assault in this case, Mr. Clarke's injuries would have had to endanger his life or wound him.

[103] Mr. MacNeil disputes that Mr. Clarke's injuries can be regarded as aggravated assault based on the fact that once a CT scan was completed of Mr. Clarke's head, it was determined that his injuries were not life-threatening.

[104] The "endangerment of life" element of aggravated assault is intended to refer to a consequence of the assault rather than a risk which arose from it. (*R. v. De Freitas, [1999]M.J. No. 69 (C.A.), paragraph 11*) The expert medical opinion of Dr. Henneberry was that Mr. Clarke's injuries were not life-threatening. This satisfies me that Mr. MacNeil cannot be found guilty of aggravated assault on the basis of the assault endangering Mr. Clarke's life.

[105] Although the medical evidence shows that Mr. Clarke's life was not actually endangered, he experienced significant injuries from the assault. The remaining issue to be addressed is this: did those injuries amount to "wounding"?

[106] I have provided Crown and Defence with an opportunity to address me on the "wounding" issue. I will render a further decision once I have heard from them and determined if Mr. MacNeil's unlawful assault of Mr. Clarke resulted in injuries that constitute "wounding" as that term is understood in law.

*Conclusion*

[107] In accordance with the reasons I have just given, I find Mr. MacNeil guilty of the aggravated assault of Mr. Mykety. I am reserving my decision on whether Mr. MacNeil's unlawful assault of Mr. Clarke amounted to an aggravated assault on the basis of Mr. Clarke having been "wounded." I find that the aggravated assault charge in relation to Mr. Clarke has not been proven on the basis of "endangerment of life."

[108] Finally, I am not satisfied that the Crown has proven beyond a reasonable doubt that Mr. MacNeil caused a disturbance by fighting contrary to section 175(1)(a)(i) of the *Criminal Code* and I acquit him of that charge.