

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Desmond*, 2024 NSSC 60

**Date:** 20240229

**Docket:** 514194

**Registry:** Antigonish

**Between:**

His Majesty the King

v.

Cassandra Desmond

**Decision**

**Judge:** The Honourable Justice Frank P. Hoskins

**Heard:** January 4, 5, April 26, 28, August 18, 2023, in Antigonish,  
Nova Scotia

**Oral Decision:** January 17, 2024

**Written Decision:** February 29, 2024

**Counsel:** Jonathan Gavel, for the Crown  
Robert Jeffcock, for the Accused

**By the Court:**

**Introduction**

[1] This is the decision in the in the matter of *His Majesty the King v. Cassandra Desmond* who is charged with having committed six indictable offences on or about January 3, 2022, at or near Antigonish, Nova Scotia. The alleged offences are described in the six-count indictment as follows:

Count 1: That on or about January 3, 2022, at or near, Antigonish, Nova Scotia, did in committing an assault on Kirk MacDonnell use a weapon, to wit a glass picture frame and a knife, contrary to s. 267(a) of the *Criminal Code*;

Count 2: That on or about January 3, 2022, at or near, Antigonish, Nova Scotia, did carry a weapon, to wit a knife, for a purpose dangerous to the public peace contrary to s. 88 of the *Criminal Code*;

Count 3: That on or about January 3, 2022, at or near, Antigonish, Nova Scotia, did by gesture convey a threat to Kirk MacDonnell to cause bodily harm to Kirk MacDonnell contrary to s. 264.1(1)(a) of the *Criminal Code*;

Count 4: That on or about January 3, 2022, at or near, Antigonish, Nova Scotia, did wound Elijah Watts thereby committing an aggravated assault contrary to s. 268 of the *Criminal Code*;

Count 5: That on or about January 3, 2022, at or near, Antigonish, Nova Scotia, did in committing an assault on Elijah Watts use a weapon, to wit a knife, contrary to section 267(a) of the *Criminal Code*; and

Count 6: That on or about January 3, 2022, at or near, Antigonish, Nova Scotia, did by gesture convey a threat to Elijah Watts to cause bodily harm to Elijah Watts contrary to s. 264.1(1)(a) of the *Criminal Code*.

[2] On the last court date, I gave an oral decision in relation to the six offences or charges as described in the Indictment. What follows are my reasons for having reached those verdicts.

### **Reasons**

[3] I have had the opportunity to listen intently to the submissions that have been made by Counsel and have considered all the evidence that was proffered in this case.

[4] I will refer to a great deal of evidence which was proffered at the trial, but if I do not make specific reference to it, be assured that I have considered all the evidence in reaching my decision. Given the context in which this case arises, it required a careful, painstaking, and repetitive detailed examination of all the evidence. In particular, Exhibit 1, the audio and video surveillance recordings which were assiduously and meticulously reviewed.

[5] Having considered all of the evidence, I find Ms. Desmond not guilty of committing the alleged offences because the Crown did not prove beyond a reasonable doubt all of the essential elements of the alleged offence of aggravated assault, as described in count 4 of the Indictment, and failed to disprove beyond a reasonable doubt that Ms. Desmond was acting in defence of her friend, Mr. Ehler, pursuant to s. 34 of the *Criminal Code*, in respect to the remaining five counts or charges on the six count Indictment.

[6] In explaining my reasons, I will briefly summarize the surrounding circumstances which have emerged from the evidence presented, touch upon the law and then provide my analysis which has led me to the conclusion that the Crown failed to prove beyond a reasonable doubt that Ms. Desmond committed the alleged offences as described in the six count Indictment.

[7] It may be appropriate at this junction to briefly comment on the context in which this case arose by touching upon the background of the case.

### **Background**

[8] This case arises from a physical confrontation between Mr. Elijah Watts, and Mr. Kyle Ehler that occurred at Dooly's Bar in Antigonish, Nova Scotia on January 3, 2022. Mr. Watts initiated the altercation for no apparent reason.

[9] Most of the physical confrontation between the men is captured by audio and video surveillance cameras situated in the bar. There were a few people in attendance at Dooly's when the physical altercation occurred, including Cassandra Desmond and Kirk MacDonnell, whom were both involved in the physical altercation. Cassandra Desmond was seating at the VLT machines, Elijah Watts, and Kalista Desmond were seating at the bar when the altercation began. Upon noticing the interaction between Elijah Watts, Kirk MacDonnell and Kyle Ehler, Cassander Desmond immediately intervened by shoving both Mr. MacDonnell and Mr. Watts. Mr. MacDonnell was with Mr. Watts throughout the altercation, and at times he became physically engaged in the confrontation. During the entire incident, Cassander Desmond repeatedly yelled at the two men to leave Mr. Watts alone, and at times, she physically intervened in the altercation. At one point, Ms. Desmond attempted to pull Mr. Watts off of Mr. Ehler, and at another point she pushed Mr. MacDonnell away from Mr. Ehler. At one point, after Ms. Desmond shouted at Mr. Watts, he replied by saying something to the effect that, "I can't hear you bitch", to which Ms. Desmond's responded, "you can't hear me?" Immediately following that exchange, Ms. Desmond walked away towards the VLT machines where she had been sitting. Within seconds, she returned to the altercation with an object, which appears to be a knife, in her possession.

[10] At that time, Mr. MacDonnell had hold of Mr. Watts. Ms. Desmond placed the knife on the side of Mr. MacDonnell's neck area, to which he put his hands up and backed away. Mr. MacDonnell's reaction is consistent with the object being a knife in Ms. Desmond's possession. Indeed, Ms. MacEachern, a bartender at Dooly's, observed a knife in Ms. Desmond's possession. During this time, Mr. Watts and Mr. Ehler were grappling on the floor. While Mr. Ehler was on top of Mr. Watts with his hands on Mr. Watts' neck choking him, Ms. Desmond placed the knife against Mr. Watts' face and said something to him. As a result, Mr. Watts sustained a laceration on his face.

[11] Mr. MacDonnell pulled Ms. Desmond away from Mr. Watts. Eventually, Mr. MacDonnell convinced Mr. Watts to leave the bar. As Mr. Watts and Mr. MacDonnell exited the bar, Ms. Desmond continued to yell at them. The bar staff also repeatedly asked the men to leave.

[12] After Mr. MacDonnell noticed that Mr. Watts was wounded in the abdomen, he returned to the bar and charged at Mr. Ehler, grabbing, and pushing him against a wall. Ms. Desmond intervened and at one point grabbed a picture frame from the wall where the men were fighting and struck Mr. MacDonnell with it. Following that, the incident ended, and Mr. MacDonnell exited the bar.

[13] There is no direct evidence respecting the causation of the wound to Mr. Watt's abdomen as none of the witnesses, including Mr. Watts, observed or witnessed the wound being caused, nor can the cause of the wound be seen in video surveillance recordings, Exhibit 1. Mr. Watts testified that he sustained the wound on the night in question while in the bar, but could not say when, or how he sustained it. He testified that he did not see a weapon or knife, and could not say who, or what, applied the force to his abdomen that resulted in the injury he sustained.

### **The Central Issue**

[14] The central issue in this case is whether the Crown proved beyond a reasonable doubt the alleged offences as described in the six-count Indictment, including disproving that Ms. Desmond was acting in defence of Mr. Ehlers, pursuant to s. 34 of the *Criminal Code*.

### **Summary of the Evidence**

#### **Admissions: Section 655 of the *Criminal Code***

[15] At the outset of trial, Defence Counsel, Mr. Jeffcock, read into the record the following admissions:

1. Date, time, and jurisdiction is not an issue as the incident occurred in Antigonish, Nova Scotia.
2. There is no issue with the authenticity of the audio and video surveillance recordings from Dooly's, and therefore Defence consent to its admission.
3. The persons shown in the audio and video surveillance recordings, include Cassandra Desmond, Kalista Desmond, Kyle Ehlers, Kirk

MacDonnell, Elijah Watts, Sarah Morgan, Faith MacEachern, and two other males.

### **The Evidence of Ms. Tanya DeWolfe**

[16] Ms. DeWolfe testified that she is employed as a manager at Dooly's in Antigonish. Dooly's is a pool and billiard hall that sells alcohol. It has both VLTs and pool tables. She has been employed at Dooly's for 19 years. After describing her managerial responsibilities, she confirmed that she was the manager on January 3, 2022. She explained that due to COVID Dooly's opened at 10:00 a.m. They were allowed to serve alcohol until 11:00 p.m. The bar's last call for service was at 10:45 p.m. The VLTs automatically shut down at 11:45 p.m. and patrons had to be out of the building by midnight.

[17] Ms. DeWolfe stated that there were 16 surveillance cameras at Dooly's. The cameras record when there is movement. There are 14 cameras inside the bar, and two located on the exterior of the Dooly's building.

[18] Ms. DeWolfe testified that she was at home on the evening of January 3, 2022. She received a phone call around 11:00 p.m. from the alarm company who informed her that the panic buttons were activated because of an incident at the bar. She explained that the security company that called is a monitoring company that reacted to the activated panic buttons. Ms. DeWolfe called the bar ensure that the staff were fine. She first spoke to Sarah Morgan who answered the phone. After speaking to Sarah, Ms. DeWolfe then spoke to Faith MacEachern.

[19] Ms. DeWolfe stated that the RCMP contacted her the next day on the morning of January 4, 2022. She and the police reviewed surveillance footage from her cell phone. She described her interactions with the police, including how they reviewed the surveillance recordings. The police asked her for the all the recording angles that showed footage of the incident. After reviewing all 16 cameras, she provided the police with five cameras because they had footage, and provided a sixth camera out of an abundance of caution because it could have footage recorded from a different angle. She explained that because the police asked her for the surveillance cameras recordings that captured the incident, she provided them recordings ten minutes before the incident started up to and including when everyone was vacated from the bar.

[20] Ms. DeWolfe with the assistance of a diagram, described the physical layout of Dooly's, and the locations of the surveillance audio and video recordings.

[21] Ms. DeWolfe testified and confirmed several functionalities of the audio and video surveillance recordings from Dooly's. After marking the disc containing the audio and video surveillance records as Exhibit 1, Ms. DeWolfe explained that there are five video files labelled as channel one main, channel four main, channel nine main, channel ten main, and channel thirteen. After she explained the operating system of the Disc containing Exhibit 1, Ms. DeWolfe described what is being shown on the channels. She stated that channel one main shows the foyer entrance of Dooly's. Channel four main shows an overview of the bar at Dooly's. Channel nine main shows one of the VLT rooms at Dooly's. Channel ten main shows the opposite angle from the same VLT room in channel nine man. Channel ten main shows the opposite angle from the other end of the same VLC room at Dooly's. Channel fifteen main is an exterior camera at Dooly's, which is located above the door aim at the parking lot.

[22] Ms. DeWolfe confirmed that Dooly's has cameras located at the rear of the building where the pool tables are located. She also confirmed that the surveillance cameras record both audio and video.

### **The Evidence of Corporal Anthony MacKinnon**

[23] Corporal MacKinnon testified that he has been employed as a RCMP officer for seventeen years. After describing his general duties as a police officer in Antigonish, he explained his involvement in the investigation of the case before the Court. He explained that he met with Ms. DeWolfe at Dooly's and reviewed the surveillance videos with her. He recalled what he observed on the video and asked her to provide him with a copy of the recordings. He received a copy of the recordings which he reviewed, and which appeared to be the same as he had reviewed earlier with Ms. DeWolfe.

[24] Corporal MacKinnon described what is being shown in the audio and video surveillance recordings. He also explained that he learned that the recordings contained audio when he reviewed them at the police detachment.

[25] Corporal MacKinnon stated that he went to Dooly's to obtain video recordings of the altercation that occurred in the bar. He confirmed that he was

reviewing the video looking for a weapon, which he had not found. He also learned that the scene had already been cleaned.

### **The Evidence of Constable John Donaldson**

[26] Cst. Donaldson testified that he has been a member of the RCMP for 18 years. He stated that he became involved in an attempted murder investigation that occurred at Dooly's on January 4, 2022. He was informed about the video surveillance at Dooly's and he retrieved that video, with the intent to see whether the weapon used in the incident could be seen on the video. He viewed the video to see what happened. He described how he did that, and what he observed. He also stated that he spoke to Kirk MacDonnell who provided "somewhat" of a statement, and he spoke to Kyle Ehler who provided a statement.

[27] Cst. Donaldson's explained that he retrieved a gold chain from Mr. Watts seized clothing at the request of Mr. Watts' mother.

### **The Evidence of Constable Josee Neudorf**

[28] Cst. Neudorf testified that she has been a member of the RCMP since 2009 and has been posted in Antigonish in July 2021. She described her involvement in the investigation of the matter before the Court. On the evening of January 3, 2022, she was dispatched to investigate a fight in progress at Dooly's in Antigonish. Upon her arrival, she observed two males on the sidewalk outside of Dooly's. The taller man was providing medical assistance to the man on the sidewalk, Mr. Watts. She did not notice any injuries at that time.

[29] She recalled that an employee from Dooly's came out of the bar and told her and her partner, Cst. Tlyer Baird, that Cassandra Desmond was inside the bar with a knife. They went inside the bar to arrest Ms. Desmond and to take control of the situation. After they entered the bar, they asked Ms. Desmond to come over to the door, which she did. She was then placed under arrest. After securing Ms. Desmond in the police vehicle, Cst. Neudorf stated that she and Cst. Baird went back into the bar and spoke to people inside the bar. Kyle Ehlers and Kalista Desmond were in the bar. Kalista Desmond approached her and advised that she wanted to tell her what happened. Cst. Neudorf obtained a statement from Kalista Desmond.

[30] Cst. Neudorf seized Mr. Watts' bag of clothing from the Emergency Room staff, which was sealed in a bag. She did not examine the bag of clothing. She turned it over to Cst. Baird.

[31] Cst. Neudorf recalled that prior to attending the hospital, she had taken photographs at Dooly's, which was marked and tendered as Exhibit 3, there were 14 pages of photographs. Cst. Neudorf described what was depicted in each photograph. One photograph was taken of the sidewalk outside the bar.

[32] Cst. Neudorf confirmed that upon her arrival at the scene she did not conduct a pat-down search on any individuals. She agreed that the photographs were taken after the patrons exited the bar, and that she cannot speak to what was going on inside the bar when she was outside.

[33] After that, Cst. Neudorf went to the hospital to check on the victim. She had minimal interaction with the victim, Mr. Watts, because he was receiving medical assistance. She stated that Mr. Watts was "pretty vocal at the hospital that he didn't want to speak to the police.

[34] Cst. Neudorf stated that she arrived at the hospital at 12:15 a.m. She observed Mr. Watts to be intoxicated and he was belligerent.

### **The Evidence of Constable Tyler Baird**

[35] Cst. Baird testified that he has been a member of the RCMP for three years and eleven months. He stated that on January 3, at approximately 11:45 p.m. he was dispatched to Dooly's in response to a complaint about a fight in progress.

[36] On route to the bar, he was notified by Sarah Morgan that one of the individuals had a knife. Upon arrival, he observed two males along the guard railing outside of Dooly's. One male was holding another, later identified as Kirk MacDonnell. Mr MacDonnell stated that the man he was holding was stabbed, Elijah Watts was later identified as the man with Mr. MacDonnell.

[37] Cst. Baird stated that he noticed that Mr. Watts was injured. He observed blood on his face, stomach, and underwear. He immediately requested EHS to treat Mr. Watts. He stated that Faith MacEachern approached him and informed him that Cassandra Desmond had a knife and she hit Mr. Watts over the head with a glass

picture. Based on that information, Cst. Baird stated that he formed grounds to arrest Cassandra Desmond for assault with a weapon and possession of a weapon for a dangerous purpose. He and Cst. Neudorf entered Dooly's and after Cassandra Desmond identified herself to them while inside the bar, they arrested her. Cst. Baird searched her as an incidental to arrest and placed her in the police vehicle.

[38] Cst. Baird could not recall whether there were other people in the bar when he went to arrest Cassandra Desmond, nor could he recall making any observations of the scene. He recalled going back inside the bar and speaking to bar staff. He also recalled observing Kyle Ehler in the parking lot screaming that Cassandra Desmond should not be arrested as he was pacing back and forth in the parking lot. Corporal Dennis Munroe arrested Kyle Ehler for causing a disturbance.

[39] Cst. Baird did not observe any injuries on Cassandra Desmond when he arrested her, and could not recall what she was wearing. He recalled observing Kyle Ehlers and noted that he did not have any physical injuries.

[40] After Cst. Baird escorted Cassandra Desmond to the police detachment, he went to the hospital. He arrived at the hospital at approximately 1:18 a.m. on January 4, 2024. He explained that after he recorded the names of the paramedics involved in the case, he took photographs of a laceration on Elijah Watts' face and a wound to his stomach. He also spoke to the duty doctor that was treating Elijah Watts, Dr. Scott Foley.

[41] Cst. Baird described the injuries that Elijah Watts sustained as a laceration on his cheek, and a deep cut into his abdomen. He identified Exhibit 2 as a photograph that he had taken of Mr. Watts' wound to the abdomen, and laceration to his face. He took those photographs while he was in the hospital.

[42] Cst. Bair testified that Cst. Neudorf sized Elijah Watts' clothing and brought them to the detachment in Antigonish, where he took possession of them. He exhibited the clothing into evidence bags.

[43] Cst. Baird testified that during the processing of Cassandra Desmond at the RCMP detachment he observed blood on her hands but did not observe any injuries on her hands. Cst. Baird stated that he did not observe any injuries on Ms. Desmond, meaning cuts, bruising, or bleeding.

[44] Cst. Baird introduced Exhibit 4, five pages of photographs, which he took of Ms. Desmond hands at the detachment. He described what is being depicted in each photograph. Cst. Baird also confirmed that he took the two photographs in Exhibit 5, which depict Ms. Desmond's hands.

[45] Cst. Baird stated that he went to the hospital to assist Cst. Neudorf with Elijah Watts who was refusing treatment, and then returned to the detachment where he obtained DNA swabs from Ms. Desmond's hands.

[46] On Cross-examination Cst. Baird confirmed that when he entered the bar and called out Cassandra Desmond's name, she immediately presented herself to him.

[47] He agreed that he did not tell the Dooly's staff not to touch the scene. He also agreed that he did not search incidental to arrest anyone inside the bar other than Ms. Desmond. He confirmed that he searched incident to arrest Kyle Ehlers after he was charged with causing a disturbance outside in the parking lot.

[48] Cst. Baird's attention was directed to Exhibits 4 and 5, photographs of Ms. Desmond's hands and shown on her hands where fingernails were missing on some of her fingers. He also stated that he did not observe a cut on Ms. Desmond's finger but observed agreed that he could see blood on the middle fingernail.

[49] Cst. Baird agreed that he received information from Dr. Scott Foley at the hospital that led him to believe that there may have been glass in the wound that Mr. Watts sustained. He was asked what investigative steps that he had taken upon learning that information to which he replied that "we went back to the detachment, and we did DNA swabs of Cassandra Desmond's hands, and we also seized her clothing."

[50] Cst. Baird was asked whether he took a statement form Dr. Scott Foley, to which he replied that he did not. He also confirmed that he did not ask to speak to Dr. Scott Foley about what steps he took in observing and cleaning Mr. Watts' wound.

[51] Cst. Baird replied that he obtained Mr. Watts' medical records, and the next day he obtained security footage that shows that there's no glass being cut before Elijah Watts was injured. He added that Ms. MacEachern observed Cassandra Desmond with a knife, there is video footage that shows Ms. Desmond with the

knife, the medical records says that Elijah Watts has a stab wound, and the video footage does not show any broken glass at the time when Elijah Watts was wounded.

[52] It was suggested to Cst. Baird that he does not know when Mr. Watts sustained the wound to his abdomen, to which he replied, “I do not know an exact time, yes, but I do know when ... from reviewing the footage, when he’s outside laying on the ground, that at that time ... laying on the ground, that at that time... laying on his stomach, and he hasn’t moved since before we arrived, after we arrived, that I don’t observe any broken glass in the video, so he’s injured, before.”

[53] Again, it was suggested to Cst. Baird that he took no investigative steps to learn any more information about that glass in Mr. Watts’ wound, to which he replied, “I obtained medical records.”

[54] Cst. Baird confirmed that he took the photographs in, Exhibit 2, on January 4, at 1:24 a.m., and he is not able to say whether or not any medical procedures had been performed on that injury, and therefore, cannot confirmed that the wound looked like what is depicted in the photograph when Mr. Watts arrived at the hospital. He also agreed that it is possible that the wound depicted in the photograph is much larger than it was originally.

[55] Cst. Baird agreed that he did not observe any injuries to Mr. Watts’ neck, but he did on Mr. Watts’ cheek and his stomach. He also confirmed that Mr. Watts was handcuffed to the bed at the hospital because he was becoming belligerent because he wanted to leave. He also agreed that Mr. Watts highly intoxicated.

### **The Evidence of Corporal Marie Rose Bezaire**

[56] Cst. Bezaire testified that she has been a member of the RCMP for 20 years, and for the last four and a half years in the forensic identification section. Cst. Bezaire explained she took photographs of clothing seized in the investigation, which are contained in Exhibit 6, a booklet of photographs. She explained what is depicted in each photograph.

### **Occurrence Witnesses**

[57] The Crown called three witnesses who were present at Dooly’s when the incident occurred: namely, Mr. Elijah Watts, Ms. Faith MacEachern, and Ms. Sarah

McLauchlin. The Crown also tendered audio and video surveillance recordings from Dooly's bar, Exhibit 1, which consist of five different channels. The recordings contain a number of different camera angles from cameras situated in various locations in and around the bar. The following is a summary of the evidence adduced in the trial.

### **The Evidence of Mr. Elijah Joseph Watts**

[58] Mr. Watts testified that he is 23 years old, and resides in Port Hawkesbury, Nova Scotia. On January 3, 2022, he was in Antigonish. He recalled that he was at Dooly's but stressed that his memory is "a little foggy" because he was intoxicated from drinking alcohol. He recalled that on January 3, 2022, he drove in his truck to Port Hawkesbury with his friend, Kirk MacDonnell to play the "slots" at Dooly's. He stated that he and his friend, Kirk MacDonnell, decided to go to Dooly's in Antigonish because they did not have any luck playing in Port Hawkesbury. They arrived at Dooly's in Antigonish around 6:00 p.m. Dooly's was very quiet, there was no one else in the establishment. He and Mr. MacDonnell ordered a few drinks, played pool, and played the slots. While doing that, "Parker", a friend of Mr. Watts arrived. He stayed there for about an hour, from 7:00 to 8:00 p.m. After "Parker" left the bar, Mr. Watts observed two females and a male enter the bar. He did not know them. He described himself as being "pretty drunk". He stated that he does not know how much he had drunk up to that point in time.

[59] Mr. Watts testified that he did not know Cassandra Desmond, Kyle Ehlers, or Kalista Desmond. He stated that they asked them if they wanted to play pool, and "then an altercation happened where we started kinda fighting, I guess."

[60] Mr. Watts was asked how the three individuals responded when he and Mr. MacDonnell asked them to play pool, to which he replied, "violently, I guess." He guessed that this incident occurred around 10:00 p.m. or 11:00 p.m. He further stated that he asked the male who was at the bar. He does not recall much about that conversation. He added that he thought the person was one of his friends, Parker, who he had seen earlier in the evening. Mr. Watts stated that he and the man at the bar "ended up in an argument, because he had mistaken him for someone else, and things went back and forth." He could not recall what was said. He stated that they were "kind of wrestling around. Then I remember blood pouring from me, I felt weak." He added that he ended up in the hospital because he "thought that he got stabbed." He stressed that he is not sure that he got stabbed.

[61] Mr. Watts testified that he received a cut on his face and in his stomach while in the bar. He did not have these cuts before he entered Dooly's. He described the cut on his left cheek as being a "couple of inches long". Mr. Watts was shown Exhibit 2, a photograph, and confirmed that "wound" shown in the photograph is located in the "middle of his stomach". He stated that the photograph was taken January 4, 2022, around midnight. Mr. Watts also stated that he had surgery, which required him to be in the hospital for a "number of days": he guessed 5 or 6 days. Following his discharged from the hospital, he stated that he had to stay in bed for about a month. He has a scar as a result of the wound on his abdomen.

[62] On cross-examination Mr. Watts disagreed with the suggestion that the altercation took place after he approached a male and asked him if he wanted to play pool. He stated that "no, it's as I was coming back in." He was asked, "It's as you were coming back in from outside the bar?", to which he replied, "Yeah."

[63] Mr. Watts thought that the altercation occurred around 10:00 p.m. or 11:00 p.m., after he had a cigarette outside of the bar. He stopped and asked the male to play pool. He agreed that he mistook the male for his friend, "Parker", who is a close friend of his, who he spent an hour with earlier in the evening.

[64] It was suggested to Mr. Watts that "in order for you to mistake that person for a friend of yours, you must have been extremely intoxicated", to which Mr. Watts replied, "he was facing the other way. He looked similar from the back, yeah, and I was intoxicated, yes."

[65] Mr. Watts disagreed with the suggestion that he was the aggressor in the incident. He was shown Exhibit 1, the audio and video recording, at timestamp 23:41:30, channel four. He agreed that he is placing his hand on Mr. Ehler's shoulder, getting into his face, while Mr. Ehler is not reacting, he is drinking his beer. Mr. Watts agreed that he was trying to "get into his face." At timestamp 21:41:37, channel four, on the video, Mr. Watts agreed that Mr. MacDonnell may have been placing his hand on his back in an attempt to get him to leave the situation. Mr. Watts stated that he does not recall what he was saying to Mr. Ehler. He does not think that he was trying to provoke Mr. Ehler as he does not remember.

[66] It was suggested to Mr. Watts that he was looking for a reaction from Mr. Ehler, to which he responded, "Ah, yes, I guess I was, yeah." He also agreed that

from watching Exhibit 1 he looks intimidating as he is leaning down on Mr. Ehler who is sitting at the bar. Mr. Watts agreed that he is taller than Mr. Ehler. Mr. Watts

Mr. Watts was directed to the video, at timestamp 23:42:03, channel four, where he agreed that he and Mr. MacDonnell are taller than Mr. Ehler. He agreed that he and Mr. MacDonnell provoked Mr. Ehler to get out of his seat and after that he placed his hands on him. He also agreed that Mr. Ehler did not say anything to them, nor did he do anything to them.

[67] It was suggested to Mr. Watts that had he walked away, as Mr. MacDonnell directed him to do, the incident would not have occurred, to which he answered, "Maybe not, no."

[68] Mr. Watts agreed that he had Mr. Ehler pinned up against the bar. He had nowhere to go. It was suggested to him that he was enjoying it, to which he stated, "It might, yeah". He added that he does not remember.

[69] At timestamp 23:42:11, channel four, on the video, it was suggested to Mr. Watts that he and Mr. MacDonnell were trying to attack Mr. Ehlers to which he replied that "it looked like he punched us first."

[70] Mr. Watts agreed that he can hear Cassandra Desmond on the video, yelling "Let him go", and that he was not stopping. He did not agree with the suggestion that Mr. Ehler posed no threat to him.

[71] At timestamp 23:42:40, channel four, on the video, Mr. Watts agreed that Mr. Ehler has his hands wrapped around his stomach area, while Cassandra Desmond is attempting to keep Mr. MacDonnell away, from joining in on the fight against Mr. Ehler. He also agreed that at timestamp 23:42:56, channel four, on the video, that he and Mr. Ehler are wrestling as Mr. Ehler is defending himself. It was suggested to Mr. Watts that despite hearing cries from people to stop, he had no interest in stopping to which he answered, "No."

[72] Mr. Watts did not agree with the suggestion that Mr. Ehler was acting in self defence from being attacked by him. He added that he was protecting himself as well. Mr. Watts was asked, "So you're saying here that you believe that Mr. Ehler is prolonging this attack?", to which he replied, "I'd say we both are."

[73] Mr. Watts' attention was directed to timestamp 23:42:56 of Exhibit 1, channel four, on the video, and asked whether he could hear on the audio, "I can't hear you, bitch", to which he agreed that was in response to Cassandra Desmond's saying "let him go right now". He further agreed that notwithstanding repeated requests to let Mr. Ehler go, he ignored them.

[74] Mr. Watts' attention was directed to timestamp 23:43:10 channel four, on the video, and it was suggested to him that he was saying unkind words to Mr. Ehler at that time, to which he replied, "Probably, I don't remember. He also agreed that at that time that Mr. MacDonnell also grabbed a hold of Mr. Ehler, as Mr. Ehler is attempting to defend himself from two larger males attacking one smaller male. Mr. Watts stated, "I guess it looks like that, yeah." He further agreed that the women in the video was not intervening in the incident.

[75] At timestamp 23:43:14, channel four, on the video, Mr. Watts agreed that he can hear a voice yelling out, "Stop, or I'm going to call the cops", but he could not remember hearing that at the time of the incident. He also agreed that at that time it can be shown in the video that Mr. MacDonnell had a "fistful" of Mr. Ehler's hoody, and with his other hand he appears to be pointing a finger in Mr. Ehler's face. And he is starring him down.

[76] At timestamp 23:43:18, channel four, on the video, a voice can be heard saying, "Stop or I'm calling the cops", to which Mr. Watts stated that he could not remember hearing that. He agreed that he is not stopping the fight, and that at that time he was on the ground, Mr. Ehlers was on top of him, and Mr. MacDonnell's hands were full of Mr. Ehler's sweater.

[77] At timestamp, 23:43:16, channel nine, on the video, Mr. Watts agreed that Cassandra Desmond is seen intervening in the altercation. He disagreed with the suggestion that Cassandra Desmond was able to get Mr. MacDonnell off of Mr. Ehler. He stated, "No, it looked like he took him off of me, I'd say."

[78] At timestamp 23:43: 19, channel nine, on the video, Mr. Watts agreed that in the still frame he is able to see Mr. Ehler's right hand, but not his left hand, and that Mr. MacDonnell is grabbing hold of Mr. Ehlers. He further agreed that in the recordings Cassandra Desmond is yelling, "let him fucking go, let him fucking go", and Mr. MacDonnell lets him go. Mr. Watt further agreed that "now it is one-on-one instead of two-on-one.

Later in the frame, Mr. Watts agreed that after everyone separated, he could have walked away, but he did not. He continued to walk towards Mr. Ehlers. He also agreed that at that moment, he was unaware that he sustained any injuries to his face or stomach. At timestamp 23:44:02 channel nine, on the video, he agreed that Cassandra Desmond is directing him and Mr. MacDonnell towards the door, and that Mr. MacDonnell is trying to restrain him. At timestamp 23:43:45, channel nine, on the video, Mr. Watts agreed that Mr. MacDonnell reached in to pull him away from Cassandra Desmond and Mr. Ehler.

[79] At timestamp 23:44:01, channel nine, on the video, Mr. Watts agreed that he took a swing at Cassandra Desmond, and that she and Kalista Desmond were trying to get him out of the building. He agreed that he refused to exit the building because he wanted to prolong the altercation. He further agreed that at this point he is out of control, and that he was “not adhering to any form of common sense or reasoning.” Mr. Watts agreed that he wanted to pick a fight with anyone at this point in time. He stated, “Yeah, I guess so, yes. Yes.”

[80] Mr. Watts’ attention was directed to timestamp 23:43:51, channel ten, on the video, showing a man with a ballcap on and a face mask. He agreed that the man had nothing to do with the altercation, as he was just minding his own business, trying to exit the bar. After watching the video, Mr. Watts was asked whether he tried to intimidate the man, a total stranger to him. He answered that he could not remember and agreed that he could not rule it out.

[81] Mr. Watts agreed that in the video at timestamp 23:43:23, channel ten, Ms. MacEachern, Dooly’s Staff, appears not to have done anything to intervene in the altercation.

[82] Mr. Watts’ attention was directed to the video at timestamp 23:44:28, channel ten, and agreed that Cassandra Desmond is no longer between him and Mr. Ehler, and he and Mr. MacDonnell turn back into the bar and start approaching Mr. Ehler as there is nothing to prevent him from attacking Mr. Ehler. Mr. Watts agreed that the video at timestamp 23:44:28, channel ten, shows Mr. Ehler retreating, and showing no interest in continuing the altercation. He further agreed that at this point he and Mr. MacDonnell are interested in being aggressive, and that Ms. MacEachern “sticks her hands up and tries to stop” him.

[83] Mr. Watts confirmed that he is familiar with Ms. MacEachern as he is a regular at Dooly's bar. He agreed that Ms. MacEachern pleaded with him to stop, and he did not, he would not listen.

[84] Mr. Watts further confirmed that he heard himself on the audio and video recordings, saying, "I own you bitch." He does not know what he meant by that. He agreed that his friend was trying to calm him down at that point.

[85] At timestamp 23:45:10, channel nine, on the video, Mr. Watts agreed that people were trying to get him to leave the bar, as he was at the door.

[86] Mr. Watts' attention was directed to the video, at timestamp 23:45:23, channel nine, and asked whether he realized at this point in time that he had sustained an injury to his stomach, to which he answered, "I think so, yeah." And he agreed that as a result of him becoming weak he decided to leave the bar. He was asked, "If you didn't feel weak, you cannot answer how long you would be continuing this attack on Mr. Ehlers", to which he answered, "No." He was also asked, "And you'd agree that, at that moment, you clearly had no desire to finish what you had started at the bar", to which he answered, "Yeah."

[87] Mr. Watts' attention was drawn to the video, and he agreed that after timestamp 23:45:29, channel nine, he had exited the bar and never returned for the rest of the evening.

[88] Mr. Watts agreed that he never saw any weapons, including a knife, on the night in question. Nor does he recall who or what caused the injury to his stomach.

[89] Mr. Watts agreed that he spent a significant portion of the time during the altercation on the ground, rolling around with Mr. Ehlers.

[90] Mr. Watts does not recall whether he and Mr. MacDonnell ordered at least 12 shots of Tequilla and Fireball Whisky, at last call, but agreed that he was highly intoxicated, out of control and nothing was going to stop him whatever mission he was on at that point.

[91] On re-direct examination, Mr. Watts confirmed that he had seen the video that was played in court. He added that he had seen part of the video before. He also stated that on the video, at timestamp 23:41:00, channel four, it appears to him that

Mr. MacDonnell is touching his shoulder and is probably doing that to calm him down.

[92] Mr. Watts was asked what had happen just before Mr. Watts stood up from seating on his chair, to which he explained that he approached Mr. Ehler, tapped him on the shoulder and asked him a few questions. He sated that there was no physical contact between him and Mr. Watts.

[93] Mr. Watts' attention was directed to the video, at timestamp 23:41:58, channel four, and he explained that he and Mr. Watts were face to face, and he added that Mr. Ehler appears to be moving a little bit towards him. He then described that Mr. Ehler put his hands on him, trying to grab him. He added that Mr. MacDonnell is trying to get in between them.

[94] At timestamp 23:42:13, channel four, on the video, Mr. Watts described what was happening in the video. He stated that Mr. Ehler "got his hand in my face, or he's got his hand on my shoulder, or on his shoulder." He stated that in the video Mr. Ehler is moving towards him, and he is moving backwards.

[95] At timestamp 23:42:31, channel four, on the video, Mr. Watts was asked where Mr. Ehler's hands were located. He stated, "Still on my neck and my face." He stated that he was moving backwards, as Mr. Ehler is moving forward.

[96] After viewing the video, Mr. Watts stated that Mr. Ehler caused him to hit his back against the bar. He was asked whether Mr. Ehler seemed disinterested in fighting, to which he replied, "no."

[97] Mr. Watts viewed the video and stated that he did not have any physical confrontation with Kalista Desmond, nor with any of the bar staff. He had only physical contact with Mr. Ehler and Cassandra Desmond.

[98] Mr. Watts' attention was directed to the video, at timestamp from 23:42:28 to 23:42:46, channel four, and asked what Mr. MacDonnell is doing at timestamp 23:42:37, channel four to which he answered, "trying to break it up." He added that at timestamp 23:42:37, channel four Mr. MacDonnell is being grabbed by Cassandra Desmond, and he is putting his hands up, palms out, which in his view is not aggressive behaviour.

## **The Evidence of Ms. Faith MacEachern**

[99] Ms. MacEachern testified that she is a bartender at Dooly's, a pool hall located in Antigonish. She was working on January 3, 2022. Her duties on that night included cashing tickets, getting drinks for people, accommodating customers needs, checking IDs and the COVID vaccination records, etcetera.

[100] After Ms. MacEachern described the physical layout of Dooly's, she stated that there were only five or six people in the bar around eight o'clock. She stated that Elijah Watts, Kirk MacDonnell, Klye Ehler, Cassandra Desmond, Kalista Desmond, and then there was a VLT player named Wilson.

[101] Ms. MacEachern described her familiarity with Elijah Watts. Her roommate was friends with him. She went to school with him. She described her relationship with Mr. Watts as being friendly, as she would say "hi" whenever he came into the bar but did not talk outside of him coming in. She does not know Kirk MacDonnell, nor does she know Kyle Ehler. She knows Cassandra Desmond and Kalista Desmond from occasionally coming into the bar.

[102] Ms. MacEachern recalled that on the night in question, Elijah Watts, and Kirk MacDonnell were at pool table seven. She described that the pool table is in a little alcove to the left of the bar. She stated that Kalista Desmond, Cassandra Desmond, and Kyle Ehler were sitting at the bar. She recalled seeing Elijah Watts and Kirk MacDonnell going to the washroom and going outside to smoke cigarettes. She did not observe any interactions between Elijah Watts and Kirk MacDonnell and Cassandra Desmond, Kalista Desmond, and Kyler Ehler prior to the altercation that occurred at the end of the night. Ms. MacEachern described the "mood" at the bar prior to the altercation. She stated it was "good". "It seemed like everybody was having a good time. I didn't see anybody mad or angry in any way."

[103] Ms. MacEachern testified that the altercation occurred sometime after "last call" after 10:45 p.m. She observed Elijah Watts and Kirk MacDonnell walking up to Kyle Ehler at the bar, and they had a conversation about something. She could not hear what it was, because of the plexiglass that was up at the time. She recalled her co-worker mentioning that there was going to be a fight, and then they started pushing each other.

[104] Ms. MacEachern was asked how the fight started. She stated, "I saw Elijah and Kirk walk up to Kyle. He was sitting on the barstool at the bar. They had exchanged some words, I'm not again, I'm not sure what they said, but then Kyle had stood up and they all kind of started getting closer together and getting up in each other's faces. That's when it was pretty apparent to me that something would happen." She added, "They were kind of pushing each other around a little bit, nothing too serious. I had walked over to the side of the bar and started slamming my hand against the bar, telling them to stop. And then they just kept pushing each other around."

[105] Ms. MacEachern was not sure how long the altercation lasted, she stated, "it wouldn't be longer than ten minutes, I don't know."

[106] She stated that the first breakout of the altercation involved Kyle Ehler, Elijah Watts, and Kirk MacDonnell. She added that when Kyle Ehlers, Elijah Watts and Kirk MacDonnell were standing up, kind of pushing each other around in front of the bar, Cassandra Desmond had come over from the VLT room. At that point, the men were saying some things to each other. She could not hear what it was, "cause they were pretty up close and personal with one another, kind of shoving each other around a little bit, very close to one another, but nothing had really happened at that point yet."

[107] She did not witness any punches being thrown by anyone. She was asked what happened when Cassandra Desmond became involved, what was the nature of her involvement to which she stated, "Very aggressive. I think it was at that point that they started throwing some punches, maybe."

[108] Ms. MacEachern was asked to describe what she meant by aggressive. She stated, "I remember her kind of running up to the bar and yelling. I don't remember what." MacEachern was asked how things progressed from there. She stated, "I remember them pushing each other around. The fight had kind of moved towards the front of the ATM machine, a lot of people being pushed around. I remember Kirk being thrown into the front of the bar at one point. Elijah and Kyle had thrown a couple of punches at each other, I believe, and then they were kind of at a standstill at that point, holding onto each other's clothes. They were still holding onto each other, but nothing was really happening at that point. I think they were talking to one another about something, and that's when Cassandra had been in Elijah's face, basically telling him to let him go." She added, "Elijah had said that he was not

going to hit Cassandra, but she was kind of, like, tugging on him as well, trying to like, get Elijah off of Kyle at that point.”

[109] She further stated, “I remember Kirk getting back up after he had been pushed into the bar. And I remember Cassandra had been yelling for somebody to get her purse. I don’t know what that was for, but she had separated herself from the guys that were in a fight, and had come back, holding a knife in her hand. I had backed up from that situation at that point and was telling Sarah to get the police here immediately, because she had a knife. At that time, Ms. MacEachern described what was happening between the three men. She stated that, “I believe Elijah and Kyle were still hanging onto each other. Kirk was trying to pull Kyle away from it and hanging onto him in some way.”

[110] Ms. MacEachern described the knife as a “dark colour, maybe black. It was one of the ones you fold out. I don’t know what the names of them, and it had a clip on the back of it.” She described how Cassandra Desmond was holding the knife in this way, “She had originally came up and she was holding it to Elijah’s throat on, like, the lefthand side, I think, and that’s when I had backed away, and I had told my co-worker, Sarah, to call the police. I had walked behind the bar, and I pressed the panic button underneath the bar.” She described what she meant by the “left hand side”, she stated, “I remember Elijah standing with his back to the door, so his left side would have been exposed to, like, Cassandra would have been there, on his left side.”

[111] She added that would have been Elijah’s left side of his body. She does not recall which hand Ms. Desmond was holding the knife in. Nor did she observe anyone else in possession of a weapon that night. She did not see anyone else take control of the knife that she had seen in Ms. Desmond’s hand.

[112] Ms. MacEachern was asked to describe what happen when she first saw the knife. She stated, “The fight had moved further into the VLT room, and from when I originally had seen the knife, her holding it to his throat, she had backed up from when I went behind the bar and pushed the panic button, she had backed up and I assume put her knife in her purse or it was gone at that point, and Elijah and Kyle were still holding onto one another and they had... there had been a fight. Somebody had landed on the ground or something along those sorts, in front of the doors, when I was behind the bar, so I didn’t see what happened when they were there. But when Elijah and Kyle had backed themselves into the VLT room, there is a half door that

opens up into the VLT room that I was standing behind, and I saw Kyle standing back against the wall. He had blood coming from his mouth and he was trying to catch his breath and then I had entered the VLT room when and Elijah was standing there, looking at him. I was kinda holding Elijah back, like, pleading with him to stop, and the blood coming from, like, his cheek and his throat had been dripping onto my hands and arms. When he saw the blood, he asked Kyle if he cut him, which got him angry. And then he kinda tried to push past me to get to Kyle when Cassandra came in and said that she was the one that cut him. And then that's when Kirk came in and kind of went around all of us and went towards Kyle. When Kirk had gotten pushed into the wall, into the VLT room, into the VLT and the wall, was pressed up against the wall. And then Kyle was kind of hitting him. And Cassandra had came up and took the picture frame off of the wall. I tried to reach for it, but it came down over Kirk's head". She does not remember seeing Elijah at that point. And Kyle was against the wall. She stated, "I believe Cassandra had backed up from the situation. I don't remember those couple of moments there, after ... how everybody had separated themselves. But that was ... I remember going outside to check to see where Elijah had went."

[113] Ms. MacEachern stated that the incident de-escalated at that point. She stated, "nobody was hitting each other anymore, and I didn't see Elijah or Kirk anymore. I remember seeing Kirk walk out, and I went outside to see where they were going because I obviously wanted them to be around when the police got there, but when I went outside, I found Elijah at the bottom of the ramp, laying on his back. So I went down and I saw that there was blood coming from his face and his neck, so I had ran back inside and I had gotten paper towel to try and clean up the blood, put something on his face. And then I went back out and I held the paper towel to his neck, and he said, 'Don't' worry about my face", like, and he had taken his hands off of his chest and lifted up his sweater, and that's when I see he'd been stabbed in his abdomen."

[114] Ms. MacEachern described Mr. Watts' abdomen. She stated, "when he lifted up his sweater, I could see a cut in, like, the top portion of his abdomen, and there was a lot of blood, and it was kind of like an open wound."

[115] She further stated that it was not longer after that the police arrived, and she informed them what was going on, including that a women had a knife on her.

[116] Ms. MacEachern stated that a picture frame was damaged. She stated that “the glass had been shattered in it, and I think the frame had been broken.” She was asked when that might have happened, to which she stated, “No. It was towards the end of the night.” She added that it was the same picture frame that Ms. Desmond had taken off of the wall. Ms. MacEachern confirmed that glass was broken, from the picture frame. She described the broken glass as small shards. She did nothing with the broken glass at that point in time.

[117] Ms. MacEachern’s attention was drawn to Exhibit 1, the recordings, at timestamp 23:43:21, channel four where she was shown an item in Cassandra Desmond’s hand, which she described as the knife she saw.

[118] Ms. MacEachern stated that she recalled “Kirk asking who had cut Elijah, and Elijah asking the same thing. They kinda both had thought that Kyle might have been the one who had done that. And I remember Cassandra coming around the corner and repeatedly saying, like, ‘It was me.’”

[119] Ms. MacEachern the comment “it was me”, can be heard at timestamp 23:45:24, channel four, on the video.

[120] Ms. MacEachern testified that Mr. Watts and Mr. MacDonnell arrived at Dooly’s around the time she arrived there, around 5:00 p.m. She recalled that they ordered a picture of Black Horse (beer) and asked for a pool table. She recalled that Ms. Desmond and her friends arrived around 8:00 p.m., when Sarah arrived. She remembered serving them around last call. She recalled that they ordered a picture of Coors light, three Jaeger Bombs, and a Smirnoff Ice.

[121] Ms. MacEachern testified that she did not see how the injury (wound) to Mr. Watts’ abdomen was caused.

[122] On Cross-Examination Ms. MacEachern confirmed that she was shown the video at the preliminary inquiry, where she viewed the entirety of the video, and provided a running commentary on what she observed. She testified that when she observed the altercation between Kyle Ehler and the two men, she also observed Cassandra Desmond “run” over from the VLT room to intervene in the altercation. After her attention was directed to the video, Exhibit 1, which shows Cassandra Desmond’s movement from the VLT room to the men, she agreed that Ms. Desmond “walked” over to the men.

[123] Ms. MacEachern's attention was directed to the video recordings, in particular channel four and nine, and agreed that no where in the video recordings did, she observe Ms. Desmond come from behind her with a knife and held it to Mr. Watts' throat while he was standing and doing nothing, as she testified to earlier in her testimony. Ms. MacEachern agreed that what she observed is not captured in the video recordings. She added that there are some things that could have been missed from camera angles or bodies blocking the cameras.

[124] Ms. MacEachern was asked, "so when could this alleged event that you are certain of have taken place, could have taken place", to which she replied, "Like I said, it had happened when I backed up from the situation and went behind the bar."

[125] Ms. MacEachern's attention was directed to the video at timestamp 23:44:46, channel four and asked whether she can hear Mr. Watts say, "I can't hear you bitch, and I own you, bitch." She answered that she could not make out what was being said.

[126] Ms. MacEachern reaffirmed her evidence on direct examination that she observed a cut on Mr. Watts' neck. Following that reaffirmation it was pointed out to her that Mr. Watts testified that he had two injuries; a cut on his cheek, and abdomen, and asked to respond. She stated, "I remember seeing the cut across his cheek, and I remember there being a lot of blood on his neck, and then I remember seeing a wound on his abdomen."

[127] She was then asked, "So you saw blood on the neck, not a cut on his neck, to which she answered, "Maybe not, I don't know."

[128] It was suggested to Ms. MacEachern that Mr. Watts is quite familiar with him, to which she stated, "I know him." Following that, Ms. MacEachern's attention was directed to the video recording at timestamp 23:59: 22, channel four where she can be heard saying, "Like, oh, my God, my friend from Port Hood is literally laying on the ground, he got a stab right to his gut". It was then suggested to Ms. MacEachern that in the heat of the moment she described Mr. Watts as her friend, to which she replied that, "it was easier than explaining how I knew him to my boss then." Ms. MacEachern agreed that when Mr. Watts started a tab at the bar on the night in question, she did not request his credit card. She added that she would demand a credit card, "for anybody that isn't semi-regular or somebody that you wouldn't feel

comfortable sending a message to, you would get a card from, or somebody you didn't know.”

[129] Ms. MacEachern confirmed that on the night in question Dooly's bar required all customers to be vaccinated, which required proof of their vaccination by showing a card. She also agreed that she was responsible on the night in question for checking the vaccine status of customers.

[130] Ms. MacEachern was asked how Mr. Watts, who was unvaccinated at the time, gained access to the bar, was it because she checked his status or because she was familiar enough with him to just let him in the bar, to which she stated, “I don't remember checking, or I don't remember.” She agreed that it is possible that she let Mr. Watts into the bar because of her familiarity with him.

[131] Ms. MacEachern confirmed that there were no bouncers working on the night in question at Dooly's, nor any security personnel. She and Sarah Morgan were staffing the bar on the night in question.

[132] Ms. MacEachern disagreed with the suggestion that she did not call the police on the night in question because it was her friend who stated the altercation, as she did not want her friend to get in trouble.

[133] She agreed that when the altercation turn physical, she walked behind the bar, and stood there, and yelled stop. She also agreed that at no point did she advise anyone that the police were on their way. Nor did she announce to the people involved that she had triggered the alarm for security.

[134] Ms. MacEachern agreed that it was not until she observed the knife that she decided to call the police. It was suggested to her that if she had not seen the knife, she would not have triggered the panic button, to which she replied, “I wouldn't have pressed the panic button, no. The cops still would have been called.” She added that Sarah was on the phone with the police at that point, as she told Sarah to call the police. It was further suggested to Ms. MacEachern that she was not going to do anything to get the police involved, to which she disagreed. She said she was going to get the police involved. She added that had she not seen the knife, she would have called the police shortly after that. She was asked why she did not call the police at the first sign of trouble to which she stated, “Because it's not always necessary for the police to come. Usually, the threat of calling the police is enough to break up the

fight there. And there has been occasions on the past where we have called, and then they might not show up for awhile. So, we don't always call if there's, like, a minor incident.”

[135] Ms. MacEachern agreed that the incident happened very quickly, and that it was a rather frightening experience for her.

[136] Ms. MacEachern recalled calling her boss to inform her that a man was on the ground and got stabbed. She did not provide her boss with any great detail about what happened. She agreed that she used the word “stab” but did not see Mr. Watts get stabbed, nor did she see the entire altercation between the men.

[137] Ms. MacEachern confirmed that she and Sarah Morgan discussed what they observed on the night in question and compared what they observed. She added that she spoke to her manager, Sarah, and another girl from work what she had observed.

[138] Ms. MacEachern's attention was drawn to the video at timestamp 23:30:59, channel four and asked to identify the man in the video. She could not identify the man. Nor did she know whether he was associated with Mr. Watts and/or Mr. MacDonnell.

[139] She confirmed that she provided the police with the name of the other individual in the VLT room as being Wilson.

[140] Ms. MacEachern agreed that both Mr. Watts and Mr. MacDonnell are taller than her.

[141] She also agreed that when she presses the panic button there is no indication in the bar that it was done. It is a silent panic alarm. The bar receives a phone call from the alarm company after the panic button is triggered.

[142] On re-direct examination, Ms. MacEachern's attention was directed to Exhibit 1, the video recordings at timestamp at 23:42:32, channel four where she identified Elijah Watts, Kyle Ehlers and Cassandra Desmond, as standing face to face with each other. She added that she believes Ms. Desmond hit Mr. Watts in the face.

[143] Ms. MacEachern's attention was directed to Exhibit 1, timestamp 23:42:48, channel four, where she identified herself, Cassandra Desmond closest to her, Elijah Watts on the opposite side of her, Kyle Ehlers in direct line with Elijah Watts, and Kirk MacDonnell was the closest to the wall on the right. She was asked how Ms. Desmond and Mr. Watts were position in relation to each other, to which she answered that Mr. Watts was faced towards Mr. Ehlers and Ms. Desmond was faced towards Mr. Watts. She added that they were pretty close to each other. She stated that Ms. Desmond was touching Mr. Watts, at timestamp 23:42:51, channel four.

### **The Evidence of Ms. Sarah Margaret MacLaughlin**

[144] Ms. MacLaughlin testified that she a teacher and works as a bar tender at Dooly's in Antigonish on a part-time basis. In January 2022, her last name was Morgan.

[145] She worked on the evening in question, from 8:00 p.m. until the bar closed, which was around midnight. She described her duties as a bar tender on the night in question, which included waiting on patrons, checking vaccine records and ID's of the patron because the COVID restrictions were in place at the time.

[146] After describing the general layout of the Dooly's bar, she estimated that there were 10 people in the bar throughout the evening. There were approximately five or six people in the bar at closing hour. She recalled that there were two parties in the bar. There was Elijah Watts and Kirk MacDonnell, and the other party consisted of Cassandra Desmond, Kalista Desmond, and Kyle Ehlers. She thought that there may have been others playing the VLT machines.

[147] Ms. MacLaughlin was asked to refer to the parties as the Desmond party and the Watts party. She recalled that the Watts party arrived at Dooly's before she arrived there at 8:00 p.m. because they were there when she arrived. She estimated that the Desmond party arrived around 9:30 p.m. or 10:00 p.m. She added that they arrived during the middle of her shift. She recalled that she served the Watts party alcohol. She served them shots of whiskey and tequila at certain points in the evening. She stated that they had a pitcher of Black Horse as well before she served them the whiskey and tequila.

[148] She recalled that the Desmond party was served alcohol. She served a cooler to Kalista, a beer or two to Cassandra and Kyle, and thought she served a round of

Jaegar bomb shots. She confirmed that she did not know any of the five individuals but recognized Elijah Watts from growing up in Port Hawkesbury. She did not know him personally because she is much older than him.

[149] Ms. MacLaughlin was asked to describe what happened on the night in question. She stated because of the COVID restrictions in place at the time she was required to check IDs and vaccine records of any patron that came in the building, to make sure they were doubled vaccinated. Ms. MacLaughlin recalled that the Watts party was already in the bar when she arrived. She explained that usually anyone renting a pool table or running a table is required to provide identification. Her fellow worker, Faith MacEachern, informed her that she did not require Mr. Watts to provide identification because she knew him and felt comfortable with letting him play pool and run a tab because there would be no issues with payment from him.

[150] Ms. MacLaughlin testified that the evening in question was a Monday night, and it was very quiet. The Desmond party arrived at the bar sometime between 9:30 p.m. and 10:00 p.m. She recalled checking their IDs, and vaccine records.

[151] She stated that the Desmond party did not interact with the Watts party until the end of the evening. She stated that the patrons had to be out of the building by midnight, which meant last call was sometime between 10:45 p.m. and 11:00 p.m. The VLT machines were shut off at around 11:45 p.m.

[152] Ms. MacLaughlin recalled cleaning up the bar around closing time on the night in question, when she noticed Elijah Watts and Kirk MacDonnell approached Kyle Ehler who was sitting at the bar with Kalista Desmond. Cassandra Desmond was playing the VLT machine. Ms. MacLaughlin was behind the bar at the time. She stated that the three men started to exchange words with one another which caused her to mention to her co-worker, Faith MacEachern, that there may be an altercation of some sort. Shortly after making that comment, Kirk Ehlers stood up and the fight started. Cassandra came over from the VLT machine and separated the two men, Elijah, and Kyle. She stated that Kirk was trying to grab Elijah and Cassandra was trying to grab Kyle. At that point, her co-worker, Faith MacEachern, exited to the right of the bar, and went to the men and hollered at them to leave the bar. The men continue to fight as they moved into the VLT room. Ms. MacLaughlin stated that at that point she heard Cassandra Desmond holler to Kalista Desmond to get her purse. Following that, Faith MacEachern came around the bar and said that “she has a knife”, and we immediately pressed our security button or panic button. She also

picked up the phone to call 9-1-1. While she was on the phone with dispatch, waiting for the police to arrive. She stated that the police arrived and questioned Kyle, and another police officer arrested Cassandra. The police escorted Cassandra outside. After that Ms. MacLauglin spoke to Ms. MacEachern where she learned that someone had been injured from the altercation. She cleaned up the bar, completed her paperwork and then exited the bar around 12:30 a.m. She added that the total incident lasted approximately less than ten minutes.

[153] Ms. MacLaughlin was asked why she became concerned when she observed Elijah Watts, Kyle Ehlers and Kirk MacDonnell interacting at the bar. She stated, “you could just kinda tell by their demeanour that, like, something was going to happen. Like, I mean, I didn’t hear what was actually said between both parties. I mean, we did have music playing usually. I mean, it’s not very loud, but its loud enough.” She also described the plastic panels in front of the men because of the COVID protocol and stressed that it was hard to hear what was being said, but she thought something was going to happened.

[154] Ms. MacLaughlin testified that she only observed what happen in front of the bar, prior to the altercation moving into the VLT room. She added that she did not see the Watts party exit the bar. She stressed that she only observed the beginning of the altercation. She was asked again to describe what she observed. She stated, “So Kyle had stood up from the bar where he was sitting, and you know, I’m not sure who threw the first punch, but it was between Kyle Ehlers and Elijah Watts, who exchange punches. Kirk tried to grab Elijah, and Cassandra came from the VLT machines to try and pull Kyle off. She added that Cassandra and Kirk tried to separate the two men that were fighting.

[155] On cross-examination Ms. MacLauglin confirmed that when she arrived at Dooly’s to start her shift, which was around 8:00 p.m., Elijah Watts and Kirk MacDonnell were already in the bar. Ms. MacLauglin stated that she is familiar with names of the individuals in the Desmond party because she checked their identification cards when she was checking their vaccination status.

[156] Ms. MacLauglin’s attention was direction to the video, at timestamp 23:31:07, channel four, and asked to identify the man in the video. After reviewing the video she could not identify the man. She could not confirm that he was the same man that briefly joined the Watts party. Nor could she describe him. She added that

she thought that the man joined the Watts party before the Desmond party arrived at the bar.

[157] Ms. MacLaughlin recalled serving alcohol to the Elijah Watts and Kirk MacDonnell. She served them Coors light draft, and a round of tequila shots.

[158] Ms. MacLaughlin agreed that the evening in question was very quiet, as it was a Monday.

[159] She confirmed that she served the Desmond group one pitcher, a round of Jaeger bomb. She served the pitcher around 10:45 p.m. Prior to that, she thought that she served Kyle Ehlers a couple of Keiths beer. She recalled that Cassandra Desmond had a drink or two, and Kalista Desmond had a Smirnoff Ice.

[160] Ms. MacLaughlin confirmed that she and Faith MacEachern were the only two working on the night in question, there were no security guards, or bouncers.

[161] She agreed that the Desmond group were well behaved, non-confrontational, while the Watt group was in the back portion of the bar where the pool tables are located.

[162] Ms. MacLaughlin stated Casandra Desmond, Kalista Desmond, and Kyle Ehlers were seating at the bar together at one point prior to the altercation. She remembered observing Elijah Watts and Kirk MacDonnell exchange pleasantries with them as they walked by them to go outside to smoke a cigarette. She never heard anyone mentioned anything about playing pool when they exchanged pleasantries.

[163] Ms. MacLaughlin agreed that the Desmond group arrived around 10:00 p.m., and the last call was around 10:45 p.m. and 11:00 p.m.

[164] Ms. MacLaughlin also agreed that when she observed Elijah Watts, Kirk MacDonnell and Kyle Ehler interacting at the bar, Elijah Watts was the aggressor of the men. She recalled that at one point during the conversation Kyle Ehler stood up to engage the men in their conversation.

[165] Ms. MacLaughlin's attention was drawn to Exhibit 1, timestamp 23:41:42, channel four. The video was played for her to observe. It was paused at timestamp

23:41:59, channel four, where she confirmed that is the point during the interaction of the three men that she became uneasy. She confirmed that Elijah Watts was the aggressor.

[166] Ms. MacLaughlin also agreed that prior to the last call (sometime between 10:45 p.m. and 11:00 p.m.) at the bar, Elijah Watts and Kirk MacDonnell ordered a total of 12 shots of whisky, and six shots of tequila.

[167] Ms. MacLaughlin confirmed that as a server she has a duty to prevent drunkenness, and to ensure that the patrons are drinking responsibly. She agreed that to be consistent with the Safe Serve Policy, servers are supposed to serve an individual two drinks at a time.

[168] Ms. MacLaughlin stated that Elijah Watts and Kirk MacDonnell seemed fine when they were served the 12 shots of alcohol; they did not appear intoxicated.

[169] At timestamp 23:43:04, channel four of the video, Ms. MacLaughlin confirmed that the person yelling, "Let go or I'm calling the cops", was her. She yelled that again at timestamp 23:43:14, channel four. She agreed that she was yelling quite loudly when she yelled. She agreed that she called the 9-1-1 later on. She also agreed that while she was on the phone with 9-1-1 she was preoccupied, and did not alert the men involved in the altercation that she was speaking with 9-1-1.

[170] Ms. MacLaughlin agreed that while speaking to the 9-1-1 operator, she believed that a glass broke, and Ms. MacEachern cut her hand. She recalled hearing the glass smash and seeing Ms. MacEachern with blood on her hands. She reported that observation to the dispatcher. She informed the dispatcher that Ms. MacEachern was hurt as there was blood on her hands.

[171] Ms. MacLaughlin agreed that after everyone had been removed from the situation, she received a phone call from her manager.

[172] Ms. MacLaughlin was asked why it took her so long for her to call 9-1-1, to which she stated that she assumed that the situation would settle down. She did not think that it would escalate to anything further.

[173] Ms. MacLaughlin agreed that both Elijah Watts and Kirk MacDonnell are physically bigger than her.

[174] It was suggested to Ms. MacLaughlin that she took no steps to break up the fight to which she replied, "I don't get paid to do that." She added that she remained behind the bar for her own safety.

[175] Ms. MacLaughlin confirmed that she never saw any weapons on the night in question, nor any injuries.

[176] Ms. MacLaughlin stated that she had spoken to Ms. MacEachern about what they observed on the night in question.

[177] She agreed that she did not observe any signs of impairment from Cassandra Desmond or Kyle Ehlers.

[178] Ms. MacLaughlin stated that she believes that there are three panic buttons at Dooly's, but she not sure. One is located above the safe, which is the one that was pressed. The other two panic buttons are located by the computers.

### **Audio and Video Surveillance Recording: Exhibit 1**

[179] Most of this incident is captured by audio and video surveillance recordings from inside the bar, Exhibit 1(the "video"). The video recordings contain the surveillance footage retrieved from Dooly's Bar. The recordings contain a number of different camera angles from cameras situated in various locations in and around the bar. As stated, what is not captured on the video recordings, however, is who, how, when, and where, Mr. Watts sustained a wound to his abdomen, as shown in Exhibit 2, the photograph of the wound.

[180] The video shows that the bar is relatively quiet, calm, or tranquil, and mostly empty prior to the incident (Exhibit 1, at timestamp of 23:40:00, channel four). Kalista Desmond is seated at the bar with a beverage. Kyle Ehler is seated two seats from Kalista Desmond. He is seating alone and can be seen looking at his cell phone. Kalista Desmond is also seating at the bar looking at her cell phone. Cassandra Desmond is seating at the Video Lottery Machine ("VLT"), playing the machine.

[181] Elijah Watts and Kirk MacDonnell can be seen walking towards Kyle Ehler, who is seated by himself at the bar (Exhibit 1, at timestamp 23:41:16, channel four). Pausing the video, at 23:41:19, Cassandra Desmond can be seen looking towards the two men before turning her attention back at the VLT machine. At timestamp 23:41:21, channel four, Elijah Watts can be seen putting his hand on Kyle Ehler's shoulder, as he leans forward towards Kyle Ehler's face.

[182] At timestamp 21:41:26, channel four, it appears that Kyle Ehler is ignoring Elijah Watts, as he turned his head away from Elijah Watts and looks at his phone. Cassandra Desmond can be seen periodically looking over at the three men at the bar; that is, Kyle Ehler, Elijah Watts, and Kirk MacDonnell. At timestamp 23:41:29, channel four, it appears that Elijah Watts is attempting to engaged with Kyle Ehler, but Kyle seems to be ignoring him by looking away and taking a drink from a glass.

[183] At timestamp 23:41:34, channel four, the video shows Kyle Ehler, while seated at the bar, make a hand gesture, at Elijah, motioning towards the door. Elijah Watts does not move. He seems to be to leaning in towards Kyle Ehler and appears to be saying something to him, which causes Kyle Ehler to suddenly stand up to face Elijah Watts. At timestamp 23:41:38, channel four, it appears that Kirk MacDonnell placed his hand on the back of Elijah Watts and patted him on his left arm. At timestamp 23:41:52 channel four, it appears that both Kalista Desmond and Cassandra Desmond are looking towards Kirk Ehler. At timestamp 23:41:55, channel four, Kyle Ehler suddenly stands up and turns to faced Elijah Watts and Kir MacDonnell, who are standing. It appears from the video, that both Kirk MacDonnell and Elijah Watts are taller than Kyle Ehler. As Kyle Ehler is facing the two men, his back is against the bar. It appears that Kyle Ehler and Elijah Watts are facing each other and Kirk MacDonnell is to the left side of Kyle Ehler. It appears from the video that one of the two men has his hand on Mr. Ehler. At timestamp 23:42:02 in the video, channel four, Kyle Ehler pushes Elijha Watts back. At timestamp 23:43:01, channel four, Kirk MacDonnell appears to be grabbing Mr. Ehler's shirt in the chest area. Cassandra Desmond is watching from her seat at the VLT machine, and within seconds rises from her seat. At approximately, at timestamp 23:42:00, channel four, the audio captures an utterance which states, "Kyle come here". Following that utterance, Cassandra Desmond can be seen walking over towards the three men at the bar. At this time, the video shows Kirk MacDonnell grabbing hold of Kyle Ehler's sweater with both hands. At that point, Cassandra Desmond appears to shove Kirk MacDonnell, while yelling, "get the fuck off of him". In response to Casandra Desmond's action, Kirk MacDonnell leaned in

towards Cassandra Desmond. Again, Cassandra Desmond shoves Kirk MacDonnell back. Following that, Elijah Watts appears to have placed his hand on the bicep of Kyle Ehler. Mr. Ehler immediately reacts and pushed Mr. Watts away. As the intensity of the physical interaction between the men escalates, a female voice, at timestamp 23:42:14, channel four, can be heard uttering, “you don’t need to fight”. At timestamp 23:42:15, channel four, it appears that Cassandra Desmond is spreading her arms apart to an effort to separate the two men from Kyle Ehler. At timestamp 23:42:17, channel four, it appears that Ms. Desmond push Mr. MacDonnell away from Mr. Ehler. At timestamp 23:42:19, channel four, it appears that Ms. Desmond is attempting to separate the men from the altercation. Ms. MacEachern appears to be watching the altercation at this time. At timestamp 23:42:19, channel four, the same female voice heard earlier, yelled, “let him go, let him fucking go,” which seems to be Ms. Desmond yelling. At timestamp 23:42:28, channel four, Ms. Desmond pushes Mr. MacDonnell away from the two men, and then turns to Mr. Ehler and Mr. Watts who are physically embraced. At this time, Ms. Desmond can be heard yelling, “let him go”. Immediately following that, Mr. MacDonnell rejoins the altercation. Ms. Desmond appears to be trying to separate Mr. MacDonnell from the altercation.

[184] At timestamp 23:42: 43, channel four, Ms. Desmond appears to be looking down at her hands. Immediately following that, Ms. Desmond returns to the altercation and wraps her arms around the head and shoulder area of Mr. Watts, while yelling, “get the fuck off of him”. Mr. Watts responds by uttering, “I can’t hear you bitch”. Ms. Desmond then responds, “you can’t hear me, get my purse.” Immediately following that utterance, Ms. Desmond walked over towards the VLT machine where she had been previously seated. While Ms. Desmond is removed from the altercation, at timestamp 23:43:07, channel four, Mr. MacDonnell can be seen moving towards Mr. Ehler who has his back facing the taller Mr. MacDonnell. Ms. Desmond can be seen on the video rejoining the altercation. At timestamp 23:43:09, channel four, Ms. MacEachern can be heard yelling, “stop or I am calling the cops.” At this time, it appears that both Mr. MacDonnell and Mr. Watts have hold of Mr. Ehler. Shortly after this point, Ms. Desmond can be seen returning to the altercation. At timestamp 23:43:18, channel four, Mr. Watts is on the floor and Mr. Ehler is on top of him, and then Mr. MacDonnell pulled Mr. Ehler to the floor.

[185] At timestamp 23:43:21, on channel nine, it appears that Ms. Desmond has returned to the altercation with an object in her hand. The object appears to be a knife when the frame is amplified. At that point in time, it appears that Mr.

MacDonnell is trying to pull Mr. Ehler away from Mr. Watts. Ms. Desmond yells, “let him go” to Mr. MacDonnell. Mr. MacDonnell does not let him go. At timestamp 23:43:24, channel ten, it appears that Ms. Desmond is holding the knife to the neck/face area of Mr. MacDonnell, while yelling, “let him fucking go right now”, to which Mr. MacDonnell retreats with both arms, and palms up in the air. Immediately following this, Ms. Desmond removes the knife. This can be seen at timestamp 23:43:28, channel nine. Ms. Desmond then immediately, turns to Mr. Watts, who at this point is being held down by Mr. Ehler. Ms. Desmond can be seen putting the knife to Mr. Watts face, his cheek, while Mr. MacDonnell appears to be standing watching. This is captured in the still frame at timestamp 23:43:30, channel nine. At timestamp 23:43:31, channel nine, Mr. MacDonnell appears to be grabbing Mr. Ehler while Ms. Desmond is standing, leading down towards Mr. Watts with the knife on his cheek. The video from Channel nine shows Ms. Desmond holding the knife against Mr. Watts cheek beginning at timestamp 23:43:29, channel nine, telling him to “you... let him go”, and at timestamp 23:43:31, channel nine, Ms. Desmond has risen and yells at Mr. MacDonnell to stop. At timestamp 23:43:32, channel nine, the still frame shows Ms. Desmond and Mr. MacDonnell facing one another. Within seconds of that, Mr. MacDonnell grabbed Mr. Ehler. Ms. Desmond then stood up and turned towards Mr. MacDonnell who was grabbing Mr. Ehler. Ms. Desmond can be seen in the video holding the knife behind her, at arms length: at channel nine timestamp 23:43:33, channel nine. She is backing away from the larger and taller Mr. MacDonnell. Seconds later, Ms. Desmond can be seen folding the knife in her hand, and heard yelling, “call the cops, call the cops”. While Mr. MacDonnell is physically controlling Mr. Ehler by pulling and pushing him around in the VLT room, Mr. Watts can be seen rising from the floor and moving towards Mr. Ehler. As Mr. Watts approaches, Mr. MacDonnell retreats by walking away. The video depicts Mr. Watts as he approached Ms. Desmond and uttered “do you think you’re tough”, to which Ms. Desmond replied, “I am tough, I should slice/ cut your fucking throat right now”. Mr. Watts then replied, “right here”, as he made a gesture to his throat. Mr. MacDonnell was pulling Mr. Watts back from Ms. Desmond when he made that response and continued to pull Mr. Watts towards the exit door. While Mr. Watts was exiting the bar with Mr. MacDonnell, he continued his verbal exchange with Ms. Desmond. Ms. Desmond retreated to another room while Mr. Watts and Mr. MacDonnell were in the doorway of Dooly’s. Mr. Ehler remained in the VLT room.

[186] From timestamp 23:43:32 to 23:43:36, channel nine, Ms. Desmond appears to be focused on keeping Mr. MacDonnell away from Mr. Watts and Mr. Ehler who

are grappling on the floor. At timestamp 23:43:44, Mr. MacDonnell is pulling Mr. Ehler away from Mr. Watts, as Ms. Desmond is standing looking at Mr. Watts, who is on the floor. At timestamp 23:43:46, channel nine, it appears that Mr. MacDonnell is physically controlling Mr. Ehler by pushing him into a VLT machine. At timestamp 23:43:50, channel nine, it appears that Mr. Desmond is trying to intervene. At timestamp 23:43:51, channel nine, Mr. Ehler's sweater is off, and Ms. Desmond is between Mr. Ehler and Mr. MacDonnell. Mr. Watts is moving towards Mr. Ehler, when Ms. Desmond turned around and intervened between the two men. At timestamp 23:43:53, channel nine, it appears that Ms. Desmond is pointing in Mr. Watts face, as Mr. Ehler is walking away, taking off his sweater. At timestamp 23:43:55, channel nine, Mr. MacDonnell appears to have placed his hand on Mr. Watts, as he is arguing with Ms. Desmond, and pulls him backwards towards the exit door of the bar. The video depicts that at one point Ms. MacEachern entered the VLT room and interacted with Mr. Watts and Mr. MacDonnell while Mr. Ehler retreated. Ms. MacEachern positioned herself between the men.

[187] At timestamp 23:44:3, channel nine, it appears that Ms. MacEachern is saying something to Mr. Watts and Mr. MacDonnell who returned to the VLT room.

[188] At that time, Mr. Ehler's back is facing the men, and he is walking away with his sweater in his hands. The bar staff placed her hand on Mr. Watts to keep him away from Mr. Ehler. Mr. MacDonnell is behind Mr. Watts looking towards Mr. Ehler. At timestamp 23:44:40, channel nine, bar staff is physically preventing Mr. Watts from getting to Mr. Ehler. Mr. MacDonnell then appears to be pulling Mr. Watts away from Mr. Ehler and the bar staff member.

[189] The video depicts Ms. Desmond entering the room and asking Mr. Watts the question, "Do you even know who he is?" Mr. Watts then turns, and utters, "I own this mother fucker". He then turned towards Ms. Desmond who was retreating from the room, and yelled, "I own you bitch", to which Ms. Desmond yelled back, "you don't even know my name". Mr. Watts then turned his attention towards Ms. Ehler who was quietly standing in the corner. Mr. MacDonnell can be heard yelling at Ms. Desmond, "fuck you, quit talking shit."

[190] At timestamp 23:45:18, channel nine, on the video, it appears that Mr. Watts and Mr. MacDonnell exit the bar, and Mr. Ehler is walking with his sweater in his hand.

[191] At timestamp 23:45:25, channel nine, on the video, Mr. MacDonnell enters the VLT and charges towards Mr. Ehler, yelling, “what the fuck, what the fuck”. He physically grabs Mr. Ehler, and is pushing him around, when Ms. Desmond enters the room with a bag in her left hand. The video shows Ms. Desmond entering the room, yelling, “it was me, it was me bitch”. Mr. MacDonnell continued to physically control Mr. Ehler by pushing him towards the VLT machines. She intervenes while Mr. MacDonnell is grabbing Mr. Ehler. At timestamp 23:45:38, channel nine, Ms. Desmond grabbed the picture frame from the wall and hits Mr. MacDonnell with it, as Mr. MacDonnell is grabbing Mr. Ehler. Ms. Desmond intervened in the struggle, with one hand holding a bag, and the other pushing the men apart. The video depicts that she reached for a picture frame on the wall, took it off and struck Mr. MacDonnell with it, which seems to have slowed down Mr. MacDonnell. Mr. Ehlers can be heard yelling, “get off of me” and the video captures Mr. MacDonnell asking, “who stabbed him.” Following that, Ms. Desmond and Mr. Ehler can be seen on the video, walking away. Mr. MacDonnell can be seen leaving the bar. Ms. Desmond continues to intervene between the men as they continue fighting.

[192] At timestamp 23:45:41, channel nine of the video, Ms. Desmond steps back from the men while she is holding a bag in one hand and with the other hand trying to intervene between the men.

[193] The men exit the VLT room at timestamp 23:45:45, channel nine, on the video, Ms. Desmond appears to be looking at them as they exit the room. Ms. Desmond then walks away. She can be seen walking away with her bag at timestamp 23:45:47, channel nine on the video. The men are not present in the VLT room at this time. At timestamp 23:45:51, channel nine, on the video. Mr. MacDonnell is following Mr. Ehler back into the VLT room, as Mr. Ehler is walking away from him. At timestamp 23:45:56, channel nine, on the video Mr. MacDonnell appears to be waving his arms in the air saying something to Mr. Ehler. Mr. MacDonnell then exited the VLT room. At timestamp 23:46:20, channel nine, on the video, Mr. Ehler returns to the VLT alone and retrieves his sweater. At timestamp 23:46:44 Mr. Ehler exits the VLT room with his sweater. At timestamp 23:49:38, channel nine, on the video, a member of the RCMP can be seen in the doorway.

[194] After Mr. MacDonnell exited the bar, Cassandra Desmond and Kalista Desmond and Mr. Ehler can be seen and heard on the video complaining that Ms. MacEachern and Ms. McLachlin did nothing: at 23:46:11, channel four on the video.

## **An Application of the Relevant Governing Principles**

[195] Before embarking on my analysis of the issues raised in this case, I will address the importance of the relevant general principles to this case, particularly the application of circumstantial evidence.

### **Burden of Proof**

[196] The burden is upon the Crown to prove the six allegations or charges contained in the Indictment beyond a reasonable doubt, which includes proving beyond a reasonable doubt that self-defence does not apply in the circumstances of this case. There is no burden on Ms. Desmond to provide anything, as she is presumed innocent.

[197] This legal or persuasive burden never shifts to the accused, Ms. Desmond, it remains with the Crown throughout the trial. It remains with the Crown because Ms. Desmond is presumed innocent. The presumption of innocence is of fundamental importance to the criminal justice system as it serves to place the burden of proof on the Crown and serves to protect against wrongful conviction.

[198] The presumption of innocence can only be displaced by credible and reliable evidence that establishes beyond a reasonable doubt all the essential elements of the offences charged and disproves beyond a reasonable doubt that self-defence does not apply in the circumstances.

[199] The ultimate issue, as noted by Justice Binnie in *R. v. Sheppard*, [2002]1 S.C.R. 869, at para. 65, is not credibility, but reasonable doubt.

[200] In *R. v. Mah*, 2002 NSCA 99, Justice Cromwell, in delivering the judgement of the Nova Scotia Court of Appeal, aptly stated:

41... the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond a reasonable doubt.

[201] In *R v. Starr*, 2000 SCC 40, at para. 242, the Supreme Court of Canada held that this burden of proof lies much closer to absolute certainty than to a balance of probabilities.

[202] In *R v. Lifchus*, [1997] 3 SCR 320, at para. 39, the Supreme Court of Canada held that it is *not* sufficient to conclude that an accused person is - probably or likely guilty for a conviction to be registered.

[203] A reasonable doubt is not an imaginary or frivolous doubt. It must not be based on sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

[204] In cases where the case for the prosecution consists entirely of or substantially of circumstantial evidence, the *absence of evidence* may raise a reasonable doubt about the guilt of an accused or contribute to a conclusion by the trier of fact that the case for the Crown falls short of the standard of proof the law demands (*R. v. Tebo* (2003), 175 C.C.C. 3(d) 116 (Ont. C.A.), at para. 8.

[205] The absence of evidence may be of special importance to the defence where no defence evidence is called: *R. v. Bero* (2000), 151 C.C.C. (3d) 545 (Ont. C.A.), at para. 57. It follows that it is open to defence counsel to demonstrate inadequacies or failures in an investigation through cross-examination of the witnesses for the Crown, and to link those failures to the Crown's obligation to prove its case beyond a reasonable doubt: *Bero*, at para. 58. In accordance with *Lifchus*, trial judges instruct juries that a reasonable doubt may arise from the evidence or an *absence of evidence* *Lifchus*, at para. 39. Similarly, in *Villaroman*, the Supreme Court of Canada, again, emphasized that a reasonable doubt, or theory alternative to guilt, is not rendered “speculative” by the mere fact that it arises from a *lack of evidence*... 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 certain *gap* in the evidence may result in inferences other than guilt. But those inferences must be *reasonable* given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

[206] This case, like most cases, involves consideration of both direct and circumstantial evidence. With respect to circumstantial evidence, as stated, I am mindful of the instructive comments of the Supreme Court of Canada in *R. v. Villaroman*, 2016 SCC 33, particularly paras. 35 to 37, where Justice Cromwell wrote:

[35] At one time, it was said that in circumstantial cases, “conclusions alternative to the guilt of the accused must be rational conclusions based on

inferences drawn from proven facts”: see *R. v. McIver*, [1965] 2 O.R. 475 (C.A.), at p. 479, aff’d without discussion of this point [1966] S.C.R. 254. However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614, 14 C.R. (7th) 149, at para. 28. Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown’s evidence does not meet the standard of proof beyond a reasonable doubt.

[36] I agree with the respondent’s position that a reasonable doubt, or theory alternative to guilt, is not rendered “speculative” by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt “is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence”: para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

[37] When assessing circumstantial evidence, the trier of fact should consider “other plausible theor[ies]” and “other reasonable possibilities” which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff’d [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these reasonable possibilities, but certainly does not need to “negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused”: *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. “Other plausible theories” or “other reasonable possibilities” must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[Emphasis added]

[207] Importantly, Justice Cromwell added it is not always easy to differentiate between plausible theory and speculation:

[38] Of course, the line between a “plausible theory” and “speculation” is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.

[208] As Justice Beveridge pointed out more recently in *R. v. Snow*, 2019 NSCA 76, where wrote:

[48] [a]s noted earlier, counsel suggested that it is settled law that there must be an evidentiary basis for any inference to be drawn.

[49] As a general proposition, that is accurate. It is certainly so where the inference to be drawn is necessary to establish some element of an offence beyond a reasonable doubt. But in circumstances where an accused suggests an alternate explanation inconsistent with guilt, there is no obligation to call evidence to establish a factual basis for that alternate explanation.

[209] While it is settled law that there must be an evidentiary basis for any inference to be drawn, particularly where the inference to be drawn is necessary to establish some element of an offence beyond a reasonable doubt, in circumstances where an accused suggests an alternate explanation inconsistent with guilt, there is no obligation to call evidence to establish a factual basis for that alternate explanation.

[210] Thus, conclusions, alternative to the guilt of the accused, need not be based on proven facts.

[211] While I must assess the issues raised in this case in the context of the whole of the evidence adduced at trial, I am mindful, as previously emphasized, that the presumption of innocence is displaced only by proof beyond a reasonable doubt, and I am mindful of what my role, as the trier of fact, is *not* to simply choose between alternative versions and, having done so, convict if the Crown's version is preferred.

[212] With respect to the demeanour of a witness, I am mindful of the cautious approach that I have to take in considering the demeanour of witnesses as there are a multitude of variables that would explain or contribute to a witness' demeanour while testifying. Indeed, it is trite to say that demeanour is a notoriously poor gauge of truthfulness or reliability.

[213] Demeanour evidence standing alone is hardly determinative, and the best tool in determining credibility and reliability is the painstaking, careful and repeated testing of the evidence as to how it stacks up. Justice Saunders' observation in *R. v. D.D.S.*, 2006 NSCA 34, is apposite:

77. Before leaving the subject and for the sake of future guidance it would be wise to consider what has been said about the trier's place and responsibility in

the search of the truth. Centuries of case law remind us that there is no formula with which to uncover deceit or rank credibility. There is no crucible for truth, as if pieces of evidence, a dash of procedure, and a measure of principle mixed together by seasoned judicial stirring will yield proof of veracity. Human nature, common sense and life's experience are indispensable when assessing creditworthiness, but they cannot be the only guide posts. Demeanour too can be a factor taken into account by the trier of fact when testing the evidence but standing alone it is hardly determinative. Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard proof in a civil or a criminal trial ?

[214] Lastly, I may believe all, none, or some of a witness' evidence, and I am entitled to accept parts of witness' evidence or reject other parts, and, similarly, I can afford different weight to different parts of the evidence that I have accepted.

[215] It is against this context I must consider the issues, and I am mindful that the presumption of innocence is displaced only by proof beyond a reasonable doubt.

[216] It is trite to say that most criminal trials involve an assessment of the reliability and credibility of witnesses; this case is no exception. Therefore, it is essential that the credibility and reliability of each witness be considered in light of all of the other evidence presented.

[217] This imposes an important and special obligation upon the court, as it requires a thorough, painstaking and careful examination of all the evidence; mindful that in assessing credibility and reliability, the central question is not whether the offences occurred, but whether the evidence establishes the accused's guilt beyond a reasonable doubt.

[218] It is also important to recognize the distinction between credibility and reliability, which has been addressed by Justice Watt in *R. v. H.C.*, 2009 ONCA 56, where he wrote:

41. Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately: observe, recalled, and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the

other hand, is not a proxy for reliability: a credible witness may give unreliable evidence.

[219] There are witnesses, as well, who may have a bias or prejudice either for or against an accused, which must be factored into what weight can be given to a witnesses' testimony. There are witnesses who have very little interest in the outcome of the matter. That can contribute to the weight the witnesses' evidence is given.

[220] Reliability and accuracy of witnesses' testimony is also something which, similarly, needs to be assessed on a witness-by-witness basis. Each witness has factors which may impact their reliability and accuracy of their testimony, which is something that can be considered independent of credibility. A witness who is not credible will never be reliable or accurate, but a person who is well meaning and attempting to be truthful can lack reliability and accuracy.

[221] As emphasized by Justice Saunders in *D.D.S*, there is no magic formula for deciding how much or how little to believe a witness' testimony or how much to rely on it in deciding a case. What is required is a careful, thorough and thoughtful examination of all aspects of the evidence called in the case, which includes *viva voce* evidence, and the Exhibits.

[222] Moreover, I am also cognizant that while pieces of evidence are important to consider, they cannot deal with any piece of evidence in isolation, as I must consider the totality of the evidence before me in considering whether or not the Crown has proved its case beyond a reasonable doubt.

[223] This imposes an important and special obligation upon the Court, mindful, that in assessing the issues of credibility and reliability, the central question is not whether the offences occurred, but whether the evidence establishes the accused's guilt beyond a reasonable doubt.

[224] As previously stated, this burden of proof lies much closer to absolute certainty than to a balance of probabilities, as it is not sufficient to conclude that an accused person is - probably or likely guilty for a conviction to be registered.

### **Position of the Parties**

[225] I wish to express my gratitude for the very able submissions of counsel for the Crown and Defence which were forceful, fair, and thoughtful. The court is grateful for their comprehensive submissions as they were very helpful to the court in its consideration of the issues raised in the case.

[226] What follows are the positions of the Crown and Defence in respect to whether the Crown proved beyond a reasonable doubt the allegations as contained in the six count Indictment. The Crown submits that it has met the onus of establishing beyond a reasonable doubt all the essential elements of the offences for which Ms. Desmond is charged in the six count Indictment.

[227] I will set out the Parties' positions with respect to each of the six charges beginning with count 4, the aggravated assault charge, where it is alleged that Ms. Desmond did wound Elijah Watts, thereby committing an aggravated assault, contrary to s. 268 of the *Criminal Code*, and then proceed to set out the Parties positions in respect to the other five charges.

**Count 4: Aggravated Assault, contrary to s. 268 of the *Criminal Code***

[228] This charge alleges that on or about January 2, 2022, at or near Antigonish, Nova Scotia, Cassandra Desmond, did wound Elijah Watts, thereby committing an aggravated assault, contrary to s. 268 of the *Criminal Code*.

**The Crown's Position: Aggravated Assault: Count 4**

[229] It is the Crown's position that the video clearly shows a minor altercation between Mr. Watts and Mr. Ehler that is immediately escalated when Ms. Desmond inserts herself in an aggressive and violent manner into that altercation. The Crown further submits that the altercation was escalated by Ms. Desmond introducing a weapon into the situation, which ultimately led to Mr. Watts sustaining a stab wound to his abdomen.

[230] The Crown acknowledges that there is no direct evidence respecting the causation of the wound to Mr. Watts' abdomen, as none of the witnesses, including Mr. Watts, observed how the wound was caused, nor does Exhibit 1, the audio and video surveillance cameras shed any light on how, or who caused the wound to Mr. Watts' abdomen.

[231] The Crown contends that the wound described by Ms. MacEachern and as depicted in Exhibit 2, would appear to be consistent with a wound caused by a stabbing with a knife or knife-like object. The Crown's position in respect to the aggravated assault charge as described in count 4 on the 6 count Indictment is set out in the Crown's written submissions at paras. 18 to 29.

#### **Defence's Position: Aggravated Assault: Count 4**

[232] The Defence's position in respect to whether the Crown has proven beyond a reasonable doubt that Ms. Desmond committed the offence of aggravated assault, as described in count 4 is set in their written submissions at paras. 11 to 41. In essence, the Defence contends that the Crown has not led any direct evidence to establish that it was Ms. Desmond who caused the injury to Mr. Watts' stomach, and therefore has not led any direct evidence to establish that it was Ms. Desmond who did intentionally apply force to the stomach of Elijah Watts resulting in a wound as has been alleged.

#### **Crown's Position: Remaining Five Counts: Counts 1,2,3,5, and 6.**

[233] The Crown's position is that Ms. Desmond was aggressive throughout the entire incident and was not acting in defence of herself or Mr. Ehler when she committed the alleged offences as described in the six count Indictment. Thus, the evidence clearly establishes beyond a reasonable doubt that Ms. Desmond was not acting in self-defence or defence of Mr. Ehler when she committed the alleged offences.

[234] For convenience the five remaining charges on the six count Indictment are:

- Count 1: That on or about January 3, 2022, at or near, Antigonish, Nova Scotia, did in committing an assault on Kirk MacDonnell use a weapon, to wit a glass picture frame and a knife, contrary to s. 267(a) of the *Criminal Code*;
- Count 2: That on or about January 3, 2022, at or near, Antigonish, Nova Scotia, did carry a weapon, to wit a knife, for a purpose dangerous to the public peace contrary to s. 88 of the *Criminal Code*;
- Count 3: That on or about January 3, 2022, at or near, Antigonish, Nova Scotia, did by gesture convey a threat to Kirk MacDonnell to cause bodily harm to Kirk MacDonnell contrary to s. 264.1(1)(a) of the *Criminal Code*;

- Count 5: That on or about January 3, 2022, at or near, Antigonish, Nova Scotia, did in committing an assault on Elijah Watts use a weapon, to wit a knife, contrary to section 267(a) of the *Criminal Code*; and
- Count 6: That on or about January 3, 2022, at or near, Antigonish, Nova Scotia, did by gesture convey a threat to Elijah Watts to cause bodily harm to Elijah Watts contrary to s. 264.1(1)(a) of the *Criminal Code*.

[235] The Crown's position is that these five charges or counts have been proven beyond a reasonable doubt for the reasons set out in paras. 10 to 17 of their written submissions.

**Defence's Position: Remaining Five Counts: Counts 1, 2, 3, 5, and 6.**

[236] The central thesis of the Defence's position is that the Crown has failed to prove beyond a reasonable doubt that Ms. Desmond was *not* acting in self-defence or defence of Mr. Ehler in relation to the five remaining charges or counts, as described in the six count Indictment. The basis for the Defence's position is set out in paras 42 to 186 of their written submission. The Defence contends that the Crown has failed to *disprove* beyond a reasonable doubt that Ms. Desmond was acting in self defence and/or defence of Mr. Ehler pursuant to s. 34 of the *Criminal Code*.

[237] Given that the central issue in this case is whether the Defence of person pursuant to s. 34 of the *Criminal Code* is available to Ms. Desmond in respect to any of the five remaining charges or counts on the Indictment, I will summarize the positions of the Parties before turning to my analysis on the application of s. 34 of the *Criminal Code* to the circumstances of this case.

[238] The Crown submits that there is no air of reality to self- defence or defence of Mr. Ehler because Ms. Desmond did not testify, and the defence chose not to call any evidence. As a result, there is no evidence before the Court respecting Ms. Desmond's subjective beliefs immediately before and during the altercation at Dooly's on the date in question. Nor is there any evidence in the video as to why the actions Ms. Desmond took were "reasonable" (at paras. 33 to 41 of Crown's written submissions).

[239] The Defence submits that there is an "air of reality to the defence, notwithstanding the Crown's position that s. 34 defence is not available to Ms. Desmond because she elected not to testify. and the defence chose not to call any

evidence. In response to the Crown's position, the defence submits that in *R. v. Cinous*, [2002] 2 SCR 3 the Supreme Court of Canada made clear how the evidentiary foundation required for advancing defence can be established. It held:

53 In applying the air of reality test, a trial judge considers the totality of the evidence, and assumes the evidence relied upon by the accused to be true. See *Osolin*, supra; *Park*, supra. The evidential foundation can be indicated by evidence emanating from the examination in chief or cross-examination of the accused, of defence witnesses, or of Crown witnesses. It can also rest upon the factual circumstances of the case or from any other evidential source on the record. There is no requirement that the evidence be adduced by the accused. See *Osolin*, supra; *Park*, supra; *Davis*, supra.

[240] The Defence further submits that Crown's position that self-defence is not available to Ms. Desmond for the reasons stated above, appears to be the exact argument that was advanced in *R. v. MacNeil*, 2022 NSCA 55, and rejected by the Court of Appeal. Moreover, the Defence argues that there is no requirement that the evidence emanate from the accused person. The air of reality test is not an onerous one to meet (*R. v. Barrett*, 2022 ONCA 355, at para. 61). At the air of reality stage, the question is to be determined is whether there is evidence upon which a properly instructed jury acting reasonably could find that the Crown has failed to provide beyond a reasonable doubt that Ms. Desmond did not act in self-defence.

[241] The Defence argues that there is overwhelming evidence to support the position that there is an air of reality to its application, and that given the air of reality to the defence, the Crown has failed to disprove beyond a reasonable doubt its applicability as is required in order for the Court to convict.

[242] The Defence contends that on the totality of the evidence there is an evidentiary foundation for the position that the evidence that (1) Ms. Desmond believed that force was being used or threatened against Mr. Ehler and herself, and that this belief was reasonable in the circumstances; (2) Ms. Desmond's actions throughout the altercation were done for the purpose of defending or protecting herself and / or Mr. Ehler; and (3) that Ms. Desmond 's actions were reasonable in the circumstances.

### **Applicability of Defence of Person: Section 34 of the *Criminal Code***

[243] Obviously, there is a real dispute between the Crown and the Defence as to whether Ms. Desmond was acting in self-defence or in defence of Mr. Ehler on the night in question.

[244] The Defence's position is that on the totality of the evidence establishes that Ms. Desmond was acting in a manner that was consistent with the intention of protecting her friend, Mr. Ehler. The Defence argues that Ms. Desmond cannot be held to a standard of perfection but rather to the standard expected of a reasonable person placed in an identical situation. This incident was high paced and stressful for all involved. This is evidenced by the constant screaming that can be heard. The Defence submits that this incident was a frightening situation, and Ms. Desmond's fear can be seen on her face in the still frame on Exhibit 1, the audio and video surveillance recordings as submitted in the Defence written submissions.

[245] The Defence submits on the totality of the evidence would strongly suggest that all of Ms. Desmond's actions taken that night were defensive. As such, the Crown is required to disprove the application of s. 34 of the *Criminal Code*, which is available on all charges. The Crown has failed to identify when or how Mr. Watts sustained the injury to his abdomen. Thus, by being unable to identify the moment that the injury was caused, in addition to the arguments above, the Crown has been unable to establish beyond a reasonable doubt that it was Ms. Desmond who caused this injury, and that the injury was not simply caused as a result of an accident due to the fact paced nature of the lawful, defensive, act. The Defence further submits that there most certainly is doubt relating to the cause of the injury.

[246] The Defence's position is that the Crown has failed to disprove beyond a reasonable doubt that Ms. Desmond was not acting in self-defence or defence of Mr. Ehler in respect to all of the alleged offences or charges on the six count Indictment, and therefore, Ms. Desmond should be found not guilty of all offences charged.

### **General Assessment of the Crown Evidence**

[247] Before turning to the factual findings and analysis, I will briefly comment on my general assessment of Crown evidence which was made after considering all of evidence adduced in the case. This general assessment will hopefully provide the necessary context for my factual findings and analysis while applying the appropriate standard of proof in a criminal trial.

[248] As I assessed the demeanour of the Crown witnesses, including: Tanya DeWolfe, Corporal Anthony MacKinnon, Constable John Donaldson, Constable Josee Neudorf, Constable Tyler Baird, and Corporal Marie Rose Bezaire, during their respective testimony, I mindful of the inherent dangers of this exercise, I was struck by, for the most part, their apparent sincerity, as each witness seemed to testify to the best of their respective abilities.

[249] The most material witnesses are the occurrence witnesses that were present in Dooly's when the altercation occurred, including: Elijah Watts, Faith MacEachern, Sarah McLauchlin, and the "silent witness", the video which captured almost the entirety of the incident at Dooly's.

### **The Evidence of Elijah Watts**

[250] Mr. Watts testified to the best of his abilities, seemed sincere, at times, particularly when he was confronted with the video evidence. While he was seemingly sincere during cross-examination his credibility and reliability were significantly undermined. For example, Mr. Watts disagreed with the suggestion that he was the aggressor in the incident. He was then shown the video at timestamp 23:41:30, channel four. He agreed that he is placing his hand on Mr. Ehler's shoulder, getting into his face, while Mr. Ehler is not reacting to his actions, he is drinking his beer. Mr. Watts agreed that he was trying to "get into his face." At timestamp 21:41:37, channel four on the video Mr. Watts agreed that Mr. MacDonnell may have been placing his hand on his back in an attempt to get him to leave the situation. Mr. Watts stated that he does not recall what he was saying to Mr. Ehler. He does not think that he was trying to provoke Mr. Ehler as he does not remember.

[251] Mr. Watts' reliability is undermined by his poor memory of what occurred, and his credibility is undermined by his internal inconsistencies throughout his evidence. Mr. Watt's described his memory as being "foggy" because he was "pretty drunk". As Cst. Baird expressed it, when he observed Mr. Watts at the hospital, he was "highly intoxicated" and "belligerent", which is entirely consistent with his behaviour at Dooly's, as depicted in the video.

[252] As will be addressed later in these reasons, Mr. Watts was not a very persuasive witness, but there are certain aspects of his evidence that was confirmed by the video evidence.

### **The Evidence of Faith MacEachern**

[253] Ms. MacEachern testified in a forthright manner and seemed honest and sincere in providing her evidence to the best of her abilities. While I accept that Ms. MacEachern provided her evidence to the best of her abilities, and was honest, there are certain aspects of her evidence which are troublesome. For instance, she struck me as being steadfast that she observed Ms. Desmond come from behind her with a knife and place it against Mr. Watts' throat while he "was standing and doing nothing" even after she reviewed the video and readily acknowledged that her recollection is not captured on the video. Rather than concede she may have been mistaken because the incident happened rather quickly, she stressed that there are some things that could have been missed from camera angles or bodies blocking the cameras. Another troubling aspect of her evidence is her evidence that she was confident that she observed a cut on Mr. Watts neck but somewhat retracted that observation later in her evidence when it was pointed out to that Mr. Watts did not sustain a neck injury. After pressing her on this issue in cross-examination, where Ms. MacEachern was asked, "So you saw blood on the neck, not a cut on his neck, she answered, "Maybe not, I don't know." I will further comment of Ms. MacEachern's evidence later in these reasons.

### **The Evidence of Sarah Magaret MacLaughlin**

[254] Ms. MacLaughlin struck me as being sincere and honest in providing her evidence. She testified in a forthright manner, demonstrated a good recollection of the details surrounding the altercation and was very candid. She also struck me as being conscience and careful in providing her evidence. For example, she explained why she could not hear the conversation between the Mr. Watts' and Mr. Ehler's at the bar, and why she did not observe the whole incident. I accept her evidence and will comment further on her evidence in these reasons.

### **The Evidence of the Audio and Video Surveillance Recordings: Exhibit 1**

[255] Undoubtedly, the most compelling and persuasive evidence proffered in this case is from the "silent witness", the video for the reasons stated in *R. v. Nikolovski*, [1996] S.C. J. No. 122, where Cory J., wrote:

21 The video camera on the other hand is never subject to stress. Through tumultuous events it continues to record accurately and dispassionately all that

comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all that it observed. The trier of fact may review the evidence of this silent witness as often as desired. The tape may be stopped and studied at a critical juncture.

[256] In the instant case, the Parties agreed at the outset of the trial that the video accurately depicts the incident from multiple camera angles, and the authenticity of the video and the identity of the parties depicted were not in issue. The video is of good quality and gives a clear picture of the incident as it unfolded inside the bar. The Parties disagree, however, what is actually occurring in the video. Notwithstanding that, the video evidence can be assessed for reliability since the court is in a position to view it and arrive at its own conclusions as to what it depicts.

[257] Not only is the video real evidence, but it is also, to a certain extent, testimonial evidence as well, as it includes utterances of those present which is admissible as part of the *res gestae*.

[258] As Cory J. further stated:

25 ... The powerful and probative record provided by the videotape should not be excluded when it can provide such valuable assistance in the search for truth. In the course of their deliberations, triers of fact will make their assessment of the weight that should be accorded the evidence of the videotape just as they assess the weight of the evidence given by viva voce testimony.

[259] In this case, there are statements made by individuals depicted in the video. These statements can be considered in determining that person's state of mind, where the state of mind is relevant. Since the statement describing the state of mind is made when the state of mind is being experienced, memory is not a concern; and since the statement is alleged to be accompanying the claimed state of mind, the context in which it is made will generally assist in evaluating its reliability.

### **Brief Comment on the Parties submissions Regarding Mr. Watts' Clothing**

[260] Both the Crown and defence commented on the holes in Mr. Watts clothing as depicted in Exhibit 6. The Crown submits that the wound as described by Ms. MacEachern and as depicted in Exhibit 2 would appear to be consistent with a wound caused by stabbing with a knife or knife-like object. The series of photographs before the Court as Exhibit 6 includes photographs of the clothing Mr. Watts was wearing the night of January 3, 2022. Cst. Catherine Bezaire testified as

to those photographs and her examination of the items depicted therein and noted a “vertical slice” through the front of the hoodie Mr. Watts was wearing, just above the pocket. A similar hole was observed in the shirt Mr. Watts was wearing that night. The Crown further submits that the holes through Mr. Watts’ clothing are consistent with a stab, and – viewing Exhibit 2 and Exhibit 6 together – the holes through Mr. Watts’ clothing are consistent with the location of the wound to his abdomen.

[261] The defence submits that the photograph of Mr. Watts’ t-shirt, in Exhibit 6, worn on the night in question shows a tear in the t-shirt. The Defence argues that it is apparent from the photograph that the tear in the t-shirt is not straight as one would expect to see if it had been caused by the straight blade of a knife. Instead, the cut has a clear curve to it, which, the defence submits, would be more consistent with the curve of a broken bottle, or a drinking glass. The Defence further contends that the photograph has a ruler to provide a scale. The bottom point of the tear in the t-shirt corresponds with 0.6 cm on the ruler. The tear then travels upwards in the photograph and to the left reaching a point of 0.4 cm. The tear then curves back to the right and the top point of the tear corresponds with 1.5 cm on the ruler. Thus, the Defence contends that this is a significant variation and would be inconsistent with a “stabbing” which presumably would have a motion of in, and then out, with the straight blade of a knife. The Defence submits that had Mr. Watts been stabbed with a knife, the tear in the shirt would expect to be a straight line. Instead, the photos depict a curve which would be more consistent with either being caused by a curved instrument, or being caused while rolling onto an item, such as a broken piece of glass which, the defence submits, could quite reasonably have occurred when Mr. Ehler and Mr. Watts ended up on the floor of the Dooly's bar.

[262] In my view this evidence should not be carefully scrutinized without the assistance of an expert because there are too many variables. Be that as it may, I did not place much weight on the Crown and Defence’s submissions in respect to their views of the significance of the holes in the clothing.

### **Factual Findings and Analysis**

[263] Having considered the totality of the evidence, including the video, I find that on the night in question Dooly’s was relatively quiet, calm or tranquil, and mostly empty prior to the altercation. I find that Kalista Desmond, and Kyle Ehler were

seating at the bar relaxing, looking at their cell phones, and drinking a beverage while Cassandra Desmond was seating at the Video Lottery Machine (“VLT”), playing the machine. I find that Elijah Watts approached Kyle Ehler while he was sitting at the bar. Mr. Watts placed his hand on Mr. Ehler’s shoulder and leaned in close to his face, while Mr. MacDonnell stood behind the men. It can be inferred from Mr. Ehler’s reaction that he did not want to engage with Mr. Watts as he turned his head away from Mr. Watts and looked at his cell phone, and at one point drank a beverage. The video clearly depicts that Ms. Desmond looking over at the three men during their interaction. Thus, it is reasonable to infer from Ms. Desmond’s actions that she is concerned for her friend, Mr. Ehler.

[264] At one point, the video clearly depicts Mr. Ehler making a hand gesture at Mr. Watts, which seems to be motioning towards the door, which in my view is consistent with Mr. Ehler asking to be left alone. At that time, Mr. MacDonnell has his hand Mr. Watts’ back. I find that shortly after making that gesture, Mr. Watts continued lean his head into the personal space of Mr. Ehler, who seemed disinterested and continued to ignore Mr. Watts. Shortly after that, within seconds, Mr. Ehler suddenly stood up from his chair, and turn to face the two men, who were looming over him. At this time, Mr. MacDonnell was to the left of Mr. Ehler, while Mr. Watts was directly in Mr. Ehler’s face. It is reasonable to infer that Mr. Ehler’s reacted to something that Mr. Watts said to him. Shortly after that, Mr. MacDonnell placed his hand on the back of Mr. Watts and patted him on his left arm, which I infer was an attempt to have Mr. Watts’ calm down or leave Mr. Ehler alone. Mr. Watts agreed on cross-examination that he placed his hand on Mr. Ehler’s shoulder, as he was getting into his Mr. Ehler’s face, while Mr. Ehler ignore him, and did not react to his actions. Mr. Watts also agreed that Mr. MacDonnell may have been placing his hand on his back in an attempt to get him to leave the situation. Further evidence which leads to the inescapable inference that Mr. Ehler was provoked by Mr. Watts’ is the evidence of Ms. MacLaughlin, who was behind the bar at the time. She overheard the three men exchange words with one another which caused her to mention to her co-worker, Ms. MacEachern, that there may be an altercation of some short. During all of this, Ms. Desmond can be seen on the video watching the men. Shortly after Mr. Ehler stood up to face the two taller men, Mr. Watts and Mr. MacDonnell, Ms. Desmond can be heard on the video yelling to Mr. Ehler, “come over”, from which I infer that she is worried for her friend, Mr. Ehler.

[265] As shown on the video, one of the two men has his hand on Mr. Ehler. At that time, Mr. Ehler pushed Mr. Watts back out of his personal space. Mr. MacDonnell

then grabbed the shirt/ chest area of Mr. Ehler, and Mr. Watts put his face in Mr. Ehler's face. Immediately after that, within seconds, Ms. Desmond intervened in the altercation. I find from reviewing the video that Ms. Desmond intervened when Mr. MacDonnell was grabbing Mr. Ehler's sweater with both hands. At that point, the video depicts Ms. Desmond shoving Mr. MacDonnell, while yelling, "get the fuck off of him". In response to Ms. Desmond's action, Mr. MacDonnell leaned in towards Ms. Desmond. Ms. Desmond shoved Mr. MacDonnell back. Following that, Mr. Watts placed his hand on the bicep of Mr. Ehler, which caused Mr. Ehler to push Mr. Watts away.

[266] I find that during the physical altercation, the video depicts a female yelling, can "you don't need to fight". At that time, Ms. Desmond was spreading her arms apart to separate the two men from Mr. Ehler. It is reasonable to infer that Ms. Desmond pushed Mr. MacDonnell away from Mr. Ehler in an effort to separate the men from the altercation. Ms. MacEachern was watching the altercation at this time. On the video, Ms. Desmond can be heard yelling again, "let him go, let him fucking go." She then pushed Mr. MacDonnell away from the two men. Following that, Ms. Desmond turned to Mr. Ehler and Mr. Watts who were physically embraced. At this time, Ms. Desmond yelled, again, "let him go". Immediately following that, Mr. MacDonnell rejoined the altercation. Ms. Desmond tried again to separate Mr. MacDonnell from the altercation.

[267] Following that, Ms. Desmond can be seen on the video, staring at her hands. The zoom feature on the video shows Ms. Desmond looking at her hands. At that point there does not appear to be anything in her hands. I find that it is possible that she is looking at her fingernails, which were broken off at some point during the altercation as shown in Exhibits 4 and 6. After looking at her hands, Ms. Desmond walked towards Mr. Watts and Mr. Ehlers. Ms. Desmond wrapped her arms around the head and shoulder area of Mr. Watts, and yelled, "get the fuck off of him right now". I find that Ms. Desmond's actions, coupled with her utterance is entirely consistent with trying to defend Mr. Ehler from Mr. Watts. The strength in drawing this inference is bolstered by the evidence of Mr. Watts who acknowledged in his evidence, that he at one point during the altercation he yelled to Ms. Desmond, "I can't hear you bitch", which was in response to Ms. Desmond yelled, "let him go right now". I find that after Mr. Watts yelled, "I can't hear you bitch", Ms. Desmond responded by yelling, "you can't hear me, get my purse". Immediately following that utterance, the video depicts that Ms. Desmond walked over towards the VLT machines where she had been previously seating. While she was removed from the

altercation, the video shows Mr. MacDonnell move towards Mr. Ehler. At this point, Ms. MacEachern tried to intervene. She yelled, “stop, or I am calling the cops”, as Mr. Watts and Mr. MacDonnell both have their hands on Mr. Ehler. As can be clearly seen on the video, the three men continue to grapple and are on the floor when Ms. Desmond returns to the altercation with a knife in her hand. I accept Ms. MacEachern’s evidence and find that Ms. Desmond was in possession of a knife, which can be seen when the video frame is zoomed in on Ms. Desmond’s hand.

[268] As stated, I find that shortly after Ms. Desmond retreated from the altercation, within seconds, she returned to the altercation with a knife in her hand while Mr. MacDonnell was pulling Mr. Ehler away from Mr. Watts. At that point, Ms. Desmond yelled to Mr. MacDonnell, “let him go”. Mr. MacDonnell did not. Ms. Desmond then put the knife to the neck area of Mr. MacDonnell, and yelled, “let him fucking go right now”, to which Mr. MacDonnell retreated with both arms, and palms up in the air. Immediately following this, Ms. Desmond removed the knife, and turned to Mr. Watts who was on the floor grappling with Mr. Ehler. At this point Mr. Watts is being held down by Mr. Ehler. As can be seen on the video, Ms. Desmond leaned down towards Mr. Watts’ and put the knife on Mr. Watts’ face, his cheek, while Mr. MacDonnell stood back and watched. While Ms. Desmond was holding the knife against Mr. Watts’ face, she yelled, “you... let him go”. Within seconds of that, Mr. MacDonnell grabbed Mr. Ehler. Ms. Desmond then stood up and turned towards Mr. MacDonnell who was grabbing Mr. Ehler. Ms. Desmond can be seen in the video holding the knife behind her, at arms length. She is backing away from the larger and taller Mr. MacDonnell. Seconds later, Ms. Desmond can be seen folding the knife in her hand, and heard yelling, “call the cops, call the cops”. While Mr. MacDonnell is physically controlling Mr. Ehler by pulling and pushing him around in the VLT room, Mr. Watts can be seen rising from the floor and moving towards Mr. Ehler. As Mr. Watts approaches, Mr. MacDonnell retreats by walking away. The video depicts Mr. Watts as he approached Ms. Desmond and uttered “do you think your tough”, to which Ms. Desmond replied, “I am tough, I should slice/ cut your fucking throat right now”. Mr. Watts then replied, “right here”, as he made a gesture to his throat. Mr. MacDonnell was pulling Mr. Watts back from Ms. Desmond when he made that response and continued to pull Mr. Watts towards the exit door. While Mr. Watts was exiting the bar with Mr. MacDonnell, he continued his verbal exchange with Ms. Desmond. Ms. Desmond retreated to another room while Mr. Watts and Mr. MacDonnell were in the doorway of Dooly’s. Mr. Ehler remained in the VLT room.

[269] The video depicts that at one point Ms. MacEachern entered the VLT room and interacted with Mr. Watts and Mr. MacDonnell while Mr. Ehler retreated. Ms. MacEachern positioned herself between the men. I accept Ms. MacEachern's evidence that she observed blood on Mr. Watts' face and neck area. I accept her evidence that she held Mr. Watts back as she pleaded with him to stop. I accept and find that Ms. MacEachern asked Mr. Watts who cut him which angered Mr. Watts. He then tried to push past her to get to Mr. Ehlers. I accept that at one point, Ms. Desmond entered the room and stated that she was the one who cut Mr. Watts.

[270] The video depicts Ms. Desmond entering the room and asking Mr. Watts the question, "Do you even know who he is?" Mr. Watts then turns, and utters, "I own this mother fucker". He then turned towards Ms. Desmond who was retreating from the room, and yelled, "I own you bitch", to which Ms. Desmond yelled back, "you don't even know my name". Mr. Watts then turned his attention towards Ms. Ehler who was quietly standing in the corner. Mr. MacDonnell can be heard yelling at Ms. Desmond, "fuck you, quit talking shit."

[271] Following that, Mr. Watts and Mr. MacDonnell can be seen on the video walking towards the exit and then eventually exit the building.

[272] Shortly after that, within seconds, Mr. MacDonnell can be seen on the video, yelling, "what the fuck, what the fuck", as he charged into the VLT room towards Mr. Ehler, who was standing in the room. He grabbed Mr. Ehler and physically pushed him up against the VLT machines. The video shows Ms. Desmond entering the room, yelling, "it was me, it was me bitch". Mr. MacDonnell continued to physically control Mr. Ehler by pushing him towards the VLT machines. Ms. Desmond intervened in the struggle, with one hand holding a bag, and the other pushing the men apart. The video depicts that she reached for a picture frame on the wall, took it off and struck Mr. MacDonnell with it, which seems to have slowed down Mr. MacDonnell. Mr. Ehlers can be heard yelling, "get off of me" and the video captures Mr. MacDonnell asking, "who stabbed him." Following that, Ms. Desmond and Mr. Ehler can be seen on the video, walking away. Mr. MacDonnell can be seen leaving the bar.

### **The Offence of Aggravated Assault: Wounding Elijah Watts**

[273] As previously mentioned, the Crown has alleged in count four of the six count Indictment that on or about January 3, 2022, at or near, Antigonish, Nova Scotia,

did wound Elijah Watts thereby committing an aggravated assault contrary to s. 268 of the *Criminal Code*.

[274] There are two issues which arise from this allegation. The first is whether the Crown proved beyond a reasonable doubt all the essential elements of the offence. If so, then the second issue arises, which is whether the Crown disproved beyond a reasonable doubt that Ms. Desmond was acting in self-defence or defence of Mr. Ehler pursuant to s. 34 of the *Criminal Code*.

**First Issue: Whether the Crown Proved all the Essential Elements of the Offence Beyond a Reasonable Doubt**

[275] It is indisputable that Mr. Watts sustained a wound to his abdomen at some point during the night of January 3, 2020, while at Dooly's. A photograph, Exhibit 2, of Mr. Watts' injury was taken by Cst. Baird while at hospital on January 4, 2022. However, how that wound was caused is a real issue because there is no direct evidence as to who, and how the injury was caused.

[276] The Crown acknowledges that there is no direct evidence respecting the causation of the wound to Mr. Watts' abdomen, as none of the witnesses, including Mr. Watts, observed how the wound was caused, nor does the video shed any light on how, or who caused the wound to Mr. Watts' abdomen.

[277] The Crown submits that the wound described by Ms. MacEachern and as depicted in Exhibit 2, would appear to be consistent with a wound caused by a stabbing with a knife or knife-like object.

[278] While the Crown acknowledges that there is no direct evidence respecting the causation of the injury to Mr. Watts' abdomen, the Crown submits that the only reasonable inference that can be drawn from the totality of the evidence is that the wound to Mr. Watts' abdomen was caused by Cassandra Desmond stabbing him with a knife.

[279] The Defence, on the other hand, submits that there are other reasonable inferences that can be drawn from the totality of the evidence as to who, and how the injury was caused, other than Ms. Desmond.

[280] The Defence further submits that the Crown has not only failed to proffer any direct evidence to establish that it was Ms. Desmond who caused the injury to Mr. Watts abdomen, but has additionally failed to prove that Ms. Desmond *intentionally* applied force to the abdomen of Mr. Watts resulting in a wound.

[281] As previously mentioned, the most persuasive and compelling evidence adduced in this case is from the “silent witness”, the video, which is of good quality and provides a clear picture of events and the individuals involved in the incident. While the video does not capture how, when, where, or who caused Mr. Watts’ to sustain his wound to his abdomen, it does, however, provide cogent and convincing evidence on the issue of defence of person under s. 34 of the *Criminal Code* which will be addressed later in these reasons.

[282] As emphasized earlier, when assessing circumstantial evidence, the trier of fact should consider “other plausible theories” and “other reasonable possibilities” which are inconsistent with guilt. The Crown thus may need to negative these reasonable possibilities, but certainly does not need to “negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused”. “Other plausible theories” or “other reasonable possibilities” must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[283] I am mindful that a reasonable doubt, or theory alternative to guilt, is not rendered “speculative” by the mere fact that it arises from a *lack of evidence*. 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 certain *gap* in the evidence may result in inferences other than guilt. But those inferences must be *reasonable* given the evidence and the absence of evidence, assessed logically, and considering human experience and common sense. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts.

[284] Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused person to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown’s evidence does not meet the standard of proof beyond a reasonable doubt.

[285] Lastly, it is worth repeating that circumstantial evidence refers to any evidence from which one or more inferences are to be drawn to establish material facts. While there is no burden to prove every piece of evidence on a standard of beyond a reasonable doubt, in order to convict on a circumstantial case, the trier of fact must be satisfied beyond a reasonable doubt that the *only* rational or reasonable inference that can be drawn from the circumstantial evidence is one of guilt.

[286] In this case, having considered the totality of the evidence I am not satisfied beyond a reasonable doubt that the only rational or reasonable inference that can be drawn from the circumstantial evidence is that Ms. Desmond stabbed Mr. Watts in the abdomen with a knife, for the following reasons.

[287] As stated, the Crown has not established any direct evidence to establish that Ms. Desmond stabbed Mr. Watts in the abdomen. Mr. Watts testified that he did not see a weapon or a knife, and could not say who, or what, applied force to his abdomen that resulted in the injury that he sustained. Ms. MacLachlin also testified that she did not see a weapon or a knife during the incident. Nor did she observe how or when Mr. Watts sustained a wound to his abdomen. Ms. MacEachern testified that she saw Ms. Desmond with a knife in her hand, but did not observe how, or when Mr. Watts sustained a wound to his abdomen. The “silent witness”, the video does not shed any light on who, how, where or when Mr. Watts sustained the wound to his abdomen.

[288] I agree with the proposition that the knife seen on the video in Ms. Desmond’s hand *could* be consistent with causing the wound to Mr. Watts’ abdomen, notwithstanding that there is no medical evidence to assist the Court in confidently making that inference. In other words, there is no medical evidence proffered in this case to explain the nature of the wound to Mr. Watts’ abdomen, including its dimensions, scope, depth, the degree of force required to cause it, and the extent and/or impact of blood lost. Moreover, expert opinion would be of assistance in explaining why the knife shown in the video is consistent with causing the wound, as this could strengthen the inference.

[289] Also, it is worthy to note that expert medical opinion evidence may have been of assistance to the Court in understanding the nature of the cut to Mr. Watts’ face, as well as Ms. Desmond’s broken nails in relation to the amount of blood loss. I mention this because the Crown submits that the blood on Ms. Desmond’s hands is consistent with causing the wound to Ms. Watts’ abdomen by stabbing him with the

knife. In my view, it is equally consistent that the blood on Ms. Desmond's hands was the result of breaking her nails, or from Mr. Watts' face, or both. Indeed, in my view, it is more likely that the blood came from one or both of those sources, than it did from Mr. Watts' wound given the clothing that he was wearing, and the absence of evidence of blood until he was outside the bar. Moreover, the absence of blood on Mr. Ehler does not necessarily mean that he could not have inflicted the wound on Mr. Watts' abdomen.

[290] Though the presence of the knife in Ms. Desmond's possession does provide her with opportunity and means to stab Mr. Watts, I find based on the totality of the evidence that she was in possession of the knife for a defensive purpose, in that, she reasonably believed that Mr. Ehler needed protection from the two unknown men, who were in the process of assaulting him. The basis of this finding will be explained later in these reasons.

[291] The Defence submits that the Crown elected not to call Mr. Ehler and Mr. MacDonnell to testify in this case, and thus, failed to negate the possibility that it was Mr. Ehler who caused the injury to Mr. Watts' abdomen.

[292] Given the context of this case, where is a gap in the evidence or absence of evidence in respect to how, or who caused the wound, I am mindful that the importance of this gap in the evidence may result in inferences other than guilt. But those inferences must be *reasonable* given the evidence and the absence of evidence, assessed logically, and considering human experience and common sense.

[293] In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts. Thus, in my view, it is possible that Mr. Ehler could have inflicted the wound to Mr. Watts' abdomen given that he had the opportunity as depicted in the video where both men are grappling up against the bar and then on the floor. As the Defence pointed out, it is possible that Mr. Ehler could have stabbed Mr. Watts with a sharp object or knife that was in his possession, or by something he grabbed during the altercation, and discarded it afterwards. The delay in searching Mr. Ehler provided him time and opportunity to dispose of any weapon he may have used.

[294] It is noteworthy that even though Ms. Desmond had used the knife to ward off both Mr. Watts and Mr. MacDonnell during the altercation, Mr. MacDonnell charged towards Mr. Ehler upon learning that Mr. Watts was wounded in the

abdomen, not Ms. Desmond, asking who stabbed Mr. Watts. Mr. MacDonnell who was actively involved in the altercation did not testify. Therefore, it would be speculative to infer that he may have seen who caused the injury to Mr. Watts' abdomen.

[295] I have also considered Ms. Desmond's utterance that she it was the one who cut or stabbed Mr. Watts' when she responded to Mr. MacDonnell. Clearly, there are two equally compelling inferences that can be drawn from her statement, which are that she was referring to Mr. Watts' face or his abdomen. It is reasonable to infer that Ms. Desmond caused a cut to Mr. Watts' face, his cheek, when she put the knife to his face, as can be seen on the video. Thus, the stronger inference of the two competing inferences is that she was referring to the cut on Mr. Watts' face.

[296] As stated, the absence of evidence as to how, or who caused Mr. Watts' injury to his abdomen is a "gap" in the evidence, and may give rise to an alternate, exculpatory inference, as the accused is not required to fill those gaps or present evidence sufficient to support an exculpatory inference, as the accused is entitled to the presumption of innocence. In this case, an alternate exculpatory inference is that Mr. Ehler could have caused the injury to Mr. Watts' abdomen.

[297] Having considered the totality of the evidence, I am mindful that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. In this case, as stated above, it is more than a fanciful possibility that Mr. Ehler could have caused the wound to Mr. Watts' abdomen.

[298] I am mindful that it is also equally reasonably plausible Ms. Desmond caused the wound as well. Put differently, based on the totality of the evidence, including the lack of evidence, there is more than one reasonable inference that can be drawn from the totality of the evidence.

[299] Additionally, even if the only reasonable inference that can be drawn from the totality of the evidence is that it was Ms. Desmond who caused the injury to Mr. Watts' abdomen, the Crown has failed to prove beyond a reasonable doubt that Ms. Desmond had requisite *mens rea* for the offence, as there is an absence of evidence surrounding the circumstances of how exactly Ms. Desmond caused the injury to Mr. Watts' abdomen. There is no evidence that provides the foundation to draw the inference that Ms. Desmond possessed the requisite *mens rea* for the offence of

aggravated assault. In other words, the Crown cannot negate the reasonable possibility that the wound was accidentally caused when the men were grappling, while standing and while on the floor. As can be seen on the video, this altercation was very fluid and quick as the men were embraced in a struggle that caused them to move from one room in the bar to the next. It would be pure speculation to infer how Ms. Desmond was able to stab Mr. Watts without being seen by Mr. Watts, Mr. MacDonnell, and/or Mr. Ehler.

[300] To be clear, based on the totality of the evidence the Crown has failed to prove beyond a reasonable doubt that Ms. Desmond intentionally or recklessly caused the wound to Mr. Watts' abdomen, and furthermore, as will be discussed later in these reasons, I am not satisfied beyond a reasonable doubt that Ms. Desmond was not acting in self-defence of Mr. Ehler when she acted in the manner she did on the night in question.

[301] For all of these reasons, I am left in a state of reasonable doubt, nagging doubt, that Ms. Desmond committed the offence of aggravated assault by wounding Mr. Watts'.

### **Air of Reality to the defence of Person: Section 34 of the *Criminal Code***

[302] As stated above, the Crown position is that there is no *air of reality* to defence of self-defence or defence of Mr. Ehler under s. 34 of the *Criminal Code*. Therefore, s. 34 of the *Criminal Code* is not available. The defence's position is that there is an air of reality to the defence under s. 34 of the *Criminal Code*, and therefore, the Crown bears of the onus of disproving the defence beyond a reasonable doubt.

[303] Recently, in *R. v. MacNeil*, 2022 NSCA 55, the court held:

14 Unlike a jury trial, there is no requirement in a judge alone trial for a separate determination of whether an air of reality exists in relation to a potential defence. The parties may, as they did in this case, find it helpful for the trial judge to consider this issue because if there is no air of reality to a defence it reduces the issues to be addressed in closing arguments.

[304] At this juncture, mindful that there is no requirement in a judge alone trial for a separate determination of whether there an air reality exist to a potential defence, I should note that, having considered all the evidence adduced in this case, especially the video evidence, I find that that there is clearly an air of reality to the defence

under s. 34 of the *Criminal Code* having considered the seminal case of *R. v. Cinous*, [2002] 2 S.C.R. 3, at para. 51, which held that there must be an air of reality to a defence before it can be considered by the trier of fact. As emphasized in *Cinous*, a defence should be put to the jury if, and only if, there is an air of reality to that defence.

[305] A defence has an air of reality if, and only if, a properly instructed jury, acting reasonably, *could* acquit the accused on the basis of the defence: *Cinous*, at para. 92. This inquiry requires a consideration of the totality of the evidence, assuming the evidence relied upon by the accused to be true: *Cinous*, at para. 53. There is no requirement that the evidence emanate from the accused person. The factual circumstances of the case can provide the evidential foundation for the defence (*Cinous*, at paras. 52-53). The air of reality test is not an onerous one to meet: *R. v. Barrett*, 2022 ONCA 355, at para. 61). At the “air of reality stage” the question to be determined is whether there is evidence upon which a properly instructed jury reasonably could find that the Crown has failed to prove beyond a reasonable doubt that Ms. Desmond did not act in self-defence or defence of Mr. Ehler.

[306] I have concluded that there is an air of reality to the defence of person under s. 34 of the *Criminal Code* based all the totality of the evidence in this case. I will be discuss the application of the relevant provisions of the *Criminal Code* for self-defence and defence of person, and case law, later in these reasons.

### **The Supreme Court of Canada: *R. v. Khill*, 2021 SCC 37**

[307] Before turning to the application of the provisions of s. 34 of the *Criminal Code* in this this case, a discussion of the most recent decision of the Supreme Court of Canada will hopefully inform the analysis of my application of the provisions.

[308] The decision in *Khill* is important because it is the first interpretation by the Supreme Court of Canada of the new *Criminal Code* provisions on self-defence. The new *Criminal Code* provisions changed the law of self-defence in significant ways by broadening the scope and application of self-defence and by employing a multifactorial reasonableness assessment.

[309] The facts of the case are worthy of note.

[310] In the early morning hours Mr. Khill shot and killed a young man who was breaking into his truck. The vehicle was parked in the driveway of Mr. Khill's home, in a rural area. Mr. Khill was awoken by his partner, who alerted him to the sound of a loud knocking outside their home. Mr. Khill went to the bedroom window and observed that the dashboard lights of his pickup truck were on.

[311] Mr. Khill retrieved his shotgun from the bedroom closet and loaded two shells. Dressed only in underwear and a t-shirt, Mr. Khill left his house through the back door in his bare feet and quietly approached the truck. As he rounded the rear of the truck, Mr. Khill noticed someone bent over into the open passenger-side door. He shouted to the person, who would later be identified as S, "Hey, hands up!" As S turned towards the sound of Mr. Khill's voice, Mr. Khill fired, racked the action and fired a second time, striking S twice in the chest and shoulder. After S fell to the ground, Mr. Khill searched him for weapons. There was no gun, only a folding knife in S's pants pocket.

[312] Mr. Khill told the 9-1-1 dispatcher and police that he had shot S in self-defence, as he thought S had a gun and was going to shoot him.

[313] At trial, he testified that he shot S in self-defence, believing S was armed and about to shoot him.

[314] Mr. Khill's training as a former part-time reservist was raised at trial.

[315] At trial, the Crown argued that Mr. Khill acted recklessly, unreasonably and unlawfully by resorting to deadly force for what was, and he knew to be, a property crime. He unlawfully killed S despite being in no immediate danger.

[316] Among the most obvious alternatives was calling 9-1-1 and staying inside with his partner.

[317] Mr. Khill claimed that his conduct, both preceding and during the shooting, was motivated solely to defend himself and his common-law partner.

[318] Mr. Khill said he sought to regain control and acted instinctively according to his (dated) military training without any thought.

[319] Despite Mr. Khill's evidence, his counsel at trial suggested to the jury that self-defence was not an issue at that stage. The Defence directed the jury to focus on the "split second" before Mr. Khill fired, and not his decision to go outside, when assessing his claim of self-defence.

[320] In his charge to the jury, the trial judge described some of the statutory factors in s. 34(2) that should assist the jury in weighing whether the act of shooting S was reasonable in the circumstances. The trial judge did *not* make any reference to Mr. Khill's "role in the incident" under s. 34(2)(c).

[321] The jury found Mr. Khill not guilty.

[322] The Court of Appeal unanimously overturned Mr. Khill's acquittal and ordered a new trial, having concluded that the omission of Mr. Khill's "role in the incident" as a discrete factor for the jury to consider was a material error.

[323] The Court of Appeal determined that an accused's "role in the incident" was not limited to unlawful conduct or provocation, but rather that the new s. 34 entitled the jury to refer to an accused's behavior throughout the incident to determine the extent of their responsibility for the final confrontation and the reasonableness of the act underlying the offence.

[324] The Supreme Court dismissed Mr. Khill's appeal and affirmed the Ontario Court of Appeal's decision ordering a new trial. Justice Moldaver concurred (for three Justices), and Justice Côté dissented alone.

[325] Justice Martin, for a majority of five, agreed with the Ontario Court of Appeal that the trial judge's failure to adequately instruct the jury was a reversible error warranting a new trial. She held that an accused's "role in the incident" includes all the accused's acts and omissions during the incident, from beginning to end, that were relevant to whether or not their self-defence act was reasonable.

[326] In the case of self-defence, the success of each defence turns on three requirements pursuant to s. 34(1) of the *Criminal Code*, R.S.C. 1985, c. C-46:

- (a) the accused must believe on reasonable grounds that force or threat of force is being used against them or someone else;

(b) the purpose for the act that constitutes the offence must be to protect oneself or others from that force or threat of force; and

(c) the act committed must be reasonable in the circumstances.

[327] The first and last requirements blend objective and subjective considerations to determine what is reasonable in the circumstances, while the second requirement is subjective: *R. v. Khill*, 2020 ONCA 151, paras. 54 and 57.

[328] In *Khill*, the Supreme Court considered the relationship between the old and the new provisions dealing with self-defence: (para. 29). The old *Code* provisions were contained in ss. 34 to 37. They were split into four separate limbs (doors) designed to deal with different factual scenarios:

1. s. 34(1) (unprovoked assaults without intention to cause death)
2. s. 34(2) (assaults causing death or bodily harm)
3. s. 35 (provoked assaults) and 37.
4. s. 37 extended the defence to accused person who acted to defend themselves or anyone under their protection, even if they intended to cause death or bodily harm, so long as the act was necessary and proportionate.

[329] As Justice Martin explained, each section (34-37) established its own set of "preliminary conditions" that needed to be satisfied to bring a particular self-defence section into play, as well as "qualifying conditions" that needed to be met to successfully establish the defence: (para. 30). The four doors into self-defence under ss. 34 to 37, with their exacting, often intention-based preconditions, drew substantial criticism from lawyers, scholars and the judiciary. They described the regime as "overlapping", "complex", "excessively detailed" and "little more than a source of bewilderment and confusion": (para. 33).

[330] In response to decades of prevailing criticism concerning the complexity and unworkability of the prior provisions, Bill C-26 came into force on March 11, 2013, and introduced extensive amendments to the law of self-defence, defence of property and citizen's arrest (*Citizen's Arrest and Self-Defence Act*, S.C. 2012, c. 9, s. 2): (para. 34).

[331] As Martin J. observed:

Parliament dismantled the structure of the old provisions and constructed something original. In doing so, it took many of the building blocks from the prior law, left some as rubble, brought in some new materials and reshaped others to fit the new form: (para. 39).

[332] Justice Martin explained that a review of the of the old and new self-defence provisions inform the context, purpose, and scheme of the amendments, which provides guidance in understanding the proper interpretation of the new phrase “the person’s role in the incident”. The former sections 34, 35, and 37 have been merged into a single section: s. 34. The streamlined approach now means that rather than a variety of sections to fit multiple situations, there is now a single rule that is broken into three constituent parts (paras 28-24).

[333] Justice Martin described the three inquires under s. 34 as:

1. the catalyst;
2. the motive; and
3. the response (para. 51).

[334] A trier of fact must find all three constituent conditions are met before the defence becomes available to the accused.

**1. The Catalyst: s. 34(1)(a) – Did the Accused Believe on Reasonable Grounds that Force was Being Used or Threatened Against Them or Another Person?**

[335] This element considers the accused’s state of mind and the perception of events that led them to act. Unless the accused subjectively believed that force or a threat of force thereof was being used against their person or that of another, the defence is unavailable. Importantly, the accused’s actual belief must be held on reasonable grounds. The question is not what the accused thought was reasonable based on their characteristics and experiences, but rather what a reasonable person with those relevant characteristics and experiences would perceive: *Khill*, at paras 52-58.

[336] Under the new law, what is relevant is reasonably apprehended “force” of any kind.

[337] The accused’s response under the new law is also no longer limited to a defensive use of force. It can apply to other classes of offences, including acts that tread upon the rights of innocent third parties, such as theft, breaking and entering or dangerous driving. Replacing “assault” with “force” also clarifies that imminence is not a strict requirement. The accused did not believe that the victim had the present ability to effect a threat of physical force: *Khill*, at para. 40.

[338] Finally, s. 34 is equally applicable whether the intention is to protect oneself or another and is no longer circumscribed to persons “under the accused’s protection”, as was previously required by former provision, s. 37: *Khill*, at para. 40.

**2. The Motive: s. 34 (1)(b) – Did the Accused Do Something for the Purpose of Defending or Protecting Themselves or Another Person from that Use or Threat of Force?**

[339] The second element considers the accused’s personal purpose in committing the act that constitutes the offence. The act undertaken by the accused must be to defend or protect themselves or others from the use or threat of force. This is a subjective inquiry which goes to the root of self-defence. If there is no defensive or protective purpose, the rationale for the defence disappears. The motive provision – ensures that the actions of the accused are not undertaken for the purpose of vigilantism, vengeance or some other personal motivation: *Khill*, at paras. 59-61.

**3. The Response: s. 34(1)(c) – Was the Accused’s Conduct Reasonable in the Circumstances?**

[340] This inquiry examines the accused’s response to the use or threat of force and requires that the act committed be reasonable in the circumstances, which must conform to community norms of conduct. The transition to “reasonableness” under this section illustrates the new scheme’s orientation toward a more broad and flexible language. The old law treated the words “no more than is necessary” as akin to “reasonableness”: *Khill*, at paras. 62-63.

**Section 34(2) of the *Criminal Code*: The of Factors that Determines Reasonableness (a) to (h)**

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

- (a) the nature of the force or threat;
- (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
- (c) the person's role in the incident;
- (d) whether any party to the incident used or threatened to use a weapon;
- (e) the size, age, gender and physical capabilities of the parties to the incident;
- (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
- (f.1) any history of interaction or communication between the parties to the incident;

- (g) the nature and proportionality of the person's response to the use or threat of force; and
- (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

[342] As Martin J. observed, in practice, the new provisions are more generous to the accused and more restrictive: the provisions narrow the scope of self-defence in some factual circumstances and broaden it in others. By incorporating the mandatory conditions into mere factors suggests more flexibility in accessing the defence, but this added flexibility is counter-balanced by the requirement to consider certain factors – including proportionality and the availability of other means to respond to the use or threat of force – in every case in which they are relevant, regardless of the genesis of the confrontation: *Khill*, at para. 46.

[343] Justice Martin also noted that Parliament chose a novel methodology when it removed the tangle of preliminary and qualifying conditions under the previous provisions and established a unified framework with a general reasonableness standard.

[344] What this means is that the conditions formerly imposed by each of the self-defence provisions were screening devices used to determine whether the defence was left with the jury in the first place, and then determine whether the defence had been established. These concepts are now incorporated into s. 34(2) as relevant factors in the reasonableness inquiry: *Khill*, at para. 41.

[345] Justice Martin stressed that replacing qualifying conditions with reasonableness factors means these factors must be considered in all self-defence cases in which they are relevant on the facts. The criteria in the old sections are no longer mandatory hurdles that need to be overcome but simply factors which may be applicable in the circumstances of a particular case: *Khill*, at para. 45.

### **The Meaning of the Accused's "Role in the Incident": s. 34(2)(c)**

[346] Justice Martin emphasized that the correct interpretation of the "person's role in the incident" lies at the heart of the appeal: *Khill*, at para. 72. The majority's view

is that based on accepted principles of statutory interpretation, Parliament deliberately chose broad and neutral words to capture a wide range of conduct, both temporally and behaviourally: *Khill* at para. 74. The “person’s role in the incident” refers to the person’s conduct – such as actions, omissions and exercises of judgment – during the course of the incident, from beginning to end, that is relevant to whether the ultimate act was reasonable in the circumstances: *Khill*, at para.74.

[347] The significance of this reform is that the evaluative component of the defence is more fluid, and factors that would not have been contemplated under the previous provisions are now available to the trier of fact. It is now for the trier of fact to weigh these factors and determine the ultimate success of the defence: *Khill*, at para. 42. The defence is now more open and flexible and additional claims of self-defence will be placed before triers of fact: *Khill*, at para. 44. Even in situations where the extent of the accused’s initial involvement is contested, or the violent encounter developed over a series of discrete confrontations the unified framework under s. 34 means judges need only provide juries with a single set of instructions: *Khill*, at para. 44.

[348] As Justice Martin stated, 34(2)(c) draws attention to a key question: “who bears what responsibility for how this happened?”

[349] The extent to which the accused bears responsibility for the ultimate confrontation or is the author of their own misfortune may colour the assessment of whether the accused’s act was reasonable.

[350] The challenging issue is - how do you characterize the accused’s role within it?

[351] The parameters are unclear but would likely include plainly excessive acts or continued acts when there is no longer a threat.

[352] In light of all of foregoing, I will address the central issue in this case which is whether the Crown disproved, beyond a reasonable doubt, that Ms. Desmond was acting in self-defence or in defence of Mr. Ehler.

**Principle Issue: Has the Crown disproved, beyond a reasonable doubt, that Ms. Desmond acted in defence of Person under s. 34 of the *Criminal Code*?**

[353] At the outset, it is important to re-emphasize that the accused, Ms. Desmond, does not have to prove that she acted in self-defence or in defence of Mr. Ehler. Rather, the onus is on the Crown to prove beyond a reasonable doubt that Ms. Desmond did not. Indeed, unless the Crown proves beyond a reasonable doubt that at least one of the three conditions for defence was absent, this Court must acquit Ms. Desmond of the offences charged.

[354] As previously noted above, s. 34(1) of the *Criminal Code* sets out the three elements of self-defence or defence of another person:

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

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

[355] As noted above, these three lines of inquiry have been described in short form as the catalyst, the motive, and the response (*Khill* at para. 51). The catalyst focusses on the accused's state of mind and asks whether the accused subjectively believed on objectively reasonable grounds that force was being used or threatened against them or another person (s.34(1)(a)). The motive asks whether the accused did something for the subjective purpose of defending or protecting himself or another (s. 34(1)(b)). The response asks whether the conduct of the accused was reasonable in the circumstances (s. 34(1)(c)) by having regard to the non-exhaustive list of factors in s. 34(2).

### **The Factual Underpinnings to the Self-Defence or Defence of Other Person Claim**

[356] The factual findings underlying an application of s. 34 of the *Criminal Code* has been set out above. In an effort to be economical, I will attempt to only repeat the facts when necessary.

[357] As discussed above, there are three inquiries under s. 34:

1. the catalyst;
2. the motive; and
3. the response

**1. The Catalyst: s. 34(1)(a) – Did Ms. Desmond believe on reasonable grounds that force was being used or threatened against her friend Mr. Ehler?**

[358] This element considers Ms. Desmond’s state of mind and the perception of events that led her to act. Unless she *subjectively* believed that force or a threat of force thereof was being used against Mr. Ehler, the defence is unavailable.

[359] Having considered the totality of the evidence, especially the video evidence, I find that Ms. Desmond *subjectively* believed that her friend Mr. Ehler was being forced into a physical confrontation with Mr. Watts’ and Mr. MacDonnell. The basis for this belief is the video evidence which also captures Ms. Desmond’s utterances throughout the altercation that clearly demonstrate her intent to protect her friend, Mr. Ehler, from the very beginning of incident until it ended.

[360] It is reasonable to infer from the video that Ms. Desmond had a real concern for Mr. Ehler’s safety after he was accosted by two unknown men. It also reasonable to infer that she had reasonable grounds to believe that force was being used or threatened against her friend Mr. Ehler while he was sitting alone at the bar, and throughout the altercation.

[361] The findings of fact, as noted above, clearly establishes that Ms. Desmond believed on reasonable grounds that force was being used or against her friend Mr. Ehler.

[362] Ms. Desmond was enjoying a quiet evening in Dooly’s with her friends when she observed Mr. Ehler’s accosted was relatively quiet, calm or tranquil, and mostly empty prior to the altercation. The video clearly depicts that Mr. Desmond looking over at the three men during their interaction. Thus, it is reasonable to infer from Ms. Desmond’s actions that she is concern for her friend, Mr. Ehler. Shortly after Mr. Ehler stood up to face the two taller men, Mr. Watts and Mr. MacDonnell, Ms. Desmond can be heard on the video yelling to Mr. Ehler to “come over”, which I infer she is worried for her friend, Mr. Ehler’s, safety, which is a reasonable and

measured response to a situation where a reasonable person would believe that force was being used or threatened against her Mr. Ehler.

[363] Ms. Desmond subjective belief that she believed on reasonable grounds that force was being used or threatened against her friend, Mr. Ehler, is further demonstrated by her following actions and/or behaviour, which is detailed above in the findings of fact, and summarized below.

**2. The Motive: s. 34 (1)(b) – Did Ms. Desmond do Something for the purpose of defending or protecting her Mr. Ehler**

[364] As previously mentioned, the second element considers the accused's personal purpose in committing the act that constitutes the offences. The act undertaken by the accused must be to defend or protect themselves or others from the use or threat of force. This is a subjective inquiry which goes to the root of self-defence. If there is no defensive or protective purpose, the rationale for the defence disappears. The motive provision ensures that the actions of the accused are not undertaken for the purpose of vigilantism, vengeance, or some other personal motivation.

[365] As stated, it is reasonable to infer that all of Mr. Desmond's actions were for the purposes of defending or protecting Mr. Ehler from the use of force or threat of force by Mr. Watts' and Mr. MacDonnell.

[366] I find based on the totality of the evidence that Ms. Desmond was not acting out of vengeance, but rather acted instinctively to defend Mr. Ehler from a threat of force and assaultive behaviour of Mr. Watts, and Mr. MacDonnell, as found in the factual findings above and summarize below. Ms. Desmond's

[367] Ms. Desmond's motive to protect and/or defend Mr. Ehler is clearly demonstrated by her following actions and/or behaviour:

- Ms. Desmond immediately hurried over to the three men at the bar after she observed Mr. Ehler push Mr. Watts back out of his personal space, as Mr. MacDonnell grabbed the shirt/chest area of Mr. Ehler, and Mr. Watts put his face in Mr. Ehler's face.
- Within seconds Ms. Desmond intervened in the altercation by shoving Mr. MacDonnell back. She spread her arms apart to separate the two

men from Mr. Ehler, while yelling, “let him go, let him fucking go”, she then pushed Mr. MacDonnell away from the two men.

- Ms. Desmond yelled at Mr. Watts while he was embraced with Mr. Ehler. She yelled, “let him go”, and then rejoined the altercation and tried to again separate Mr. MacDonnell from the altercation.
- At one point Ms. Desmond wrapped her arms around the head and shoulder of Mr. Watts, and yelled, “get the fuck off of him right now.” Mr. Watts responded that he could not hear her. Following that response Ms. Desmond retreated from the altercation and then returned with a knife. Thus, it can be reasonably inferred that Ms. Desmond retrieved the knife in response to Mr. Watts’ direct dismissive response to her. Thus, it is reasonable to infer that Ms. Desmond decided to retrieve the knife for a defensive purpose to stop the ongoing assault on Mr. Ehler.
- Prior to retrieving the knife Ms. Desmond had tried to physically separate Mr. MacDonnell and Mr. Watts from Mr. Ehler but had been unsuccessful in doing so. She tried yelling at Mr. Watts and Mr. MacDonnell to stop but was ignored and dismissed. Thus, it is reasonable to infer that Mr. Watts, in an intoxicated, aggressive, and violent state could not be deterred by the presence and actions of Ms. Desmond, nor from the protestations of bar staff to stop, as they were calling the police. It is reasonable to infer that in the throes of a fast paced, emotionally violent altercation, Ms. Desmond felt it was necessary to retrieve a knife for the purpose of stopping the ongoing assault on Mr. Ehler. In other words, she retrieved the knife to persuade the men to stop their aggressive assault on Mr. Ehler.
- Upon her return with the knife, Ms. Desmond immediately confronted Mr. MacDonnell who was trying to pull Mr. Ehler away from Mr. Watts. She yelled, “let him go” to which he did not. She then put the knife to the cheek of Mr. MacDonnell, and yelled, “let him fucking go right now”, to which Mr. MacDonnell retreated back with his arms raised. As soon as Mr. MacDonnell retreated, she removed the knife, and turned her focus on Mr. Watts, who was on the floor grappling with Mr. Ehler. Ms. Desmond leaned down and put the knife to Mr.

Watts face, where she cut him and yelled, “you...let him go”. Within seconds of that Mr. MacDonnell grabbed Mr. Ehler.

- Ms. Desmond stood up and turned towards Mr. MacDonnell who was grabbing Mr. Ehler. She held the knife behind her as she engaged Mr. MacDonnell, as she backed away from Mr. MacDonnell. After Ms. Desmond folded the knife in her hand, she yelled, “call the cops, call the cops”, while Mr. MacDonnell is pushing and pulling Mr. Ehler around in the VLT room. At that point Mr. Watts approached Ms. Desmond and uttered, “do you think your tough”, to which Ms. Desmond replied, “I am tough, I should slice/cut you fucking throat right now.” Mr. Watts’ then replied, “right here”, as he made a gesture to his throat, while being pulled back from Ms. Desmond by Mr. MacDonnell.
- Shortly after Mr. Watts and Mr. MacDonnell exited Dooly’s, Mr. MacDonnell returned in a very emotional state, yelling, “what the fuck, what the fuck”, as he charged into the VLT room towards Mr. Ehler, who was standing in the room. He grabbed Mr. Ehler and physically pushed him up against the VLT machines. Ms. Desmond entered the room, yelling, “it was me, it was me bitch”. Mr. MacDonnell continued to physically control Mr. Ehler by pushing him towards the VLT machines. Ms. Desmond intervened in the struggle, with one hand holding a bag, and the other pushing the men apart. The video depicts that she reached for a picture frame on the wall, took it off and struck Mr. MacDonnell with it, which seems to have slowed down Mr. MacDonnell. Mr. Ehlers can be heard yelling, “get off of me” and the video captures Mr. MacDonnell asking, “who stabbed him.” Following that, Ms. Desmond and Mr. Ehler can be seen on the video, walking away. Mr. MacDonnell can be seen leaving the bar.
- I find that it is reasonable to infer that Ms. Desmond’s actions of reaching in with one hand to separate Mr. MacDonnell from Mr. Ehler, and her action of hitting Mr. MacDonnell with the picture frame were done as an act to protect or defend Mr. Ehlers from an ongoing assault.
- It is reasonable to infer that Mr. Desmond’s actions were for the purposes of defending or protecting Mr. Ehler from the use of force or

threat of force Mr. MacDonnell, which seems from the video slowed him down.

[368] To be clear, I find that Ms. Desmond did not possess the knife for a dangerous purpose, but rather for a specific defensive purpose to defend or protect her friend, Mr. Ehler, from the use or threat of force.

[369] I find that Ms. Desmond was acting in self-defence of Mr. Ehlers when she uttered the threat to Mr. Watts in her effort to stop him from the ongoing use or threat of force against Mr. Ehlers'. It is reasonable to infer from the factual findings that Mr. Watts was intoxicated, aggressive and belligerent throughout the incident, and thus, Ms. Desmond's utterance was made while in the course of defending Mr. Ehler. I find that Ms. Desmond's intent and motive were to deter Mr. Watts from continuing his assaultive behaviour as he is being pulled away by Mr. MacDonnell. Thus, it is reasonable to infer that her threat with the knife was a means to stop Mr. Watts from continuing to use or threat of force against Mr. Ehlers and or herself at that point. This inference is strengthened by Ms. Desmond's repeated pleas to call the police shortly before her exchange of words with Mr. Watts.

### **3. The Response: s. 34(1)(c) – Was Ms. Desmond's Conduct Reasonable in the Circumstances?**

[370] As discussed earlier, this inquiry examines the accused's response to the use or threat of force and requires that the act committed be reasonable in the circumstances, which must conform to community norms of conduct.

#### **Section 34(2) of the *Criminal Code*: The of Factors that Determines Reasonableness (a) to (h)**

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

##### **(a) the nature of the force or threat;**

[372] The nature of the threat to which Ms. Desmond responds is clearly relevant to assessing the reasonableness of her reaction. Ms. Desmond's subjective perception (which must be objectively verified) of the existence of a threat is also

already a required element under s. 34(1)(a), which seems to ensure that this element is part of the overall assessment of reasonableness of the defensive response.

[373] When considering the nature of the force or threat, it is important to consider the context in which the incident arose having regard for all the circumstances surrounding it. In this case, Mr. Watts initiated unprovoked aggression towards Mr. Ehler for no apparent reason in a quiet, and calm environment. A tranquil atmosphere suddenly turned into an unexpected verbal and physical altercation that lasted several minutes. The unpredictable nature and seeming inexplicably targeting of Mr. Ehler while alone at the bar by two intoxicated men would undoubtedly cause a reasonable observer to question the intent and motive of the two men in relation to the use or threat of force against Mr. Ehler, particularly when there were no security present, and only a few people in the bar.

[374] It is reasonable to infer having regard to all the circumstances, that Ms. Ehler may have felt threatened by the appearance of the two taller men and perceived a real apprehension of harm from them after Mr. Watts' ignored his gesture to leave him alone. Within seconds of making that gesture, Mr. Ehler quickly arose from his chair to face Mr. Watts, and Mr. MacDonnell, who was in arms reach.

[375] It should be stressed that I infer from the evidence that this emotionally charged incident happened very quickly and intensified as the altercation moved in and around the bar. I find that Mr. MacDonnell assisted or aided Mr. Watts at times during the altercation by grabbing Mr. Ehler. I also find that Mr. MacDonnell, at times, attempted to persuade Mr. Watts to retreat from the altercation. I find that Mr. MacDonnell aggressively charged towards Mr. Ehler and grabbed him in the VLT room because he assumed that he may have stabbed Mr. Watts.

[376] As mentioned above, given the nature of the force or the threat of harm to Mr. Ehler, it is reasonable to infer from the evidence that Mr. Desmond's actions were for the purpose of defending or protecting Mr. Ehler from the use or threat of force. It is also reasonable to infer that Ms. Desmond was emotionally charged as she intervened in the altercation where she put herself in harms way by trying to separate two larger men from Mr. Ehler. She was verbally aggressive and physically active in trying to stop the altercation which was reasonable given the nature of the force and individuals involved.

**(b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;**

[377] As stated, this entire incident happened very quickly. It is reasonable to infer that Ms. Desmond had acted instinctively, spontaneously, to the threat of force which was imminent. From the outset of the altercation, until it ended, Ms. Desmond was the only person to physically engaged in the altercation to separate the men. She was alone in that regard because there was no security available, and the bar staff, understandably, did not want to physically engage in the altercation for fear of their own personal safety. Indeed, it is reasonable to infer from the evidence that Ms. Desmond injured her fingers during her efforts to separate the men from the altercation.

[378] Other than the staff's protestations to stop, Ms. Desmond had no other means available to her to stop the altercation. It is reasonable to infer from the video evidence that Mr. Ehler had been and continued to be subjected to a series of assaults. Prior to Ms. Desmond temporarily leaving the altercation to retrieve a knife, she exhausted all reasonable avenues available to her. As discussed above, Ms. Desmond yelled at Mr. Watts and Mr. MacDonnell to stop but was ignored and dismissed. Thus, it is reasonable to infer that Mr. Watts, in an intoxicated, aggressive, and violent state could not be deterred by the presence and actions of Ms. Desmond, nor from the protestations of bar staff to stop, as they were calling the police. It is reasonable to infer that in the throes of a quick pace emotionally violent altercation, Ms. Desmond felt it was necessary to retrieve a knife for the purpose of stopping the ongoing assault on Mr. Ehlers. In other words, she retrieved the knife to persuade the men to stop their aggressive assault on Mr. Ehler because there was no other means to respond to the ongoing use of force.

**(c) the person's role in the incident;**

[379] In *Kill*, Martin J.A. explained the analytical purposes of considering the person's role in the incident. She wrote:

85 The analytical purpose of considering the person's "role in the incident" is its relevance to the reasonableness assessment where there is something about what the accused did or did not do which led to a situation where they felt the need to resort to an otherwise unlawful act to defend themselves. Only a full review of the sequence of events can establish the role the accused has played to create, cause or contribute to the incident or crisis. Where self-defence is asserted, courts have

always been interested in who did what. The fact that the victim was the cause of the violence often weighed heavily against them. As this Court explained in *R. v. Hibbert*, [1995] 2 S.C.R. 973, at para. 50:

In cases of self-defence, the victim of the otherwise criminal act at issue is himself or herself the originator of the threat that causes the actor to commit what would otherwise be an assault or culpable homicide (bearing in mind, of course, that the victim's threats may themselves have been provoked by the conduct of the accused). In this sense, he or she is the author of his or her own deserts, a factor which arguably warrants special consideration in the law. [Emphasis deleted.]

The phrase "role in the incident" captures this principle and also ensures that any role played by the accused as an originator of the conflict receives special consideration. In this way, the trier of fact called upon to evaluate this factor will determine how that person's role impacts the "equities of the situation" (*Paciocco* (2014), at p. 290).

[380] As mentioned above, s. 34(2)(c) draws attention to a key question: "who bears responsibility for how this happened?" As Justice Martin stressed the extent to which the accused bears responsibility for the ultimate confrontation or is the author of their own misfortune may colour the assessment of whether the accused's act was reasonable.

[381] In this case, having considered the totality of the evidence, I find that Mr. Watts bears responsibility for the having initiated the unprovoked assault on Mr. Ehler, who was not looking for trouble, rather he was just simply relaxing at the bar. It is reasonable to infer from the evidence that Mr. Watts was aggressive, belligerent and unwavering in his efforts to engage in a verbal and/or physical confrontation, as described above in the factual findings.

[382] In my view, Ms. Desmond tried to de-escalate the confrontation between the men at the beginning of the incident, and throughout the entire incident tried to protect and/or defend Mr. Ehler from the use or threat of force by Mr. Watts and Mr. MacDonnell. In other words, actions were in response to an unprovoked, unwarranted, assault on her friend Mr. Ehler. As the Defence stated, to characterize Ms. Desmond's role in any other manner would require a failure to consider the total sequence of events, bearing in mind the speed the altercation unfolded.

[383] As stated, it is reasonable to infer from Mr. Desmond's behavior and actions during the entire incident that her only purpose was to protect or defend her friend Mr. Ehler from the use or threat of force.

**(d) whether any party to the incident used or threatened to use a weapon;**

[384] Obviously, there were no weapons used, or threatened to be used in the circumstances of this case by either Mr. Watts or Mr. MacDonnell.

**(e) the size, age, gender and physical capabilities of the parties to the incident;**

[385] It is reasonable to infer from the evidence that Mr. Watts and Mr. MacDonnell were physically able, stronger, and bigger than Ms. Desmond. It can also be inferred from the video that both Mr. Watts and Mr. MacDonnell appear to be taller than Mr. Ehler and Ms. Desmond.

[386] Ms. Desmond, a female, made repeated attempts to physically restrain both Mr. Watts and Mr. MacDonnell using her strength. All of these attempts were unsuccessful as both Mr. Watts and Mr. MacDonnell appeared to be strong and capable men. It is reasonable to infer from the evidence that Ms. Desmond's physical did not deter Mr. Watts or Mr. MacDonnell from continuing to engage in the altercation. However, both men to reacted and stopped when Ms. Desmond retrieved the knife.

**(f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;**

[387] In this case, there is no history of any relationship nor any prior use of threats or force between Kyle Ehler, Kalista Desmond, Cassandra Desmond, and Mr. Watts and Mr. MacDonnell.

**(f.1) any history of interaction or communication between the parties to the incident;**

[388] The evidence does not reveal any history of remarkable interaction or communication between Kyle Ehler, Kalista Desmond, Cassandra Desmond, and

Mr. Watts and Mr. MacDonnell. There was one brief encounter while at the bar between them, but it was described as uneventful and uncontroversial.

[389] As noted above, Ms. Desmond did not know either Mr. Watts or Mr. MacDonnell prior to the night in question. Thus, it is reasonable to infer that she had no previous information to rely upon to assist with determining Mr. Watts' intentions, as discussed above.

**(g) the nature and proportionality of the person's response to the use or threat of force;**

[390] This factor intended clearly emphasizes that proportionality between the threat and responses remains a vital consideration. Obviously, proportionality is highly relevant in every self-defence situation as it requires an assessment of whether the response itself was a reasonable one. It is difficult to conceive of a defensive action being reasonable if it is disproportionate to the threat, absent exceptional circumstances.

[391] In the present case, Ms. Desmond's actions must be considered during the entire incident, which were in reaction to a sudden, spontaneous response to a situational threat, where there was no reasonable means for Mr. Ehler to retreat, as discussed above.

[392] As discussed above, it can be reasonably inferred that Ms. Desmond retrieved the knife in response to Mr. Watts' direct dismissive response to her. Thus, it is reasonable to infer that Ms. Desmond decided to retrieve the knife for a defensive purpose to stop the ongoing assault on Mr. Ehler. I find that she did not possess the knife for a *dangerous purpose*, but rather for a specific defensive purpose to defend or protect her friend, Mr. Ehler, from being assaulted. Upon her return with the knife, Ms. Desmond immediately confronted Mr. MacDonnell who was trying to pull Mr. Ehler away from Mr. Watts. She yelled, "let him go" to which he did not. She then put the knife to the cheek of Mr. MacDonnell, and yelled, "let him fucking go right now", to which Mr. MacDonnell retreated back with his arms raised. It can be inferred that Ms. Desmond's action of threatening Mr. MacDonnell with the knife, was for the purposes of defending or protecting Mr. Ehler. I found that it was a reasonable response in the heat of the moment and was proportionate to the continuing threat of force by Mr. MacDonnell.

[393] As soon as Mr. MacDonnell retreated, she removed the knife, and turned her focus on Mr. Watts, who was on the floor grappling with Mr. Ehler. Ms. Desmond leaned down and put the knife to Mr. Watts face, where she cut him and yelled, “you...let him go”.

[394] Having considered the whole sequence of the incident, including Ms. Desmond’s intention of stopping the assaultive behaviour towards her friend, Mr. Ehler, it is reasonable to infer that the pressing of the knife against Mr. Watts cheek was a proportionate response to the ongoing threat that existed at the time. She cut Mr. Watts’ cheek with the knife, and he sustained an injury. There is no evidence that he required surgery or sutures. Nor is there any medical evidence to describe the nature and extent of the injury, including how much force would be required to cause the injury to Mr. Watts’ cheek. It can be inferred from the evidence that Ms. Desmond applied the minimum amount of force required in the circumstances in her efforts to convince Mr. Watts to stop. It appears from the video that Ms. Desmond held the knife to Mr. Watts face very briefly, a matter of seconds, while leaning down towards him as he was on the floor embraced with Mr. Ehler, when she yelled, “you... let him go”. Her actions in holding the knife to face of both Mr. MacDonnell and Mr. Watts’ are entirely consistent with her earlier actions when she did not possess the knife, which included the screaming the following protestations: “get the fuck off of him”; “let him go, let him fucking go”; “let him go”; and “get the fuck off of him right now”. Based on all of the evidence, I find that Ms. Desmond’s actions, including her strong protestations, utterances, are demonstrative of her intent to protect or defend Mr. Ehler from an ongoing assault. It is reasonable to infer that Ms. Desmond could have easily inflicted seriously grievously bodily harm to both Mr. MacDonnell and Mr. Watts if she wanted to do that.

[395] Based on the totality of the evidence, it is reasonable to infer that Ms. Desmond did not have the intent to cause bodily harm to either Mr. Watts or Mr. MacDonnell. Ms. There is no evidence that she cut Mr. MacDonnell.

[396] I found that it is plausible that Ms. Desmond’s cut Mr. Watts cheek unintentionally, and after realizing what she did, she kept the knife behind her at arms length as depicted in the video, and later folded because it was not longer necessary.

[397] Shortly after that Ms. Desmond stood up and turned towards Mr. MacDonnell who was grabbing Mr. Ehler. She held the knife behind her as she engaged Mr.

MacDonnell, as she backed away from Mr. MacDonnell. Again, the presence of the knife was for the purposes of defending or protecting Mr. Ehler, her utterances with the knife in her possession was solely for the purposes of defending or protecting Mr. Ehlers. Again, it can be inferred that Ms. Desmond's action of threatening Mr. MacDonnell with the knife, was for the purposes of defending or protecting Mr. Ehlers. I found that it was a reasonable response in the heat of the moment and was proportionate to the continuing threat of force by Mr. MacDonnell.

[398] After Ms. Desmond folded the knife in her hand, she yelled, "call the cops, call the cops", while Mr. MacDonnell is pushing and pulling Mr. Ehler around in the VLT room. At that point Mr. Watts approached Ms. Desmond and uttered, "do you think your tough", to which Ms. Desmond replied, "I am tough, I should slice/cut you fucking throat right now." Mr. Watts' then replied, "right here", as he made a gesture to his throat, while being pulled back from Ms. Desmond by Mr. MacDonnell.

[399] As discussed above, I find that Ms. Desmond was acting in self-defence of Mr. Ehlers when she uttered the threat to Mr. Watts in her effort to stop him from the ongoing use or threat of force against Mr. Ehler. It is reasonable to infer that Mr. Watts was intoxicated, aggressive and belligerent throughout the incident, and thus, Ms. Desmond's utterance was made while in the course of defending Mr. Ehler. I found that it was a reasonable response in the heat of the moment and was proportionate to the continuing threat of force by Mr. Watts. I find that Ms. Desmond's intent and motive were to deter Mr. Watts from continuing his assaultive behaviour as he is being pulled away by Mr. MacDonnell. Thus, it is reasonable to infer that her threat with the knife was a means to stop Mr. Watts from continuing to use or threat of force against Mr. Ehler and or herself at that point. This inference is strengthened by Ms. Desmond's repeated pleas to call the police shortly before her exchange of words with Mr. Watts.

[400] As discussed above, shortly after Mr. Watts and Mr. MacDonnell exited Dooly's, Mr. MacDonnell returned in a very emotional state, yelling, "what the fuck, what the fuck", as he charged into the VLT room towards Mr. Ehler, who was standing in the room. He grabbed Mr. Ehler and physically pushed him up against the VLT machines. Ms. Desmond entered the room, yelling, "it was me, it was me bitch". Mr. MacDonnell continued to physically control Mr. Ehler by pushing him towards the VLT machines. Ms. Desmond intervened in the struggle, with one hand holding a bag, and the other pushing the men apart. The video depicts that she

reached for a picture frame on the wall, took it off and struck Mr. MacDonnell with it, which seems to have slowed down Mr. MacDonnell. Mr. Ehler can be heard yelling, “get off of me” and the video captures Mr. MacDonnell asking, “who stabbed him.” Following that, Ms. Desmond and Mr. Ehler can be seen on the video, walking away. Mr. MacDonnell can be seen leaving the bar.

[401] Again, I find that it is reasonable to infer that Ms. Desmond’s actions of reaching in with one hand to separate Mr. MacDonnell from Mr. Ehler, and her action of hitting Mr. MacDonnell with the picture frame were done as an act to protect or defend Mr. Ehlers from an ongoing assault.

[402] As emphasized throughout this case, “context is important”! At this point in the incident, it can be inferred that Mr. MacDonnell was reacting emotionally and violently towards Mr. Ehler. In my view, hitting Mr. MacDonnell with the picture frame in the manner that Ms. Desmond did was for the purpose of stopping Mr. MacDonnell’s sudden and unexpected attack on Mr. Ehler and was proportionate to the use of force against Mr. Ehler. Again, it is unlikely that Ms. Desmond acting spontaneously in defence of Mr. Ehlers would be in a position of being able to weigh with nicety, the exact measure of necessary defensive action: *R. v. Baxter* (1995), 27 C.C.C. (2d) 96, at p. 11. In my view, a reasonable person similarly situated as Ms. Desmond, would view Ms. Desmond’s action of hitting Mr. MacDonnell with a picture frame as no more than was reasonably necessary to achieve her defensive purpose of making Mr. MacDonnell stop harming Mr. Ehler.

[403] It can be inferred from the totality of the evidence, that the use of the knife to stop the assault on Mr. Ehler was not more than was reasonably necessary to achieve her defensive purpose of making his perceived threat stop from harming Mr. Ehlers. As Martin J. observed in *Khill*, at para. 32, citing *Baxter*, at p. 111 (Ont. C.A.), even under the previous *Criminal Code* self-defence provisions, which were narrower and more restrictive than the current version of s. 34, “the accused was not required to ‘weigh to a nicety’ the amount of force used under the rubric of proportionality”.

[404] It seems that under the new self -defence provisions this principle is reinforced by treating the issue of proportionality as one of many factors to be considered when assessing the reasonableness of the accused’s response to the use or threat of force.

[405] I find that in this specific situation, a reasonable person would view Ms. Desmond's response as being reasonable in the circumstances, given that she had no alternative means to respond to the ongoing assault, and her response arose from an act of protection rather than vengeance.

**(h) whether the act committed was in response to a use or threat of force that the person knew was lawful.**

[406] This factor is inapplicable in this case.

[407] Balancing the Relevant factors listed in s. 34(2) of the *Criminal Code*.

[408] It is important to emphasize that in *Khill*, the majority clearly stressed the assessment of whether an accused's use of force was "reasonable in the circumstances" within the meaning of s. 34(1)(c) is not based on the assessment of a factor individually, but the relevance of each factor to the ultimate question of the reasonableness of the act. Once a factor meets the appropriate legal and factual standards, it is for the trier of fact to assess and weigh the factors and determine whether or not the act was reasonable. In other words, the assessment is a global, holistic exercise. No single factor is necessarily determinative of the outcome: *Khill*, at para. 69.

[409] As Justice Dawe observed in *R. v. P.S.*, 2022 ONSC 3894, at para. 300:

[T]his concept of moral involuntariness must now inform the s. 34(1)(c) inquiry into whether a defendant's use of force was "reasonable in the circumstances". The relevant question is not whether a reasonable person assessing the accused's actions after the fact would consider the accused's use of force to have been justified in hindsight, but whether the evidence proves beyond a reasonable doubt that a reasonable person in the accused's position, "sharing the personal characteristics of the accused, such as age, sex and background" (*Ruzic, supra* at para. 76), would realistically have acted significantly differently if he or she had been put in the accused's position.

[410] In the present case, it is essential to keep in mind how quickly events unfolded and how they would have been perceived by a reasonable person in Ms. Desmond's situation.

[411] On the facts as I have found them, I find that any reasonable person in the same situation as Ms. Desmond would have felt that same way and reacted in the same manner.

[412] In my view, having considered and applied all the factors under s. 34(2) of the *Criminal Code*, the Crown has not proved that Ms. Desmond's actions fell outside the expanded scope of s. 34. Based on all of evidence, it is reasonable to infer that Ms. Desmond was emotional and fearful for Mr. Ehler, and thinking only about how to make the imminent threat of force stop. Her reaction was instinctive, sudden, and spontaneous. Her behaviour during this incident was not motivated by vengeance, but rather the protection of or in defence of Mr. Ehler when she acted in the manner that she did.

[413] I am not satisfied beyond a reasonable doubt that a reasonable person in Ms. Desmond's position, of a similar age and with similar personal characteristics, would have acted differently when she did in acting to protect or defend her friend, Mr. Ehler.

[414] For all the forgoing reasons, I am not satisfied that the Crown has disproved beyond a reasonable doubt that Ms. Desmond was acting in defence of or in protection of Mr. Ehler when she is alleged to have committed those alleged five offences.

## **Conclusion**

[415] In concluding, I found the video a very compelling and persuasive "silent witness", that left me in a state of reasonable doubt that Ms. Desmond committed the alleged offences after I considered the totality of the evidence. In other words, having considered the totality of the evidence, particularly video evidence, I am not satisfied that the Crown disproved that Ms. Desmond was acting in defence of or for the protection of Mr. Ehler when she is alleged to have committed the following offences:

- did in committing an assault on Kirk MacDonnell use a weapon, to wit glass picture frame and a knife on Kirk MacDonnell contrary to s. 267(a) of the *Criminal Code*, count 1;
- carry a weapon, to wit a knife, for a purpose dangerous to the public peace, contrary to s. 88 of the *Criminal Code*, count 2;

- did gesture convey a threat to Kirk MacDonnell to cause bodily harm to Kirk MacDonnell, contrary to s. 264.1(1)(a) of the *Criminal Code*, count 3;
- did in committing an assault on Elijah Watts use a weapon, to wit a knife, contrary to s. 267(a) of the *Criminal Code*; count 5 and,
- did by gesture convey a threat to Elijah Watts to cause bodily harm to Elijah Watts, contrary to s. 264.1(1)(a) of the *Criminal Code*.

[416] Again, I am mindful the proper approach to the burden of proof is to consider all the evidence together and not to assess individual items of evidence in isolation. To put it another way, I must consider the totality of the evidence in determining whether the Crown discharged its burden of proving the offences beyond a reasonable doubt.

[417] Whether Ms. Desmond likely committed the alleged offences, or probably committed the offences, it is not enough to find her guilty of the offences, as I have to be satisfied on the totality of the evidence that she committed the offences beyond a reasonable doubt.

[418] I am not satisfied beyond a reasonable doubt that Ms. Desmond committed the alleged offences, the six alleged offences in the Indictment, based on the totality of the evidence, which left me in a state of reasonable doubt.

Again, it is worth repeating that in a criminal trial, the Crown has the burden to prove beyond a reasonable doubt that Ms. Desmond committed the alleged offences. As the Supreme Court of Canada held, this burden of proof lies “much closer to absolute certainty than to a balance of probabilities and it is not sufficient to conclude that an accused person is - probably or likely guilty for a conviction to be registered.

[419] Therefore, for all the foregoing reasons, I find Ms. Desmond not guilty of committing the alleged six offences as described in the six count Indictment.

Hoskins, J.

