

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. MacDonald, 2013 NSPC 109

Date: November 18, 2013

Docket: 2555749
2555750

Registry: Halifax

Between:

Her Majesty the Queen

v.

Jeffrey Bryan MacDonald

TRIAL DECISION

Judge: The Honourable Judge Anne S. Derrick

Heard: July 2, 3, 24, 29, 30, and November 5 and 6, 2013

Decision: November 18, 2013

Charges: Assault with a weapon, contrary to section 267(a) of the *Criminal Code of Canada* and assault causing bodily harm, contrary to section 267(b) of the *Criminal Code*

Counsel: Sean MacCarroll, for the Crown

Eugene Tan, for Jeffrey MacDonald

By the Court:*Introduction*

[1] On January 27, 2013, Jeffrey MacDonald was arrested for assaulting Joseph Sanford at the Toothy Moose bar on Argyle Street in Halifax. His arrest came after an altercation in the bar around 2 a.m. He was removed by security staff and ran off. Mr. Sanford was given some first aid at the scene and then taken by police to the hospital.

[2] Mr. MacDonald was charged with committing an assault on Joseph Sanford using a weapon, a beer bottle, contrary to section 267(a) of the *Criminal Code*, and committing an assault causing bodily harm to Joseph Sanford, contrary to section 267(b) of the *Code*.

[3] The central issue to be determined is whether the Crown has proven beyond a reasonable doubt that Mr. MacDonald assaulted Mr. Sanford with a beer bottle and caused him bodily harm. Mr. MacDonald has testified that he never hit Mr. Sanford with a beer bottle and that any physical contact he had with Mr. Sanford was in self-defence. The Crown has the onus to prove beyond a reasonable doubt that this was not the case.

Presumption of Innocence and Reasonable Doubt

[4] It is not Mr. MacDonald's responsibility 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 of proof beyond a reasonable doubt throughout the trial and it never shifts.

An Overview of the Evidence Led at Trial

[5] The Crown called Joseph Sanford and two friends who were with him at the Toothy Moose, Amy McLeod and Andrew Tracey, two members of the bar's security staff, and various police officers. Mr. MacDonald elected to call evidence. I heard from Elijah Fralick, a close friend who went to the Moose with him, and Mr. MacDonald himself. I declined to admit evidence from a former RCMP officer whom the Defence sought to have qualified as an expert. Later in these reasons I will explain why I did not qualify this proposed witness.

[6] No video surveillance exists of the events inside the Toothy Moose as the bar's video footage over-writes itself every 24 hours. As is usual in these kinds of cases, different witnesses saw different parts of what happened, and some witnesses only saw events that occurred after the altercation. As is often the case, the two most centrally involved witnesses, Mr. Sanford and Mr. MacDonald offered very divergent descriptions of what occurred in the fleeing moments of the incident that led to Mr. MacDonald's charges.

[7] While there is little in common between Mr. Sanford's and Mr. MacDonald's evidence about the critical events, they each started out the evening with the same purpose: to go to the Toothy Moose with friends to have a good time on a Saturday night. Sadly, the good time went bad.

Evidence Not in Dispute

[8] Aspects of the evidence are not in dispute. Identification is not an issue in this case. Although Mr. MacDonald was not known to Mr. Sanford, Ms. McLeod, and Mr. Tracey, and Mr. Sanford was not known to Mr. MacDonald and Mr. Fralick, and neither of them was known to the security staff at the Moose, there is no disagreement about who the witnesses were identifying when they gave their evidence. It is not contested that the altercation witnesses observed was between Mr. Sanford and Mr. MacDonald.

[9] It is also not disputed that Mr. Sanford sustained injuries at the Toothy Moose on January 27. His injuries are documented in photographs taken a couple of days later. They show a cut on the bridge of his nose and a blackened left eye. His forehead shows little cuts and he had cuts on his left cheek, neck, and head. He was cut on his arm and had a laceration on his knuckle. He did not require any stitches and has not been left with any lingering effects.

[10] Mr. Sanford testified that he was bumped by Mr. MacDonald whom he did not know. He did not think it was intentional. Mr. MacDonald acknowledges bumping into Mr. Sanford by accident. Beyond this point the descriptions of events diverge. Mr. Sanford testified to a sequence of events that led to an attack by Mr. MacDonald wielding a beer bottle. Mr. MacDonald testified that his accidental bumping of Mr. Sanford led to Mr. Sanford assaulting him. It is necessary to

review these narratives and the evidence of the other witnesses to determine what happened in a few, explosive moments by the main bar of the Toothy Moose.

Joseph Sanford

[11] Joseph Sanford began his Saturday night by driving in from Porter's Lake to meet friends at the Midtown Tavern. While there he had approximately 2 to 3 beers.

[12] From the Midtown, Mr. Sanford went with his friends, Andrew Tracey and Amy McLeod, to the Toothy Moose. Once inside, they deposited their jackets behind the DJ's booth, and went to the bar to order their drinks.

[13] Mr. Sanford recalls having one or two beers at the bar before the incident with Mr. MacDonald. He was firm on this fact. His total alcohol intake that night of 3 to 5 beers did not make him feel intoxicated.

[14] After ordering his beer, Mr. Sanford remained standing by the bar talking with Mr. Tracey. Ms. McLeod was close by. The Toothy Moose was very busy and the bar area was quite crowded. The crowd in front of the bar was about 2 people deep.

[15] It was Mr. Sanford's evidence that Mr. MacDonald approached the bar and was jumping around, from side to side. He got bumped by Mr. MacDonald, shoulder to shoulder. In Mr. Sanford's description, Mr. MacDonald was obnoxious, not aggressive. Mr. Sanford did not know him and did not react to being bumped. He testified that he did not think Mr. MacDonald had bumped into him on purpose.

[16] Mr. Sanford believed Mr. MacDonald to be intoxicated. In addition to getting bumped, there was some other behaviour that suggested this to him: Mr. MacDonald was hammering his beer bottle on the bar and swaying back and forth. He shook his beer with his thumb over the mouth of the bottle and sprayed people in the vicinity, including Mr. Sanford. Mr. Sanford did not react to this either.

[17] When Mr. MacDonald then set his beer bottle down, Mr. Sanford took it and placed it down behind the bar out of Mr. MacDonald's reach. Mr. MacDonald was not facing him at the time so Mr. Sanford could not say if he saw him do this.

When Mr. Sanford was turned away talking to a friend, he was tapped on the shoulder. He turned in response and Mr. MacDonald threw a mixed drink in his face.

[18] Mr. Sanford couldn't see as a result of the drink being thrown in his face. He set his beer down and wiped his eyes. He was now able to see that Mr. MacDonald had a beer bottle in his hand which he was holding by the neck and swinging over his head, back and forth. Mr. Sanford believed Mr. MacDonald was getting ready to hit him. Mr. MacDonald was 4 to 5 feet away. Mr. Sanford had his back to the bar and was cornered.

[19] Mr. Sanford could not see the bartender or any security staff. He kept his eyes on Mr. MacDonald. He was afraid that if he tried to walk away or took his eyes off Mr. MacDonald that Mr. MacDonald would hit him with the beer bottle.

[20] Mr. Sanford yelled at Mr. MacDonald several times to put the beer bottle down. Mr. MacDonald, hopping up and down like a boxer, was shaking his head, no. Mr. Sanford recalls an individual stepping in between him and Mr. MacDonald. He told this individual to get Mr. MacDonald out of there as he was going to hit Mr. Sanford with the bottle. The individual stepped away. Mr. Sanford testified that Mr. MacDonald leaned in to him and he knew he was going to get hit. On cross-examination, Mr. Sanford described this as Mr. MacDonald taking a step toward him. Mr. Sanford tried to block him, lunging at him when he was in mid-swing in an effort to try and stop Mr. MacDonald from hitting him.

[21] Mr. Sanford tried to grab Mr. MacDonald using both hands, up high, to hold on to Mr. MacDonald's shirt. He tried to lock Mr. MacDonald's arms to avoid getting hit. It was Mr. Sanford's evidence that Mr. MacDonald struck him right between the eyes with the beer bottle. The bottle broke. Mr. Sanford's nose was cut and broken. He was bleeding. The blood was everywhere and he could not see.

[22] Once hit, there was nothing Mr. Sanford could do but try and protect himself. He pushed Mr. MacDonald about 10 feet along the bar and while he was doing so, Mr. MacDonald still had the broken beer bottle and was trying to cut him with it.

[23] Mr. Sanford kept his head ducked as Mr. MacDonald jabbed at him. Mr. Sanford got cut on the head and face by the jagged bottle. He could feel Mr. MacDonald's arm coming in and the bottle slicing his head, face, and arm. Mr. Sanford testified that he could have been swinging at Mr. MacDonald as he tried to push him down the bar. He may have hit him. It was his evidence he was trying to do anything to protect himself. He couldn't see because there was blood in his eyes.

[24] At this point security staff at the Toothy Moose intervened and pulled Mr. Sanford and Mr. MacDonald apart. Mr. MacDonald was escorted to the stairs and Mr. Sanford was taken to an office for some first aid.

[25] Mr. Sanford testified that the cuts on his forehead were from shards of glass when the bottle broke. The cuts to his left cheek, neck, and head were from Mr. MacDonald stabbing at his face with the broken bottle. His arm sustained a defensive cut and his knuckle was lacerated by the broken bottle.

[26] No beer bottle was seized as evidence. The police were subsequently advised that immediately after the altercation the area had been cleaned up.

Amy McLeod

[27] Amy McLeod went to the Toothy Moose after the Midtown with her boyfriend, Jeff, Mr. Sanford, and Andrew Tracey. It was packed when they arrived. People were shoulder to shoulder at the bar. Ms. McLeod ordered a Coors Light and stood talking to Jeff who was on his way to the washroom.

[28] Ms. McLeod glanced over and could see a tall man jumping around at the bar, being obnoxious, bumping into Mr. Sanford and Mr. Tracey. His behaviour was out of the norm for the particular area. It was a crowded area and it didn't seem to be the right place for him to be bouncing around, up against the bar. Ms. McLeod agreed on cross-examination that had the man been on the dance floor she would not have noticed him. However, he wasn't on the dance floor.

[29] Ms. McLeod did not notice the tall, obnoxious man shake up his beer bottle and spray beer on Mr. Sanford. When Mr. Sanford put the man's drink down below the service area of the bar, because, as Ms. McLeod said, he had been

“spilling it”, the man grabbed two mixed drinks off the bar and threw them at Mr. Sanford, hitting him in the chest.

[30] At this point, Ms. McLeod observed a shorter man try to calm the tall man down. This small grouping of the tall, obnoxious man, the shorter man, Mr. Tracey, and Mr. Sanford, moved to the right. Ms. McLeod was not paying attention. She saw some quick movements but nothing else. She did not hear anything being said. She noted the bar was noisy.

[31] Security staff had grabbed Mr. Sanford and when they turned him around, Ms. McLeod saw his face. His blood splattered on her. In Ms. MacLeod’s estimation, about 30 seconds had passed between Mr. MacDonald throwing the drinks and this point.

[32] Ms. McLeod saw that Mr. Sanford had a rip in his shirt. He had blood all over his face and little cuts. He was bleeding everywhere.

Andrew Tracey

[33] Mr. Tracey remembers the Moose being packed. People were standing shoulder to shoulder. Waiting in front of the bar with Mr. Sanford for their drinks, Mr. Tracey noticed a man was jumping around to his right, next to Mr. Sanford. Mr. Sanford was getting bumped by the jumping man, given how closely packed everyone was. Mr. Tracey did not have the impression that the jumping man was intentionally colliding with Mr. Sanford.

[34] After being bumped a few times, which also pushed Mr. Sanford into Mr. Tracey, Mr. Sanford spoke to the jumping man but maintained his composure. The man then started to bang his beer bottle on the bar which caused beer to spray around, soaking Mr. Sanford. In plain view of the man, Mr. Sanford took the beer bottle and set it behind the bar. Mr. Tracey testified that three seconds later, the man had grabbed a drink from the bar and thrown it in Mr. Sanford’s face.

[35] The thrown drink blinded Mr. Sanford and Mr. Tracey observed him using both his hands to try and wipe his eyes so he could see. By this point, the man had reached across to grab his beer bottle from behind the bar and was holding it by the neck. He was swinging it around. He began to goad Mr. Sanford, saying, “Fight

me, fight me.” There were lots of people around the bar area and music playing but Mr. Tracey could hear what the man was saying.

[36] It is Mr. Tracey’s recollection that by now he had his back to the bar with Mr. Sanford in front of him. There were about 4 feet separating them. A stranger came up to Mr. Tracey and spoke into his ear saying, “Don’t get involved: tell your friend to leave it alone.”

[37] Mr. Tracey heard Mr. Sanford telling the man to put the bottle down, put the bottle down. Mr. Tracey started looking around for bar security but saw no one. He looked over toward the DJ but the DJ wasn’t looking in his direction. He looked back in time to see the beer bottle come down on Mr. Sanford. Mr. Tracey did not know if this was a first or second blow with the bottle but this time the bottle broke on contact. Mr. Tracey could not say precisely which part of Mr. Sanford’s body the bottle broke against.

[38] As the bottle was coming down, Mr. Sanford had raised his hands. Mr. Tracey testified that Mr. Sanford couldn’t go anywhere as the area was packed with people. It was Mr. Tracey’s evidence that Mr. Sanford was blocking the man with his left hand.

[39] At this point, Mr. Sanford began pushing or punching the man as the man used the bottle to try and stab at him. They were moving along the bar. Mr. Tracey testified that there had been “no physical stuff” between Mr. Sanford and the man before Mr. Sanford was hit with the bottle. Mr. Tracey saw the man “jabbing” at Mr. Sanford with the bottle, using it in a downward motion on Mr. Sanford’s head and face.

[40] Although Mr. Tracey described the scene as looking “like a mutual thing”, he added, except for the fact that the man had a bottle and Mr. Sanford had a fist. In cross-examination he testified that Mr. Sanford had not lunged forward toward the man. Mr. Tracey was certain that when he was hit with the bottle, Mr. Sanford had nothing in his hands. He had just been using them to try and clear his eyes after the drink was thrown in his face.

[41] Mr. Sanford and the man stumbled into some patrons with the effect that they both fell to the floor, facing each other. Once on the floor, security pulled Mr.

Sanford and the man away from each other. Mr. Tracey estimated that the time from when the man had been banging his beer bottle on the bar, spraying its contents around, to him being on the floor with Mr. Sanford was a matter of “35 seconds, maybe.” In his words, “it was very quick.”

[42] Mr. Tracey followed as a member of the security staff was escorting the man to an exit. When he saw security let the man go he pursued him all the way to the Liquor Dome. Mr. Tracey was emphatic about being within arm’s length of the man when the police stepped in and restrained him by the Dome. He testified that he gave his name to police and said “this guy bottled my friend at the Toothy Moose.”

Security Staff

[43] Dan Rossiter was working security on January 26/27. Although he had only been working a few nights at the Toothy Moose, he had three years’ of experience working as a “bouncer” at bars in downtown Halifax. His responsibilities were the maintenance of the general safety and security of the bar, making sure the patrons were orderly, not aggressive to one another and that no one was overly intoxicated. He had been stationed to the left of the main dance floor bar. His responsibility was to concentrate on anything that occurred directly in front of the bar and the dance floor.

[44] Mr. Rossiter’s attention was drawn to an altercation in progress by the crowd spreading away from it. He noticed this first in his peripheral vision. Approximately 15 feet away, Mr. Rossiter could see one man assaulting another, and the assaulted man trying to defend himself. People had backed away from the two men, providing a clear view. Mr. Rossiter had not seen how the altercation had started.

[45] Mr. Rossiter testified that when he first saw the two men, they were on their feet striking each other. Mr. Sanford had his back to the bar. Even at this point, Mr. Rossiter observed that Mr. MacDonald had the dominant position and was the aggressor.

[46] It was Mr. Rossiter’s evidence on cross-examination that when he got over to Mr. Sanford and Mr. MacDonald, they were “very involved” and already

“striking each other” with “punches being thrown.” By the time he made it over to the men, Mr. Sanford was on his back, trying to shield himself with his arms. Mr. MacDonald was striking him with a broken beer bottle which he was holding by the neck. Mr. Rossiter saw that Mr. MacDonald had “positive control” and was in the “dominant position.” He had a weapon and was the aggressor. He was able to put his weight on Mr. Sanford to hold him down. Mr. Sanford was trying to defend himself.

[47] It only took a few seconds for Mr. Rossiter to make it over to the men and separate them. He grabbed Mr. MacDonald off Mr. Sanford and disarmed him of the broken beer bottle by whacking it out of his hand. He marched him through the crowd to the back exit and handed him off to another member of the security staff, James MacIntosh.

[48] According to Mr. Rossiter, Mr. MacDonald was very, very agitated, flailing his arms, and trying to grab people as he was moved through the crowd. There was a lot of blood which he tried to smear on to the arms and faces of security staff. This was making the staff very nervous so Mr. MacIntosh ordered Mr. MacDonald released. As soon as Mr. Rossiter let go of him, he ran down to the bottom of the back exit stairs.

[49] James MacIntosh, working security as a “floater” at the Toothy Moose on January 26/27 did not see the altercation between Mr. MacDonald and Mr. Sanford but saw Mr. MacDonald being brought across the dance floor. He followed Mr. Rossiter as he escorted Mr. MacDonald out. He noted that Mr. MacDonald was flailing a lot and seemed out of control. He seemed to be in a lot of pain. He was trying to smear blood on one of his security staff, Steven Nemethy, in particular, trying to put his bloody hand toward Mr. Nemethy’s face and mouth. Mr. MacDonald had a lot of blood coming from a finger on his right hand. This would later also be noticed by the police officer who arrested Mr. MacDonald, Cst. Jason Mood.

[50] Mr. MacIntosh pursued Mr. MacDonald when he took off, running north of the Toothy Moose on Argyle Street. Cst. Mood, a Halifax Regional Police officer working plainclothes with the liquor enforcement unit, arrested Mr. MacDonald in front of the Liquor Dome.

Mr. MacDonald's Arrest

[51] Mr. MacDonald was compliant on arrest and put up no resistance. Cst. Mood noticed that he was covered in blood, with blood on his white T-shirt and fresh blood “pouring” from his right hand. Mr. MacDonald was in Cst. Mood’s custody for about 30 seconds before he handed him over to other police officers. Cst. Mood had no conversation with Mr. MacDonald and made no observations as to his level of intoxication.

[52] Mr. MacDonald’s injuries necessitated him being taken to the Emergency Department for examination and treatment. Cst. Barna accompanied him and was present while Mr. MacDonald was examined and sutured. Cst. Barna noted four separate lacerations on Mr. MacDonald’s right hand: a small cut on the upper third of his ring finger; two lacerations on his middle finger – one near the fingernail and the other near the hand; and a laceration to the “webbing” between Mr. MacDonald’s index finger and thumb.

[53] Cst. Barna had close contact with Mr. MacDonald for an extended period of time – from 2:08 a.m. to 4:30 a.m. on January 27. In his opinion, Mr. MacDonald was intoxicated. His demeanor was very “care-free”, evincing no concerns about his injuries or being in police custody. Mr. MacDonald’s speech was slightly slurred, he had “glossy” eyes, and there was a strong smell of alcohol coming from his breath. Cst. Barna noted that Mr. MacDonald was able to walk unassisted and was not falling down.

[54] Cst. Ray Turner, who seized Mr. MacDonald’s bloody clothing, made the same observations and described him as moderately intoxicated. Both Cst. Barna and Cst. Turner testified that Mr. MacDonald was compliant and gave them no trouble.

The Defence Evidence – A Wholly Different Version of Events

[55] Both Mr. Fralick and Mr. MacDonald describe an encounter with Mr. Sanford that suggests Mr. Sanford was far from sanguine about being bumped into by Mr. MacDonald. Their versions of events cast Mr. Sanford in the role of the

belligerent and Mr. MacDonald as blameless in a confrontation that spiraled out of control. I will now discuss the relevant parts of their testimonies.

Elijah Fralick

[56] The Toothy Moose started to fill up significantly in the thirty minutes after Mr. Fralick and Mr. MacDonald arrived. The dance floor was “pretty packed” and the crowd in front of the bar waiting to get drinks was 2 to 3 people deep. According to Mr. MacDonald and Mr. Fralick, Mr. Fralick bought them each a beer. They stood hanging out at the side of the bar talking to a few people they knew. Mr. Fralick was not watching what Mr. MacDonald was doing.

[57] The area around the bar was getting increasingly congested as the number of people on the dance floor swelled. Mr. Fralick was not really paying attention to Mr. MacDonald. Although not dancing, Mr. Fralick was moving to the music and looking around for people he knew as it was common to run into friends there. However as the area got more crowded with people, Mr. Fralick started to move toward a less busy area, in the direction of another bar that was up several steps.

[58] Manoeuvring through the crowd meant turning sideways and weaving around people. Mr. Fralick knew Mr. MacDonald was fairly close behind him. As they were farther away from the DJ and the dance floor, it was easier to hear. Mr. Fralick heard some words spoken to Mr. MacDonald. Mr. Fralick thinks it was something in the nature of “F you, watch where you are going.”

[59] Mr. Fralick is unsure exactly what Mr. MacDonald said in response but described it as an apology. Mr. Fralick believes Mr. MacDonald must have bumped into someone. He looked back, assessing the situation as not being “a big deal.” He looked ahead to see if there was anyone around he knew and then looked back again. He testified he saw a man he didn’t know eyeing Mr. MacDonald who was standing still. Mr. Fralick told Mr. MacDonald to be careful, let it go – he didn’t know the man doing the eyeing. We know that the man Mr. Fralick is referring to was Mr. Sanford. Although Mr. Fralick did not think anything was going to escalate, he thought it best to just keep walking.

[60] The next thing Mr. Fralick was aware of was a commotion. When he turned in reaction to the commotion he saw bouncers on top of Mr. Sanford and Mr.

MacDonald, an altercation that was happening in the spot where Mr. MacDonald had been standing. This caused him to conclude that Mr. Sanford had moved toward Mr. MacDonald. Mr. Fralick did not see Mr. MacDonald or Mr. Sanford take a step in any direction. He did not see any confrontation between them before the commotion.

[61] Mr. Fralick stepped back, letting the bouncers have space. He watched them drag Mr. MacDonald through the bar in a choke hold. Mr. Fralick had not expected these developments. He described himself as “lost for answers.” By the time he had made his way back to their jackets and gone outside, neither Mr. Sanford nor Mr. MacDonald were to be seen.

[62] Mr. Fralick testified that when he told Mr. MacDonald to be careful, Mr. MacDonald was reaching over people in the crowd around the bar to put his empty beer bottle on the bar. Mr. Fralick described what he observed this way: “...basically he was going to put the beer, I knew he was going to do it, and I turned around, and the next thing I know, the commotion...” He heard the commotion and the next thing he saw were the bouncers wrestling with Mr. MacDonald and Mr. Sanford.

Jeffrey MacDonald

[63] Mr. MacDonald acknowledged in his evidence that he had arrived at the Toothy Moose around midnight with “a bit more” than a “buzz”. He had been with friends, including Elijah Fralick, at a private residence until leaving by cab for the Moose. He described his level of intoxication on a scale of 1 to 10 as a 6 or 7. He had been drinking gin and tonics made from a pint of gin he shared with another friend while hanging around, chatting, and watching the hockey game. In his words, he was “drunk” but not “polluted.”

[64] Mr. MacDonald and Mr. Fralick made their way around the Moose looking to see who might be there that they knew. The crowd on the dance floor had swelled and was spreading into the crush of people waiting in front of the bar to order drinks. The area was congested and navigating it required Mr. MacDonald and Mr. Fralick to zig-zag their way through. They ended up near the end of the bar by a quieter area.

[65] Mr. MacDonald describes having fun, doing fist pumps with Mr. Fralick and “dancing around, bouncing around, spinning around.” He had his arms in the air, holding his beer. Although he does not recall spilling any of it, he agrees it is very possible he could have got some beer on the people around him.

[66] The bumping into Mr. Sanford was accidental. Mr. MacDonald does not recall it happening as Mr. Fralick does, while they were walking. Mr. MacDonald recalls apologizing. He expected that to be the end of it and looked away. When he looked back, Mr. Sanford “didn’t look pleased”. Mr. MacDonald testified that he doesn’t know if Mr. Sanford either didn’t hear or didn’t accept his apology. Mr. Sanford kept staring at him. Mr. MacDonald couldn’t understand why the situation hadn’t defused. Mr. MacDonald says he was trying to let it go but he could tell Mr. Sanford had not.

[67] It is Mr. MacDonald’s recollection that two of his friends started talking to Mr. Sanford, trying to smooth things over. Mr. Sanford wasn’t taking his eyes off Mr. MacDonald and started “doing something with his sleeves.” Mr. Fralick warned him that Mr. Sanford was “not impressed” and that Mr. MacDonald should watch out. Mr. MacDonald described himself as “catching the same play” as Mr. Fralick, that something was about to happen. Mr. MacDonald thought Mr. Sanford looked as though he was getting “amped up.” It appeared to him that Mr. Sanford “was ready to fight.”

[68] Mr. MacDonald says he put his beer down on the bar. A tall man at 6 foot 3 or 4 all he had to do was reach over the crowd to do so. He now had nothing in his hands. He says he didn’t want anything in his hands. He leaned over toward Mr. Sanford to ask what the problem was. He does not recall making any gestures or taunting Mr. Sanford or trying to entice him to fight. He says he did not throw a drink in Mr. Sanford’s face or swing a beer bottle at him.

[69] Everything happened very quickly. It is Mr. MacDonald’s evidence that he was rushed and hit in the mouth. He “toppled” to the floor, backwards. He testified to a vivid recollection of his head going back giving him a clear view of the “rafters” in the bar. He does not know who hit him. His assailant, Mr. Sanford, was on top of him and Mr. MacDonald was trying to punch him to get him off. Lying

on his back on the floor all he could see was a forest of legs. Then he was hauled to his feet by security using a chokehold.

[70] Mr. MacDonald's reaction to being dragged out of the bar by his neck was to try and push the bouncer off. He couldn't breathe or see what was happening. When he was let go he was dazed and took off, scared that he might be beaten up. He could see a bouncer and another person behind him. Presumably this was James MacIntosh and Andrew Tracey. He thought they were following him to beat him up so he ran.

[71] It was Cst. Mood who made Mr. MacDonald aware of his bleeding hand. Mr. MacDonald says he also had a fat lip from where he had been punched in the Moose.

[72] During his direct examination, Mr. MacDonald identified Exhibits 3 and 4 which are his bloodied long-sleeved t-shirt and a grey cardigan. There is a hole in the right shoulder of the cardigan with a smear of blood around it. A small bloodied area about the size of the hole is visible on the t-shirt. Mr. MacDonald testified that he is fastidious about his clothing and the T-shirt and the cardigan were in pristine condition when he went out that night.

The Proposed Evidence of Mr. George Fraser

[73] The Defence called George Fraser, a retired RCMP officer and forensic IDENT specialist, to give opinion evidence as to the potential cause of the injuries sustained by Joseph Sanford. The Crown objected to Mr. Fraser primarily on the basis that he was not a properly qualified expert as required under the *Mohan* criteria. (*R. v. Mohan*, [1994] S.C.J. No. 36)

[74] A voir dire was held to assess Mr. Fraser's qualifications. Following the voir dire, I declined to qualify Mr. Fraser indicating I was not satisfied on a balance of probabilities that he is a properly qualified expert capable of giving the opinion evidence sought by the Defence. I indicated I would later provide more fulsome reasons for my decision not to qualify him. What follows now are these reasons.

[75] Mr Fraser spent 34 years and 8 months as a member of the RCMP and now works as a licensed private investigator. As a member of the RCMP he was

qualified as a crime scene investigator and worked in forensic identification from 1987 to 2008. Up until 2007, Mr. Fraser oversaw the 17 forensic IDENT sections from the Manitoba/Ontario border east, a responsibility that included training and testing members acquiring this expertise and auditing major files. Mr. Fraser estimated that he has attended over 3500 crime scenes from minor break and enters to multiple murders. He estimated he has dealt with 500 traumatic stabbings, describing this as a low estimate. His duties as a forensic IDENT officer included assessing what caused the injuries of the victim – a beating, stabbing, or shooting. His opinions were provided to the case managers for the files. He described himself as a “support service” for the investigation and acknowledged that he was never called upon to give an opinion in court as to the cause of injuries.

[76] From 1996 Mr. Fraser also worked as a bloodstain pattern analyst and was qualified in various courts as an expert in this field of forensic science. Bloodstain pattern analysis deals with determining how blood got to be within a crime scene or on exhibits. In one case, Mr. Fraser was qualified to give an opinion on why an axe, believed to have been used in an assault, had no blood on it. Mr. Fraser was able to give an opinion based on his knowledge of the properties of skin and blood vessels and how an axe could slice into them and not get bloodied.

[77] Mr. Fraser also served specialized roles involving traumatic injuries: he was the officer in charge of DNA collection and coordination following the 1998 Swiss Air crash and he was the officer in charge of the RCMP forensic team that responded to the Asian tsunami in 2004.

[78] Mr. Fraser testified that the injuries he has viewed - at crime scenes, in photographs, at autopsies, and by his observation of bodies, for example in the context of the Asian tsunami - number in the thousands.

[79] The Crown brought out in cross-examination that Mr. Fraser had been asked by Defence in preparing his report to consider three questions: (1) do the injuries show that Mr. Sanford was struck by a bottle? (2) are Mr. Sanford’s injuries consistent with a fight in which no bottle was used; and (3) if a bottle was used, how was it held and how was it used in relation to the injuries?

[80] Mr. Fraser is not a medical doctor or a forensic pathologist. He acknowledged that he was not asked to offer a bloodstain pattern analysis, did not visit the Toothy Moose, and did not meet Mr. Sanford or view his injuries other than in the police photographs.

[81] Expert opinion evidence is presumptively inadmissible. The party that is seeking to have the evidence heard must establish its admissibility on a balance of probabilities. The dangers associated with expert opinion evidence have been described in *R. v. Abbey*, [2009] O.J. No. 3534:

It is fundamental to the adversary process that witnesses testify to what they saw, heard, felt or did, and the trier of fact, using that evidentiary raw material, determines the facts. Expert opinion evidence is different. Experts take information accumulated from their own work and experience, combine it with evidence offered by other witnesses, and present an opinion as to a factual inference that should be drawn from that material. The trier of fact must then decide whether to accept or reject the expert's opinion as to the appropriate factual inference. Expert evidence has the real potential to swallow whole the fact-finding function of the court, especially in jury cases...(*Abbey*, paragraph 71)

[82] The comments of the Ontario Court of Appeal in *Abbey* underscore the importance of the requirement that opinion evidence be admitted only through a properly qualified expert. In this case, the Defence needed to satisfy me on a balance of probabilities standard that Mr. Fraser was qualified to give his opinion about the possible causes of Mr. Sanford's injuries. This threshold has to be cleared before a judge is called upon to determine, in a "gatekeeper" role, that the expert opinion evidence "is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from [its] admission..." (*Abbey*, paragraph 76)

[83] While acknowledging Mr. Fraser's impressive professional career, I found that the opinion evidence the Defence wished to elicit from him fell outside the scope of his expertise as a crime scene investigator and a bloodstain pattern

analyst. Those forensic disciplines have afforded Mr. Fraser experience in observing wounds and injuries – as noted he has viewed autopsies, police photographs, and actual bodies – but he has none of the training, accreditation, or experience that would qualify him to offer opinions about the physiology and anatomy of the human body, the diagnosis of wounds and injuries, or the effects of trauma on the human body. This is expertise that falls within well-established areas of specialized medical knowledge, such as, forensic pathology. Mr. Fraser’s training and experience do not qualify him to make determinations about the cause of wounds or injuries. He has not been shown “to have acquired special or peculiar knowledge through study or experience” in respect of the cause of wounds on the human body. (*Mohan*, paragraph 27) Mr. Fraser has not previously been put forward as an expert in the causes of wounds or injuries nor has he ever been qualified by a court to give an opinion such as was proposed in this case.

[84] As for the occasion when Mr. Fraser was qualified to give an opinion concerning why an axe would not have bloodstaining on it, I was given no particulars concerning this case or the circumstances of qualifying Mr. Fraser. Furthermore the description of Mr. Fraser’s opinion is the description of an opinion that a bloodstain pattern expert may be in a position to offer, based on training and experience in that discipline.

[85] An example of expert opinion evidence in relation to wounds inflicted by a sharp object is found in *R. v. Smith*, [2010] B.C.J. No. 101 (C.A.) where forensic pathologists described the nature of the wounds and the anatomical features that led them to form the opinions they held about how the wounds had been caused. An expert in forensic identification also testified but about bloodletting (“a trail of blood”) that had been found at the scene. (*Smith*, paragraph 13) The opinion evidence about how the victim’s wounds had been caused was admitted through the testimony of medical doctors (*see, for example, paragraphs 21 and 22*) with the necessary training and experience to formulate the opinions that could assist the trier of fact draw appropriate inferences.

[86] Had Mr. Fraser had relevant evidence to offer as a proposed bloodstain pattern analyst, I would have qualified him as an expert. However I concluded that Mr. Fraser was not “a properly qualified expert” under the *Mohan* criteria on the

matter of the cause of Mr. Sanford's injuries, rendering his proposed opinion evidence inadmissible.

Self-Defence and section 34(1) of the Criminal Code

[87] Mr. MacDonald has denied that he hit Mr. Sanford with a beer bottle. He acknowledges that he may have punched him but says he did so in self-defence only after he was hit in the mouth. As Mr. MacDonald has raised the issue of self-defence, I must consider whether the Crown has proven beyond a reasonable doubt that self-defence under section 34 of the *Criminal Code* is not available in this case.

[88] 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) If I have a reasonable doubt on all the elements of the defence then the Crown's challenge to it cannot succeed. The elements of the defence are: (1) that Mr. MacDonald 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 these elements is not present, the defence fails. (*Hebert*, paragraph 25)

[89] The Crown says that Mr. MacDonald is not entitled to the benefit of section 34(1). The Crown maintains that at no time on January 27, 2013, was Mr. MacDonald unlawfully assaulted by Mr. Sanford within the meaning of assault under section 265 of the *Criminal Code*. The witnesses called by the Crown describe an assault by Mr. MacDonald of Mr. Sanford, not the other way around.

[90] Mr. MacDonald however has testified that after accidentally bumping into Mr. Sanford he believed Mr. Sanford was poised to retaliate. But it is Mr. MacDonald's evidence that before he could do anything more than ask what the problem was, Mr. Sanford rushed at him and punched him. (I am aware that Mr. MacDonald has said he does not know who did this but it was Mr. Sanford who was pulled away from Mr. MacDonald by Mr. Rossiter.)

[91] It is Mr. MacDonald's evidence that at most he may have punched Mr. Sanford once they landed on the floor together and Mr. MacDonald was pinned

under him. He says he did not have a beer bottle in his hand and did not inflict the injuries that Mr. Sanford sustained.

[92] Mr. Fralick did not see what brought Mr. MacDonald and Mr. Sanford into actual, physical contact. He had turned away. He described nothing more than Mr. Sanford staring at Mr. MacDonald. He says he thought Mr. Sanford was eyeing Mr. MacDonald in a menacing way. His evidence supports Mr. MacDonald's on these points but he sheds no light on how the altercation had erupted.

[93] Mr. MacDonald bears an evidentiary burden in advancing self-defence. There must be an evidentiary record upon which a properly instructed jury, acting reasonably, could acquit him on the basis of self-defence if it accepted the evidence as true. I have to consider all of the evidence in determining if there is an air of reality to the defence in this case. (*R. v. Cinous*, [2002] S.C.J. No. 28, paragraph 53)

[94] The air of reality threshold is low given the Crown's overall onus to establish proof beyond a reasonable doubt. But even on this low threshold standard, I find there is no air of reality to Mr. MacDonald's claim of self-defence. Mr. MacDonald claims he was assaulted by Mr. Sanford but the evidence is overwhelming that Mr. Sanford was the person assaulted not Mr. MacDonald. Ms. McKay and Mr. Tracey both saw Mr. MacDonald throw a drink or drinks at Mr. Sanford, which is what Mr. Sanford says happened before he was hit with the beer bottle. Mr. Tracey witnessed Mr. MacDonald smashing the beer bottle on Mr. Sanford.

[95] In addition to this evidence, there is the evidence of Mr. Rossiter, an experienced bouncer, who observed Mr. MacDonald as the aggressor against Mr. Sanford even before they went to the floor. He saw that Mr. MacDonald had a beer bottle in his hand and that it was Mr. MacDonald pinning Mr. Sanford down, not the other way around. He witnessed Mr. MacDonald wielding the beer bottle against Mr. Sanford and knocked it out of his hand. I cannot ignore this independent evidence in assessing whether there is an evidentiary basis for Mr. MacDonald's claim of self-defence.

[96] Even if I was to accept as true the evidence of Mr. MacDonald that he was subject to an unlawful assault by being rushed and punched by Mr. Sanford before he did anything, the force that witnesses saw Mr. MacDonald use was clearly excessive and well beyond what would have been necessary to defend against a punch.

The Defence of Denial

[97] Although it is necessary for me to deal with self-defence as it has been raised, it seems to me it is a red herring in this case. Mr. MacDonald's real defence is one of denial. He denies assaulting Mr. Sanford with a beer bottle and inflicting his injuries. That is what he is charged with doing – assaulting Mr. Sanford with a weapon and causing him bodily harm. Mr. MacDonald says he did not do this. He has effectively said, I do not know how Mr. Sanford got the lacerations shown in the police photographs but I had nothing to do with them. He denies hitting Mr. Sanford with a beer bottle or using a broken beer bottle to cut him.

[98] I must consider Mr. MacDonald's evidence according to the requirements of *R. v. W.(D.)*, [1991] S.C.J. No. 26. I must assess whether I believe Mr. MacDonald's version of the events and even if I do not, whether it still leaves me with a reasonable doubt, or whether on all the evidence I have a reasonable doubt.

[99] Mr. MacDonald's version of the events is simply not credible. It is not consistent with the evidence of Mr. Rossiter, an independent witness, nor is it consistent with Mr. Sanford's injuries or the testimony of the other witnesses – Mr. Sanford, Ms. McLeod, and Mr. Tracey, whose evidence on the central features of the events at the Toothy Moose I accept. Mr. Sanford's injuries are wholly consistent with what Andrew Tracey described: Mr. MacDonald clobbering Mr. Sanford with a beer bottle that broke on impact. Mr. Sanford described this as a blow to the bridge of his nose which would explain the injuries in that area of his face, including his broken nose. I view the lacerations to Mr. Sanford's cheek, neck, and head as consistent with being cut by the jagged edges of a broken beer bottle. Mr. Tracey and Mr. Rossiter saw Mr. MacDonald slicing at Mr. Sanford with the broken bottle. It was not a figment of their imaginations: Mr. Rossiter whacked a broken beer bottle out of Mr. MacDonald's hand to disarm him.

[100] Mr. MacDonald's own injuries are consistent with his having gripped a broken beer bottle. He had cuts to his hand that bled copiously and had to be sutured.

[101] I will add that there is nothing about the small hole in Mr. MacDonald's cardigan that leads me to question how Mr. Sanford got injured. I do not know how the hole got there but it does not raise a doubt in my mind about what happened in the Toothy Moose after Mr. MacDonald bumped Mr. Sanford. The hole in the cardigan is a fact that is dwarfed by the facts that support the charges against Mr. MacDonald.

[102] What I accept about Mr. MacDonald's evidence is that he was jumping around in a congested area of the bar and bumped into Mr. Sanford. He had a beer in his hand. Even Mr. MacDonald acknowledged that he may have been spilling some of his beer as he danced about with his hands over his head. What I do not accept of Mr. MacDonald's evidence is his description of what happened next. He may now believe what he testified to but I do not. I find that he was intoxicated and behaving in a disinhibited fashion. He took issue with Mr. Sanford moving the beer bottle that he had been holding. He became belligerent. He smashed the beer bottle against Mr. Sanford's face and then sliced him with it in various places injuring him as the photographs depict. Mr. Sanford tried to defend himself. He ended up underneath Mr. MacDonald on the floor and this is how they were positioned when Mr. Rossiter grabbed hold of Mr. MacDonald.

[103] Mr. Sanford was a very measured, collected witness. He seemed to have a good recollection of events and was matter-of-fact and careful in his answers. I did not get the impression that he was embellishing or adding gratuitous details. I also find Ms. McKay and Mr. Tracey to be credible and accept most of their evidence. While I do not accept that Mr. Tracey ultimately tackled Mr. MacDonald outside the Liquor Dome as he testified he might have done, this does not cause me to doubt the evidence he gave about what he saw inside the Toothy Moose. I do not find that either of Mr. Sanford's friends engaged in any tailoring of their evidence to support Mr. Sanford's description of what happened. The small differences in the various accounts by Mr. Sanford, Ms. McKay, and Mr. Tracey are not what I

would expect to find if the witnesses had collaborated. I also noted that both Ms. McLeod and Mr. Tracey were careful to say what they did not see happen.

[104] Having considered all the evidence, I am satisfied beyond a reasonable doubt that Mr. MacDonald's fuse was lit at the Toothy Moose leading him to attack Mr. Sanford with a beer bottle, breaking it on his nose and cutting him. After that Mr. MacDonald continued to wield the broken bottle against Mr. Sanford, injuring him further. The Crown has proven its case against Mr. MacDonald beyond a reasonable doubt and I accordingly convict him of both charges – assault with a weapon and assault causing bodily harm.