

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Campbell, 2011 NSPC 61

Date: 20110908

Docket: 2001562, 2001563
2001564, 2001565
2001566

Registry: Sydney

Between:

Her Majesty the Queen

Plaintiff

-and-

Clinton W. Campbell

Defendant

DECISION

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Judge Jean M. Whalen, J.P.C.

Heard: September 8, 2011

Charges: Sections 236(a), 264.1(1)(a) x 2, 430(4) x 2, *Criminal Code*

Counsel: Kathryn Pentz, Q.C., and Gerald MacDonald, for the Crown
Nash Brogan, for the Defence

Introduction

[1.] The defendant, Clinton Campbell, and his common law spouse, Cathy Long, were neighbours and friends with Mary and Dan MacIntosh. The day before Dan MacIntosh's untimely death Mary MacIntosh had called the defendant's wife, Cathy Long, and asked if they would come over and help cut their wood because Dan Henry MacIntosh was still "disabled" from an operation he had the previous July.

[2.] Clinton Campbell and Cathy Long came over and split the wood. Mary MacIntosh invited them to stay for supper that evening. They were drinking alcohol and eating the food that had been prepared.

[3.] As a result of words said and actions between the defendant and Ron Gillis, Mr. Campbell was asked to leave by Mary MacIntosh. Subsequently, Dan MacIntosh got involved and he ended up dead on his living room floor.

[4.] Mr. Campbell was charged with second degree murder, but the Crown amended the charge to manslaughter; s. 236(a) and the matter was set for trial in Provincial Court.

I. ISSUES

[5.] (1) Has the Crown proven elements of each offence beyond a reasonable doubt.

(2) Is the defence of necessity available to the defendant.

(3) Is the defence of self defence available to the defendant given all of the circumstances.

II. Review of Evidence

[6.] The Crown called 23 witnesses. Much of their testimony was not challenged by defence counsel. Many issues were agreed upon, such as the qualification of experts and the chain of continuity regarding the 34 exhibits tendered by the Crown.

[7.] Therefore, I will not review in length all of the evidence of the Crown witnesses, only those that I feel are pertinent to the issue at hand. The others may be interspersed throughout my decision.

Mary MacIntosh

[8.] Mary MacIntosh testified that she was the wife of the deceased, Dan MacIntosh. On January 23, 2009, she called Cathy Long, the common law spouse

of the Defendant, Clinton Campbell, and asked them to come to cut wood for her and her husband. Mr. MacIntosh had surgery in July of 2008 and apparently it still affected him.

[9.] The Defendant and Cathy Long arrived around 1:00 pm before their children got out of school. Mrs. MacIntosh indicated that both individuals had been to her house before. They lived about one kilometre away. They finished bringing the wood in by about three or four that afternoon. Mrs. MacIntosh indicated that Cathy Long had gone to the bus stop to get her children and returned to her home with the children. Mrs. MacIntosh indicated she had stayed behind to begin preparing supper.

[10.] When Cathy Long returned, Mrs. MacIntosh indicated that they went to the store. Mrs. MacIntosh testified that she had not been drinking up to this point. But, Dan MacIntosh had a drink she said around 2:00 pm. He was an alcoholic and he drank often.

[11.] Mrs. MacIntosh indicated that at one point in the afternoon Mr. MacIntosh went to get his power saw that Mr. Reginato had fixed for him. Mrs. MacIntosh had gone to the store. She said she picked up liquor and groceries in order to prepare supper.

[12.] While she prepared the food, Cathy was with her in the kitchen, Dan and Clint were in the living room, and the children were in the bedroom watching television.

[13.] Ron Gillis, stopped by and said he would return after playing darts. Mr. Gillis is their neighbour and is at their home often. Mrs. MacIntosh said that Mr. Gillis did not speak with Cathy at this time.

[14.] Mrs. MacIntosh testified that they ate supper, then Mrs. MacIntosh and Cathy Long went back to the liquor store for more beer.

[15.] She indicated that Clint Campbell and Dan MacIntosh were drinking beer and vodka [respectively]. She had one beer up to this point. She testified that Cathy was, "sipping". She may have had two drinks all evening.

[16.] Stephen MacIntosh, Dan's cousin, showed up around 9:00 pm. He had a few cans of beer with him. He was not there long before he and Clint Campbell went to the liquor store, but it was closed.

[17.] She testified that Clint and Stephen knew each other, but she wouldn't call them friends.

[18.] After the second trip to the liquor store, Mrs. MacIntosh indicated that she suggested to Clint and Cathy that they may as well stay the night. She had bought beer for Clint, as well as a bottle of Fireball and a Dooleys.

[19.] Mrs. MacIntosh testified that Stephen and Clint returned about an hour later. She said that Cathy was upset they had not returned right away. Mrs. MacIntosh and Cathy Long were cleaning up from supper. Dan MacIntosh was in the living room on the couch, and she said that he was in and out of sleep. She also indicated on direct examination that this was his usual routine in the evening, and she said that if Mr. MacIntosh was startled he does not know what is going on. [I would note on cross exam there was a different answer.]

[20.] Mrs. MacIntosh testified that Ron Gillis returned shortly after Stephen and Clint returned to the house. She testified Clint started in on Steve wanting to fight right after Cathy jumped on Clint for not coming right back to the house. Mrs. MacIntosh did not know if it was real or play, but would not allow it in her house. She got Steve to sit on the couch next to Dan and Clint sat on the other chesterfield, meaning the loveseat. She testified that Cathy was next to Clint, and that Ron Gillis was between kitchen and the living room because he was snacking on the chicken wings and potato skins that she had prepared earlier in the evening for supper.

[21.] Mrs. MacIntosh testified that Clint “started” on Ronnie. He was calling him names such as wuss and pussy. Mrs. MacIntosh told Clint, “It was not going to happen in my house.”

[22.] She indicated she was not initially paying attention, but then she heard arguing so she jumped in. She said she was trying to get Clint out the door because she knew an argument was going to start.

[23.] Mrs. MacIntosh said she was not being forceful with Clint Campbell and had him almost out the door when Dan woke up. She does not recall her tone of voice, or where Cathy and the children were at this point. She does not recall where Ron Gillis was either. She said the next thing she remembered was her husband was on the ground. She said that she remembers vaguely a shadow on her left and now realizes it was Dan, her husband.

[24.] She testified that Clint, who was at the front door in front of her, grabbed the gun from Dan. She heard Clint say “a gun” and he picked it up. Mrs. MacIntosh said her husband Dan had the gun as a cane, the barrel to the floor and the butt in his hand. She did not see the gun raised, only when Clint picked it up. She testified that Clint hit Dan with the gun and Dan fell to the floor.

[25.] She testified, Ron subsequently got Clint outside of the house. She does not know how many times Clint struck Dan. All she does know is that Clint came up to Ron's face, but she did not see any physical contact between the two. The next thing Mary does remember is Ron holding the porch door and calling 911.

[26.] Mrs. MacIntosh testified that she only moved Dan MacIntosh's head to put it on her lap. She stated that Ron Gillis was holding the door closed so Clint could not come back in. Mrs. MacIntosh did not realize or know if Clint had left her home. She testified that Stephen MacIntosh was still on the couch, "comatose". Mrs. MacIntosh does recall the police arriving and that they took her to Ron's to use the bathroom. On the way over there, she saw Ron's car smashed and blood on it.

[27.] Mrs. MacIntosh testified that Mr. MacIntosh had a previous injury on his nose from the scope of the gun. She said it had recoiled when he tried to shoot a coyote a few days before that. She indicated that on that day she had to hold the barrel of the gun as Mr. MacIntosh was too frail.

[28.] Mrs. MacIntosh was shown a series of photographs in Exhibit 1 and identified picture number 4, which contained the house and the door "where the yellow light is" as the front door and that Clint was outside that door.

[29.] She described the damage to her door saying it was smashed in, the locks and knobs broken. She said the door was only a month old and that it cost about eighty-eight hundred dollars to repair the damage from that night.

[30.] Mrs. MacIntosh indicates that she gave her first statement to the police the same night as the incident, and then she gave a second statement as she began to recall more. She indicated that when she gave the initial statement she was in shock.

[31.] Mrs. MacIntosh says that Clint Campbell and Cathy Long knew how Mr. MacIntosh got the cut on his nose because they had talked about it. She also indicated that Mr. MacIntosh had been consuming “grass” that evening besides the alcohol and his medication.

[32.] On cross examination Mrs. MacIntosh says that she has known Clint for quite awhile, and that there was no animosity between them. She indicated that she had about seven or eight beer that day but she was not really feeling the affects because it was over such a long period of time. She says that there was marijuana present and that Mr. MacIntosh had just started using it for pain management. She said that she did not see Cathy, Clint, Steve or Ron smoke any marijuana.

[33.] She says Clint did not say anything about wrestling. He called Ron a wuss and she broke it up. She said she told the Defendant to leave. She indicated she did not need to push him as he was leaving the house. She said she was in the porch and Clint did not walk to the bottom of the steps as she recalls.

[34.] She testified everything happened very fast and in a very short period of time. Mrs. MacIntosh was sure her husband was asleep and did not hear the argument between Clint Campbell and Ron Gillis. Mrs. MacIntosh says her husband picked up the gun to use it as a cane. He was not trying to scare Clint. She says she does not recall telling the police that that's what he was doing. Mrs. MacIntosh did not see her husband get off the couch as she was in the porch and he was behind her. Mrs. MacIntosh testified she saw Clint grab the butt of the gun. She said her husband had two hands on the butt of the gun and the barrel was on the floor. She does not recall how her husband's hands were placed on the gun as it happened so fast.

[35.] Mrs. MacIntosh denies ever smoking marijuana with Cathy Long or Ron Gillis.

[36.] She said it is possible that Cathy Long was at the house without her husband because she had taken her to the store before. Mrs. MacIntosh denies that her

husband would be spooked or confused when he wakes up from “an alcoholic” sleep.

[37.] Mrs. MacIntosh can not give a reason why Dan MacIntosh walked to the door. She only recalls him saying, “Please leave my house.” She does not recall him saying “I’ll show them.” She testified that Clint reached in and grabbed it, meaning the gun. Mrs. MacIntosh said they did not fall on top of one another. She does not know how Mr. Campbell grabbed the gun as she was not watching. When asked by Defence Counsel, “Was Clint disarming your husband?”, she shrugged and said yes.

[38.] Mrs. MacIntosh said she had to point and hold up the gun for Mr. MacIntosh to shoot the coyote as he was too feeble to hold it, and the scope came back and hit him in the nose. She said they were shooting at coyotes a couple of times a month. There was no trigger lock on the gun. She has no recollection of Cathy and the children leaving. She says that Cathy was sober that night.

[39.] She agrees that Mr. MacIntosh was well experienced with rifles and a good hunter in his day. Mrs. MacIntosh thought there was going to be an argument between Ron and Clint.

Ron Leo Gillis

[40.] Mr. Gillis testified he is neighbours with Mary and Dan MacIntosh and he has known them for over fifteen years. He stated he also knows Stephen MacIntosh and has socialized with him.

[41.] He has met Cathy Long approximately three or four times when he has dropped in to see Dan, which he says he does daily. Mr. Gillis met Clint for the first time the day they were cutting wood for Dan and Mary. He said that he had dropped off a chainsaw for them to cut the wood. They have never been formally introduced. He said that when he stopped by the home it was around four or four thirty, and that Mary and Cathy were preparing food. He said he left shortly after, but said he would come back after he finished playing darts. He said he arrived at darts around 7:10 PM and left there to return to Dan and Mary's at about 10:15. During the period of time he was playing darts he said he drank three beer.

[42.] He testified that he arrived at Dan and Mary's between 10:25 and 10:30 PM. He indicated that Dan, Mary and Cathy were there when he arrived.

[43.] Mr. Gillis says he drives an Impala and it was parked in the driveway, and that there was no damage when he arrived that evening.

[44.] Mr. Gillis places Dan on the red couch, Mary in the rocking chair [see Exhibit #1 - #089].

[45.] He says that evening there were four of them in the living room and Mr. Gillis describes it as light chatter. He testified that Dan was awake prior to the incident, and though drinking, he seemed to be lucid as they were discussing something with details.

[46.] He said that there was a light hearted discussion regarding the whereabouts of Clint and Steve as they had been gone for over an hour.

[47.] Mr. Gillis said he opened a beer that evening, but he does not think that he finished it.

[48.] He testified that the Defendant and Steve MacIntosh returned to the house somewhere between 11:17 pm and 11:27 pm. He noted the time as there was a clock on the wall. He said it was evident that they had been drinking and one was carrying a bottle of whiskey.

[49.] Cathy asked Clint why he had not called and Clint said something to Steve but he does not know or he is not sure what was said. It was something like, "I'll smash you" or "I'll beat you." He said Stephen went to sit on the couch. Mr. Gillis testified that he felt this comment did not sound overly serious to him. He

said he did not notice any contact between the two and he described it as “just guys jawing.”

[50.] He said subsequently Stephen went to sleep on the couch and Dan and Clint were passing a bottle around taking a drink. He said later that evening Clint said first of all “You’re a big fellow. I would like to wrestle you without your shirt on out on the front lawn.” Mr. Gillis testified that he told Mr. Campbell that was not going to happen. Mr. Gillis stated he did not know if Mr. Campbell was being serious, aggressive, or just carrying on. He testified that Mr. Campbell said that he was scared and called him a pussy. Mr. Gillis said, “I took it as drunk talk.” Shortly thereafter he then decided he was going to leave and he said to Dan that he had to “Go to his car and look for his keys.” He then proceeded to walk to the door in the living room and he testified that Clint Campbell jumped up, said something to him, and then head butted him in the chest.

[51.] He said Clint Campbell called him a pussy and cocked his fist. Mr. Gillis testified he “Knocked him down and pinned him on the loveseat.” Mr. Gillis testified he told him to “smarten up” and he was leaving. He stated he hit him a few times, “but not too hard.” It was at this time he said that Mary and Cathy jumped in. Cathy Long said she was getting the kids and leaving, and Clint

Campbell he says was outside screaming. He testified that Clint Campbell was continuing to yell pussy and stating, "I'll kill you. I'll show you."

[52.] Mr. Gillis did not notice Dan MacIntosh get up from the couch because he was watching out the window and could see Mr. Campbell on the step.

[53.] He stated the Defendant was looking in at him and yelling threats. Mr. MacIntosh was behind Mr. Gillis and to his left. Mary and Cathy were ushering Mr. Campbell out the door, but Mr. Campbell did not want to let it go.

[54.] Mr. Gillis testified he saw Mr. MacIntosh walk to the door with a rifle in his right hand with the barrel pointed at the ground. He heard Mr. MacIntosh say "Enough of this bullshit. Get away from my house." He stated that Clint came "barrelling up the steps." Dan went through the door to the porch. Mr. Gillis said he heard a crack and Dan came back out through the porch door into the living room.

[55.] Mr. Gillis testified that Clint was on top of Dan and he came down with the butt of the gun on Dan's mouth. He then stated that Mr. Campbell had the gun with two hands like a stick crossways raised and saying "Who the fuck are you. I'll show you."

[56.] It was at this time that Mr. Gillis pulled at the gun and the Defendant came with it. He then tried to twist the gun out Mr. Campbell's hands. Mr. Gillis said he had to drive his right elbow into the Defendant's face and the Defendant subsequently let go of the gun.

[57.] The girls grabbed Mr. Campbell and Mr. Gillis went to the bedroom, checked the chamber of the gun and hid the gun under the bed. He then called 911 from the bedroom. When he went back to the living room, Cathy and Clint were gone and Stephen was still asleep on the couch.

[58.] He observed Dan's lip was split and his mouth was full of blood. He tried to scoop the blood away to give mouth to mouth resuscitation. He testified that Clint Campbell returned and Mr. Gillis locked the door. Mr. Gillis testified that Mr. Campbell was banging on the door hollering "let me in." Mr. Gillis went back to work on Dan. The porch door bolted open again. It was Mr. Campbell and Mr. Gillis subsequently had to push Mr. Campbell back outdoors. Mr. Gillis closed the door and had to prop his foot at the bottom and place his two hands at the top of the door so that Mr. Campbell could not get back in.

[59.] Mr. Gillis testified that Mr. Campbell was blaming him yelling "It's all my fault." Mr. Gillis told him he was in enough trouble and to go home. Mr. Gillis

said he could not leave the door as he was worried that Mr. Campbell might return and get back into the house so Mary had to take over CPR on Dan. He said Mr. Campbell was still outside, hollering “I’m gonna get you fucker.”

[60.] Mr. Gillis said he threw some things at Steve trying to wake him up but to no avail. He remained passed out on the couch.

[61.] When the police arrived, Mr. Campbell was on the step and Mr. Gillis testified he heard them say, “Put your hands up.”

[62.] Mr. Gillis indicated that Steve MacIntosh woke up, Mary was crying, and the police removed them from the living room.

[63.] He only moved Dan’s head to tilt it sideways when he was trying to resuscitate him. He did not move the rest of his body.

[64.] Mr. Gillis further describes Dan coming through the door, he stated “I heard a crack and then Dan fell back. He did not have his hands on the gun.” He stated that Mr. MacIntosh’s head hit the floor and then a split second later he was hit with the gun by Mr. Campbell. Mr. Gillis said he never saw Dan raise the gun. He does admit that from his position in the living room that he lost sight of Dan for second and then he saw Dan fall back through the door into the living room. Mr. Gillis does acknowledge telling the police something different in his statement.

[65.] Mr. Gillis says the Defendant was off the step where Mary's car was parked and that he saw Mr. Campbell rush up as Dan was going to the door. Mr. Gillis said he did not observe Mr. Campbell's car because it was over by the garage. He did not see any headlights shining into the house. (B. says in her statement that the truck was by the garage. Cathy Long says she moved truck and it was facing the house.)

[66.] Mr. Gillis identifies his car in [Exhibit #1- photo #007] with a smashed windshield. The cost was between three hundred and three hundred and fifty dollars, and he indicated that damage was not done prior to him returning to Mr. MacIntosh's house.

[67.] On cross examination Mr. Gillis said that the head butt by Mr. Campbell was the start of the incident. He indicated he took it seriously. He hit Mr. Campbell in the face twice and pulled his hair to pin him down on the loveseat.

[68.] Mr. Gillis says Dan was awake during the whole incident because he was talking to him minutes before the incident.

[69.] On cross examination Defence counsel put Mr. Gillis' statement that he had given to the police to him and he quoted "...thought he would take the gun and

scare the shit out...” meaning the Defendant. Mr. Gillis stated that it was an impression that he told the police that that’s what he thought was taking place.

[70.] Mr. Gillis agreed that Mr. Campbell was already out of the house when Dan got up with the gun.

[71.] Mr. Gillis is unable to say what happened in the porch because he could not see Dan out in the porch or how he was holding the gun when he was out in the porch.

[72.] There is a discrepancy in what Mr. Gillis told the police he heard Mr. Campbell say and what he testified to at trial. He was asked did Clint say “How dare you point the rifle at me?” and Mr. Gillis replied “No.” Mr. Gillis testified that he heard Mr. Campbell say, “I’ll show you how to use a gun.” Mr. Gillis testified that Dan was falling to the floor and that Clint followed him coming through the door and when Mr. Campbell came through the door he had possession of the gun.

[73.] Mr. Gillis is not saying that the two fell together. He is saying that Dan came through the door, and then Clint came after and came down on top of Dan.

[74.] On cross examination Mr. Gillis says that he did not hear Mr. Campbell say “How dare you point a fucking gun at me.” Mr. Gillis says he only remembers now Mr. Campbell saying “How dare you point a gun at me.”

[75.] Mr. Gillis agreed that Mr. Campbell did not run or flee the scene. He says that he recalls Mr. Campbell saying “Let me in.” He does not recall Mr. Campbell saying “Let me help.”

Stephen MacIntosh

[76.] Stephen MacIntosh testified that he stopped in at Dan’s to have a beer probably around 8:30 pm that evening. He brought an eight pack with him. He testified that Mr. Campbell and he left to get more liquor about ten minutes before ten. It was his intention to drive to the liquor store. However, the liquor store was closed, so they went to Ray Sherwood’s house and while at Ray Sherwood’s they drank some rum and some wine. Mr. MacIntosh says they were there for about 45 minutes.

[77.] He does not recall being back at the residence or any other interaction with Clinton Campbell. He testified he woke up and Dan was on the floor, and then the next thing he remembered he woke up in a jail cell.

Catherine Newton

[78.] Mrs. Newton testified that she knows Mary MacIntosh because her husband was good friends with Dan MacIntosh. Mrs. Newton testified that Mary MacIntosh called her around 6:30 am and asked if she could come to Catherine's house.

[79.] Mrs. MacIntosh arrived at Mrs. Newton's house in a police van about ten minutes later. She described her as crying and she simply said "Dan is dead."

[80.] Mrs. Newton said she made coffee and Mrs. MacIntosh was rambling and she really could not understand "...half of what she was saying." Mrs. MacIntosh took a shower and then she said she wanted to go to tell Dan's mother. She stated Mrs. MacIntosh did not say what happened. She was trying to figure out what happened.

[81.] She took Mrs. MacIntosh to her mother-in-law's home, the home of Norma and Harold Delaney. She stated there were a two people there, plus a few police officers when they arrived. She indicated that Mrs. MacIntosh was talking about a fight but the witness does not think she really knew what happened. It was something about Clint and Ronnie.

[82.] She testified that Mrs. MacIntosh made one phone call and that Mrs. MacIntosh did not tell what she remembered. Mrs. Newton said that Mrs. MacIntosh was at the house for one hour and during that time nothing that Mrs. MacIntosh said made any sense.

[83.] She said that Mrs. MacIntosh stayed approximately two or three days until her house was released.

Allister Edwards, Paramedic

[84.] Mr. Edwards testified that he arrived on scene at 1:46 am and that the police were already on scene when he arrived. As he and his partner approached the house, they saw a police officer struggling with a gentleman. At the officer's request, the paramedic told the police in the house that the police officer outside needed help. When Mr. Edwards entered the house there was a man on the floor and it looked like he had no vital signs. There was a lady on her knees cradling this man in her arms.

[85.] They checked the gentleman, later identified as Mr. MacIntosh, and there were no vital signs – “that means no pulse or respiration.” “The defibrillator detected no shockable activity.” They began CPR.

[86.] Mr. Edwards observed the following as he attempted to resuscitate Mr. MacIntosh: (1.) There was a lot of blood pooled in his airway which made it hard to see. (2.) His lip was split. They used a suction machine to try and clear his airway.

[87.] As they were trying to clear the airway, the paramedic noticed something in Mr. MacIntosh's airway that appeared to be teeth. Mr. Edwards used an instrument to go into the airway and it turned out that it was in fact Mr. MacIntosh's partial plate, obstructing his airway. It was removed by the paramedic and placed off to one side. (This partial plate was subsequently seized by the police. Exhibit #12)

[88.] Mr. Edwards testified that Mr. MacIntosh was moved a couple of feet away from the loveseat so that they could start a second intravenous. A number of procedures were tried by the paramedics, including administering medication, all to no avail. Mr. MacIntosh was pronounced dead at 2:27 am.

Lori Campbell (qualified as an expert)

[89.] Toxicologist from the RCMP Forensic Lab testified that Dan MacIntosh's blood alcohol level at the time of his death was 320 millilitres. This level is quite high and it would be associated with a "chronic drinker" who was "likely intoxicated at the time."

[90.] Some individuals who are more experienced drinkers may be able to function at this level (speak, walk, etc.), however, you can not mask the impairing affects on one's mental capacity.

[91.] For example, any sudden emergency, when sober you could perceive/plan; when impaired you are incapable of dealing with what you perceive only at the last second.

[92.] The drug *Librax* >1000 nano/ml was found in Mr. MacIntosh's blood. When combined with the alcohol, it will increase the effect (nervous system depressant).

[93.] The deceased's medication and alcohol were not meant to be mixed together. The high levels suggest fairly recent use. The medications in the system may have an effect on how one perceives his/her environment. It is a recipe for disaster in an emergency situation, the person may not react appropriately or quickly enough.

Dr. Matthew Bowes (qualified as an expert)

[94.] After examination of the deceased, Dan MacIntosh, Dr. Bowes concluded the cause of death was: asphyxia due to choking on blood, tissue and a fragment of denture due to blunt traumatic injuries of the head.

[95.] Blunt traumatic injuries of the head and neck with:

- (1.) Lacerations and abrasions of the face
- (2.) Comminuted fracture of the left face

[96.] Dr. Bowes also concluded based on all the information the he received that the most:

“...reasonable explanation for his death is that the blow or blows to this man’s mouth and face caused the denture to break, and that the fragment or fragments of denture, along with blood and tissue from his wounds, occluded (blocked) his airway. Since alcohol and chlordiazepaxide are known to cause central nervous system impairment (and thus negatively effect an individual’s ability to protect their airway). I believe it is reasonable to conclude that alcohol and chlorigazepaxide intoxication contributed to this man’s death.”

[97.] Specific finding during the external examination revealed the nose was not fractured and the nasal septum was intact. The upper jaw was edentulous (means having no teeth).

Evidence of Injury:

[98.] Skin of left forehead just above left eye had two vertical lacerations (below skin) exam revealed haemorrhage. Skin of upper left cheek has an abrasion. The left upper lip has laceration that involves the full thickness of the lip (through this laceration a comminuted fracture of the alveolar ridge and roof of the maxillary sinus can be seen.” There is also diffuse bruising of the left face around the mouth and nose. Left lower incisor “traumatically” lost.

Joy Kearsey (DNA – Forensic Report) (Exhibit 30)

[99.] This report was entered by consent and Ms. Kearney was not called to testify.

[100.] Mr. Campbell's blood was found on four samples:

- (1) Exhibit Number 4 – front of residence
- (2) Exhibit Number 6 – stain – wall C – residence
- (3) Exhibit Number 7 – stain – wall D – residence
- (4) Exhibit Number 13A5 – swab – barrel end of rifle

[101.] Mr. MacIntosh's blood was found in on Exhibit 13C1 – butt end of rifle.

B. C.

[102.] B. C. was almost nine when this incident took place. At the time of trial she was 10 years old. Her statement was videotaped on February 4, 2009, at the offices of the Children's Aid Society of Cape Breton. By consent of counsel, the Crown tendered her statement pursuant to s. 715.1 of the *Criminal Code* and after B. promised to tell the truth, we watched the videotaped statement.

[103.] B. said her Dad and "Cement" (Ron Gillis) were fighting. Her father jumped on Cement. It took place on the couch. Cement was on the side (doorway to the kitchen) and Dan was on the other side. Another guy was asleep. Because they all got in a fight, they did not want them to stay, that is why they left. Her mother told her Cement was saying bad stuff about Dad.

[104.] She was putting her shoes on by the couch, her mom and sister were beside her. Her mother took them out to the truck. (Parked in front of the garage.)

[105.] While in the truck she saw Mary push her Dad out and talk to him. It was a little push because he wouldn't get out. Her father turned to go to the truck, but Dan ran with the gun and her father went back and hit him with the end of the gun and then went back to the truck. Then they left.

[106.] B. said she was not able to hear anything. Dan was standing in the doorway, Mary was on the steps, in the way of the gun. Her Dad turned and went back (he was standing on ground.)

[107.] Her father hit Dan on the side of his face and he fell. She saw her Dad hit Dan once.

[108.] They all stayed in the truck until her mother saw Dan with the gun. Her mother got out and hollered to her father. He turned around and went up the step and hit Dan with the end of the gun. (The big part where it...sits on your shoulder).

[109.] She saw Dan raise the gun before her father got to walk anywhere.

[110.] They, meaning Mary and her father, were grabbing for the gun, but her father got the gun and hit Dan in the face. He grabbed it in the middle. Later she

says her Mom yelled at Dan, then her father turned and looked at Dan; he walked up the step to get it.

[111.] Her Dad came back to the truck and on his way she saw him throw something at Cement's car. It might have been a stick and it may have hit the window.

[112.] Her father said something when he got in the truck but she can't remember; but he was okay when he got in the truck.

[113.] B. stood up to demonstrate how high Dan raised the gun. She qualifies her demonstration by saying "he couldn't really raise it because he was drunk." Later at p.23 "...couldn't raise it because he was too drunk"

[114.] B. said Dan had showed her father and everyone the gun about three weeks before [this incident]. She saw it in the front room, but it wasn't loaded.

[115.] B. did not see the gun that night until Dan raised it. She "thinks it was probably loaded but [maybe not] because he could have forgot to load it because he was so drunk and stuff." B. thinks he was drunk because there was beer there and he's a real alcoholic.

[116.] She said Cement was drinking, her father had three or four and her mom only had one all night “And it lasted a long time.” Mary had some.

[117.] B. stated “Dad was doing it to protect us though” Why do you say?
“Because Dan could have hit one of us with it.”

[118.] [p.23] He couldn't raise gun because too drunk. Drunk means he drank too much beer and stuff. [p.24] He had more than anyone else. Alcoholic means drink too much beer and stuff... like everyday... all the time. [p.24] She did not hear the fight between Cement and her Dad but her Mom told her he (Dad) stood up for himself. [p.25] B. says the truck was facing the garage. It was close to Cement's car – [p.26].

[119.] B. thinks when her dad hit Dan with the gun, Cement walked over... she saw someone.

[120.] [p.27] B. remembers her father getting into other fights but not getting into that much trouble.

On Cross Examination

[121.] Her Mom told her to duck down because she saw he gun; they ducked for four or five seconds then popped back up. The gun was “kinda up and down, trying to raise it.”

Cathy Long

[122.] There was a joint submission by counsel that Ms. Long be called as a “Court witness”. Based on submissions the Court agreed and called Ms. Long. Both Crown and Defence were given the opportunity to examine Ms. Long, although Defence counsel did not avail himself of that opportunity.

[123.] Ms. Long testified she has known Mary MacIntosh for a year, but her husband, Clinton Campbell, has known her longer. They were all friends and had no problems with Dan and Mary.

[124.] Mary had called and asked them to cut and split wood because Dan was unable. They arrived in the early afternoon and cut, split and piled the wood. Dan did not help. He had gone to get his saw. There was no drinking at this time. When they were getting ready to leave, Mary told them to stay for supper for doing the wood.

[125.] So Mary went to get the kids from school (at the bus stop). When she returned Dan was home. Then she and Mary went to the store to get groceries and beer. Mary wanted to give Clint beer for helping because she knew he wouldn't take any money. Ms. Long thinks she had three beer all evening.

[126.] At the store Mary bought a case of beer for herself and for Clint, and things she wanted for supper.

[127.] Ron Gillis stopped by - he talked with Mary and her in the kitchen. He had a beer. He left, but she is not sure what time. Clint had met Ron before.

[128.] They (Mary and Cathy) went to the liquor store again. They got 'fireball'. Stephen MacIntosh was there when they got back. Everyone was drinking. She may have had a beer. Clint was drinking beer; she doesn't know if he had liquor. She denies when he drinks hard liquor his behaviour changes; but admits he is different.

Q. Does hard liquor change his behaviour?

A. Not different, just not sitting back relaxed.

Q. Not as passive?

A. Yes."

[129.] Ms. Long says they were told about the coyote story. Supper was over and around ten to ten Clint and Stephen went to get more liquor. They were gone over

an hour. She testified she became concerned and upset because they were gone so long. But she does not recall making any comments to Mary or Ron about them being gone so long.

[130.] Ms. Long testified they were drunk when they got back. She was upset and she said the defendant apologized.

[131.] Ms. Long stated [the family] had no plans one way or the other to stay. However, Mary asked later because they were drinking.

[132.] Clint and Stephen were carrying on wrestling and Mary told them to go outside. She says they were just carrying on; bantering back and forth about wrestling. Stephen and Clint were in front of the loveseat. Dan was on the red couch. She was on the loveseat and Mary on the other side of the room. She does not know where Ron was seated. Steve fell asleep, but before that Clint and Stephen had been joking with Ron Gillis about wrestling but he was not interested. Everyone was jovial.

[133.] Ms. Long says Ron Gillis was not hitting on her. There was no reason to think he was. She does not recall Clint calling Ron “pussy” but does say his voice was different with Clint than with her. She does not recall name calling. She says Dan was awake and talking.

[134.] Ms. Long testified it was Ronnie who first attacked Clint. He walked over to Clint and got in front of him and said something like “I don’t know you, I don’t like you, I don’t like your attitude.” They were standing and grabbing each other. She did not see her husband head butt Ron Gillis.

[135.] Ms. Long went to get the girls from the bedroom (they were watching tv). She says she turned and saw Ronnie reach over Mary and hit Clinton. The girls put their shoes and jackets on in the porch. She was not paying attention to Ron and Clint at this point because she was concerned about her children. She rushed the girls to the truck.

[136.] The truck was parked towards the garage, but she backed the truck up so it was now facing the other cars in the driveway and the front of the house. She was waiting for Clint.

[137.] Ms. Long testified Clint came out fairly quick after they got out – a few seconds [in her statement she says a couple of minutes]. She didn’t see anyone behind him, then she saw Mary, then she saw Dan coming out with a gun after Clint. She does not know who came out first and whether she [Mary] was behind or in front of Dan.

[138.] Ms. Long testified she does not know how Dan was carrying the gun, but she says she saw him point it at Clint; she pulled the girls to her so they wouldn't see anything.

[139.] Ms. Long stated Clint and Dan were struggling over the gun and she got out of the truck. She then went into the house.

[140.] She is not sure if Dan said "...teach you a lesson boy" [she has no true recollection]. She is not sure if the windows were up but the truck engine was running.

[141.] She testified Dan did not come off the steps, that Clinton turned to go back to Dan. They ended up in the doorway struggling for the gun.

[142.] In her statement she said Dan was off the steps and Clinton gave it a push. At trial she testified that she saw the motion of gun go down – she didn't see it hit Dan; she assumed there was contact because when she walked in the house she saw Dan.

[143.] Ms. Long said she only saw what went on at the front door. She saw nothing in the porch.

[144.] She does not know why she went back in the house. She saw Dan, she didn't know where Clint was.

[145.] When Clint came out of the house and was walking towards the truck she saw him smash Ron's vehicle.

[146.] Ms. Long testified she does not recall Clint saying anything on the way home. She did tell police that the Accused was upset and that he went back to Dan's. She did not try and stop him.

Clinton Campbell

[147.] Mr. Clinton Campbell testified that he arrived at Dan and Mary's house between 11:30 am and 12 noon to put wood away. He stated it took about one hour and forty five minutes to do that.

[148.] Dan was there when he first arrived, but then he took a saw to get fixed. Exhibit 1, photo 99 is a picture of the saw that was similar to what he used. He said it weighs approximately fifteen pounds. He also testified a rifle weighs about eight or nine pounds.

[149.] Mr. Campbell testified that he saw Dan put the saw in the back of the truck by himself with no problems or difficulties. Dan returned with the saw and carried it from the truck to the house with no problems.

[150.] Mr. Campbell says he knew Dan all of his life and he was a friend.

[151.] Mr. Campbell testified he had done chores with Dan about a week and a half before this incident. He blocked and split wood and that Dan loaded the splitter on that occasion. Mr. Campbell said that Dan had no problems or complaints at that time.

[152.] Mr. Campbell testified that approximately one week before the incident he and Dan had carried a fridge, which he said weighed between a hundred and fifty to a hundred and sixty pounds. They had to carry it. They had no dolly to use. He said Dan lifted the bottom end and he does not recall any complaints by Dan on that date.

[153.] Mr. Campbell states that Dan was not feeble. He could do things. He was just slow. He said he acted about seventy years of age, although he was only 48 years old. He said he went to Dan's to help because Dan had asked for help.

[154.] No alcohol was consumed while they were cutting and stacking wood that day. When Cathy Long went to get the kids from school, Mr. Campbell said he had a beer.

[155.] Mr. Campbell indicated that Dan came back to the house between four and four thirty pm and then Mary MacIntosh and Cathy Long went to the grocery store. Mr. Campbell said he remained and talked with Dan about a number of things, including trying to shoot a coyote with the gun and the fact that the scope had hit his nose. Mr. Campbell testified there was no bandage on Dan's nose.

[156.] Mr. Campbell testified that Dan was drinking rum or vodka. He thinks it was vodka. Dan usually mixed it three to one in a large glass; three being the liquor.

[157.] Mr. Campbell said they had supper about seven pm and he had a couple of beer by then. He said Dan had three to four glasses of rum by this point.

[158.] Mr. Campbell indicated that after they had eaten a woman by the name of Cathy Martin showed up and stayed one and a half to two hours. Between eight and eight thirty Cathy Long and Mary MacIntosh made a second trip to get liquor.

[159.] Steven MacIntosh arrived around eight thirty or nine pm and they sat around chatting.

[160.] Earlier in the evening an older couple showed up but they did not stay as Dan was drunk and passed out. Mr. Campbell says he does not know who they were. Mr. Campbell indicated that Dan had a habit of falling asleep and then waking up.

[161.] Ron Gillis dropped in for half an hour before they ate supper. Mr. Campbell said he had a beer and said he might be back.

[162.] Mr. Campbell said that he had met Mr. Gillis a couple of times at Dan and Mary MacIntosh's, however, they were not familiar with one another's company.

[163.] Mr. Campbell indicated that when Ron Gillis came back to the house he had gone to the liquor store with Steven MacIntosh, however, the store was closed so they went to Sherwood's house. They were at Sherwood's for about forty-five minutes. Mr. Campbell said he had one drink while they were there, a glass of wine. He said that Steven MacIntosh had been drinking and when they left Mr. Campbell said Mr. MacIntosh was not in good shape. Mr. MacIntosh had consumed most of the wine.

[164.] Mr. Campbell said that he had five or six beer before he left to go the liquor store. They brought back a bottle of cooler for whoever wanted to drink it.

[165.] Mr. Campbell testified that Cathy Long was upset with him because he did not call. He said he knew this would happen. He testified that he apologized to Cathy and “straightened back up.”

[166.] Mr. Campbell said he sat on the white couch, with Cathy sitting next to him. That can be seen in Exhibit #1, photograph #89. Mr. Campbell testified that Dan was asleep.

[167.] Mr. Campbell testified on the way back from Sherwood’s that he and Steven were talking about wrestling and when they were in the living room Steve looked at Ron Gillis and said “There’s a wrestler for you there.”

[168.] Mr. Campbell said that Mary heard this and “overreacted” by telling them to take it outside. Mr. Campbell said that Ron Gillis told them to take it outside.

[169.] Mr. Campbell says he got up and “shoved Ron”. Mr. Gillis laughed and Mary told Steve and Mr. Campbell to sit down, and he says they did. Mr. Campbell doesn’t recall Dan saying anything at this time.

[170.] By this time Mr. Campbell says that he had six or seven drinks and admits he “was feeling pretty good.”

[171.] As the evening continued, Mr. Campbell says he looked at Ron and he looked mad, and that he thought Mr. Gillis had an attitude. Mr. Campbell says he continued to joke about wrestling but Ron was not going along. Mr. Campbell began asking Mr. Gillis about where he worked, just trying to make conversation. However, Mr. Campbell stated Mr. Gillis was giving him dirty looks. Mr. Campbell then asked him about Billy but he says that Mr. Gillis said “why the fuck are you asking me.”

[172.] Mr. Campbell admitted he was drunk at this time and that Mr. Gillis was sober. He says he decided to stop talking. Then he said Mr. Gillis said, “I don’t know you, I don’t like you.” Mr. Campbell says Mr. Gillis then walked toward him so he got up. Mr. Gillis grabbed onto him so he grabbed Mr. Gillis.

[173.] Mr. Campbell testified that Mary MacIntosh and Cathy Long hollered at them to stop. Cathy Long went to get the kids. Mary MacIntosh came over to Mr. Campbell and told him to leave. Mr. Campbell testified he was not able to because Mr. Gillis had him by his ponytail. Mr. Campbell stated Mary MacIntosh was between them, meaning Ron Gillis and he, and he says that Ron Gillis punched him in the face twice.

[174.] Mr. Campbell testified Mary told Mr. Gillis to let go of Mr. Campbell and Ron did let him go. He said Mary was trying to calm him down, meaning Mr. Campbell. Mr. Campbell said he wanted Mr. Gillis to come outside “now”.

[175.] Cathy Long was now outside as she had walked past him. Mr. Campbell said that Dan did not say anything and he doesn't know if he was still on the couch or not. Mr. Campbell continued to have words with Mr. Gillis as he put his boots on to leave. Mr. Campbell said he got down the steps [Exhibit #1, photo 8] and he was walking on a 45 degree angle to the truck. Mr. Campbell stated he took four or five steps and heard “Dan no gun.” He doesn't know who said it, but Mr. Campbell says he turned around and Dan had a rifle in his hands. Mr. Campbell testified that Dan was saying either “won't or “don't miss.” Mr. Campbell is not sure.

[176.] Mr. Campbell testified that Dan was on the step with the rifle in his two hands. Mr. Campbell goes on to show the court how Dan was holding the gun. Mr. Campbell said that he saw the rifle positioned (the court observation is the barrel is pointing down and both hands are on the gun). Mr. Campbell said, “Dan was going to shoot me or start shooting.” Mr. Campbell said he was 10 to 15 feet away from Dan, (halfway to his car). There was no one else on the step. Mr. Campbell said that Mary was in the doorway behind Dan Henry over his left

shoulder. Mr. Campbell said he turned and rushed Dan, the gun hit him in the face breaking his tooth. Mr. Campbell said the line of sight was “Dan, the gun, me, the truck, it was pointed down at my face.”

[177.] Mr. Campbell testified that the barrel “...is up pointing in my direction”. When asked where by his counsel, Mr. Campbell hesitated and then said “Towards me in the beginning. By the time I get to the top of the steps, it’s in my face, it broke my tooth off.”

[178.] Mr. Campbell indicated he grabbed for the end of the gun with his left hand. He says he twisted it, meaning the gun, up and the barrel was pointing towards the ceiling. He says that Dan would not let go and Mary was grabbing at the gun. Mr. Campbell testified that he is not sure if Dan was hit with the gun. He says he pushed the gun forward and Dan was in front of him. Mr. Campbell testified that he does not recall the position of the gun when he hit the floor, but he says the barrel was pointing up because “that’s what you do when you are in the woods.” Mr. Campbell continued to testify that “It happened in seconds. There was no big long struggle. It happened in an instant.”

[179.] Mr. Campbell stated then Ron grabbed the gun and went to the end of the house. He says “there was a little struggle with Ron.”

[180.] Mr. Campbell stated he saw Dan with blood on his mouth and at this time Cathy and the kids were in the truck. He left and took them home, and then he came back. Mr. Campbell testified that Ron would not let him in and Ron told him that Dan was dead.

[181.] Mr. Campbell said "Let me in, I can help." He said that Mr. Gillis told him that he couldn't let him in and I told him to do something. Mr. Campbell saw Mary on the floor with Dan's head in her lap. It was at this time Mr. Campbell said he hollered to Ron Gillis to wake Steve up, however, Steven wouldn't wake up.

[182.] Mr. Campbell admits to being calm at the beginning, but then he got frustrated and booted the door. He said he started losing it because a man was dying on the floor and nobody was doing anything about it.

[183.] Mr. Campbell testified that the police showed up and handcuffed him. They put him in the cop car and took him to the Correctional Centre. He indicated he had no conversation with his wife and he does not know the first time he talked with her after the arrest but it was some time.

[184.] Mr. Campbell testified that when he was in the doorway he said to Dan “Why the fuck would you pull a gun on us?” Mr. Campbell says “I don’t think I said anything to Ron Gillis.”

[185.] Mr. Campbell testified that when he returned he said to Ron Gillis “Let me in, don’t be so stupid.” Mr. Campbell blamed Ron Gillis for the situation. Mr. Campbell indicated at first he tried to speak rational, but then after a couple of minutes he hollered at him, however, Mr. Campbell does not remember what he said to Mr. Gillis. Mr. Campbell stated “I wanted in the house to help Dan.”

[186.] Mr. Campbell described Dan’s rifle skills as “not the greatest” and that he had never heard of him going out hunting. Mr. Campbell said he didn’t see the rifle in the house that day, however, Dan did show him the rifle a bunch of times before.

[187.] On cross examination Mr. Campbell stated that Dan was able to do the wood but it would have taken him all day. Mr. Campbell did not know that Dan had surgery. Mr. Campbell does not recall Ron Gillis dropping off a chainsaw.

[188.] Mr. Campbell testified that the first time Ron Gillis came he was on the couch. That was at approximately 3:00 pm. He did recall that Mr. Gills was there for about half an hour and left because he had to go to darts.

[189.] Mr. Campbell said that Dan was drinking in the afternoon, and that Dan was awake when Cathy and Mary went to the store.

[190.] Mr. Campbell acknowledged that his plan before he left his house was simply to go and cut the wood and leave; that is not stay at Dan's place because "We knew what would happen if we get to drinking, etc." When Dan returned he said the wood was cut.

[191.] Mr. Campbell said that Mr. Gillis and he never socialized or hung out, that they were not familiar with one another, just had common friends. Mr. Campbell agreed that he did not know Ron Gillis well enough to joke or clown around with him (this contradicts his continued talk to make jokes with Ron Gillis about wrestling.) Mr. Campbell says that there were three trips for liquor. Mr. Campbell also said he knows Sherwood better than Steven MacIntosh and Ron Gillis, and he felt comfortable at Sherwood's. He does admit to feeling the alcohol.

[192.] Later in his cross examination he indicated that evening he was doing well, he was drinking slow, and knows that "This is what happens." He did not feel like sitting for the day and drinking. This was a concern. However, he kept drinking and the initial plan that he had to leave early "...was off the table."

[193.] Mr. Campbell indicated when they left Sherwood's, Steven MacIntosh was feeling the effects of alcohol and says that he was drunk behind the wheel. Mr. Campbell says that he was better but he was not going to take the wheel on the way back. The conversation turned to wrestling in the car on the way back. He is not sure how, but they had been talking about trapping (animals).

[194.] The defendant indicated that it was a light conversation and there were no challenges to wrestling. He had one drink at Sherwood's. Mr. Campbell said, yes he was under the influence of alcohol and Mr. Sherwood's description of him could be very possible. (I would note that later on Mr. Campbell indicates he was drunk.)

[195.] Mr. Campbell thought that he would be yelled at by Cathy Long because he was late.

[196.] Mr. Campbell said that he suggested that he should leave, but Steve MacIntosh took the heat off and everything went back to normal.

[197.] Mr. Campbell testified that he began "horsing around" with Steve MacIntosh. Mr. Campbell said he was giving shoves and elbows and just goofing around with him. He testified that no one wanted any part of wrestling, that when

Steve responded to the wrestling he said Mary just simply overreacted, and Ron was upset for some reason

[198.] Mr. Campbell said he and Steve MacIntosh were jostling and Mary MacIntosh broke them up, and that there was no more jostling afterwards. Steve MacIntosh then went and passed out on the couch.

[199.] Mr. Campbell indicated that Mary MacIntosh continued to go on about wrestling, but Mr. Campbell said it was not directed at him. He still says that Mary MacIntosh overreacted to the jostling.

[200.] Mr. Campbell agrees that if Ron Gillis said that he did not know Mr. Campbell that would be an accurate statement. When Mr. Campbell was asked “What did he say that upset you?” Mr. Campbell replied “Nothing.”

[201.] Mr. Campbell says the first thing he saw was Ron Gillis looking at him with a dirty look. Mr. Campbell stated, “I said go outside and wrestle.” Mr. Campbell said he was not ignoring what Mary was saying but he “...was not asking someone to wrestle.”

[202.] Mr. Campbell says that it was his way of joking because Ron Gillis had this mad look on his face. Mr. Campbell says on cross examination that it is possible that he misunderstood, but “I think I’m right” and Mr. Campbell says

“Instead of saying sorry it was just a joke.” He did not think that it would set the fire going again.

[203.] Mr. Campbell stated that Ron Gillis said “No I don’t want to wrestle.” He did not want to talk about it, meaning wrestling. Mr. Campbell said there was look of anger that did not leave his face.

[204.] Mr. Campbell testified that Ron Gillis was not going to the door to get car keys. He was walking towards him, and Mr. Gillis grabbed him and had him by the arm. Mr. Campbell said it was then that he head butted Mr. Gillis. However, later in this questioning Mr. Campbell was unsure of the sequence of events. He said it was “Not how I remember it.”

[205.] Mr. Campbell denies calling Mr. Gillis names, although he does agree he was probably hollering at him.

[206.] Mr. Campbell said he was talking to Mary MacIntosh trying to tell her he could not go outside because Mr. Gillis had a hold of him. Mr. Campbell stated that Cathy Long went to get the kids and he denies hitting Mr. Gillis that night. Mr. Campbell does not remember the kids going by and out the door.

[207.] Mr. Campbell admits that he was really angry because Mr. Gillis grabbed his ponytail stating, “People not overreacting now because people have to leave.”

[208.] Mr. Campbell put his boots on and just left. He did not see Cathy Long and the kids in the yard.

[209.] Mr. Campbell said that he challenged Mr. Gillis to go outside. He wanted Mr. Gillis to go outside then and now.

[210.] Mr. Campbell was heading to his truck. He did not see Mr. Gillis in the window. He does not think that he was screaming at Mr. Gillis to come outside. Mr. Campbell said that he got in the passenger's side of the truck, the kids were in the middle. There was no discussion on the way home. He agreed that it was odd and said "I was trying to think."

[211.] Mr. Campbell says that "I knew he (Dan) must have got hit with the gun when we were down. I don't remember hitting him." Mr. Campbell says in cross examination there is no disputing that he hit Dan. Then he went on to say that he can't say for sure if he hit him. He says "We struggled with the gun."

[212.] Mr. Campbell testified that "The first I heard of Mary having to raise the gun for Dan was at trial." He says this because "Dan MacIntosh was drunk and stupid, but not frail."

[213.] Mr. Campbell testified that when he was leaving the front of the truck was pointing at the back end of Ron Gillis' car, approximately ten, twelve, fifteen feet

away. He said originally his truck was pointed the other way, but Cathy Long had moved the truck. (She testifies to this.)

[214.] Mr. Campbell says he could not see Ron Gillis. He did not look back, or at least he does not remember looking back at the house. Mr. Campbell says that he was three strides away from the bottom of the steps and he heard the word “gun.”

[215.] He testified that Mary did not have to push him or use much force to get him out of the house as he agreed to go. Mr. Campbell says that Mary was in the doorway as I went down the steps, although I note that he seemed to be unsure about this as he stated “I guess.”

[216.] Mr. Campbell testified that Dan was at the top of the steps and the line of sight was Dan, gun, me and then the truck. He said he was not obscured by Mr. Gillis’ car. He said he was at the front end of Mr. Gillis’ car when he heard the word “gun.” Mr. Campbell said he went for the gun and he said he “was scared to death” as he ran to him.

[217.] Mr. Campbell admits yelling because he was angry when he got up and said “Why the fuck use a gun.” Mr. Campbell says his first contact with Dan was at the top of the steps, “He hung on to it (meaning the gun) until we hit the floor.”

[218.] Mr. Campbell says that he grabbed the muzzle “I wanted to control the muzzle.” Mr. Campbell did not tell Dan to put down the gun. Mr. Campbell says that Dan was at the top of the steps when he was hit.

[219.] Mr. Campbell disagrees with the placement of Dan MacIntosh’s body. He recalls that Dan fell down more towards the end of the couch. Mr. Campbell says Dan’s head was where his knees are [Exhibit #1, photo 89]. Mr. Campbell is not sure if the chainsaw was there the whole night [Exhibit #1, photo # 95].

[220.] Mr. Campbell says that his struggle with Mr. Gillis was where Dan is laying [Exhibit #1, photos 89 and 95].

[221.] Mr. Campbell says that when he got off of Dan, Ron Gillis grabbed the gun. Mr. Campbell denies that he hit Dan a second time.

[222.] Mr. Campbell admits on cross examination that it is possible that he is confused about the exact location of Dan’s body.

[223.] Mr. Campbell says that he had no real control of the gun. (Yet he says that he grabbed the muzzle and butt end to take it from Dan and they struggled.) Mr. Campbell says that it was rush. “When we were falling it was pointing towards the ceiling.”

[224.] Mr. Campbell testified that Dan was to the left of the driveway, and that Mary was over Dan's left shoulder in the driveway. And in the porch Mary was to Mr. Campbell's right, he said "grabbing for the gun." Mr. Campbell does not remember getting hit with an elbow. Mr. Campbell says he lost his tooth with the barrel of the gun. Mr. Campbell says he remembers this for sure.

[225.] Mr. Campbell says that Mr. Gillis took the gun to the bedroom. But he does not remember much of a struggle with Mr. Gillis.

[226.] Mr. Campbell admits to causing damage to the windshield of Mr. Gillis' car. He indicates that he came out of the house, picked up a skateboard and smashed the windshield. Mr. Campbell says that he cannot remember making any threats, but says "Can't see me not saying something."

[227.] Mr. Campbell indicates that he knew Mr. Gillis went down the back room with it, meaning the gun.

[228.] Mr. Campbell went home and then said he was going back. Mr. Campbell said he was not concerned with the rifle or any violence towards him.

[229.] Mr. Campbell does admit to damaging the door of Dan and Mary's home. Mr. Campbell does remember Mr. Gillis saying to him to go home. Mr. Campbell says he heard the 911 tape and said that was him banging on the door. He said he

could see Mary had Dan's head on her lap. Mr. Campbell knew the police were coming but he wanted to get in the house.

[230.] Mr. Campbell said that he had returned to help, not because he was angry at Ron. Mr. Campbell said he told Ron "Let me help." Mr. Campbell says he was calm the first few minutes, but because Ron would not let him in the house, he became upset.

[231.] Mr. Campbell does not remember that EHS could not go in the house because of his presence. Mr. Campbell does admit he was resisting the police officer. Mr. Campbell testified "I was there to help, not to finish off something."

[232.] Mr. Campbell does not remember the moment of impact with Dan's head.

[233.] Mr. Campbell admits "I wasn't thinking at the time." Mr. Campbell says he was there to help and that he did not believe that Dan was dead.

[234.] With respect to the cursing and swearing, Mr. Campbell says he was not referring to Dan or Mary. It was his "guess" that he was referring to the police officer who punched him in the face. Mr. Campbell remembers that he had plastic bags on his hands at the police station, but he does not remember washing his hands.

[235.] Mr. Campbell does agree that he was still angry at Mr. Gillis when he was at the police station. I would note this contradicts what Mr. Campbell said earlier about getting in the house, that he was not angry at Mr. Gillis, but was there to help. Mr. Campbell says the reference to the big guy is Mr. Gillis. Mr. Campbell says he was still angry at Mr. Gillis at that time.

[236.] On redirect Mr. Campbell said the word “wuss” is not a word that he would use. He thinks the cuts on his hand came from the site of the rifle when he was struggling with Ron Gillis.

The Law

[237.] Mr. Campbell has availed himself of s. 34(1), self defence against an unprovoked attack:

34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

Extent of justification

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

R.S., 1985, c. C-46, s. 34;

1992, c. 1, s. 60(F).

[238.] As its name implies, “self-defence” justifies the use of force against a victim where the accused acts for the purpose of protecting him or herself. Self-defence is an inherently purposive thing; it applies to conduct by the accused – specifically the use of force - undertaken for the purpose or with the motive of defending himself.

[239.] The focus should not be on the elements of the offence charged, but on whether the alleged *actus reus* for the offence was undertaken as a self-defence initiative. The inherently purposive nature of self-defence does, however, make it appropriate to rely simultaneously on the defences of self-defence and accident; an *actus reus* that is accidental or not wilful cannot be treated as an attempt at self-defence.

[240.] Self-defence is an ordinary rather than a reverse onus defence. This means that the defence will succeed even if the trier of fact cannot decide whether the accused acted in self-defence, so long as the trier of fact is left in reasonable doubt about it. In other words, for the defence to be operative, the court must be left with a reasonable doubt with respect to each and every element of the defence as

presented (*R. v. Goodstiker* [2007] A.J. No. 307). It is therefore the accused who must be given the benefit of a reasonable doubt left by the evidence. (*R. v. Laking* [2004] O.J. No. 1549).

[241.] As a matter of law, the accused has an evidential burden to show that the particular form of self-defence being relied upon has an air of reality.

[242.] An air of reality will exist where there is evidence upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true. The second part of the question can be rendered by asking whether the evidence put forth is reasonably capable of suggesting the inferences required to acquit the accused.

[243.] The air of reality standard is only met if there is an air of reality to each and every one of the elements or components of a successful defence. This includes those components that require an evaluation of the reasonableness of any beliefs held by an accused.

[244.] The air of reality examination must take account of the relevant burden of proof. The question is whether a properly instructed jury could reasonably be left in doubt about each of the elements of the defence; if the only reasonable

conclusion is that one or more of the elements of the defence has been disproved on the evidence beyond a reasonable doubt, the defence has no air of reality.

[245.] The evidence that is needed to provide an air of reality can come from the Crown case or defence case; chief, cross-examination or reply; real evidence or oral testimony. In applying the air of reality test, a judge is to assume that the evidence is credible and reliable. The only decision for a judge is “whether the evidence is reasonably capable of supporting the inferences required to acquit the accused,... could the jury reasonably infer that the Crown has failed to disprove each and every element of the relevant defence.”

[246.] The Supreme Court of Canada addressed “air of reality” in **R. v. Cinous**, [2002] S.C.J. No. 28, McLachlin C.J. stated at paragraph 51:

The basic requirement of an evidential foundation for defences gives rise to two well-established principles. First, a trial judge must put to the jury all defences that arise on the facts, whether or not they have been specifically raised by an accused. Where there is an air of reality to a defence, it should go to the jury. Second, a trial judge has a positive duty to keep from the jury defences lacking an evidential foundation. A defence that lacks an air of reality should be kept from the jury. Wu, supra; Squire, supra; Pappajohn, supra; Osolin, supra; Davis, supra. This is so even when the defence lacking an air of reality represents the accused's only chance for an acquittal, as illustrated by R. v. Latimer, [2001] 1 S.C.R. 3, 2001 SCC 1.

[247.] The Court stated further at paragraphs 52-54:

52 It is trite law that the air of reality test imposes a burden on the accused that is merely evidential, rather than persuasive. Dickson C.J. drew attention to the distinction between these two types of burden in *R. v. Schwartz*, [1988] 2 S.C.R. 443, at p. 466:

Judges and academics have used a variety of terms to try to capture the distinction between the two types of burdens. The burden of establishing a case has been referred to as the "major burden," the "primary burden," the "legal burden" and the "persuasive burden." The burden of putting an issue in play has been called the "minor burden," the "secondary burden," the "evidential burden," the "burden of going forward," and the "burden of adducing evidence." [Emphasis added.]

The air of reality test is concerned only with whether or not a putative defence should be "put in play", that is, submitted to the jury for consideration. This idea was crucial to the finding in *Osolin* that the air of reality test is consistent with the presumption of innocence guaranteed by s. 11(d) of the *Canadian Charter of Rights and Freedoms*.

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*.

54 The threshold determination by the trial judge is not aimed at deciding the substantive merits of the defence. That question is reserved for the jury. See *Finta, supra*; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330. The trial judge does not make determinations about the credibility of witnesses, weigh the evidence, make findings of fact, or draw determinate factual inferences. See *R. v. Bulmer*, [1987] 1

[S.C.R. 782](#); Park, *supra*. Nor is the air of reality test intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day. The question for the trial judge is whether the evidence discloses a real issue to be decided by the jury, and not how the jury should ultimately decide the issue.

[248.] The Nova Scotia Court of Appeal in **R. v. Chan** 2005 N.S.C.A. 61 addressed “air of reality.” Saunders J. (as he then was) adopted the words of Fish J. speaking for the court in **R. v. Fontaine** (2004), 183 C.C.C. at page 13:

Cinous is the decisive authority, as a matter of both sequence and of consequence, in this courts consideration and determination of the evidential burden governing all defences.

Chan, *supra*, was a case where Pickup J. found an “air of reality” to self defence where the accused had not testified. The trial judge’s decision was upheld on appeal.

[249.] The court has considered the totality of the evidence, including Crown witnesses, exhibits and defence evidence, and finds the evidence discloses a real issue to be decided.

[250.] It will be necessary to analyze each element found in s. 34(1) to determine the defendant’s guilt or innocence.

Credibility Assessment

[251.] The credibility of witness lies at the heart of most trials. Although a trial is not a credibility contest, comparison of versions of events is proper and part of the duty of the trial judge to assess the evidence of the defendant in the context of the whole of the evidence adduced at trial.

[252.] When assessing credibility, **R. v. White** (1997), 89 C.C.C. 148 (S.C.C.) at p. 151 states:

The general integrity and intelligence of the witness, his powers to observe, his capacity to remember and his accuracy in statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biased, reticent and evasive. All these questions and others may be answered from the observation of the witness' general conduct and demeanour in determining the question of credibility.

[253.] Although the trier of fact is at liberty to accept none, some or all of the witness' evidence, this must not be done arbitrarily. **R. v. Reid** (2003), 167 O.A.C. The consistency between a witness' testimony and his/her statements on other occasions is the most valuable means of assessing credibility. Inconsistency in a material matter, about which an honest witness would be unlikely to be mistaken,

can demonstrate a carelessness for the truth. **R. v. G.(M.)** (1994), 93 C.C.C. (3d) 347 (Ont. C.A.)

[254.] It is tempting to believe a witness with a credible demeanor. However, it is wrong to equate credible demeanor with reliability and accuracy and to find the witness credible on that basis alone, especially in the face of significant evidence contradicting that witness. **R. v. Gittens** [1994] O.J. No. 2140 (Ont. C.A.)

[255.] The issue is not which version is true or whether to believe the Crown witnesses or the accused. The issue is whether the Crown has proved its case beyond a reasonable doubt. Since the defendant testified, the court must consider **R. v. W.(D.)** (1991), 63 C.C.C. (3d) 397 (S.C.C.):

- (1.) If the defendant is believed, the judge must acquit:
- (2.) If the defendant is not believed, there may still be a reasonable doubt as the result of the defendant's testimony;
- (3.) Even if the defendant's testimony does not raise a reasonable doubt, there may be a reasonable doubt on the basis of the evidence that is accepted.

[256.] The court must also assess the testimony of nine year old B. C.. Children are now presumed to have the capacity to testify, just like adults. However, the law recognizes it may be wrong to apply adult tests for credibility to the evidence of children. This is not to say that the courts should not carefully assess the

credibility of a child, nor should the standard of proof be lowered when dealing with children. A flaw in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult.

[257.] While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened.

[258.] All of the civil and adult witnesses for the Crown appeared to be trying their best to tell the truth of what they could recall. But it was evident that their memories or recollection of events were affected by the passage of time, effects of alcohol, the trauma of the incident or a combination thereof.

[259.] The defendant did not appear to be attempting to be evasive or mislead the court. He was trying his best to answer the questions and at times he struggled because he could not recall. I find that his recollection and perception of events was affected by his alcohol consumption that evening. In his own words he was drunk and on numerous occasions he could not recall.

[260.] B. did her best to recall and with respect to some things it was clearly hearsay (what she was told or what she overheard), but with respect to her dad's

fight with Cement and what she saw, and the incident she witnessed from the truck, her narrative was straightforward.

Analysis

[261.] In order to come within s. 34(1) and thereby be justified in using force to repel force, there must be first and foremost an unprovoked unlawful assault occasioned to the defendant.

[262.] The defendant, responding to this assault, must have no intention to cause death or grievous bodily harm and must use no more force than is necessary to defend himself. This mandates a consideration of four essential elements that must be considered separately:

- (1.) The defendant was unlawfully assaulted;
- (2.) The defendant did not provoke the assault;
- (3.) The force used by the defendant was not intended to cause death or grievous bodily harm;
- (4.) The force use by the defendant was no more than necessary to enable him to defend himself.

These elements are all necessary. Let me examine each one separately.

Unlawful assault

[263.] The essential question here is not so much whether or not the defendant was being assaulted at the relevant time, but rather whether the defendant reasonably believed he was being assaulted. An assault would also include any attempt or threat by an act or gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose.

- Mary MacIntosh tells the defendant to leave because he and Ron Gillis were arguing.
- Mary MacIntosh had the defendant almost out the door when Dan MacIntosh woke up. Prior to this he had been in and out of sleep on the couch.
- Mary MacIntosh recalls vaguely Dan MacIntosh being next to her. He was using the gun as a cane with the barrel to the floor and the butt in his hand. She did not see the gun raised, but heard the defendant say “gun.”

[264.] The defendant was at the door in front of her and grabbed the gun from Dan MacIntosh. Mary MacIntosh recalls Dan MacIntosh saying “please leave my house”. She does not recall him saying “I’ll show them.”

[265.] Mr. Ron Gillis states Dan MacIntosh was awake prior to the incident as they had been talking. After the defendant head butted Ron Gillis, both Mary MacIntosh and Cathy Long got involved and were trying to get the defendant out the door. Mr. Gillis did not see Dan MacIntosh get off the couch, but he did see him walk to the door with a rifle in his right hand, with the barrel pointed at the ground. He heard Dan MacIntosh say “Enough of this bullshit. Get away from my house” or words to that effect. Ron Gillis says he never saw Dan MacIntosh raise the gun. He lost sight of Dan MacIntosh because of his position in the living room. Ron Gillis saw the defendant outside yelling and then he came “barrelling up the steps.” Ron Gillis told police his impression was Dan MacIntosh was simply going to “scare the shit of out [of Clint].” Ron Gillis remembers hearing the defendant say “How dare you point a gun at me” but on cross examination he said he heard the defendant say “I’ll show you how to use a gun.”

[266.] B. C. testified that her dad and “Cement” (Ron Gillis) were fighting, and that is why they left. B. said she saw Mary MacIntosh push her dad out of the house. Her father turned to go to the truck, but Dan ran with the gun and [her father] went back and hit him.

[267.] B. saw Dan raise the gun; he did not shoot it at [her father]. “He couldn’t really raise it because he was drunk.” The gun was “kinda up and down, trying to

raise it.” Her mother hollered at her dad when she saw Dan with the gun. Her mother told her and her sister to “duck down.”

[268.] Cathy Long testified that Ronnie [Gillis] first attacked the defendant and when this started she went to get the girls. Dan MacIntosh was awake and talking.

[269.] Cathy Long went to the truck. The defendant came out. Then she saw Mary MacIntosh, and then Dan MacIntosh coming out with a gun after Clint.

[270.] She saw Dan MacIntosh carrying the gun and she saw him point it at Clint. She pulled the girls to her so they would not see anything. She is not sure if Dan said anything to Clint.

[271.] Clinton Campbell testified Mary MacIntosh came over to him and asked him to leave, but he could not because Ron Gillis had a hold of him. When Ron Gillis let go of him, he put his boots on and wanted Ron Gillis to go outside with him.

[272.] The defendant said Dan MacIntosh did not say anything and he does not know if Dan was on the couch at that point. The defendant said he got down the steps and was walking to the truck when he heard “Dan no gun.”

[273.] The defendant turned and saw Dan with the rifle in his hands and he said either “won’t” or “don’t miss.”

[274.] The defendant explained to the court how he saw the rifle positioned, the barrel pointing down and both hands on the gun. The defendant testified “Dan was going to shoot me or start shooting.” The defendant was ten to fifteen feet away from Dan MacIntosh. The defendant said the line of site was Dan, the gun, me, the truck.

Finding

[275.] There was an altercation between the defendant and Ron Gillis which had absolutely nothing to do with Dan Henry MacIntosh.

[276.] Mr. Campbell was asked to leave by Mary MacIntosh and he was going out the door when Dan Henry MacIntosh got involved. Dan MacIntosh went to the exterior porch door with a gun. This caused sufficient concern to Cathy Long, so much so that she called out a warning to her husband, Mr. Campbell, and she told the children to duck down in the truck.

[277.] It was Mary MacIntosh and Ron Gillis’ impression that Dan MacIntosh was only going to “scare Clint.” Well he succeeded.

[278.] When Mr. Campbell turned after hearing the word “gun” he saw Dan Henry MacIntosh with a gun pointed at him. Mr. Campbell immediately ran towards Dan Henry MacIntosh who was in the doorway. Mr. Campbell was “scared he [Dan MacIntosh] was going to shoot him or start shooting.”

[279.] I find it reasonable in the circumstances for the defendant to believe he was being assaulted by Dan Henry MacIntosh.

[280.] **II.** The defendant did not provoke the assault (as between himself and the deceased, Dan MacIntosh). Section 36 of the *Criminal Code* defines provocation in the following terms:

Provocation includes, for the purposes of section 34 and 35, provocation by blows, words or gestures.

[281.] Mary MacIntosh testified the defendant and Dan MacIntosh were drinking and eating prior to the defendant going for liquor with Stephen MacIntosh. There was no animosity between them; friends and neighbours. Mary intervened when the defendant and Stephen were going on about wrestling and fighting.

[282.] Mary MacIntosh intervened when the defendant “started” on Ronnie. She jumped in when she heard them arguing. She told the defendant to leave and he was almost out the door when Dan MacIntosh woke up.

[283.] Mary is sure Dan did not hear the argument between the defendant and Ronnie Gillis. She cannot give a reason why Dan walked to the door. She only recalls him saying “Please leave my house.”

[284.] Ron Gillis says Dan MacIntosh was awake prior to the incident and he seemed lucid as they had been discussing something with details.

[285.] Stephen MacIntosh and Clint Campbell were “jawing” when they returned from Sherwood’s.

[286.] There was some conversation between the defendant and Ron Gillis about wrestling, but Ron Gillis wanted nothing to do with that. Shortly after Ron Gillis told Dan he had to go to his car and look for his keys.

[287.] The altercation takes place between the defendant and Ron Gillis. Mary MacIntosh and Cathy Long intervene and usher the defendant out the door. It was then that Ron Gillis saw Dan MacIntosh walk to the door with the rifle in his right hand and say “Enough of this bullshit. Get away from my house.”

[288.] Cathy long testified Mary MacIntosh intervened when the defendant and Stephen MacIntosh were “carrying on wrestling.” She says Dan MacIntosh was awake and talking. All of her evidence refers to the defendant and Ron Gillis having words and grabbing one another.

[289.] Mr. Clinton Campbell testified that he and Dan MacIntosh talked after the wood was split and the ladies had gone to the grocery store. They were drinking and continued to drink with supper.

[290.] Clinton Campbell says Mary MacIntosh intervened when he and Stephen were talking about wrestling and jostling one another. He says Mary intervened between himself and Ron Gillis. The defendant says he did not say anything.

Finding

[291.] The defendant did not provoke the assault by Dan Henry MacIntosh. All evening the issue was between the defendant and Ron Gillis. There is no evidence that Dan Henry MacIntosh got involved in anything that evening until Dan came to the door with the gun.

[292.] The defendant was leaving Dan Henry MacIntosh's house and was either on the step or ground when Dan Henry MacIntosh made his way to the door.

[293.] The defendant's anger was focussed on Ron Gillis up until he turned and saw the gun.

[294.] **III.** The force used by the defendant was not intended to cause death or grievous bodily harm.

[295.] This involves a subjective inquiry. However, in assessing this subjective criterion, the trier of fact is entitled to consider the consequences of the force used as one potentially relevant factor on the basis of the common-sense notion (recognized at law) that people are able to foresee the ordinary consequences of their actions. It is noteworthy that grievous bodily harm is not limited to harm or injury that is permanent or life-threatening [**R. v. Paice**, 2005 S.C.C. 22].

[296.] Dr. Bowes's testimony and his report indicate that Dan Henry MacIntosh suffered blunt traumatic injuries to his head and neck with lacerations and abrasions of the face, and commuted fracture of the left face.

[297.] Mary MacIntosh testified that the defendant was at the front door in front of her. He grabbed the gun, hit Dan with the gun, and Dan fell to the floor. She only moved Dan's head to put it on her lap. (@ p. 100 – they did not fall on top of one another)

[298.] Ron Gillis testified that the defendant came barrelling up the steps and Dan MacIntosh went through the living room to the porch. Mr. Gillis heard a crack and saw Dan MacIntosh came back through the porch door into the living room. Mr. Gillis explained that Dan fell back with his arms spread open, and Dan did not have a gun in his hands. Ron Gillis says Dan MacIntosh's head hit the floor. He

was hit with a gun by the defendant (in the month). The defendant was on top of Dan saying “Who the fuck are you? I’ll show you.” with the gun raised crossways.

[299.] On cross-examination Ron Gillis says the defendant said “I’ll show you how to use a gun.” Ron Gillis grabbed the gun and he and the defendant struggled. Ron Gillis remembers the defendant saying “How dare you point a gun at me?”

[300.] B. C. while seated in the truck, says Dan was in the doorway of the house. Her father hit Dan on the side of his face and he fell. She saw her dad hit Dan once.

[301.] B. would not have been able to see inside the living room from where the truck was positioned so this was the first hit (heard by Ron Gillis).

[302.] At page 16 of her statement B. says:

“Dad went to turn around. Ahm Dad raised the gun and then ahm Dad came back up... back up the steps. Mary turned around and ahm Mary came up the steps to try to stop Dan. But Dad grabbed the gun from Dan. Mary tried to get the gun from Dad. They were all fighting around for the gun. But Dad got the gun and hit ah Dan in the face.”

[303.] Cathy Long testified she moved the truck and it was now facing the other cars in the driveway. She was waiting for Clint in the truck when she saw Dan

with the gun. Dan did not come off the steps. Dan and Clint were in the doorway struggling for the gun. (In her statement to police she said Dan was off the steps.)

[304.] Cathy saw the motion of the gun go down, but she did not see it hit Dan. She only saw what went on at the front door. She saw nothing in the porch.

[305.] Clinton Campbell testified that Dan was on the step with the rifle, about ten to fifteen feet away. Clint grabbed the gun and they struggled. He is not sure if Dan was hit with the gun. He says he pushed the gun forward and that Dan was in front of him.

[306.] The defendant does not recall the position of the gun when he hit the floor, but he says the barrel was pointing up. Later in his testimony the defendant says “I knew (Dan) must have got hit with the gun when we were down. I don’t remember hitting him.” The defendant said he yelled when he got up “Why the fuck use a gun?” How do we determine someone’s intention? We must look at their action’s and the words spoken.

Findings:

[307.] Based on the evidence before me, I find there were two blows. The first was witnessed by B. and heard by Ron Gillis. This caused Dan MacIntosh to fall backwards into the living room landing on his back on the living room floor.

[308.] The defendant followed within seconds and struck Dan Henry MacIntosh with the gun a second time in the face as witnessed by Ron Gillis.

[309.] While the defendant is over Dan Henry MacIntosh with the gun raised, Ron Gillis grabs the rifle and struggles with the defendant, eventually getting the gun from the defendant.

[310.] There is some disagreement as to what was said by the defendant. Was it “How dare you point a gun at me? I’ll show you how to use a gun.” or “Why the fuck use a gun.”

[311.] The court is uncertain, but whatever was said does not convince me that the defendant intended to cause serious bodily harm. Nor do his spontaneous utterances to various police officers.

[312.] There is no doubt Mr. Campbell was angry, but his threats were towards Ron Gillis, not Dan Henry MacIntosh. He was upset that Mr. MacIntosh had pointed a gun at him, but why would he not be upset. They had been friends and neighbours for some time. The defendant helped Dan MacIntosh split his wood. They had sat around eating and drinking earlier. There was absolutely no animosity between the parties. Mr. Campbell was leaving his friend’s house as asked to by Mary MacIntosh.

[313.] Dan Henry MacIntosh was struck in the face twice. The Medical Examiner testified neither injury would cause death. It was the “occluded” airway that caused Mr. MacIntosh’s death.

[314.] Because of alcohol, both Dan Henry MacIntosh and Clinton Campbell did or said things that they would not normally do. This was borne out in the evidence. There was absolutely no history of any previous problems. They were friends.

[315.] Mr. Campbell’s “after the fact conduct is potentially relevant because its circumstantial evidence with respect to the defendant’s state of mind” (**R. v. Kong**, 200 C.C.C. (3d) 19).

[316.] Mr. Campbell took his children home, took them out of a volatile situation. He returned he says to help. That is testified to by Mr. Gillis in that he stated the defendant wanted back in the house. Mr. Gillis would not let him in as instructed by the 911 dispatcher.

[317.] The defendant was still on the step when police and paramedics arrived. He stated he was there to help, “not to finish something off.” There is no doubt he became angry at Mr. Gillis when he would not let him in, however, Mr. Gillis cannot be faulted for not opening that door.

[318.] Based on all of the above, it is not clear the defendant intended to cause serious bodily harm.

[319.] **IV.** The force used by the defendant was no more than necessary to enable him to defend himself.

[320.] This inquiry is concerned with two factors:

- (i.) The nature and the extent of the assault or threatened assault facing the defendant – the “threat assessment”;
- (ii.) The nature and the extent of the force that the defendant actually used in response.

[321.] The threat assessment must be determined on a modified basis. This means that the first target of the inquiry is the defendant’s subjective perception of the degree of violence or threatened assault he was facing, and the second is the reasonableness of the defendant’s belief.

[322.] The force used by the defendant in response to the violence occasioned to him or the perceived threat must be assessed on an objective basis. It does not require the accused to measure with nicety the degree of force necessary to ward off the attack. Nor does it require the defendant to retreat.

[323.] In the end, if the evidence establishes that the force used by a defendant is justified, then the defence is available even if death or grievous bodily harm results, provided, of course, that this result was not intended.

[324.] Mary MacIntosh testified:

- Clint reached to grab gun
- (they did not fall on one another) – she was right there in the fray
- She admits to the defence counsel, the defendant was disarming her husband
- Dan Henry was experienced with rifles and a good hunter in his day. He was an alcoholic and drinking by 2 pm that day.

[325.] Ron Gillis testified:

- Dan Henry went to door with the gun – the defendant came “barrelling up steps”
- Dan Henry went into the porch. He heard a crack and Dan Henry came back through the door into the living room (on floor). Dan Henry did not have his hands on the gun.
- The defendant followed Dan Henry through the door, hit Dan Henry with the butt in the mouth. He remembers the defendant saying “How dare you point a gun at me.”, “Who the fuck are you? I’ll show you.”

[326.] Dr. Bowes testified:

- Mr. MacIntosh’s hands were uninjured, there were no defensive or assaultive wounds, which suggests no struggle.

[327.] Lori Campbell testified:

- Dan Henry's blood alcohol level was 320 mgs, quite high and associated with a chronic drinker who was likely intoxicated at the time (which suggests there would be no problem disarming Dan Henry MacIntosh.)

[328.] Joy Kearsley's report states:

- The defendant's blood was on wall C and D (above loveseat/wall of porch door.)
- Dan Henry's blood was found on the butt end of the file.

[329.] B. C.:

- Describes Dan Henry as a drunk. Knows what it means. He could not raise gun because he was too drunk.

[330.] Clint Campbell testified:

- Dan Henry was not feeble, just slow. He acted 70 years although he was 48 years old.
- B. says father (the defendant) hit Dan Henry with butt of gun (when she was in the truck.)
- He described Dan Henry's drinks as three to one – by supper Dan Henry had three or four drinks.
- Dan Henry MacIntosh could do the wood, but it would take all day.

[331.] **R. v. Paciocco**, 12 C.C.L.R. 25 at p. 23 - right to repel force not confined to restraining force: The extent of the victim's injuries will not determine whether more force than necessary was used, but may be considered re: intent of defendant.

[332.] **R. v. Kong**, 200 C.C.C. (3d) 19):

At [para. 113]: "...defensive force need not be 'weighed to a nicety'."

At [para. 117]: in considering the force necessary to repel the real or apprehended assault, the court is also entitled to examine whether the accused had other reasonable options open to him or her, for example, retreat, and whether he or she should have seen those other options. While it is true that there is no duty to retreat before resorting to self-defence under s. 34(1), the fact that this was an available option is a factor to be considered in assessing whether it was necessary to use force and whether the force used was no more than necessary in the circumstances: *R. v. Ward* (1978) 4 C.R. (3d) 190 (Ont. C.A.).⁶⁵ In other words, the existence of a retreat route goes to the reasonableness of the accused's actions: *R. v. McInnes* [1971] 3 All E.R. 295 at 300 (C.A.); *R. v. Northwest* [1980] 5 W.W.R. 48 at 60 (Alta. C.A.).

At [para. 60]: in *R. v. Kandola* (1993) 80 C.C.C. (3d) 481 (B.C.C.A.), the British Columbia Court of Appeal explained that in addressing the proportionality of the force used, it was important to distinguish between the force itself - in that case, firing a warning shot - and the consequences of that force. As explained by Wood, J.A. at 489:

... [R]ecklessness is not mentioned as a relevant state of mind in s. 34(1). Logically, of course, force which is so recklessly applied in self-defence as to be excessive, will be unnecessary force and by that finding the defence will fail. But what deprives the accused of the defence in that circumstance is his recklessness as to the measure of force necessary, not recklessness as to the consequences, or the risk of consequences, flowing from the application of that force.

At [para. 99]: In terms of the responsive force used, the trial judge is to consider all the force an accused used and not just fragments of it. That force should be assessed as a whole and not in stop action.

At [para. 100]: The trial judge is to consider whether, from the perspective of a reasonable person in the circumstances of the accused, there is an air of reality to an accused's claim that the force used was objectively no more than necessary given the nature and quality of both the threat and the responsive force.

Finding:

[333.] Mr. Campbell was face to face with a man who was wielding a gun. A man who was drunk. Mr. Campbell's wife and children were in very close proximity. When he heard the word "gun" he turned and immediately ran towards Dan Henry MacIntosh.

[334.] Based on the evidence before me, I find Mr. Campbell's intention was to disarm Dan Henry MacIntosh and in so doing he struck him twice.

[335.] Mr. Campbell was repelling the force (assault against him). He need not "weigh this response to a nicety." Nor, under the circumstances, was it reasonable for the defendant to retreat or weigh those options.

[336.] Based on the evidence, the rifle had not been seen the entire evening until Dan Henry MacIntosh came to the door with it. How was the defendant to know it was not loaded. With his family in close proximity he ran to disarm Dan Henry MacIntosh. This all happened "very quickly", "within seconds." I must look at the whole picture, not just pieces and, based on all of the evidence before me, I am satisfied that the force used by Mr. Campbell was justified.

[337.] The Crown has not proven beyond a reasonable doubt that the defendant was not acting in self-defence. Therefore I find the defendant not guilty on Count

#1: “did unlawfully kill Dan MacIntosh (1960/02/03) while using a firearm, to wit, a Savage model 170 30.30 pump action rifle and thereby commit manslaughter, contrary to Section 236(a) of the *Criminal Code of Canada*.”.

[338.] With respect to the other charges, based on all of the evidence, including the defendant’s own admission, I find the defendant guilty of:

Count #2, knowingly convey a threat to Ron Gillis, to cause death or serious bodily harm, contrary to Section 264.1(1)(a) of the *Criminal Code of Canada*;

Count #3, knowingly utter a threat to Cst. Philip Macleod to cause death or serious bodily harm to Ron Gillis, contrary to Section 264.1(1)(a) of the *Criminal Code of Canada*; and

Count #4, commit mischief by wilfully damaging without legal justification or excuse and without color of right properly to wit: windshield of a 2004 Chev Impala (DZS 609 NS/ Registered owner, Ron Gillis) contrary to Section 430(4) of the *Criminal Code of Canada*.

[339.] Regarding Count #5, Section 430(4), damage to the property of Dan and Mary MacIntosh, the defendant has raised the defence of necessity. Counsel argues Mr. Campbell returned to the MacIntosh residence because he thought he could be of some assistance. He did not believe Dan MacIntosh was dead. Mr. Gillis refused to let him in at the direction of the 911 dispatcher, and Mr. Gillis told him to go home. Mr. Campbell refused to go and was still on the veranda (steps) when the police and paramedics arrived.

[340.] Necessity is a common law defence presumed by Section 8(3) of the *Criminal Code of Canada*. The burden of proof is on the defendant; the burden of disproof is not on the Crown. As per *Criminal Law Defences* (2nd), Knoll, Patrick J., Carswell (1993):

Necessity

(a)-Nature of Defence

258 The defence of necessity is recognized as a common law defence, being a residual excuse. Its underlying rationale is that it is inappropriate to punish actions which are normatively involuntary.⁴⁸

48. *Perka v. R.*, [1984] 2 S.C.R. 232 [B.C.]; *R. v. Salvador* (1981), 21 C.R. (3d) 1 (N.S.C.A.) (generally speaking, defence covering all cases where non-compliance excused by emergency or justified by pursuit of greater good); *Morgentaler v. R.* [1976] 1 S.C.R. 616 [Que.].

(b) Availability of Defence

259 The defence of necessity is available where there is an urgent situation of clear and imminent peril when compliance with the law is demonstrably impossible.⁴⁹

49. *Perka v. R.*, ante (wrongful act not involuntary if accused making choice); *R. v. Tewari* (1987), 36 C.C.C. (3d) 150 (B.C.C.A.) (must be imminent peril); *R. v. Walls* (1986), 47 M.V.R. 92 (B.C. Co. Ct.) (speeding not necessity); *R. v. Berriman* (1987), 45 M.V.R. 165 (Nfld. C.A.) (impaired driving not necessity).

260 At a minimum, the situation must be emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable.⁵⁰

50. *Perka v. R.*, ante; see also *R. v. Morgentaler*, 48 C.R. (3d) 1; reversed on other grounds [1988] 1 S.C.R. 30 [Ont.]; *R. v. Morris* (1981), 23 C.R. (3d) 175 (Alta. Q.B.).

261 A further requirement for a successful necessity defence is that compliance with the law be demonstrably impossible. If there is a reasonable legal alternative to disobeying the law, then the decision to disobey becomes a voluntary one, impelled by some consideration beyond the dictates of necessity and human instincts.⁵¹

51. *Perka v. R.*, ante (importance of no reasonable legal alternative cannot be overstressed); see also *R. v. Morgentaler*, ante (compliance with law possible); *Everywoman's Health Centre Society (1988) v. Bridges* (1990), 54 B.C.L.R. (2d) 273; supplemented 54 B.C.L.R. (2d) 294 (C.A.) (violating court injunction at abortion clinic no necessity); *R. v. Roberts* (1987), 65 Nfld. & PEIR 343 (P.E.I.C.A.) (impaired driving not necessity – taking mother to hospital).

262 The final requirement for a necessity defence is that the harm inflicted must be less than the harm sought to be avoided.⁵²

52. *Perka v. R.*, ante

(c) Illegality or Contributory Fault

263 The fact that the accused was engaged in illegal or immoral conduct when the emergency arose will not disentitle an individual to rely on the defence of necessity.

53. *Perka v. R., ante*

c) Burden of Proof

264 Normally, voluntariness can be presumed, but if the accused places before the court, through his or her own witnesses or through cross-examination of crown witnesses, evidence sufficient to raise an issue that the situation created by external forces was so emergent that failure to act could endanger life or health and, upon any reasonable view of the facts, compliance with the law was impossible, then the Crown must be prepared to meet that issue. There is no onus of proof on the accused.⁵⁴

54. *Perka v. R., ante; r. v. McKay* (1992), 13 C.R. (4th) 315 (B.C.C.AZ.) (no air of reality to defence, therefore not put to jury).

[341.] And **R. v. Latimer**, 150 C.C.C. (3d) 129 (S.C.C.):

Perka outlined three elements that must be present for the defence of necessity. First, there is the requirement of imminent peril or danger. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be proportionality between the harm inflicted and the harm avoided.

[342.] **R. v. Nelson**, 228 C.C.C. (3d) 302 (B.C.C.A.):

The trier of fact must determine whether the defendant's perception of the situation and the absence of any legal alternatives had an objectively reasonable foundation.

[343.] **R. v. MacMillan Bloedel Ltd. v. Simpson**, 89 C.C.C. (3d) 217 (B.C.C.A.):

The defence of necessity is available only in truly emergent circumstances when the person at risk has no alternative but to break the law.

Findings:

[344.] In the case at bar, the defendant created the situation and left the scene. The defendant says he returned to help. How? He had no training in first aid or C.P.R., etc.

[345.] The defendant returned to see how hurt Dan MacIntosh was. I find he was unsure of what he had done, i.e. was Dan dead or alive, thus his comment that in the truck on the way home, “I was trying to think.”

[346.] The defendant testified at trial that a man was dying on the floor, but I find he did not know that then. He knows it now after preparing for his trial. He asked at the police station if Dan was dead?

[347.] When he could not get back in, he became enraged once again, hollering at and blaming Ron Gillis for what he had done. Ron Gillis was instructed, and rightly so, by the dispatcher not to let the defendant in. The defendant could be heard screaming and yelling on the 911 tape.

[348.] The “imminent peril” had occurred, Dan Henry MacIntosh had been knocked unconscious and lay on the floor. He was being tended to by Ron Gillis and Mary MacIntosh; 911 had been called.

[349.] There was a reasonable legal alternative – leave the premises; call 911; and wait in his truck. But Mr. Campbell was not acting reasonable because he was drunk and angry. His perception was clouded by alcohol. Even if he was let in, what was a drunken man going to do.

[350.] **R. v. Latimer**, 150 C.C.C. (3d) 129 (S.C.C.) at para. 34:

The third requirement for the defence of necessity, proportionality, must be measured on an objective standard, as it would violate fundamental principles of the criminal law to do otherwise. Evaluating the nature of an act is fundamentally a determination reflecting society's values as to what is appropriate and what represents a transgression. Some insight into this requirement is provided by G. P. Fletcher, in a passage from *Rethinking Criminal Law* (1978), at p. 804. Fletcher spoke of the comparison between the harm inflicted and the harm avoided, and suggested that there was a threshold at which a person must be expected to suffer the harm rather than break the law. He continued:

Determining this threshold is patently a matter of moral judgment about what we expect people to be able to resist in trying situations. A valuable aid in making that judgment is comparing the competing interests at stake and assessing the degree to which the actor inflicts harm beyond the benefit that accrues from his action.

The evaluation of the seriousness of the harms must be objective. A subjective evaluation of the competing harms would, by definition, look at the matter from the perspective of the accused person who

seeks to avoid harm, usually to himself. The proper perspective, however, is an objective one, since evaluating the gravity of the act is a matter of community standards infused with constitutional considerations (such as, in this case, the s. 15(1) equality rights of the disabled). We conclude that the proportionality requirement must be determined on a purely objective standard.

[351.] When the defendant returned and broke down the door, he only made a bad situation worse. What harm was avoided by the defendant's actions? None. The harm was already inflicted upon Dan Henry MacIntosh. Mr. Campbell could do nothing more.

[352.] Therefore, based on all of the evidence before me, I find the defendant guilty of Count #5, did commit mischief by wilfully damaging without legal justification or excuse and without color of right property to wit: steel door of Dan and Mary MacIntosh of 5168 Gabarus Highway, Big Ridge contrary to Section 430)4) of the *Criminal Code of Canada*.

The Honourable Judge Jean M. Whalen, J.P.C.