

SUPREME COURT OF YUKON

Citation: *R v Kearns*, 2026 YKSC 96

Date: 20261008
S.C. No. 25-01507
Registry: Whitehorse

BETWEEN

HIS MAJESTY THE KING

AND

LIAM STEPHEN KEARNS

Before Justice K. Wenckebach

Counsel for the Crown

Adrienne Switzer (by videoconference)

Counsel for the Defence

Kevin Drolet

This decision was delivered in the form of Oral Reasons on October 8, 2026. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The accused, Liam Kearns, is charged with one count of aggravated assault against Tyler MacDougall, contrary to s. 268 of the *Criminal Code*, RSC 1985, c C-46 (*Criminal Code*), and one count of assault with a weapon against Heather Belcher, contrary to s. 267(a) of the *Criminal Code*.

[2] Defence counsel concedes that Mr. Kearns stabbed Mr. MacDougall and in doing so wounded him. Defence also concedes that Mr. Kearns stabbed Ms. Belcher with a

knife. He states, however, that Mr. Kearns was acting in self-defence. The Crown states that Mr. Kearns was not acting in self-defence.

[3] The altercation leading to the trial has had a grave impact on Mr. MacDougall. He was severely injured and continues to feel the effects of the stabbing to this day.

Ms. Belcher's physical injuries were not as severe, but it was apparent during the trial that what happened had an emotional impact on her. I cannot decide the case solely on the severity of the complainants' injuries, however. My task is to review all the circumstances to determine if Mr. Kearns acted in self-defence. Having assessed the evidence, as I will explain below, I have reasonable doubt about whether Mr. Kearns acted in self-defence. I therefore find him not guilty on both counts.

[4] I will start by explaining the facts. Some of the facts in this case are uncontested. Until a month or two before the incident, Mr. Kearns and Ms. Belcher had been in a relationship and had a young daughter together. Mr. Kearns was also very good friends with Mr. MacDougall. He told the police that he and Ms. Belcher separated because she cheated on him with Mr. MacDougall. Mr. MacDougall's and Ms. Belcher's evidence was only that Ms. Belcher had stopped dating Mr. Kearns and had started dating Mr. MacDougall. In any event, Mr. Kearns and Mr. MacDougall's relationship soured because of the new relationship and they stopped talking.

[5] About a month or two after they stopped talking, on the night of January 6 and into the early morning of January 7, 2024, Mr. MacDougall, Ms. Belcher, and at least two other friends, Terrence Jager and Jaden Elias-Miller, were hanging out at Ms. Belcher's house. All were drinking. At least Mr. MacDougall was using cocaine; Ms. Belcher may have been using cocaine as well. Another friend, Sahcho, was either

with them at the time or they went out and picked him up shortly before the incident with Mr. Kearns.

[6] The group went to an alleyway next to the townhouse complex where Mr. Kearns lived and spoke with his brother, Layne. Mr. MacDougall testified that he and Layne are friends. They likely left after the conversation. Mr. Kearns learned that Ms. Belcher had just been there and began texting her. She responded. The content of the texts is unclear: either Mr. Kearns asked Ms. Belcher to return or Ms. Belcher told him the group was returning. Either way, Mr. MacDougall and the rest of the group returned very shortly after leaving, in the very early morning hours.

[7] Ms. Belcher texted Mr. Kearns that they were in the alleyway and to come down. Mr. Kearns went to the alleyway but before doing so, he took a steak knife with him. He went to the passenger side of Mr. MacDougall's car where Ms. Belcher was sitting and tried to get her out of the car. He did not have the knife out. At that point, Mr. MacDougall grabbed Mr. Kearns. Much of what occurred after is contested. What is clear is that there was an altercation involving Mr. MacDougall and Mr. Kearns, and that Mr. Kearns stabbed Mr. MacDougall. He also mistakenly stabbed Ms. Belcher. When Mr. MacDougall realized he was stabbed, the fighting stopped. Mr. MacDougall, Ms. Belcher, and his friends then left to go to the hospital.

[8] At trial, Mr. MacDougall, Ms. Belcher, and Mr. Elias-Miller testified about the facts of the case. Someone filmed a part of the altercation; the video was filed as an exhibit. The Crown also filed a statement Mr. Kearns gave to the police for the truth of its contents. Mr. Kearns did not testify.

[9] Because this is a trial about self-defence, the issue is whether Mr. Kearns' circumstances in the incident meet the test for self-defence. Before the Court will consider whether self-defence applies, the defence must demonstrate that there is an air of reality to the defence. There is a three-part test for establishing that the defendant acted in self-defence. The test, as it applies here, is: first, did the accused believe on reasonable grounds that force was being used against them; second, did the accused commit the act that they are charged with to defend themselves; and third, did the accused act reasonably in committing the act (s. 34, the *Criminal Code*).

[10] In this case, the Crown concedes that the first part of the test is met. Mr. Kearns stabbed Mr. MacDougall and Ms. Belcher during a physical altercation with Mr. MacDougall. The issues concern the second and third parts of the test. On the second branch of the test, the Crown argues that Mr. Kearns did not stab Mr. MacDougall and Ms. Belcher for the purpose of defending himself. On the third part of the test, the Crown submits that Mr. Kearns has not established an air of reality to the claim that he acted reasonably in the circumstances. The Crown furthermore submits that even if he has established an air of reality, he did not act reasonably in the circumstances.

[11] Before addressing these questions, however, I will assess the credibility of the witnesses and of Mr. Kearns when he provided his statement to the police.

[12] There are two components to credibility: reliability and credibility. Reliability is about whether the witness' testimony is accurate. Credibility is about whether a witness is trying to tell the truth. In this case, there are issues of reliability with all the evidence. I have also noted issues of credibility with some of the evidence.

[13] First, I will address Mr. MacDougall's testimony. While there were some issues with Mr. MacDougall's credibility, the larger issue is with his reliability. There are some inconsistencies between what he told the police, what he told the Crown in meeting with her, and what he testified to on the witness stand. This is unsurprising. Mr. MacDougall had been drinking and doing cocaine before the altercation; with adrenaline and emotions running high, he would not remember much of the fight; and he was severely injured. Inconsistencies are to be expected.

[14] Some of these details are not significant, such as where everyone was seated in the car when they arrived in the alleyway. Others, although details, are important for assessing whether Mr. Kearns acted in self-defence. Thus, for instance, in his statement to police, Mr. MacDougall stated that Mr. Kearns punched Mr. Jager; however, he did not mention this in his testimony. He also testified that only he and Mr. Kearns were involved in the altercation. In reality, Mr. Jager was also involved. The added difficulty is that Mr. MacDougall testified confidently on matters in which he was later shown to be either incorrect or on which he was inconsistent. This suggests that Mr. MacDougall does not know what he does not remember. It makes it difficult to rely on his evidence.

[15] Additionally, I am concerned that Mr. MacDougall's memory has been tainted. During cross-examination, he referred frequently to the video to explain the evidence rather than relying on his own memory. When asked about why his testimony changed from what he told Crown counsel, Mr. MacDougall stated that when he went over the video with the Crown, "That's when I recollected everything." Similarly, when he was asked about an inconsistency between his police statement and his testimony,

Mr. MacDougall stated that when he spoke to the police, “That’s what I thought was true. That’s before I saw the video or that’s before I talked to anybody or anything.” If Mr. MacDougall reconstructed his memory based on the video and on discussions he had with others, then his memories are not his own. I am therefore cautious in accepting his testimony.

[16] Ms. Belcher and Mr. Elias-Miller were both vague in their testimony. Mr. Elias-Miller stated he did not remember much because he had been drinking and the events were a long time ago. Ms. Belcher, as well, was inconsistent in her testimony. I accept their evidence only when it is corroborated.

[17] Regarding Mr. Kearns’ statement, the Crown submits that I should be cautious in accepting it. Mr. Kearns was in police custody. The Crown submits he had reason to lie. She also adds that he was not under oath. Crown counsel suggests that Mr. Kearns’ story evolves as he speaks to the police officer. I have reviewed the statement carefully. There are times where Mr. Kearns does hold back in giving information. He is aware that he is in jeopardy. Overall, however, the sense I get is that the police officer was able to gain Mr. Kearns’ trust over the course of the interview. Mr. Kearns thus became more open as he spoke to the officer. He also admitted to a great deal that was not in his self-interest, which suggests he was being honest at least some of the time. Because I am also aware that he may at times have hidden or distorted the truth, however, I am also cautious about accepting his evidence at face value.

[18] I will now consider how the second and third parts of the test of self-defence apply to the facts of the case. Before the Court will consider if self-defence applies, the defence must establish that there is an air of reality to the defence. An air of reality

exists where there is evidence at trial that could reasonably lead the judge or jury to acquit the defendant (*R v Cinous*, 2022 SCC 29 (“*Cinous*”) at para. 53). If there is an air of reality to the defence, the burden shifts to the Crown. The Crown’s onus is to prove beyond a reasonable doubt that at least one of the parts of the test of self-defence does not apply to Mr. Kearns. If the Crown fails to do so, I must find Mr. Kearns not guilty.

[19] I will therefore address the second part of the test, that is, whether Mr. Kearns stabbed Mr. MacDougall and Ms. Belcher for the purpose of defending himself.

[20] While the Crown did not concede that this part of the test is met, she did not argue it forcefully. It is clear that there is an air of reality to the test. I also conclude Mr. Kearns stabbed Mr. MacDougall and Ms. Belcher for the purpose of defending himself.

[21] The test for determining if a defendant committed the act to defend themselves is subjective. This means that it is assessed from the point of view of the defendant (*R v Khill*, 2021 SCC 37 (“*Khill*”) at para. 52).

[22] In this case, the Crown states that there is limited direct evidence about Mr. Kearns’ subjective belief when he stabbed Mr. MacDougall. She furthermore states there is evidence upon which to conclude that Mr. Kearns acted out of anger and not fear. He was very angry with Mr. MacDougall for dating Ms. Belcher; he asked Ms. Belcher to come to his house knowing that she would be with Mr. MacDougall; and during the altercation, he stabbed Mr. MacDougall multiple times, resulting in 17 stab wounds. The evidence about whether Mr. Kearns asked Ms. Belcher to return or if Ms. Belcher suggested they return is disputed. For the purposes of resolving this issue, I will accept that Mr. Kearns asked Ms. Belcher to return to his house.

[23] I find the evidence that Mr. Kearns' purpose in stabbing Mr. MacDougall was to defend himself is persuasive. Mr. Kearns did not start the fight with Mr. MacDougall; Mr. MacDougall started the fight with him. He also did not pull the knife out immediately, but only after the fight was underway. In his statement to the police, Mr. Kearns said that he was afraid of being hurt by Mr. MacDougall and his friends. He also stated, "So, like, yeah, I fucking pulled the knife out. I was, like, fuck this, I'm not getting beat to a pulp" (Transcript of Liam Kearns' Statement at lines 831-834). He made several other similar statements to the police officer questioning him. This is enough for me to conclude that Mr. Kearns' purpose in stabbing Mr. MacDougall was to defend himself.

[24] The real issue in this matter is the third branch of the test, that is, whether Mr. Kearns acted reasonably in stabbing Mr. MacDougall. The Crown submits that there is no air of reality to the claim that Mr. Kearns acted reasonably or, if there is an air of reality, the Crown has proven beyond a reasonable doubt that Mr. Kearns did not act reasonably.

[25] I conclude, however, that there is an air of reality to the claim that Mr. Kearns acted reasonably. I also conclude that the Crown has not disproven beyond a reasonable doubt that Mr. Kearns acted reasonably.

[26] To determine whether there is an air of reality to a defence, the judge considers the totality of the evidence and assumes that the evidence relied upon by the defendant is true (*Cinous* at para. 53).

[27] Here, Crown counsel submits that either the fight began as a consensual fight or it was unreasonable for Mr. Kearns to go into the alleyway with a knife in the very early morning when there was animosity between him and Mr. MacDougall, and where

several people were waiting for him. She also states his response to the fight- using a knife when he and Mr. MacDougall were essentially wrestling- was also unreasonable.

[28] The Crown's submissions do not take into account Mr. Kearns' evidence.

Assuming the evidence Mr. Kearns relies on is true, I view the evidence differently. In Mr. Kearns' statement, he stated he went down to the alleyway not to fight but to talk with Ms. Belcher. Mr. Kearns also states that he started getting punched in the back of the head as he was trying to get Ms. Belcher to get out of the car. He also mentions getting dragged. The video as well shows Mr. Jager assisted Mr. MacDougall during the fight. There is also no direct evidence that Mr. Kearns knew that Mr. MacDougall was going to the alleyway for a fight. Based on his evidence, Mr. Kearns used the knife after he had been attacked by surprise and then set upon by two people. I conclude that this is sufficient evidence to raise an air of reality to the defence.

[29] Turning to whether the Crown has disproven that Mr. Kearns acted reasonably, the analysis applies an objective standard. It is not confined, as well, to analysing the moment in which Mr. Kearns stabbed Mr. MacDougall but instead encompasses the whole incident from his communications with Ms. Belcher while he was still at home to the end of the altercation (*Khill* at para. 64, 74).

[30] Several factors may be used to determine if a defendant acted reasonably.

The factors that are applicable in this case are:

- the nature of the force or threat used against the defendant (s. 34(2)(a), *Criminal Code*);
- the defendant's role (s. 34(2)(c))

- whether any party to the incident used or threatened to use a weapon (s. 34(2)(d));
- the nature, duration, and history of the relationship between the parties to the incident (s. 34(2)(f)); and
- the nature and proportionality of the accused's response to the use of force (s. 34(2)(g)).

[31] I will first consider the disputed evidence about what happened on the night of the incident. I will then apply the facts to the factors to determine if Mr. Kearns acted reasonably.

[32] In this case, while the parties agree about many of the facts, there is dispute on others. The evidence in dispute is: Mr. Kearns' and Mr. MacDougall's intentions that night; what happened during the fight; whether Mr. Kearns had reason to fear Mr. MacDougall and his friends; and whether anyone, other than Mr. Kearns, had a weapon.

[33] Beginning with Mr. Kearns' intentions, the Crown's argument is that the altercation started as a consensual fight. The defence, on the other hand, submits that Mr. Kearns went to the alleyway to speak to Ms. Belcher. Part of the contested evidence concerns why Mr. MacDougall and his friends returned to the alleyway and who came up with the idea they should return. Both the Crown and defence made submissions on this evidence. I do not believe that much turns on whether it was Mr. Kearns or Ms. Belcher who suggested she return, however, as regardless, I am convinced that Mr. Kearns went to the alleyway to speak with Ms. Belcher and not to fight with Mr. MacDougall.

[34] The evidence demonstrates that Mr. Kearns was intently focused on Ms. Belcher that night and not on Mr. MacDougall. Mr. Kearns was very angry with Ms. Belcher. He expressed his rage to the police officer questioning him. He was angry because he believed Ms. Belcher had cheated on him with Mr. MacDougall, that she was taking financial advantage of him, and that she was spreading rumours about him in their community. He also was upset because, in his mind, she was not taking care of their daughter.

[35] He does express anger at Mr. MacDougall, but it is far less sustained and frequent. Mr. Kearns also states to the police officer that he wanted to speak with Ms. Belcher and implied that is why he went to the alleyway. He repeated that he wanted to speak to Ms. Belcher more than once. This repetition suggests that speaking with Ms. Belcher was at the top of his mind. In contrast, he does not say anything about wanting to meet or confront Mr. MacDougall.

[36] Many of Mr. Kearns' actions on the night of the incident are consistent with his statement to the police about his intentions. When Mr. Kearns went to the alleyway, he walked directly to Ms. Belcher rather than to Mr. MacDougall. Had he been seeking to fight Mr. MacDougall, it is reasonable to conclude that he would have approached Mr. MacDougall rather than Ms. Belcher.

[37] I also conclude that Mr. Kearns did not know Mr. MacDougall had come to the alleyway looking to fight him. Had he known that Mr. MacDougall was intent on fighting him, again, it is reasonable to conclude that he would have paid attention to Mr. MacDougall's actions rather than honing in on Ms. Belcher.

[38] Mr. Kearns took a knife with him and told the police that Mr. MacDougall and his friends were dangerous. The Crown submits that even if Mr. Kearns did not go down to the alleyway with the intention of fighting, he expected that an altercation would occur. There is, however, a difference between knowing that something is a possibility and having an expectation that it will happen. Taking the knife shows an awareness of some danger; it does not, however, show whether Mr. Kearns understood the extent of the danger.

[39] I will now address Mr. MacDougall's intentions in returning to the alleyway. It is uncontroverted that Mr. MacDougall went to fight Mr. Kearns. Defence's theory goes further. He states that Mr. MacDougall conspired with his friends to jump Mr. Kearns. He then tricked Ms. Belcher into luring Mr. Kearns to the alleyway. On this theory, when Ms. Belcher realized what was happening, she unsuccessfully tried to stop Mr. Kearns from coming down.

[40] The Crown states that there is no evidence Mr. MacDougall and his friends planned to jump Mr. Kearns. Her theory is that once in the alleyway, it was Mr. Kearns that precipitated the fight by being aggressive with Ms. Belcher. Mr. MacDougall was concerned for her safety and grabbed Mr. Kearns.

[41] I reject both theories. The evidence on which the defence relies is thin. It is based, in part, on evidence that some or all of the men waiting in the alleyway for Mr. Kearns were wearing masks or balaclavas. Mr. Kearns told the police he saw them wearing masks or balaclavas. Defence counsel also indicates that in one of the stills he took of the video, one of the men can be seen wearing a mask. He also points out that all the individuals accompanying Mr. MacDougall were wearing clothes that could have

been used as improvised masks. As to Ms. Belcher's role, Mr. Kearns told the officer that after Ms. Belcher texted him to come down, she phoned him and told him not to do so. Defence counsel also relies on the video. In it, Ms. Belcher pulls Mr. Jager away from the fight. Defence counsel states that while pulling Mr. Jager away, Ms. Belcher states, "It was supposed to be one on one, you stupid fuck."

[42] First, I am not convinced that anyone was wearing a mask. The still image is very blurry. Unlike defence counsel, I cannot conclude it shows an individual wearing a mask. I see a shadow on a person's face, nothing more. Additionally, at one point in his statement, Mr. Kearns told the police officer that Mr. MacDougall was wearing a mask, although the video shows he was not. Second, I hear something different than counsel on the video. What I hear Ms. Belcher saying is, "It's one on one, you stupid fuck." I do not hear her say the phrase "supposed to be."

[43] Third, even if Ms. Belcher did phone Mr. Kearns and asked him not to go down, there are many reasons why she would have done so. It is speculation that she did so because she realized what was going to happen and tried to warn him away.

[44] Turning to the Crown's theory, her submission is based on Mr. MacDougall's testimony. He testified that Mr. Kearns grabbed Ms. Belcher by the hair. Concerned for her safety, he grabbed Mr. Kearns and they started to wrestle.

[45] I do not accept that this is what occurred. I do not believe that Mr. Kearns grabbed Ms. Belcher by the hair. Because Mr. MacDougall's memory for detail is not strong, I hesitate to accept his testimony. As well, Ms. Belcher and Mr. Kearns contradict Mr. MacDougall. Each stated that Mr. Kearns tried to grab Ms. Belcher or that he did grab her but neither mentioned that he grabbed her by the hair. Although I largely

reject Ms. Belcher's evidence, and I am sceptical about Mr. Kearns' evidence, on this point they are consistent with each other. I therefore accept Mr. Kearns' and Ms. Belcher's evidence.

[46] I furthermore reject Mr. MacDougall's evidence that he grabbed Mr. Kearns because he was worried Mr. Kearns was going to hurt Ms. Belcher. Mr. Kearns' actions were not appropriate, and because he was angry with Ms. Belcher he may have been aggressive. However, because I conclude Mr. MacDougall incorrectly remembers Mr. Kearns grabbing Ms. Belcher by the hair, it would be unsafe to rely on Mr. MacDougall's evidence that he was worried about her. Additionally, Mr. MacDougall's stated purpose for going to meet Mr. Kearns was to fight him. It seems to me that the simplest explanation is the most likely: Mr. McDougall started a fight because he had planned to fight.

[47] I will now address what happened during the fight. I can make findings about how the fight started. Mr. MacDougall testified that he grabbed Mr. Kearns and then they started to wrestle. In his statement, Mr. Kearns told the police officer that he was getting Ms. Belcher out of the car when someone started punching him in the back of the head. He also implied that Mr. MacDougall began hitting him while his back was turned to him. In Mr. MacDougall's telling, Mr. Kearns was a participant in the fight. In Mr. Kearns' statement, he was taken by surprise.

[48] I conclude that Mr. MacDougall took Mr. Kearns by surprise by starting the fight when Mr. Kearns' attention was on Ms. Belcher. Mr. Kearns believed the group returned so he and Ms. Belcher could talk and he did not know Mr. MacDougall had gone there

to fight. Mr. Kearns was also focused on Ms. Belcher. Mr. Kearns would not therefore have been prepared for the assault.

[49] I am also not convinced by Mr. MacDougall's testimony because of my concerns that his memories are tainted. Moreover, Mr. MacDougall's description omits a part of the fight. His testimony implied that other than when he grabbed Mr. Kearns, the video shows the fight in its entirety. However, at the start of the video, the fight is already underway. Mr. MacDougall and Mr. Kearns are rolling around in the snow, Mr. Jager is involved, and Ms. Belcher is trying to get Mr. Jager away. It appears that something happened between the start of the fight at the car and when the video started, which Mr. MacDougall's testimony does not address.

[50] Additionally, Mr. Kearns had scratches and swelling on his face that is not adequately explained by Mr. MacDougall's version of events. It appears that at the end of the video someone kicks Mr. Kearns. This may explain Mr. Kearns' facial injuries but there is not enough evidence to conclude that he got the facial injuries because of the kicks. In his statement, Mr. Kearns said at one point that he was also dragged. If Mr. Kearns was punched and dragged before the video started, then that could account for his facial injuries. It is therefore possible that more violence against Mr. Kearns went on than is depicted in the video.

[51] My findings are that Mr. MacDougall assaulted Mr. Kearns in some way and in doing so took Mr. Kearns by surprise. Mr. Kearns may have been punched and dragged, though I cannot be certain. The evidence clearly shows that Mr. Jager helped Mr. MacDougall in the fight, though it is unclear how long he was involved. The fight ended when Mr. MacDougall got stabbed.

[52] Defence counsel also made arguments about Mr. MacDougall's and his friends' characters, submitting that they were dangerous people. Mr. Kearns, in his statement to the police, mentions that some of the people in the alleyway that night are charged with violent offences. Additionally, he states more than once that he is fearful of the men and they are dangerous. There is, however, no real evidence that Mr. MacDougall or his friends have a propensity for violence.

[53] The final piece of contested evidence is about who had weapons. All agree that Mr. Kearns had a knife. Defence counsel furthermore argues that someone else may also have had a knife. He states that the knife found at the scene might not have been Mr. Kearns' knife because the knife found had a serrated edge, while Mr. Kearns stated in his police statement that the knife he used was not serrated.

[54] I conclude that only Mr. Kearns had a knife. There was one knife found at the scene. Mr. Kearns' DNA was found on the butt of the knife. Mr. Kearns stated to the police that he did not know what happened to the knife, which is consistent with him losing it in the snow. I conclude the knife found was Mr. Kearns' knife. There is no evidence anyone else was carrying a weapon.

[55] Given this outline of the events, I must now consider whether Mr. Kearns acted reasonably. I will do so by applying the factors used to determine reasonableness to the facts as I have found them.

[56] The first factor, then, is the nature of the force or threat used against the defendant. The nature of the force used, in my opinion, is not simply about the extent of the force used but also includes the context in which the force was used.

[57] In this case, Mr. Kearns was taken unawares when Mr. MacDougall started the fight. At some point, Mr. Jager was also involved in the altercation. The Crown emphasized that in the video Mr. Jager was briefly involved in the fight. That evidence is not the whole altercation, however. It is not clear how long Mr. Jager and Mr. MacDougall were fighting Mr. Kearns together. Although Mr. Kearns did not know that he was being attacked by more than one person, the intensity of the violence would have undoubtedly increased when Mr. Jager joined in. The fight might have involved not only wrestling. Mr. Kearns may also have been punched and dragged. The nature of the force used against Mr. Kearns was not minor.

[58] The next factor is Mr. Kearns' role in the altercation. Crown counsel submits that Mr. Kearns caused or contributed to the circumstances that resulted in him stabbing Mr. MacDougall. She argues that Mr. Kearns made poor decisions that night. He knew the people waiting for him were angry and he understood an altercation was a possibility, yet he took a knife and he precipitated the fight by grabbing Ms. Belcher. In short, he knew he was entering into a dangerous situation but he went anyway and then made the situation worse.

[59] I am not convinced by the Crown's argument because it fails to take the role of Mr. MacDougall into account. The factor under examination is the defendant's role in the incident but, in my opinion, it is also sometimes necessary to analyse the complainant's actions as they relate to the defendant's role. I have extrapolated this conclusion from the Supreme Court of Canada's decision in *Khill*. In *Khill*, the Supreme Court of Canada did emphasize the importance of examining the defendant's role in the incident. It stated that a defendant who acts rashly, recklessly, negligently, or

unreasonably may not be able to rely on self-defence (*Khill* at para.105). The Supreme Court of Canada also explained, however, that there must be a full review of the sequence of events to determine who did what. It furthermore stated that a key question in the test of self-defence is who bears what responsibility for how the incident happened (*Khill* at para. 85).

[60] This may include examining the complainant's actions. The Court cited with approval the principle that the complainant's actions will not be overlooked when they are the originator of the threat to the defendant (*Khill* at para. 85). The issue before the Supreme Court in *Khill* was not about whether a defendant's role in the interaction may include examining a complainant's role, as well. I believe, however, this principle can be drawn from the court's reasoning.

[61] In this case, Mr. Kearns had a knife with him when he went to the alleyway. Given his anger, he was probably also not gentle with Ms. Belcher. However, he went to talk to Ms. Belcher - not to confront Mr. MacDougall. This was not a consensual fight. In contrast, Mr. MacDougall went to the alleyway looking for a fight and he assaulted Mr. Kearns while Mr. Kearns' attention was focused elsewhere. Putting the blame solely on Mr. Kearns would result in excusing what I find to be Mr. MacDougall's unlawful actions.

[62] I considered that Mr. Kearns had a knife in discussing his role in the altercation more generally, but it is also addressed as a factor on its own. Mr. Kearns implied to the police that he decided to bring the knife with him when he saw that there were several people in the alleyway with Ms. Belcher. Knowing who they were, he believed they would have weapons. I have found there was little objective evidence to support his

belief, however. I have also found that he was the only person to have a weapon. On the other hand, he had the knife for defensive rather than offensive purposes. The evidence is that he used the knife only after he had been attacked and also, it seems, after Mr. Jager got involved. However, taking a knife into the alleyway that night was foolish. That he chose to take a knife with him does weigh against him.

[63] The next factor is the nature, duration, and history of the relationship between the parties. There is evidence about the history of the relationship between Mr. Kearns and Mr. MacDougall and at least about Mr. Kearns' feelings towards Mr. MacDougall at the time of the altercation. They had been close friends. This had recently changed, however. Mr. Kearns felt betrayed by Mr. MacDougall because Mr. MacDougall was in a relationship with his ex-partner and, in his mind, had been with her while Mr. Kearns and Ms. Belcher were still together. For his part, Mr. MacDougall did not testify about what his feelings towards Mr. Kearns were on the night of the fight. Mr. Kearns stated to the police officer that Mr. MacDougall had threatened him but not enough was explained for me to make anything of the threat. I can conclude that Mr. MacDougall must have been angry at Mr. Kearns, however, because he was prepared to fight.

[64] The last factor to consider is the nature and proportionality of Mr. Kearns' response to the use of force. The Crown submits that there was a great disparity between what was done to Mr. Kearns and what he did. She states that no punches are seen in the video and it was essentially a wrestling match. She also states that in the video Mr. Kearns can be seen trying to stab Mr. MacDougall in the back and had presumably already stabbed Mr. MacDougall before Mr. MacDougall cried out. She

notes that Mr. Kearns stabbed Mr. MacDougall about 15 times, in some instances, very deeply. The Crown thus submits Mr. Kearns' response was not proportional.

[65] The Crown's focus, however, is too narrow. The Crown herself notes that the video is a snippet of what happened. Mr. MacDougall planned the fight; Mr. Kearns did not. Mr. Kearns was taken by surprise while focused on Ms. Belcher and two people assaulted him. Mr. Kearns may have been punched. The altercation was not simply a wrestling match between Mr. MacDougall and Mr. Kearns as depicted in part of the video. Mr. MacDougall's and Mr. Jager's conduct and its effect on Mr. Kearns were more serious than the Crown's characterization suggests.

[66] I will consider the fact that Mr. Kearns stabbed Mr. MacDougall about 15 times separately as a factor, as this is some of the most damning evidence against him. While it is necessary to take this into account, there is much that is also unknown.

Mr. MacDougall suffered some deep stab wounds, but the evidence does not identify how many of the wounds were deep and how many, if any, were superficial.

Mr. MacDougall's hospital records were filed as evidence but not referred to by counsel. Moreover, the video shows the end of the fight. Mr. MacDougall cried out in pain from being stabbed and the fight ended seconds later. Mr. MacDougall cried out several times, which could mean that he was stabbed several times. On the other hand, he could also have cried out because one of the wounds finally hurt him and Mr. Kearns stopped upon seeing the effect.

[67] Mr. Kearns' actions were not beyond reproach, but Mr. MacDougall's were also problematic. There are some gaps in the evidence, especially regarding the extent and nature of the fight, which make it difficult to determine whether Mr. Kearns acted

reasonably. The number of times Mr. Kearns stabbed Mr. MacDougall is a factor that weighed against him, but I also do not have enough evidence to conclude that Mr. Kearns acted disproportionately in relation to the force used against him.

[68] The Crown bears the burden of disproving that Mr. Kearns acted reasonably in the circumstances. Taking together my findings of fact with the facts that are still unknown, I am left with reasonable doubt. I therefore find Liam Kearns not guilty of the charges of aggravated assault and assault with a weapon.

WENCKEBACH J.