

CANADA / JUDGMENT

R. v. Willness

2023 BCSC 1216

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Supreme Court of British Columbia

DECIDED

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2023 BCSC 1216 R. v. Willness

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Willness,

2023 BCSC 1216

Date: 20230620

Docket: 26817-2

Registry: Nelson

Rex

v.

Alex Willness

Before: The Honourable Madam Justice Lyster

Oral Reasons for Judgment

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T. Forss

Place and Date of Trial/Hearing:

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March 6-10, 20-22, 24, 27, 29 & 30 and April 3-5, 2023

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Nelson, B.C.

June 20, 2023

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Introduction

- [1] These are my oral reasons for decision in this matter. I intend to order a transcript of my reasons, and I will review the transcript and edit it for grammar, add headings, and ensure citations are complete and accurate. Of course, the reasoning will not change.
- [2] On the night of July 16, 2020, at approximately 11:45 p.m., the accused, Alex Willness, had an encounter with Allan Young in the middle of Baker Street in Nelson, B.C., just outside the Cantina Del Centro (the "Cantina") restaurant's patio.
- [3] The two men did not know one another. Mr. Young was a 55-year-old man who was enjoying drinks with his wife on the patio. Mr. Willness was a 26-year-old man who was wandering down Baker Street, carrying a skateboard. Mr. Willness was upset about events he had experienced earlier that evening, and he was swearing loudly and upsetting the Cantina's patrons. Mr. Young in particular was upset with the disturbance Mr. Willness was causing, and he went out into the street, where he and Mr. Young engaged in a brief physical altercation.
- [4] During the altercation, Mr. Young suffered three impacts to the head. The first occurred after the two men initially made contact, and Mr. Young fell, hitting his head on the pavement. The second occurred when Mr. Willness struck Mr. Young on the head with his skateboard. The third occurred when Mr. Young fell after being struck by the skateboard, hitting the back of his head on the pavement. Mr. Young suffered severe head injuries, which resulted in his death four days later in hospital.
- [5] Mr. Willness ran away after Mr. Young fell to the pavement for the final time. He was apprehended by some of the people who had been sitting on the patio, about a half a block away, at the corner of Baker Street and Ward Street. They held him until the police arrived and arrested Mr. Willness.
- [6] Mr. Willness is charged with manslaughter in relation to Mr. Young's death. There are three main issues that must be decided. First, did Mr. Willness engage in an unlawful act or acts? Second, what impact or impacts to Mr. Young's head were significant contributing factors in his death? Third, was Mr. Willness acting in self-defence?

- [7] There are four main bodies of evidence that must be considered in answering those questions: First, there were a number of eyewitnesses to the fatal encounter and the preceding and following events. Most of those witnesses were patrons of the Cantina who were seated on the patio when these events occurred. Second, there is a video recording from the Cantina's video surveillance system; the camera was focused on the patio, but events on the street can also be seen. Third, Mr. Willness testified in his own defence. Fourth, there is medical evidence from the emergency physician who initially treated Mr. Young on scene; the emergency physician that treated him at the Kootenay Lake Hospital; expert evidence from the neurosurgeon who treated Mr. Young after he was transported to Kelowna General Hospital ("KGH"); and the pathologist who conducted the autopsy on Mr. Young's body.
- [8] The parties filed admissions. The identity of the deceased, Mr. Young, was admitted, as was the fact that he was pronounced dead at 21:16 hours on July 21, 2020, at KGH. Also admitted was DNA found on a skateboard seized by the police at the scene. Mr. Willness' DNA profile was found in two areas where blood was identified: near one long edge on the bottom surface, and near one end on the top surface. Mr. Young's DNA profile was found in a mixed DNA profile located on the long edge. Mr. Young's DNA was the major component of the mixed profile.
- [9] Mr. Willness also admitted his identity as the person involved in the altercation that resulted in Mr. Young's death.
- [10] The identity of the persons involved in these events is clear on all of the evidence. In recounting individuals' evidence about their observations of what other people did, I have used the surnames of those persons, for example, Mr. Willness or Mr. Young, for clarity, even if the witness testifying about their actions did not know their names.

Eyewitnesses

Introduction

- [11] The Crown called as witnesses most of the patrons of the Cantina who were sitting on the patio. They also called the server who was working on the patio, and one other individual who was seated at a nearby street corner.
- [12] The Cantina patio extended from the sidewalk in front of the restaurant into Baker Street, occupying what would otherwise have been two parking spaces. It was elevated on a platform some inches off of street level and was fenced in by a railing about three feet or three and a half feet in height. There was a string of lights hanging from the roof around the perimeter of the patio. Baker Street is a two-lane street, with one lane of traffic in each direction.

- [13] There were three parties seated on the Cantina patio that night. At the back of the patio, near the sidewalk, and on the right hand or west side looking out from the restaurant to the street, were seated Mr. Young and his wife. Mr. Young was seated with his back to the street, facing his wife. Mr. Young's wife did not testify.
- [14] Also, at the back of the patio on the left hand or east side, was a party of six. This was a group of friends and acquaintances, aged somewhere between their mid-20s to mid-40s. The members of this group were: Dallas Trafiak; Mr. Trafiak's girlfriend, Cassandra Parks; Lisa Trafiak, who is Mr. Trafiak's sister; Allison Howe, who is a friend of Ms. Trafiak; Melissa Sparrow, who worked with Ms. Parks; and Jesse Coons, a friend of Ms. Sparrow. Some of the table of six knew each other well; others had only met just that day. They met at the Cantina that evening to eat and have a few drinks. All of the table of six testified, except Ms. Trafiak and Ms. Parks.
- [15] At the front of the patio, in the middle, at a table by the railing and closest to the street, were a father and son, Stuart and Karmangah Tait. Stuart was 64 years old and Karmangah was 24 years of age at the time of this incident. The Taites were on a camping trip together. They decided to go out for a beer at the Cantina. They both testified.
- [16] All of the Cantina patrons were eating and they were drinking alcohol that night. The evidence established that none of the Cantina patrons who testified were impaired by the alcohol they had consumed that night. Mr. Young and his wife had been drinking that day, and Mr. Young was intoxicated, with a blood-alcohol content five to six times the legal limit for driving.
- [17] Vanessa Phillips was working as the server on the patio that night. She had not been drinking alcohol. Ms. Phillips testified.
- [18] The Cantina is located on the north side of Baker Street, approximately halfway between Josephine Street to the east, and Ward Street to the west.
- [19] Danny Difiore was sitting on a bench near the corner of Baker Street and Josephine Street when the events of that night began to unfold. He later walked some distance down Baker Street to observe the events. He had not been drinking alcohol, Mr. Difiore testified.

Credibility and Reliability

- [20] With one exception, the Crown eyewitnesses were all credible witnesses who testified to the best of their ability about an experience which was deeply traumatizing to them. Counsel for Mr. Willness did not seek to impugn the credibility of any of the eyewitnesses, with the exception of Mr. Trafiak.

- [21] The defence argued that Mr. Trafiak's evidence should be approached with extreme caution for the following reason. Ms. Howe testified that the day after the incident, she was travelling in a car with her friend, Ms. Trafiak, Ms. Parks, and Mr. Trafiak to go to the police station to give statements. Ms. Howe testified that Mr. Trafiak told her and everyone in the vehicle not to tell the police that they saw Mr. Young hit Mr. Willness. Mr. Trafiak denied having told them that.
- [22] Ms. Howe had no reason to make up such a story about Mr. Trafiak. Like everyone else in the table of six, other than her friend Ms. Trafiak, she had only just met him. He was the brother of her friend. Ms. Howe, like all of the eyewitnesses, was mistaken in some of her observations of what had happened the night of the incident, but she was generally a careful and highly perceptive witness. I accept her evidence that Mr. Trafiak told her and the others not to tell the police that they saw Mr. Young hit Mr. Willness. This statement draws the credibility of Mr. Trafiak's evidence into question, as it indicates that he was prepared to counsel other witnesses to tailor their evidence to Mr. Willness' potential detriment. I do not accept Mr. Trafiak's evidence, except where it is consistent with the evidence of other witnesses or the video. That said, much of Mr. Trafiak's evidence is consistent with the evidence of the other witnesses.
- [23] I hasten to add, however, that Ms. Howe did not alter her evidence in any way as a result of Mr. Trafiak's remark. She testified that she did not see Mr. Young hit Mr. Willness, as she only observed him swing his hand in Mr. Willness' direction. She told the police what she saw happened. Ms. Howe testified, and I accept, that Mr. Trafiak's comment did not influence her evidence in court. The other two people in the car, Ms. Trafiak and Ms. Parks, did not testify.
- [24] None of the Crown eyewitnesses had perfect recall of the events of that night. This is not surprising, given the circumstances. The events unfolded rapidly. Depending on where they were seated, and in which direction they were facing, they had different lines of sight. Their attention was focused on different things at different times. The events they saw and participated in were traumatic and affected them deeply. I take these factors into account in assessing the reliability of their evidence.
- [25] I am mindful that I am entitled to accept some, none, or all of any witness' evidence. I apply that principle in assessing the evidence of the eyewitnesses.
- [26] I turn to setting out the events of that night from the perspective of each of the eyewitnesses.

Danny Difiore

- [27] The first person to observe Mr. Willness was Mr. Difiore. Mr. Difiore was visiting Nelson at the time, staying at the Mountain Hound Inn, located on Baker Street to the east of Josephine Street. He was sitting on a bench outside when he observed a group of men walking up Josephine Street towards Baker Street. The group was shouting aggressively. One man, whom the evidence establishes was Mr. Willness, was shouting more aggressively than

the others. He was yelling, "Ow, my eye", and shouting that he was feeling like he was going to "fuck someone up" or that "I'm going to fuck you up." The other men he was with laughed in response.

- [28] Mr. Difiore found the man shouting about wanting to "fuck people up" intimidating enough that he decided to move away from the bench he had been sitting on, back towards the entrance of the Mountain Hound Inn. He had been there only a few seconds when he heard a commotion. He walked back to where he had been sitting. He heard indiscriminate shouting. He saw a man, whom the evidence establishes was Mr. Young, walk out towards the group of young men. He described Mr. Young's movement as neither slow nor fast. He saw Mr. Young get struck by Mr. Willness with a skateboard. He described Mr. Willness holding the skateboard by the trucks in his left hand, drawing it up, and hitting Mr. Young's head with it broadside. He described the blow as very forceful. Mr. Difiore described both men as having been standing up when the blow was delivered, and that the two men were standing close to each other, two to three feet apart. Mr. Young immediately fell to the ground, where he lay unmoving, apparently unconscious. There was a significant amount of blood coming from Mr. Young's head. It all happened very fast.
- [29] According to Mr. Difiore, Mr. Willness ran down Baker Street towards Ward Street. Several men ran after him and caught and subdued Mr. Willness. Two men held him down on the ground. Mr. Difiore did not see Mr. Willness get arrested, but he did see the police arrive. He did not see Mr. Willness get put in the back of the police car, but he did see and hear him kick out the rear window of the police car.

Vanessa Phillips

- [30] Ms. Phillips was working at the Cantina as the server on the patio that night. She heard a group of two or three men shouting across the street. They sounded to her "angry" or "crazy" or "like they were on something". It appeared to her that one of the men was threatening and stalking another one of the men. She heard one man shout, "I'm going to fucking kill you" more than once, to which one of the other men responded, "Fuck you man," in a dismissive manner. The evidence establishes that Mr. Willness was the man shouting, "I'm going to fucking kill you."
- [31] Ms. Phillips testified that she found their behaviour frightening, and that she was afraid the men were going to kill one another or something bad was going to happen. She yelled out to them "I'm going to call the cops", and she then went inside the restaurant to get a phone. She called the police on the non-emergency line, as in her experience it was quicker than calling 9-1-1. This was not the first time she had had to call the police while working that summer.
- [32] Ms. Phillips testified that Mr. Young was intoxicated, but that he and his wife had decided to cut themselves off before this incident occurred.

- [33] Ms. Phillips did not see the interaction between Mr. Willness and Mr. Young. By the time she got back out to the patio, Mr. Young was lying in the street. She asked someone to get the restaurant's first aid kit to help Mr. Young. Later, she said the people in the table of six were "amped up", and people from that table told her they had done "grim things" to Mr. Willness.

Jesse Coons

- [34] Mr. Coons was a member of the table of six. He heard a commotion from the men on the street. Just one of the men was shouting. He heard that man, who was carrying a skateboard, and whom I find was Mr. Willness, say "I'll fuck you up" many times. He heard what he described as angry banter back and forth between the men. He also thought that the other man was trying to calm Mr. Willness down.
- [35] It seemed to Mr. Coons that Mr. Willness was looking for a fight, as he was very aggressive. As the men came about level with the patio, Mr. Coons saw Mr. Young get up and go to the railing. As Mr. Young walked closer to the railing, Mr. Willness walked towards the centre of the road. Mr. Coons heard Mr. Young say something along the lines of, "I've had about enough of you", "I'm trying to have a nice dinner with my wife", and "shut up". He did not recall Mr. Young saying, "I'm sick of this shit." Mr. Young seemed upset to Mr. Coons.
- [36] Shortly after Mr. Young said these things, he jumped over the patio railing and met up with Mr. Willness on the street. Mr. Coons said that before Mr. Young could get his hands up, he was struck by the skateboard. He described Mr. Willness cocking the skateboard behind his head with both hands, swinging it like an axe, and hitting Mr. Young in the head. Mr. Young fell backwards and hit his head on the pavement. Blood started pooling instantly. Mr. Coons did not see Mr. Young take a swing with a punch at Mr. Willness. He noticed, accurately, that Mr. Young was wearing flipflops. He did not know if Mr. Young ran towards Mr. Willness.
- [37] Mr. Coons said that he had never seen an act of violence that severe. He testified that he felt it was their duty to step up, and to make sure Mr. Willness did not leave the scene. He did not want Mr. Willness to get away. He and Mr. Trafiak ran after Mr. Willness. He recalled Mr. Willness swinging his skateboard at them. He recalled seeing Mr. Trafiak take Mr. Willness to the ground. Mr. Trafiak was having a hard time holding Mr. Willness. Mr. Coons admitted that he kicked Mr. Willness a few times in the head. He remembered that one of the two men in kilts -- I note that both of the Taites were wearing kilts -- punched Mr. Willness, and that Ms. Sparrow twisted Mr. Willness' arm behind his back and told them that they should "choke him out". He recalled Mr. Willness having a bloody nose and mouth.

Allison Howe

- [38] Ms. Howe heard really loud profanity being spewed from her left side, that is, from the Josephine Street side of Baker Street. It was very loud and she said almost intolerable, and the group of three men were saying what she described as "disgusting things". Once the men came into view, they seemed very unsavoury to Ms. Howe. She said that they were having a

conversation at each other, but not with each other. They were very separated. They were swearing at each other, but not directing it. Someone said something that upset one of the others and used the word "cunt". They were staggering, they were not walking together, and they were, as she described it, "just kind of going". Ms. Howe said that everyone on the patio was looking at these men. It seemed to her like they were "on something". They wandered back around the corner and two of them returned to turn down Baker Street, walking parallel with the restaurant on the other side of the street.

- [39] Ms. Howe was watching not only the men walking down Baker Street, but also some of the other patrons on the patio. She thought that the Taits looked annoyed. She noticed Mr. Young looked like it seemed an injustice was happening to him. He seemed irritated or agitated. He started to move in his seat, looked uneasy, stood up, and faced out to the street where the men were. It seemed to her like Mr. Young was used to confrontation or disturbances, and that he had handled things like that in the past. He seemed uncomfortable for the people on the patio, but comfortable going towards the disturbance.
- [40] Ms. Howe acknowledged that, in her police statement given the day after the incident, she told the police that when Mr. Young got up, she told him he should sit down. When she testified, she did not recall having said that to Mr. Young, but she readily acknowledged her memory would have been much clearer when she gave her police statement. She also told the police that she heard Mr. Young say, "I've had enough of this", and when that statement was put to her, she did recall him having done so.
- [41] When Ms. Howe saw Mr. Young stand up, she noticed how drunk he was. He stumbled over to the railing and he put his hands on the railing like he was trying to stabilize himself. He was rocking a bit at the railing. Ms. Howe felt that if he had been sober, he would have been able to control his movements a bit better. Ms. Howe has worked as a bartender in the past, and accordingly, she is familiar with how people act when they are intoxicated.
- [42] Ms. Howe observed that Mr. Young was mumbling to himself at the railing, but not loudly enough for her to know what he was saying. At this point, it appeared to her that the men causing the disturbance noticed Mr. Young and that they kind of locked onto one another. One of the men in particular had stopped dead in his tracks just on the other side of the middle of the street. She felt like this was the first time he had noticed people outside of the group he was walking with. This man, who was Mr. Willness, turned his body and looked at the patio. His hand was clenched on his skateboard. He stared at Mr. Young.
- [43] Ms. Howe did not know how Mr. Young got off the patio. She saw him walking or stumbling towards the men in the middle of the street. She did not agree that he charged towards Mr. Willness. Mr. Young was now mumbling louder, but she still could not make out the words, she thought because the noise on the patio was now getting louder. She said that while Mr. Young walked over there, he almost threw a hand in the direction of Mr. Willness. She did not know if he tried to strike him or stop him or to tell him to stop, but Mr. Young's right hand came out and up. She said that his punch almost went upwards, not into Mr. Willness.

Because Mr. Young's back was to her, she could not say if he hit Mr. Willness. At the point where Mr. Young's hand went up, he had stopped and he was no longer moving forward with his feet. They were squared off, not like they were having a fight, but like they were having a conversation.

- [44] Ms. Howe said that at the same moment Mr. Young's hand came out or up, the skateboard hit him in the forehead. She said that Mr. Willness stepped back with his right foot and the skateboard came up at the same time. He was holding the top trucks with his right hand by his side, and drew the skateboard upwards over his body and hit Mr. Young on the left side of his forehead, very close to his temple. She thought that Mr. Young's fist crossed the yellow line in the middle of the road at the exact same time the skateboard came up.
- [45] Ms. Howe watched Mr. Young fall backward after he was hit and, as he was falling, she said that she saw a hematoma form on his forehead like in a cartoon. She watched Mr. Young's head hit the ground and his neck come back up, and then his head hit the ground again. His head led his body down. His feet came up and his sandals flew off his feet. She saw blood come from his head.
- [46] She went out to help Mr. Young. While she did so, Ms. Sparrow was, in Ms. Howe's words, "freaking out" and yelling, and the men on the patio all ran after Mr. Willness. Ms. Howe knelt behind Mr. Young's head and she stabilized his head and shoulders because of the head and neck trauma he had sustained. She was scared and panicked, because she felt like she was putting her own life in danger, putting herself there, but she felt she had to be there for Mr. Young. Ms. Howe had some previous first aid training and she felt it was her duty to put it to use to assist Mr. Young.
- [47] There was a lot of chaos. It felt like 45 minutes until the police arrived, but she had no idea how long, in fact, she was holding Mr. Young's head. People were running up and down the street. Ms. Sparrow was running back and forth saying that they had "caught the kid", that is Mr. Willness, that he had spit in her face, and that she was scared of catching a communicable disease as a result. Mr. Young's wife was standing over Ms. Howe, and Ms. Howe asked other people to get her away because she was afraid of her falling onto Mr. Young while she was, in her words, "trying to keep his head together". A man who might have been a bouncer came over and crossed Mr. Young's arms and legs. A bread truck started to come down the street and almost hit them.
- [48] Mr. Young opened his eyes when Ms. Howe came over. Ms. Howe asked him his name and he told her he was Allan. She asked him how old he was and he told her he was 51. Ms. Howe recollected that his eyes then rolled back in his head, she heard him gurgle, and she did not see him breathing anymore. She thought, mistakenly, that he was dead or at least brain dead. She observed a hematoma on his forehead and it felt like his skull had too much movement or a gap in it. He bled all over her clothes, her hands, and her shoes. She got blood in her hair. Ms. Howe kept holding Mr. Young's head until the paramedics arrived and took over holding his head. She did not believe that he ever regained consciousness,

although she was mistaken in that impression, even when the paramedics arrived and were doing things like pinching his trapezius muscles in an attempt to get a response.

Dallas Trafiak

- [49] Mr. Trafiak testified that he heard yelling and screaming from Josephine Street. He said that there were three men, with one of them running away from the other two down the street. He said that they were screaming things that you should not say when couples are out having a meal. He could not recall the specific words. The two men who had been chasing the other man turned onto Baker Street.
- [50] Mr. Trafiak said that one of the women on the patio clapped and said, "Good show." He thought that drew the men's attention to them. He thought everyone on the patio was getting annoyed, because the way the men were talking was not right. He was annoyed. Several people were saying that "You should leave" and the server told the men that she was going to call the cops. He felt that the men were almost egging people to come and jump over the patio, like they wanted a fight. They were very verbal towards the people on the patio, and aggressive. The men were in front of the patio in the middle of the street.
- [51] At that point, Mr. Young got up and asked them to leave. He made a comment about trying to have a peaceful meal. He was not sure of Mr. Young's exact words. They started to argue and talk back to him, and Mr. Young went over the railing to talk to them in the middle of the road. Mr. Trafiak said that you would almost say Mr. Young was provoked, because the men on the street wanted to fight the people on the patio. According to Mr. Trafiak, while Mr. Young was talking to one guy, the guy with the skateboard struck him over the head with the skateboard. I note that this recollection is inaccurate, as only Mr. Willness was standing with Mr. Young. He described it as almost like a bat action. It happened very quickly. He said that Mr. Young was hit on the side of the head with the skateboard, at the top in the temple area. He thought it was on the right side, but he was not a hundred percent sure of that. Mr. Young dropped to the ground. Mr. Willness tried to run away, and at that point, Mr. Trafiak got up, jumped the railing, and went after him.
- [52] When Mr. Trafiak caught up with Mr. Willness, Mr. Willness swung his skateboard at him, trying to hit him on the upper torso or head, and caught part of his arm. He remembered being on top of Mr. Willness with his knee on his back, trying to hold him there. There were three other men there, and they took him to the ground. He then brought Mr. Willness up to a standing position by grabbing him by the shoulder. He was kind of worried, because he did not want to see anyone else hurt. Mr. Willness was yelling a lot of things, threatening, asking them to let him go, and yelling for his friend to help him, who was standing some distance away. It was all a bit of a blur, and he thought Mr. Willness might have been kicked by someone. He thought Mr. Willness might have had a bleeding lip.

- [53] At this point, Ms. Sparrow came up. She said not to let Mr. Willness go, because she thought he had killed Mr. Young with the skateboard. Mr. Willness, according to Mr. Trafiak, called Ms. Sparrow a "fucking whore" and spit in her face. There was blood from his mouth or tongue. He thought Ms. Sparrow "touched" Mr. Willness on the back so he could not move.
- [54] The police showed up shortly thereafter. They put Mr. Willness in the back of the police car where Mr. Willness was "going pretty crazy" and kicked the window out.
- [55] When Mr. Trafiak went back to the Cantina, he saw a big puddle of blood on the pavement where Mr. Young had been lying.

Melissa Sparrow

- [56] Ms. Sparrow had previously testified in a preliminary inquiry in a murder trial when she was a teenager. She had seen a fight escalate, and had tried to intervene, and had witnessed a person get murdered. She testified that, as a result, she gets nervous when people are agitated. It was apparent that Ms. Sparrow's responses and conduct on the night in question were influenced by that earlier traumatic experience.
- [57] Ms. Sparrow testified that her attention was drawn off of the patio by a guy screaming loudly and walking back and forth. He was screaming things like, "I'm going to fuck you up" repeatedly. This made her nervous and she started to pay attention to him. I find this man was Mr. Willness. He was on the street or sidewalk across from the patio. Ms. Sparrow vaguely recalled him being with another guy, but they were not really walking together. She did not know if Mr. Willness had just been in a fight or was trying to fight somebody. It seemed like he was saying, "I'm going to fuck you up" to someone down the street. She thought that she first saw Mr. Willness coming from her right, which would mean from Ward Street towards Josephine Street. This recollection was clearly mistaken.
- [58] Ms. Sparrow thought that her table just ignored what was going on, on the street. She did not recall clapping, but when shown the video that shows her doing just that, she acknowledged that she did. She recalled Mr. Young getting up and saying, "I'm sick of your shit," or something like that. That triggered a reaction in her 'like, why would you do that? There's going to be a fight". Mr. Willness stopped and they exchanged some words in which Mr. Young repeated that he was "sick of your shit". Mr. Willness advanced towards the patio. Mr. Young hopped over the railing and they met in the middle of the street. Mr. Young was wearing flipflops, seemed a little unstable, and seemed pretty intoxicated to her.
- [59] Ms. Sparrow was not sure what happened when the two men met up, as Mr. Young's back was to her. They advanced towards one another. In a way, it seemed to her like they were going to fight or something. Mr. Young sort of stumbled and Mr. Willness came at him with the skateboard over his left shoulder, holding it with both hands. At the same time that Mr. Young sort of stumbled, Mr. Willness hit him over the side of the head with the sharp side of the skateboard. Ms. Sparrow said that she knew Mr. Young did not hit or physically touch Mr. Willness because he stumbled. She also said that she did not know if he tried to grab

him or if there was a swing. The pillar of the patio was in the way of her line of sight. They were advancing towards one another, but Mr. Young was hit with the skateboard "before it began". She said that Mr. Young never touched Mr. Willness. Mr. Young fell backwards so hard that his head bounced up when it hit the pavement, and hit the pavement again, sort of like whiplash. She recalled his arms and legs crossing over themselves as he fell. That recollection was clearly mistaken, as an unidentified man can be seen moving Mr. Young's limbs into that position on the video soon after he was struck and fell to the ground.

[60] Ms. Sparrow recalled everyone standing up. She went over to where Mr. Young was lying. Ms. Howe was holding Mr. Young's head. Some other guy was gently slapping his face as if to try and wake him up, which she told him not to do because she was concerned that Mr. Young had a head injury. It seemed to her that Mr. Young was struggling to breathe. She rubbed his chest to try to wake him up. Someone had taken Mr. Young's shirt off. He was bleeding really badly. That reminded her of the murder she had seen, and it triggered a physical response in her. She panicked.

[61] Meanwhile, Mr. Trafiak and Mr. Coons and the Taites ran down the street after Mr. Willness. She ran down the street in that direction screaming, "You just fucking killed that guy." She was worried about the men who had gone after Mr. Willness and she went to try to help, so he would not get away. She recalled that when she reached the corner, Mr. Willness was standing there and the men were not holding onto him, which surprised her. She screamed at Mr. Willness that, "You just fucking killed that guy." Mr. Willness was bleeding from his nose and he spat blood, which landed in her eye. Mr. Willness said, "I hope he doesn't die." She was not sure if that was before or after he spat in her face. She grabbed his arm and she tried to put it behind his back. She asked the men to grab Mr. Willness and to "choke him out and bring him to the ground." The men then held Mr. Willness until the police showed up. Ms. Sparrow felt sick to her stomach and she was worried about Mr. Willness having spat blood in her eye.

[62] Ms. Sparrow then ran back to try and help Mr. Young. The people attending to Mr. Young told her to give him some space. She tried to comfort Mr. Young's wife. She never saw Mr. Young regain consciousness until she saw his arm move after he was placed on the stretcher. She told the server, which would be Ms. Phillips, that Mr. Willness had spat blood in her eye, and Ms. Phillips got her a first aid kit and flushed her eye out with saline solution.

Karmangah Tait

[63] Karmangah Tait saw and heard a disturbance between three men on the street. They were yelling and swearing, with the one he identified in court as Mr. Willness saying, "No, I'm not fucking doing that" and "fuck" multiple times. He described the volume as "decently loud", enough to cause a disturbance amongst the patrons on the patio.

- [64] Karmangah Tait described himself feeling uneasy seeing and hearing this disturbance, and he said that it was just his nature to feel uneasy every time he hears someone yelling and swearing in public.
- [65] Karmangah Tait described Mr. Young going to engage the men in the street: he got up from his chair, ran to the railing, and hopped over it. He described it as an attempt to de-escalate the situation. He did not remember Mr. Young telling them to "shut the fuck up." Karmangah Tait described Mr. Young as talking with his hands. After Mr. Young went over the railing, Karmangah Tait recalled Mr. Young saying, "You guys need to stop" and to relax. He said Mr. Young was raising his voice and he was possibly upset. He recalled Mr. Young saying, "I've had enough of this" and while he did not recall him saying that he had "had enough of this shit", he acknowledged that that was possible. He said Mr. Young's tone was not aggressive. He said that Mr. Willness responded with, "No, fuck you." He described Mr. Willness swinging the skateboard like a baseball bat with a tremendous amount of force. The trucks were facing out. The skateboard hit Mr. Young on the left side of his head. He heard a loud crack, like a gun going off. Mr. Young's legs stiffened, it looked like he was knocked out, and he dropped like a sack of potatoes.
- [66] Karmangah Tait said that Mr. Willness proceeded to run away down the street. He hopped over the railing and chased Mr. Willness. He told him to "stop immediately" and "stop, I'm making a citizen's arrest". His father was behind him and Karmangah Tait said that Mr. Willness lunged at his father with the skateboard. His father went to hold Mr. Willness. They were both on the ground and he picked his father up and put Mr. Willness in a chokehold. He did not recall two other men being there and holding Mr. Willness before they got there. He did recall a woman coming and yelling at Mr. Willness that he was a "fucking asshole" and that "you fucking killed him, he's dead." This would have been Ms. Sparrow.
- [67] Karmangah Tait agreed that all of this happened very quickly.

Stuart Tait

- [68] Stuart Tait described hearing yelling behind him, "f this and f that" and some other profanities. This was from the direction of Josephine Street. As the three men approached, the yelling got louder. They were walking in the middle of Baker Street. He heard Mr. Young say, "I've had enough of this." He also heard someone behind him on the deck, he was not sure who, yell out something to them like, "Shut the fuck up." Stuart Tait was not really annoyed, and he would have just ignored the men. Stuart Tait has a hearing impairment, but he could hear all of these things.
- [69] Stuart Tait saw Mr. Young jump over the railing and go over to the group of men. Mr. Young did not charge them or run, but more or less walked at a fast pace. He did not know if Mr. Young was angry, but he would say that he was annoyed. It looked like he was talking to them, although they might have been just staring at one another. He could not hear what they were saying.

- [70] Stuart Tait saw Mr. Willness bring up a skateboard from his side and swing it at Mr. Young's head. He swung it kind of like a bat and he hit the side of Mr. Young's head. He heard a loud crack and Mr. Young went down like a sack of potatoes. It looked like he hit his head on the pavement. There was a pool of blood around Mr. Young's head. He heard a woman who had gone out onto the street behind Mr. Young scream, "You killed him."
- [71] Before the skateboard came up and hit Mr. Young, the scene did not look violent. Stuart Tait did not see any major physical movements prior to the skateboard coming up, which is what made it so shocking. He did not see Mr. Young make a fist with his right hand and swing it at Mr. Willness' head.
- [72] Stuart Tait saw that Mr. Willness was leaving, so he got up and ran after him down the sidewalk. His intention was to stop him. He caught up with him and told Mr. Willness that he might have killed a guy, that he had to stop until they called the police, and that he was making a citizen's arrest. Mr. Willness told him to "fuck off". Mr. Willness swung at or came at Stuart Tait, and Stuart Tait thought he was going to attack him, so Stuart Tait grabbed Mr. Willness around the mid-section and took him to the ground. Mr. Willness landed on his leg. There was a bunch of people around. Someone lifted Mr. Willness off of him. At this point, his attention was focused on looking for his false tooth, which had got knocked out in this process. He saw that his son had Mr. Willness in a body hold and that there were other people there. Stuart Tait said to his son, "Let's go", as there were other people there to hold Mr. Willness until the police came.
- [73] Stuart Tait agreed that this all happened very fast.

Mr. Willness

Summary of Mr. Willness' Evidence

- [74] Mr. Willness testified on his own behalf. In his direct evidence, he testified that he is living in Surrey at present, where he has been employed with a temporary agency doing construction work since December 2022, and more recently with a landscaping company.
- [75] He has a Dogwood diploma, which he explained is the equivalent of Grade 12. He obtained that diploma in 2015. He has no post-secondary education beyond some construction certificates in safety training and fall protection. At the time of this incident, he was 26 years old.
- [76] Mr. Willness has gained weight since the alleged offence due to being clean and sober and taking better care of his health. He has had problems with substance use, describing himself as an alcoholic since the age of 18. He testified that in September 2020, after this incident, he started smoking methamphetamine and fentanyl, which became a bad habit. He has been clean and sober since March 2021, when he was arrested on the present charge. He was held in custody for three months before being released on bail to a recovery house in Surrey.

- [77] Mr. Willness testified that he has a criminal record. He was not questioned about the nature of his record.
- [78] In July 2020, Mr. Willness was homeless, staying at shelters, in tents, on the street, and couch surfing at friends' homes. He was living back and forth between Nelson and Castlegar. He was picking up some work here and there, but nothing steady. He was supporting himself on welfare and collecting bottles.
- [79] In July 2020, Mr. Willness was drinking alcohol a lot, drinking every day, pretty much all the time. He denied that he was using any other substances at that time.
- [80] On July 16, 2020, prior to the alleged offence, Mr. Willness had been detained in the Nelson Police Department drunk tank. He was released from cells sometime earlier that evening. He was trying to head to Castlegar, when he ran into some friends who had alcohol and he started to drink with them. He recalled the names of two of the friends, Caleb and Benny, and he said that others were coming and going. They were drinking around town in the Baker Street area. He specifically remembered drinking vodka and maybe some other drinks. He did not recall exactly how much alcohol he had to drink, but thought it was maybe half of a 26-ounce bottle. He did not buy the alcohol.
- [81] That night, Mr. Willness was wearing a hoodie and sweatpants. He had a backpack on. Sometime that evening, another person that he knew, Megan, gave him a skateboard in exchange for a couple of cigarettes. It was a beat-up, short street board that he wanted to fix up. Mr. Willness has skateboarded since he was a kid. He likes skateboarding and he did not own a skateboard at the time, so he wanted to fix this one up to use.
- [82] The next thing that Mr. Willness testified he remembered was being at a park on Baker Street near the Co-op. The Co-op is on Baker Street, a couple of blocks to the east of where the incident later occurred. He was drinking with his friends and some other people. Someone pulled out a spray can. He does not remember who sprayed him. He was not sure if it was pepper spray or bear spray or mace, or maybe something else. They sprayed it on his face and skin. It burned and caused a lot of pain. After this, he described himself as pretty upset. His eyes and his skin were burning. The person who had sprayed him took off.
- [83] The next thing that Mr. Willness testified he remembered was being determined to leave town to go to Castlegar. He was walking with Caleb and Benny, west down Baker Street, towards the intersection that leads to Castlegar. That intersection is to the west of where the incident later occurred. Benny took off up the hill. He was not sure on which street. Mr. Willness continued walking with Caleb, who was going to go with him to Castlegar.
- [84] Mr. Willness described himself as pretty drunk at this point. The next thing he remembered was walking down Baker Street. He was upset and yelling a bit. The next thing he remembered was a big group of people yelling at him from the patio across the street. He yelled back at them and he kept walking. Mr. Willness testified that he did not remember what the people yelled at him or what he yelled back.

- [85] According to Mr. Willness, one of these people, who was clearly Mr. Young, stood up and yelled at him. Mr. Willness said that he somehow ended up in the street, approaching Mr. Young. Mr. Willness testified that Mr. Young came at him and attacked him. Mr. Young took a swing at him. Mr. Willness testified that he reacted and that he guessed that he tried to push Mr. Young away. He testified that he hit Mr. Young once with the skateboard. Mr. Young hit the ground and he was not getting back up. Mr. Willness tried to leave because the person was not trying to fight him anymore at that point. He thought that the group of people on the patio were Mr. Young's friends and they started chasing him.
- [86] Mr. Willness assumed that the person who attacked him was about his age. He did not remember how big he was. It happened very quickly and he just remembered someone attacking him. He did not recall if he still had his backpack on, but he thought so. He thought the skateboard was in his hand by his side.
- [87] When asked what was going through his mind when he hit Mr. Young, Mr. Willness said that he did not think anything was going through his mind. It happened so quickly and he did not really recall exactly what happened. He just remembered parts of it.
- [88] Mr. Willness testified that at this point a whole group of people, whom he thought had been with Mr. Young, chased him down and tackled him. One of them was on top of his chest and it was hard to breathe. Others were punching and kicking him. The next thing he recalled, he was arrested, handcuffed, and put in the back of a police car.
- [89] Mr. Willness did not remember anything after he was put in handcuffs and into the police car, until sometime later when he was woken up in cells by Detective Constable Anstey, who wanted to take him to an interview room to ask him questions. I note that the time of that interview is not in evidence. The evidence only shows that it was sometime after 12:30 a.m. on July 17, 2020, which is when Mr. Willness was put in a cell at the Nelson Police Station. Mr. Willness did remember getting released the night of July 17, 2020. It was really late, after he had made his statement. Detective Constable Anstey gave him a ride to Castlegar.
- [90] Mr. Willness did not remember swinging the skateboard around at people after the incident, but he said it was possible. He did not remember kicking the window out of the police car, but he now recognizes that he did so. He did not remember being booked into the Nelson Police Department cells.
- [91] Mr. Willness did not know for some time that Mr. Young had died. Somebody showed him a news article about someone dying in Nelson from being hit with a skateboard that he thought might have been Mr. Young. It was not until he was arrested in March 2021 that he knew for sure that Mr. Young had died.

- [92] In cross-examination, Mr. Willness agreed with the suggestion that it was fair to say that July 16, 2020, was a bad day for him. He denied that he did not like Nelson, but he said that he was dealing with a lot of issues there at the time. He did not remember why he was in Nelson that day. He accepted he might have lost his cellphone sometime that day, but he did not really remember.
- [93] In response to a question about whether he did not really like some of the people he was drinking with, Mr. Willness testified that he did not remember who they were. He agreed that Caleb was his friend.
- [94] Mr. Willness testified that he did not really remember any of his conversations with the police. He had been drinking a lot. His life was chaotic. It was so long ago, and it was hard to remember specific details.
- [95] Mr. Willness was asked whether drinking alcohol changes the way he sees reality. He said that he did not know how to answer that, but said that he did know that it does make you not think straight. He agreed that it changes the way he makes decisions. When he was drunk, it put him in bad situations with the wrong people. He accepted that he had made bad choices.
- [96] Mr. Willness said that he was hung over and dehydrated when he was released from the drunk tank on July 16, 2020, prior to the incident.
- [97] In response to a suggestion that it was fair to say that he did not have a great memory of what happened, Mr. Willness agreed that he did not, but said that some things "kind of stick out, serious things that happened", but that he could not remember all the details.
- [98] Mr. Willness definitely remembered being sprayed with something, it upset him, and he was kind of upset and angry, and it was most likely that he was yelling as a result.
- [99] When it was put to him that he was upset and angry and swearing, Mr. Willness agreed that he was, and said that he was upset and angry and swearing about what had happened to him, being sprayed in the face and being drunk, and it not being a good day to begin with. He was angry at the situation and the guy who sprayed him, but he was nowhere to be seen. He was going to try to hitchhike out of town.
- [100] Mr. Willness did not remember yelling, "I'm going to fuck you up", but he accepted that he could have and that it could have been more than once. He also did not remember saying that "I'm going to kill you", but accepted that it was something he could have yelled. He testified that he was not yelling at anybody specific, and that it had nothing to do with anybody who was around. He agreed that it was reasonable to think that people might be upset by him walking down Baker Street yelling and swearing. At the time, he did not care if he was or was not loud. He had been sprayed and was angry and upset and vocal about it. He guessed that other people might reasonably find it to be aggressive.

- [101] Mr. Willness did not remember a woman on the patio at the Cantina yelling back at him. He did not remember a woman saying she was calling the police. He just remembered a group of people yelling at him. He did not remember anything they said.
- [102] When it was put to him that he did not keep moving along, Mr. Willness said that he did not really remember, although he mentioned he had seen the video. He accepted that the video showed that one person came over to him, not a group of people. He did not remember if Mr. Young had said something to him before he came over to him, but he thought he had.
- [103] Mr. Willness was asked whether, in fact, he started walking towards Mr. Young before he was even over the railing. He did not know. He said he did not really have a memory, because he was really drunk and it was so long ago. When asked if there was nothing to stop him from stopping yelling, he said he did not know, that he was pretty upset, and he was having a terrible day with being sprayed in the face. He did not know if anyone stopped him from continuing down Baker Street. He ultimately accepted that there might not have been anything to stop him from continuing down Baker Street. When it was put to him that he turned around and started towards the patio, he said that, judging from the video, Mr. Young started walking towards him. He thought he was trying to confront Mr. Young and to tell him to "f off" or something. He did not know why exactly he started to cross the street.
- [104] When asked if he was angry when he started to cross the street to the patio, Mr. Willness said that he could have been, he was already upset and people were yelling at him. He did not know why they were yelling at him.
- [105] Mr. Willness agreed that it would be upsetting to be out for dinner and have someone walking down the street, yelling and swearing, but he said he would have just called the cops and not said a word.
- [106] Mr. Willness was asked about the video. He agreed that a group of people did not come towards him and that one person walked towards him, while he walked towards him. He denied having hit Mr. Young more than once, saying that it looked more like Mr. Young swung at him, and he kind of blocked Mr. Young and he hit him once. When it was put to him that he blocked Mr. Young with his skateboard, Mr. Willness said that he was not thinking about how to block it, the guy swung at him, and he just reacted. He said that he wished that he had just walked away.
- [107] Mr. Willness agreed that when he pushed Mr. Young away, Mr. Young fell to the ground on his head. When it was put to him that Mr. Young had not stood back up all the way when he brought the skateboard down on his head, Mr. Willness said that he had seen the video and it happened within seconds, and he did not have time to think, other than to stop the guy from attacking him. He kept repeating it happened within seconds, he wanted to stop the guy from attacking him, and it was just a reaction.

- [108] Mr. Willness was asked how he could remember that Mr. Young swung at him, considering all of the things he does not remember. He responded that he did not know and that even when you are drinking, if someone is attacking you, it is something you usually remember.
- [109] Mr. Willness agreed that he did not have to hit Mr. Young over the head to stop him. He also agreed that he did not have to hit him at all. It was suggested to him that he could have just swung his skateboard and kept Mr. Young at arm's length distance. Mr. Willness said that he did not have time to think. It was then put to him that he did that later when the Cantina patrons were making their citizen's arrest. He responded that he did not remember that part, he just remembered being tackled to the ground, being punched and kicked, and having a guy on his chest. He did not remember anyone telling him to stop, that he had to wait for the police, or that they were making a citizen's arrest. He just remembered somebody saying "this guy is dead" and him saying that he hoped he did not die. For some reason, that stuck out clearly to him.
- [110] Mr. Willness agreed that he knew what would happen if he used the skateboard to hit a person, but he said he was not thinking about whether to use it and that he was not trying to fight somebody. Specifically, Mr. Willness remembered that in high school, a guy got hit in the head with the trucks on a skateboard and was knocked right out. He said it was pretty brutal. It was put to him that he had told Detective Constable Anstey that a person hit with a skateboard is usually knocked out, to which he had responded, "judging from what I had seen before, yes", but he said his intention was not to hit Mr. Young with the skateboard.
- [111] Mr. Willness was asked about comments he had made to Detective Constable Anstey about how he felt about what had happened. Mr. Willness testified that, in hindsight, he definitely wished that he had kept going and that this would not have happened. He testified that he was definitely remorseful after what had happened. He testified that hearing from Detective Constable Anstey that Mr. Young was in critical condition, he felt he had been hurt pretty bad, and felt really bad for him. He was asked whether he went a little overboard, to which he responded, "looking back on it, yeah," and that he had told Detective Constable Anstey that.
- [112] Mr. Willness testified that he could not say he did not touch Mr. Young when Mr. Young tried to swing at him. He said that he tried to block it or get out of the way of him punching him, and he cannot say exactly what happened. He maintained that he just remembered hitting Mr. Young once, and that is what the video looks like. He maintained he only hit Mr. Young once, that is when he brought the skateboard down on the top of his head. He acknowledged that Mr. Young was not fully on his feet when he did so, but testified that he assumed Mr. Young was trying to fight him and he was trying to stop him.
- [113] Mr. Willness agreed that he was a "fair piece" away before the people from the patio caught him. He could not remember Stuart Tait telling him he was making a citizen's arrest and that he had to wait for the police. He did not remember Stuart Tait telling him that he might have killed a guy. He only remembered a woman saying that.

- [114] It was put to Mr. Willness that his only focus was on himself and how he was feeling. He responded that, after getting sprayed in the face and being drunk, he could not say the only focus was on him, but more or less towards that situation.
- [115] Mr. Willness agreed that he did not listen to what the people on the patio were yelling at him, nor did he listen to them after he was leaving.
- [116] Mr. Willness did not remember telling Stuart Tait to "fuck off" after he told him he had to stop, but he acknowledged he could have. He did not remember lunging toward Stuart Tait, but only remembered being tackled, punched, and hit. He said he was probably trying to get away and assumed they were attacking him like Mr. Young had done.
- [117] Mr. Willness was asked about referring to Mr. Young as "a kid" several times to the police. He testified that he assumed he was around his age and maybe he thought he was one of the other people there. He did not remember how tall Mr. Young was. Mr. Willness acknowledged that he himself was fairly strong. When asked whether he knew that Mr. Young did not have a weapon, he responded, "How was I supposed to know that?" He did not know or remember what Mr. Young had in his hands. He said he did not swing his skateboard the first time, it looked like he tried to punch at or swing at him, and it looked to him like he blocked him. He accepted that he did not have to do any of that and testified that he wished he had just walked away and ignored them.

Credibility and Reliability of Mr. Willness' Evidence

- [118] I approach Mr. Willness' evidence with some caution. Even on direct examination, Mr. Willness was unable to provide a complete or coherent narrative of events. It is clear, on all of the evidence, including his own, that he was intoxicated by alcohol. His memory was patchy and disjointed. He recalled only isolated incidents and had no recollection of some significant events. For example, he remembered nothing after he was put in the police car until he was woken up in the cells to speak to with Detective Constable Anstey. This means that he did not remember kicking the back window out of the police car or being booked at the police station.
- [119] What Mr. Willness did tend to recall were events that happened to him, or at least his perception of events that happened to him. For example, he clearly recalled being sprayed in the face earlier in the evening. He was angry and upset about that. Mr. Willness remembered being upset and yelling a bit, but he did not remember what he was yelling. He accepted that he might have yelled, "I'm going to fuck you up" or "I'm going to kill you." He remembered the people on the patio yelling at him, but not what they yelled at him. He had no appreciation of the effect of his actions and words on the people on the patio.
- [120] Similarly, Mr. Willness had only a partial recollection of what happened after he left Mr. Young lying on the street. Mr. Willness testified that, at this point, a whole group of people, whom he thought were with Mr. Young, tackled him. He said that one of them was on top of him and it was hard to breathe. They punched and kicked him. The next thing he recalled,

he was arrested, handcuffed, and put in the back of a police car. He did not remember the men saying that they were making a citizen's arrest or that he needed to stop and wait for the police. He did not remember swinging his skateboard at them. All he remembered was what happened to him.

- [121] Mr. Willness' recollection of the altercation with Mr. Young was incomplete and, in my view, he only recollected the parts that were to his benefit. He said that Mr. Young stood up and yelled at him. He said that Mr. Young ended up in the street approaching him. He did not appear to recall the fact that he crossed the street to approach Mr. Young. Mr. Willness testified that Mr. Young attacked him and that Mr. Young took a swing at him. Mr. Willness testified that he reacted and tried to block Mr. Young. He testified that he hit Mr. Young only once with the skateboard. He testified that Mr. Young hit the ground and did not get back up.
- [122] According to Mr. Willness, at this point he tried to leave, he said, because Mr. Young was not trying to attack or fight him anymore at that point.
- [123] Mr. Willness assumed that the person who attacked him was about his age. In fact, Mr. Young was twice his age. Mr. Willness did not remember how tall Mr. Young was. Mr. Young was significantly shorter than Mr. Willness. According to Mr. Willness, it happened very quickly and he just remembered someone attacking him and him reacting. He did not know what was going through his mind at the time.
- [124] Notably absent from Mr. Willness' recollection were his own actions in the incident with Mr. Young. As I find below, I do find that Mr. Willness swung his skateboard at Mr. Young twice, not the one time he testified to. Mr. Willness has seen the video recording many times. His description of what occurred seemed to arise more from his perception of the events depicted in the video than any actual recollection on his part.
- [125] For these reasons, I approach Mr. Willness' evidence with caution. Despite this caution, I am mindful that the Crown always bears the burden of proving the elements of the offence beyond a reasonable doubt and of disproving the defence of self-defence beyond a reasonable doubt. Even if I do not believe Mr. Willness' evidence, if, having considered the evidence as a whole, I am left in a reasonable doubt, I must acquit.

Video Recording

- [126] A video recording from a fisheye security camera mounted under the canopy between the restaurant and the patio was entered into evidence. It is viewed using the Avigilon program which permits the viewer to swivel the point of view around 360 degrees. The view can zoom in or out and the video can be played full speed or frame by frame, or almost any speed in between.
- [127] In *R. v. Nikolovski*, [1996] 3 S.C.R. 1197 at para. 21, Mr. Justice Cory wrote about the value of videotape evidence as compared to eyewitness evidence as follows:

- [21] The video camera on the other hand is never subject to stress. Through tumultuous events it continues to record accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all that it observed. The trier of fact may review the evidence of this silent witness as often as desired. The tape may be stopped and studied at a critical juncture.
- [128] The recording entered into evidence in this case is a powerful piece of evidence, although it does have its limitations. The camera is focused on the patio. One can zoom in to see what is happening on the street, but it is not as clear as what is happening on the patio. While the fisheye permits the viewer to swivel to look in different directions, it is always from the point of view of where the camera is mounted. Other perspectives are not available. Depending on the speed the recording is played, different things can be seen. For example, if the recording is played very slowly, it becomes more difficult to see movement. The lights hanging from the roof of the patio create a glare on the recording which obscures some things on the street. Importantly, there is no sound.
- [129] One thing the recording does make crystal clear is, as all the eyewitnesses and Mr. Willness testified, everything happened very quickly. The recording was played many times in court at various speeds, and I have reviewed it many times in preparing my reasons. Depending on where one's attention is focused, it is not possible to see everything that is happening all at once. This goes a long way to explaining why the eyewitnesses' recollections varied and were incomplete. No one could have seen everything that happened in real time.
- [130] I will now review the salient portions of the video. At approximately 11:43:34 p.m., two indistinct black figures can be seen walking in the middle of Baker Street, coming from the direction of Josephine Street. They appear to be crossing over to the sidewalk opposite from the patio. They are walking some distance apart, one following the other. One of these two figures is Mr. Willness. He has a backpack on his back. While not always visible, he can be seen to be carrying a skateboard in his left hand alongside his leg.
- [131] By approximately 11:43:50 p.m. the two figures have crossed over the street and are walking on the Baker Street sidewalk opposite to the Cantina. They appear to be walking back and forth in a disorganized fashion. At about 11:43:58 p.m., the people on the patio start to turn their heads in the direction of the two men. Ms. Phillips and Mr. Coons appear to be the first to have their attention drawn in that direction, but the others very quickly follow in turning to try to see what the two men are doing. Mr. Young starts to turn in that direction at about 11:44:01 p.m. The two men are walking back and forth, both on the sidewalk and on the street, coming back at one point all the way to the sidewalk on the Cantina side of Baker Street.
- [132] At about 11:42:12 p.m., Ms. Phillips starts to move away from the 'Tait's' table where she has been standing and to walk across the patio towards the restaurant. She moves quickly. This is clearly when she went to get the telephone to call the police.

- [133] At about 11:44:21 p.m., the two men are beginning to re-cross Baker Street towards the south side. At about 11:44:26 p.m., Ms. Phillips returns to the patio. She walks over to the east side of the patio. The two men are in the middle of the street in front of her, moving towards the south side of Baker Street. Mr. Willness is walking in front of the other men. This appears to be when Ms. Phillips told them she was calling police.
- [134] At about 11:44:32 p.m., Ms. Sparrow can be seen clapping her hands.
- [135] By about 11:44:35 p.m., Mr. Willness is on the south side of Baker Street with the other men following him at some distance. The people on the patio continue to watch them. At about 11:44:41 p.m., Mr. Young is still in his chair, but he has moved his body just about entirely around to watch behind him. Mr. Willness is almost directly opposite the patio at this point.
- [136] At about 11:45:45 p.m., Ms. Parks, who had been absent, likely in the restroom, comes back onto the patio. Everyone's attention is drawn across the street to where Mr. Willness is standing.
- [137] By 11:44:46 p.m., Mr. Young has gotten out of his chair and is starting to walk towards the railing. By 11:44:49 p.m., Mr. Young is standing near the railing, perhaps two feet away from the railing. He is gesturing with his right hand, which is raised near his head. He appears to be talking with his hands. At about 11:44:56 p.m., Mr. Willness stops and appears to turn towards the patio. It is difficult to see this movement, as he is partially obscured by one of the hanging lights. At about 11:44:57 p.m., Mr. Young puts both of his arms up in the air. He moves closer to the railing. As Mr. Young nears the railing, Mr. Willness starts to move towards the patio. At about 11:44:58 p.m., Mr. Young starts to climb awkwardly over the railing. While he is doing so, Mr. Trafiak starts to get up out of his chair. Then, Karmangah Tait gets out of his chair.
- [138] Mr. Young's feet appear to hit the ground on the other side of the railing at about 11:45:02 p.m. By this point, Mr. Willness has already walked out into the street and is about halfway between the sidewalk and the centre yellow line. Ms. Parks is attempting to get in the way of Mr. Trafiak, as if to prevent him from going over to where Mr. Young and Mr. Willness are.
- [139] As Mr. Willness continues to walk towards Mr. Young, the skateboard can be seen in his left hand, hanging down by his side. His right arm is extended almost horizontally at about waist level.
- [140] Mr. Willness and Mr. Young approach one another. Mr. Young is unsteady on his feet. He was walking, not charging, towards Mr. Willness. At about 11:45:04 p.m., Mr. Willness is at the centre line. Mr. Young is not yet there. Mr. Willness crosses the centre line just before Mr. Young reaches it. At about 11:45:05 p.m., Mr. Coons gets up out of his chair.
- [141] It is somewhat difficult to make out Mr. Young and Mr. Willness' next movements, as they are partially obscured by one of the hanging lights. At about 11:45:05 p.m., Mr. Young begins to raise his right arm. It is impossible to determine precisely what he was attempting

to do. At the same time, Mr. Willness begins to raise the skateboard from his side. At about 11:45:05 p.m., the skateboard is extended from Mr. Willness' body at waist level. He then brings it across and hits Mr. Young with it at about 11:45:05 p.m. It connects with Mr. Young's body somewhere around his right torso or shoulder. The white flash of the skateboard contacting Mr. Young's body can be clearly seen, although the precise point of impact is not clear. At the point of impact, Mr. Young is off balance, standing on his left foot. At about 11:45:06 p.m., Mr. Young starts to fall forward and to his left. He falls forward onto what appears to be the top of his head, on his hands and knees, with his bottom in the air. Taken in isolation, it looks like he is trying to initiate a headstand. His maximum movement forward is at about 11:45:07 p.m., with his feet briefly leaving the ground. As Mr. Young falls, Mr. Willness steps back several steps.

[142] While this is going on, Karmangah Tait, Mr. Coons, and Mr. Trafiak are all moving towards the railing. Karmangah Tait is the first to start to go over the railing at about the same time that Mr. Young lands on his head.

[143] Mr. Young attempts to get up. At about 11:45:09 p.m., Mr. Young gets as far up as he ever does. He is on his right knee and he has just gotten his left foot under him. He gets onto his right foot for a split second into what could be called a low crouch. As Mr. Young is attempting to get up, Mr. Willness takes several strides back towards him. He lifts the skateboard over his head with both hands, his arms fully extended, and at about 11:45:09 p.m., brings it down with great force on the top of Mr. Young's head. At that point, Mr. Young is turned very slightly towards Mr. Willness. Mr. Young falls backward, hitting the back of his head on the pavement.

[144] Mr. Willness starts to back away immediately. The three men get over the railing and go after him as he walks away to the west down Baker Street. Ms. Phillips rushes to Mr. Young's aid, as does another unidentified man. At about 11:45:13 p.m., Ms. Howe gets up from her seat, followed by Ms. Sparrow. Ms. Howe goes around the patio to get to Mr. Young, while Ms. Sparrow starts to climb over the rail. Mr. Young's wife gets up from her seat in obvious distress. At about 11:45:27 p.m., Stuart Tait gets up and moves quickly to leave the patio and to start running down the north Baker Street sidewalk. Ms. Sparrow runs off the patio at about 11:45:51 p.m. towards where Mr. Young is lying, followed by Mr. Young's wife.

[145] By 11:45:55 p.m., only Ms. Parks and Ms. Trafiak remain on the patio. Ms. Phillips and two other people, who appear to be servers or perhaps other employees of the Cantina, move on and off the patio. There are a number of people milling about. Stuart Tait comes back to the patio at about 11:49:47 p.m. Karmangah Tait follows at about 11:50:13 p.m. At about 11:52:05 p.m., a large truck tries to drive down Baker Street and is stopped. The first of the first responders to arrive, a firefighter named Gerald Schmidtke, arrives in his fire department pickup at about 11:56:40 p.m. Paramedics follow in an ambulance at about 11:58:10 p.m. Ms. Howe is relieved of her duty holding Mr. Young's head at about 12:01:29 a.m. Mr. Young is loaded into the ambulance at about 12:17:04 a.m. The ambulance leaves with Mr. Young at approximately 12:22:58 a.m.

Medical Evidence

[146] I will now review the evidence about the injuries suffered by Mr. Young and the treatment he was provided.

At the Scene

[147] The first of the first responders on scene was Mr. Schmidtke, a firefighter. When he arrived, he saw Constable Wade Tittlemore beside Mr. Young. Tragically, Constable Tittlemore died since this incident and he was therefore unable to testify. Mr. Schmidtke could not recall how many other people were there.

[148] He asked Mr. Young questions, to which he responded, which indicated he had an open airway. He was breathing and had a strong radial pulse. Mr. Schmidtke believed he asked him his name and that he gave it in response. Mr. Young responded to his questions, but his responses were quite jumbled. He did not provide any answer when he was asked what happened. He was not really alert and oriented.

[149] There was a person holding Mr. Young's C-spine. This would have been Ms. Howe, of course. Mr. Schmidtke asked her if she knew what happened. He was told that Mr. Young had been hit in the head with a skateboard and fell straight back onto the ground. This directed his next steps, as the mechanism of injury suggested the possibility of a C-spine injury. He directed Ms. Howe to continue holding the C-spine.

[150] Mr. Schmidtke noticed that Mr. Young had a swelling over his left eye. There was a bandage over the wound on his skull which he did not remove. It was on the top left side of Mr. Young's head. There was quite a bit of blood on the road, but he did not notice Mr. Young actively bleeding while he was there.

[151] The paramedics arrived about two minutes after Mr. Schmidtke. They began to assess Mr. Young. The paramedics did not testify.

[152] Dr. Nicholas Sparrow arrived shortly after the paramedics at 11:57 p.m. Dr. Sparrow is an emergency and EMS physician who is the founder of and operator of the Kootenay Emergency Response Physicians' Association. He does so as a volunteer. He is dispatched to attend high-priority 9-1-1 calls by the British Columbia Ambulance Service. He is also an emergency physician at Kootenay Lake Hospital in Nelson.

[153] Dr. Sparrow and the paramedics got Mr. Young ready for transport. He directed Mr. Schmidtke to relieve the person holding the C-spine, which he did. This put Mr. Schmidtke about two feet from Mr. Young's face. He smelled alcohol on Mr. Young's breath. Mr. Schmidtke recalled that while they were putting on the cervical collar, Mr. Young was moving his body in some way and they were telling him to stay still to prevent any further injuries.

- [154] Dr. Sparrow noticed Mr. Young was bleeding from the back of his head. There was a long trickle of blood on the road making its way to the centre line. He recalled it being about a metre in length. He directed a paramedic to attend to the wound, while he worked on getting the cervical collar on Mr. Young. Dr. Sparrow did not formally examine the back of Mr. Young's head.
- [155] Dr. Sparrow had been told that Mr. Young was unconscious by dispatch and that he had been assaulted. When he arrived there some eight to 10 minutes later, the position of Mr. Young's arms suggested to Dr. Sparrow that he was not completely unconscious. He elicited a pain response when he squeezed Mr. Young's trapezius muscle, so Dr. Sparrow concluded that he was not wholly unconscious, but had a reduced level of consciousness. When he squeezed Mr. Young's trapezius again, Mr. Young opened his eyes and was able to converse, but was confused. He told Dr. Sparrow he was from Abbotsford, that he was on holiday, and that he had moved here from Scotland. Dr. Sparrow did not think Mr. Young told him his name on scene. Mr. Young complained about being short of breath and that the collar was annoying him. He was trying to grab at it. Some of his actions were agitated, and he was somewhat combative, and he kept saying the same things. In Dr. Sparrow's experience, those are common behaviours in patients with head injuries.
- [156] Dr. Sparrow could also smell alcohol on Mr. Young and, when asked, Mr. Young confirmed that he had been drinking. Dr. Sparrow formed the impression that Mr. Young was intoxicated.
- [157] Dr. Sparrow also observed a hematoma over Mr. Young's left eye. He did not recall what it looked like specifically, other than a vague recollection of bruising. This injury was probably one out of 10 on a scale of injuries. He had no concern about it in comparison to the injury to the back of Mr. Young's head. The hematoma did suggest, by definition, that Mr. Young had had two insults to the head.
- [158] It appeared to Dr. Sparrow that Mr. Young had a significant head injury, and he was concerned that he might have a significant brain bleed. As they were only three to four minutes from the hospital, he decided to do very little intervention on scene, to perform a rapid extraction, and to transport him to hospital.
- [159] After Mr. Young was taken to hospital by Dr. Sparrow and the paramedics, Mr. Schmidtke cleaned up the blood on scene. He hosed it down with a solution the firefighters keep on hand for this purpose. He said the blood covered quite a big area. No photographs were taken of the blood before it was cleaned up.

At Kootenay Lake Hospital

- [160] Dr. Sparrow called ahead to the emergency department to alert them that Mr. Young was coming in. Dr. Sparrow recorded that they arrived at the hospital at 12:23 a.m., now on July 17, 2020. He stayed with Mr. Young until Dr. Rahul Khosla, the emergency physician on duty that night at Kootenay Lake Hospital, relieved him and took over Mr. Young's care. Dr. Sparrow recorded that this occurred at 12:35 a.m.
- [161] Mr. Young was conscious when Dr. Khosla took over his care. He was disoriented, slightly agitated, and was not answering questions or following commands. He had a deep, 12-centimetre-long laceration on the top of his head which was bleeding. It was parallel to the midline of the skull, slightly to the right. Dr. Khosla could feel on palpation that the skull underneath was fractured. He also observed a contusion over Mr. Young's left brow which was less significant than the injury to Mr. Young's scalp and skull.
- [162] Dr. Khosla also observed that Mr. Young was intoxicated. He smelled of alcohol and he was vomiting. A laboratory test performed at Kootenay Lake Hospital that morning showed an ethanol level of 65(G), which Dr. Khosla testified is five to six times the legal limit for driving.
- [163] He noted that the symptoms of intoxication can overlap with those of a brain injury, such as not following commands and being disorganized, restless, and agitated.
- [164] Dr. Khosla ordered two CT scans of Mr. Young that night. The first was performed at 1:57 a.m. The CT scan showed multiple significant brain injuries, including bleeding in the brain and raised intracranial pressure. This was of great concern to Dr. Khosla. It indicated that Mr. Young's behaviours were due to brain injury, not intoxication. Dr. Khosla had a phone consultation with Dr. Yavin, the on-call neurologist at KGH. Dr. Yavin's initial advice was to carry on as they had been, doing neurological vital signs, including assessing Mr. Young's neurological state using the Glasgow Coma Scale ("GCS"), and otherwise managing his symptoms. At that time, Dr. Yavin did not think that Mr. Young needed to be transported urgently to KGH.
- [165] Dr. Yavin called back after reviewing the first CT scan. He advised doing neurological vitals more frequently, and a second CT scan in the morning.
- [166] Mr. Young's mental status rapidly deteriorated at around 3:00 a.m. The GCS provides a scale of three to 15. On initial examination, Dr. Khosla would have given him a GCS of 12 at best, and his GCS fluctuated between 12 and 15 until about 3:00 a.m. By 3:35 a.m., his GCS was three and it remained there until he was transported to KGH. A GCS of three means that a person is non-responsive. A deceased person would have the same score.

- [167] Dr. Khosla consulted again with Dr. Yavin, who agreed that Mr. Young should be transported to KGH as soon as possible. Dr. Khosla and the other staff at Kootenay Lake Hospital prepared Mr. Young for transport, including intubating him and having a second CT scan performed shortly before 6:00 a.m. The second CT scan indicated that Mr. Young's brain injuries had worsened, and that he was at risk of his basic life functions being impaired.
- [168] Mr. Young left Kootenay Lake Hospital shortly after 6:00 a.m. on July 17, 2020. He was transported by ambulance staffed with specialized staff to KGH.

Dr. Yavin's Expert Evidence

- [169] Dr. Yavin is the neurosurgeon who provided advice to Dr. Khosla while Mr. Young was at Kootenay Lake Hospital, and who performed neurosurgery on Mr. Young after he was transported to KGH. He also provided expert evidence with respect to the injuries that caused Mr. Young's death.
- [170] Dr. Yavin received Mr. Young on his arrival at KGH. He was unconscious at that time and he never regained consciousness. Dr. Yavin performed a decompressive craniectomy on Mr. Young shortly after his arrival, removing a large piece of his skull to relieve the increased pressure in his brain. This procedure was done because Mr. Young had life-threatening intercranial hypertension, and he would have died if it was not performed.
- [171] Dr. Yavin testified about the superior sagittal sinus, which is a large vein that runs medially from the front to the back of a person's brain. It is embedded in the skull or immediately adjacent to it. As such, it is particularly sensitive to skull fractures. Its purpose is to receive venous drainage from both cerebral hemispheres. It both drains venous blood returning to the heart and absorbs all cerebral spinal fluid.
- [172] Dr. Yavin testified that Mr. Young suffered a traumatic dural venous sinus injury. His skull fracture traversed the sinus all the way from the front to the back of his skull. That skull fracture tore the sagittal sinus. This led to subsequent thrombosis or occlusion along the sinus' most posterior aspect. This means that the venous blood flow from Mr. Young's brain was blocked. Further, occlusion results in cerebral spinal fluid not being reabsorbed, resulting in increased pressure in the brain. Increased pressure and decreased blood flow in the brain results in ischemia, which leads to infarction. This is an uncommon brain injury associated with only one to four percent of closed-head injuries. One hundred percent of occlusions in the posterior third of the sinus are fatal. This was the injury Mr. Young had.
- [173] Dr. Yavin testified that the occlusion along the proximal segment of his superior sagittal sinus was responsible for Mr. Young's rapid decline. Subsequent imaging showed extensive bilateral infarcts along his temporal, parietal, and occipital lobes, as well as his basal ganglia and mid-brain. His injuries were non-survivable.

- [174] Dr. Yavin testified that Mr. Young also had bruises along the surface of his brain. These would have occurred when his brain hit the base of his skull with great force. Dr. Yavin testified that, absent the injury to the superior sagittal sinus, the majority of patients would have survived those injuries, particularly with the decompressive procedure he performed.

Dr. McKinnon's Expert Evidence

- [175] I turn to Dr. McKinnon's evidence. Dr. McKinnon performed an autopsy on Mr. Young's body on July 24, 2020. She concluded that the cause of death was blunt force trauma to the head. Her post-mortem examination revealed evidence of blunt force trauma to the head and of Dr. Yavin's subsequent surgical intervention. She identified a posterior midline fracture of the skull. The fracture was very severe, which indicated a significant amount of force. Dr. McKinnon opined that the point of impact was likely the back of the head, somewhat to the left. She said it was in the same position that a person might wear a yarmulke. The fracture radiated out at the back of the top of the head in a ray-type fashion. The impact caused a sinus thrombosis, that is blood clots in the venous sinus. The presence of a sinus thrombosis indicates that the blunt force trauma was very severe.
- [176] There was extensive hemorrhage throughout the soft tissues of the scalp and the subdural spaces of the skull. There was diffuse cerebral edema with hemorrhagic infarcts throughout the brain tissue, including in the brain stem.
- [177] As I have already discussed, Mr. Young had undergone a craniectomy at KGH. Dr. McKinnon separately received the skull flap that had been removed. It had not been put back in place post-surgery because Mr. Young's brain was too swollen. The swelling of Mr. Young's brain was very severe, which put pressure on his brain stem. As a result, the brain stem developed infarctions, which Dr. McKinnon explained is the blockage of a blood vessel. This led to necrosis and brain death.
- [178] No other significant traumatic injuries were identified, although Dr. McKinnon also observed a hematoma on Mr. Young's left upper eyelid and some bruising on the left side of his face. She testified that the hematoma was likely the result of a fracture to the interior cranial fossa. She explained that the bones in that area are very thin and easily fractured. She characterized this injury as minor and not a factor in the cause of Mr. Young's death.
- [179] In preparing Dr. McKinnon to give evidence, Crown counsel showed her the video of the incident. In direct, she was asked whether she was able to say which blow or blows resulted in the injuries that led to Mr. Young's death. Dr. McKinnon testified that the action in which he was hit on the back of the head with an object was consistent with the injuries she observed. In cross-examination, it was revealed that Dr. McKinnon only perceived or considered a single blow to Mr. Young's head in the video, that being the one where Mr. Willness brought the skateboard down on Mr. Young's head. She did not perceive or consider the blow to his head when he initially fell down on the top of his head or the one when he fell back on his head after Mr. Willness hit him in the head with the skateboard.

She was shown the video in court and agreed that there were in fact three impacts to Mr. Young's head, and that all three could have been serious. She could not say which one was the fatal impact and testified that they could all have been.

Analysis

Introduction

- [180] Mr. Willness is charged with manslaughter contrary to s. 236(b) of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. Specifically, he is alleged to have committed unlawful act manslaughter, as defined in s. 222(5)(a) of the Code. He submits that the Crown has not proven the elements of the offence and that, regardless, he was acting in self-defence.
- [181] The Crown bears the burden of proving all elements of the offence beyond a reasonable doubt. The elements of unlawful act manslaughter are set out in *R. v. Javanmardi*, 2019 SCC 54 [Javanmardi]. The Crown must prove that:
- a) the accused committed an unlawful act, referred to as the predicate offence (para. 25);
 - b) the unlawful act caused the death (para. 25); and
 - c) there was objective foreseeability of the risk of bodily harm that is neither trivial nor transitory (para. 31).
- [182] The predicate offence alleged by the Crown in this case is assault with a weapon, contrary to s. 267(a) of the Code. In this case, the relevant necessary elements for the Crown to prove are that Mr. Willness intentionally applied force to Mr. Young with a weapon without consent. Mr. Willness does not dispute that the blow downward onto Mr. Young's head with the skateboard was an unlawful act. However, Mr. Willness argues that he never made contact with Mr. Young on the first swing of the skateboard, and that this swing was actually an attempt to move away or a reaction to an attack by Mr. Young. As a result, he submits that his actions in relation to the first impact were not unlawful.
- [183] The Supreme Court has clarified that the Crown need not prove that the unlawful act was objectively dangerous. It only needs to prove the objective foreseeability of the risk of bodily harm that is neither trivial nor transitory: *Javanmardi* at para. 26.
- [184] I have considered the totality of the evidence. In doing so, I have been mindful of the approach set out in the *R. v. W.(D.)*, [1991] 1 S.C.R. 742 [W.D.], and that the Crown must prove each element of the offence beyond a reasonable doubt. As required under *W.(D.)*, first, if I believe the evidence of the accused, I must acquit. Second, if after a careful consideration of all of the evidence, I do not know whether to believe the accused or the evidence of a competing witness, I must acquit. Third, if I do not believe the testimony of the accused, but I am left in a reasonable doubt by it, I must acquit. Fourth, even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the evidence I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the

accused.

Unlawful Act and Causation

- [185] In this part of my reasons, I consider two related issues. The first is whether Mr. Willness' actions leading to each of the three impacts to Mr. Young's head constituted unlawful acts where the risk of non-trivial harm was objectively foreseeable. The second is whether the unlawful acts caused, in fact and law, Mr. Young's death.
- [186] In brief, the defence submits that any of the three impacts to Mr. Young's head could have caused his death, and that it is not possible to determine beyond a reasonable doubt which impact caused his death.
- [187] In respect of the first impact, when Mr. Young fell forward onto his head, the defence submits that Mr. Willness did not commit an unlawful act, and that he therefore cannot be found guilty of manslaughter if that impact resulted in or could have resulted in Mr. Young's death. The defence submits that Mr. Willness was either reacting to an attack by Mr. Young or trying to get out of the way, and that in any event, he did not commit an unlawful act leading to that first impact. The defence further submits that objectively Mr. Willness would not have recognized that his action would subject Mr. Young to a risk of bodily harm that is neither trivial nor transitory. The defence submits that if the court accepts there is a reasonable doubt as to which impact caused Mr. Young's death, and therefore, that the first impact could have caused Mr. Young's death, then the Crown has failed to prove that Mr. Willness is guilty of manslaughter.
- [188] It follows that, in the defence's submission, it is only if the court determines that there is no reasonable doubt that the first impact was not fatal, and that it was either the second or third impact that was fatal, that the court must go on to determine whether Mr. Willness was acting in self-defence. I will deal with the issue of self-defence separately later in these reasons.
- [189] The Crown submits that all of Mr. Willness' actions, including his actions that led to the first impact, were unlawful acts. In respect of the actions leading to the first impact, the Crown submits that Mr. Willness committed assault with a weapon, namely the skateboard, and that his act was objectively dangerous.
- [190] The Crown further submits that the question is not which impact caused Mr. Young's death or whether it is possible that the first impact caused his death, but rather whether each impact was a significant contributing cause of his death.
- [191] For the reasons that follow, I find that Mr. Willness did swing the skateboard twice and that he applied force to Mr. Young with both swings. Mr. Young did not consent. This led to the three impacts to Mr. Young's head. I find that both swings constituted assault with a weapon.

- [192] There is no doubt that Mr. Willness' action in swinging the skateboard down on Mr. Young's head was an assault with a weapon. It was objectively foreseeable that that act would cause harm to Mr. Young that was neither trivial nor transitory. Both the second (the blow to the head with the skateboard) and the third (when Mr. Young fell backwards onto the pavement and hit his head) impacts to Mr. Young's head were the result of Mr. Willness' objectively dangerous act of hitting Mr. Young over the head with a skateboard. The defence does not argue otherwise. Therefore, I need only consider whether Mr. Willness' actions leading to the first impact to Mr. Young's head were unlawful and whether it was foreseeable that they would cause bodily harm.
- [193] The eyewitness evidence with respect to the first impact is of little assistance. Most, if not all, of the witnesses do not appear to have clearly seen the first impact. To the extent they saw the interaction leading to it, their evidence was somewhat equivocal.
- [194] The video recording is of substantially greater assistance, although it is somewhat obscured with respect to some of the actions leading to the first impact. As I have previously recounted, Mr. Young and Mr. Willness met in the middle of the street. The defence submits that Mr. Young charged at Mr. Willness and tried to punch him. I do not agree with this characterization. Mr. Young was walking no faster than Mr. Willness was, and in fact, Mr. Willness reached the middle of the street before Mr. Young did. Mr. Young had his right arm raised, but it is not possible to determine whether he was attempting to punch or perhaps grab Mr. Willness, or whether he was simply gesturing with his right hand as he had been earlier. Nor is it possible to discern whether Mr. Young's hand made contact with Mr. Willness.
- [195] The defence submits that it is unclear whether or how any contact was made from Mr. Willness to Mr. Young. I do not agree with this submission. The video shows that Mr. Willness raised his skateboard from where he had been carrying it along the left side of his body and leg, and made contact with Mr. Young's body with the flat edge of the board somewhere in the vicinity of the right side of Mr. Young's torso or shoulder. The Crown described it as a "sideswipe" across Mr. Young's body, which is an apt description. That sideswipe resulted in Mr. Young falling forward and to his left, and hitting his head on the pavement as I have described. It was the force of Mr. Willness hitting Mr. Young on the right side with the skateboard that propelled his body forward and to the left, landing on his head.
- [196] It is notable that Karmangah Tait, Mr. Coons, and Mr. Trafiak had all risen to their feet before there was any contact between Mr. Willness and Mr. Young, and had started moving towards them before Mr. Willness brought his skateboard down on Mr. Young's head. They were all clearly concerned by what they had seen to that point, to the extent they felt the need to intervene.

- [197] Having considered the entirety of the evidence, I am satisfied beyond a reasonable doubt that Mr. Willness' actions leading to the first impact to Mr. Young's head was an unlawful act. Mr. Willness clearly raised the skateboard up, intentionally swung the skateboard, and hit Mr. Young in the torso or shoulder with it. The skateboard, which was seized at the scene, weighed 4.6 pounds and was 27 inches in length. A skateboard is not designed to be used as a weapon, but it is objectively foreseeable that hitting an unarmed man with an object such as a skateboard is likely to cause harm that is neither trivial nor transitory. Indeed, Mr. Willness conceded in cross-examination that, based on his past experience, he knew that striking a person at least in the head with a skateboard could knock them out. Knocking someone out is certainly non-trivial harm.
- [198] In light of that conclusion, it follows that all of Mr. Willness' actions that led to the impacts to Mr. Young's head were assaults with a weapon, and I find that it was objectively foreseeable that assaulting a person with a skateboard carries the risk of bodily harm that is neither trivial nor transitory.
- [199] I next consider which of the impacts to Mr. Young's head were significant contributing causes of his death. Given my finding regarding the unlawful acts and subject to a consideration of the defence of self-defence argument, it is sufficient for the Crown to prove that either assault was a significant contributing cause of Mr. Young's death.
- [200] In *R. v. Maybin*, 2012 SCC 24 [Maybin] at paras. 13-17, the Supreme Court of Canada discussed causation in manslaughter cases. Causation in such cases involves both factual and legal causation. At para. 15, referring to *R. v. Nette*, 2001 SCC 78 [Nette], the Court stated that factual causation is "an inquiry about how the victim came to his or her death in a medical, mechanical, or physical sense and with the contribution of the accused to that result." Put differently, the trier of fact asks whether, but for the accused's unlawful act, would the victim have died?
- [201] Legal causation, on the other hand, is concerned with concepts of moral responsibility. It asks should the accused be held legally responsible for the death, as stated in Maybin at para. 16. Causation issues are case specific and fact driven. Different approaches to assessing legal causation may be appropriate, depending on the factual context: Maybin at para. 17.
- [202] The trier of fact does not consider factual and legal causation separately: Nette at para. 46. The ultimate question is whether the accused's actions were a significant contributing cause of the death, such that they should be held legally responsible for their actions: Maybin at paras. 28-29.

[203] In *R. v. Chief*, 2019 MBCA 59 [Chief], the Manitoba Court of Appeal dismissed the appeal of a person who had been convicted of manslaughter. The appellant submitted that the verdict was unreasonable because of the possibility that the victim died due to a previous and unrelated violent encounter. The expert evidence was unclear with respect to the part played by the appellant's assault in the victim's death. At para. 16, the Court held that:

[16] Causation is to be decided on an assessment of all relevant evidence; the trier of fact is not constricted by the expert evidence so long as the causation finding is reasonably available on the evidence and not based on speculation (see *R v Pimentel*, 2000 MBCA 35 at paras 63-67, leave to appeal to SCC refused, 2000 CarswellMan 575).

At para. 22, the Court noted that the video in that case:

[22] brutally depicts how, during the accused's violent robbery, the deceased is instantaneously transformed from a harmless individual hanging out with his companions to a person in obvious significant medical distress that turned out to be irreversible and fatal shortly thereafter.

[204] The Court was satisfied that there was ample evidence for the judge to infer the victim would not have died when he did, but for the accused's unlawful act. At para. 26, the Court stated that if the victim was already dying because of brain injuries caused by the earlier assault, the unlawful act of the accused at a minimum hastened his death by rendering him permanently unconscious.

[205] *R. v. Hong*, 2019 ONCA 170 [Hong] is to similar effect. The victim in that case was struck twice in the head with a baseball bat by the appellant's co-accused and once in the jaw by the appellant with the butt of a pellet gun. The pathologist testified that the two blows to the victim's head with the baseball bat were the most likely cause of death. At para. 23, the Ontario Court of Appeal held that there was no doubt that the appellant's blow to the victim's jaw with the pellet gun accelerated the victim's death, noting that before that blow, the victim was moving and making noises, and after it he went silent and stopped moving. Even if the jury made a finding contrary to the pathologist's evidence, the issue of causation is for the trier of fact, not the experts. At para. 28, the Court stated that a jury can find causation in the absence of medical evidence to support such a finding, and that the jury must consider all of the relevant evidence in determining the issue of causation.

[206] *Chief* and *Hong* make two points clear. First, causation is to be determined by the trier of fact with consideration of all of the evidence before them. Second, if an accused accelerates the death of the victim, then their actions are a significant contributing cause of death.

- [207] I have already described the first impact to Mr. Young's head. He fell forward and to his left after being hit by the skateboard in the right side. He fell onto the front or the top of his head, just coming off his feet, and then his body swung back, leaving him on his hands and knees. He then tried to get back to his feet. After the first impact to his head, Mr. Young was clearly conscious and was in the process of rising to his feet.
- [208] Several of the eyewitnesses described Mr. Willness bringing the skateboard down on Mr. Young's head while he was struggling to get to his feet. Mr. Willness was described as swinging the skateboard like an axe or a baseball bat. Mr. Coons said that he had never seen violence that severe. The video confirms the aptness of those descriptions. Mr. Willness takes three or four steps forward, raises the skateboard above his head with his arms fully extended, and brings it down on the top of Mr. Young's head with tremendous force. He did so while Mr. Young was in an extremely vulnerable position, trying to get up from the first blow, and not yet fully on his feet.
- [209] Several witnesses described the sound made when Mr. Willness hit Mr. Young in the head with the skateboard. It was a loud crack. Karmangah Tait said it sounded like a gun going off. The violence used by Mr. Willness was shocking to everyone who saw and heard it.
- [210] Mr. Young went down, as both Stuart and Karmangah Tait described it, like a sack of potatoes. He appears to have been unconscious from the moment the skateboard hit his head. He is unable to protect himself as he falls backward, hitting the back of his head on the pavement with great force. A large pool of blood oozed from his head onto the pavement where he lay. He was unconscious for a few minutes, before he regained consciousness, albeit in a confused and agitated state. He was able to answer some limited questions. He remained conscious for about three hours after that with reduced mental status, before he lost consciousness again at about 3:00 a.m., never to regain consciousness again.
- [211] Dr. McKinnon could not identify which of the three impacts to Mr. Young's head were the cause of death, although she did say that the injuries she observed were consistent with the skateboard impact. She also opined that the posterior midline skull fracture was consistent with having been hit in the head by an object, and was also consistent with his head hitting the pavement. There was significant blunt force trauma to the back of his head. Dr. Yavin was not asked which impact caused Mr. Young's death.
- [212] What is clear on the medical evidence is that Mr. Young died as a result of blunt force trauma to the head. In particular, he died as a result of brain injuries consequent to the posterior midline fracture of his skull. His skull was effectively split in two. The force necessary to cause that fracture was very significant. It is likely that the skull fracture which led to the brain injuries that ultimately caused Mr. Young's death was caused by the skateboard impact. It is also possible that it was caused by him falling backwards onto his head after he was struck on the head by the skateboard. Both were the result of Mr. Willness' unlawful acts. I have no doubt that they were significant contributing causes of

Mr. Young's death. But for the blow to his head by the skateboard, and falling backward and hitting his head on the pavement as a result, Mr. Young would not have died.

- [213] The defence submits that the first impact cannot be ruled out as a significant contributing cause of Mr. Young's death. In this regard, the defence points to Dr. McKinnon's evidence that any of the three impacts could have been fatal. It also submits that Dr. Yavin referred to there being swelling to the front lobe of Mr. Young's brain caused by the sudden deceleration of the brain and the skull. The defence also submits that the skull fracture started at the front and travelled to the back, suggesting that the initial impact caused the fracture.
- [214] The fact that Dr. McKinnon could not rule out any of the impacts as being fatal is not determinative. On my understanding of his evidence, Dr. Yavin did not testify that the skull fracture started in the front and travelled to the back. In my view, he testified that the fracture went all the way between the front and the back of Mr. Young's skull, but he did not testify in which direction the fracture travelled. Dr. McKinnon also opined that the impact to the back of the head caused the fracture. Dr. Yavin did testify about bruising to Mr. Young's brain caused by the sudden deceleration of his brain in his skull. He also testified that the majority of patients would have survived those injuries.
- [215] Considering the evidence as a whole, I find that the initial impact to Mr. Young's head when he fell forward on the top or the front of his head was not a significant contributing cause leading to his death. Dr. Sparrow, Dr. Khosla, and Dr. McKinnon all testified about there being a hematoma or contusion over Mr. Young's left brow. Ms. Howe testified that she saw a hematoma form in that location. Mr. Schmidtke also described some swelling in that region. Dr. McKinnon testified that she identified a fractured anterior fossa on the left side, which she related to that hematoma. I find that those injuries were likely caused when Mr. Young fell forward and to the left onto the top or the front of his head after the initial contact with Mr. Willness. All medical witnesses were in agreement that those injuries were comparatively minor and of no concern in comparison to the skull fracture. I find that the first impact was not a significant contributing cause of Mr. Young's death.
- [216] However, there is ample evidence that the second blow, when Mr. Willness raised the board and swung it down violently on Mr. Young's head, was a significant contributing cause of Mr. Young's death. Dr. Yavin was clear that the injury to Mr. Young's sagittal sinus was fatal, and that it was caused by the skull fracture. There is no doubt that the skull fracture was caused by Mr. Willness' assault. I find that the fracture was likely caused by Mr. Willness' downward strike with a skateboard and it resulted in the two impacts to Mr. Young's head, which resulted in the injury to the back of his head. This was a grave injury.

[217] In summary, I am left with no doubt that Mr. Willness' unlawful acts caused Mr. Young's death. Since I have found that both swings of the skateboard constituted assaults with a weapon where the risk of harm was objectively foreseeable, it was sufficient for the Crown to prove that either assault caused the death to prove the elements of the offence. Accordingly, I find that Mr. Willness committed an unlawful act manslaughter. Thus, I turn to consider Mr. Willness' submission that he acted in self-defence.

Self-Defence

[218] The defence argues that Mr. Willness acted in self-defence. The Crown concedes that there is an air of reality to the defence. I must determine whether the defence of self-defence is available to Mr. Willness. Self-defence is governed by s. 34 of the Code which provides:

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

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

[219] In *R. v. Khill*, 2021 SCC 37 [Khill], the Supreme Court of Canada provided substantial guidance about how s. 34 is to be applied. As discussed at para. 51, the three inquiries required under s. 34(1) "can be usefully conceptualized as (1) the catalyst; (2) the motive; and (3) the response."

[220] Section 34(2) sets out nine non-exhaustive factors that must be considered in determining whether the accused's response was reasonable in the circumstances. I will return to those factors when I consider Mr. Willness' response.

[221] In *R. v. Tremblay*, 2019 BCSC 410 [Tremblay], a case where self-defence was in issue, Justice DeWitt-Van Oosten, then of this court, summarized the applicable law at paras. 172-174:

[172] The Crown bears the burden of disproving the defence of self-defence. To meet this burden, it need only prove beyond a reasonable doubt that one of the three elements of the defence does not apply. All three of the s. 34(1) criteria must be present for the defence to be available: *R. v. Randhawa*, 2019 BCCA 15 at para. 34.

[173] In deciding whether the Crown has met its burden, the Court must consider the whole of the evidence: *R. v. Fontaine*, at para. 12. Throughout the course of the analysis, I must also remain mindful of the fact that the accused is presumed innocent unless and until the Crown meets its burden of proof.

- [174] The law does not require that an accused retreat before acting in self-defence: *R. v. Sandhu*, 2018 BCPC 122 at para. 11, although a failure to do so may be relevant to the ss. 34(1) and (2) analysis. It is also well-established that a person who is under attack, and defending themselves, cannot be expected to weigh, to a nicety, the exact measure of the defensive action required: *R. v. Sandhu* at para. 13, citing *Palmer v. The Queen* (1971), 55 Cr. App. R. 223 at p. 242. See also *R. v. Kandola*.
- [222] In *Tremblay* at para. 178, Justice DeWitt-Van Oosten instructed herself on the applicability of W.(D.) in the context of self-defence. At para. 180, she cited *R. v. Reid*, 2003 CanLII 14779 (O.N.C.A.), for how W.(D.) applies in a self-defence case as follows:
- [180] In *R. v. Reid* (2003), 65 O.R. (3d) 723 (O.N.C.A.), Justice Moldaver, as he then was, suggested that in self-defence cases, the first two principles of the W.(D.) analysis are appropriately cast in this language:
- If I accept Mr. Tremblay's evidence and on the basis of it, I believe or have a reasonable doubt that he was acting in lawful self-defence, I must find him not guilty.
 - Even if I do not accept Mr. Tremblay's evidence, if, after considering it alone or in conjunction with other evidence, I believe or have a reasonable doubt that he was acting in lawful self-defence, I must find him not guilty.
- [223] At para. 183 of *Tremblay*, Justice DeWitt-Van Oosten stated:
- [183] As noted, the main issue before me is whether the accused acted in self-defence. Accordingly, I consider it appropriate to analyze the evidence, make my findings of fact and apply the relevant legal principles with reference to the three criteria embodied within s. 34(1) of the Code.
- [224] I will do the same.

The Catalyst

- [225] The first inquiry is whether Mr. Willness believed, on reasonable grounds, that force was being used or threatened against him. As stated at para. 52 of *Khill*, this element considers the accused's state of mind and the perception of events which led him to act. The accused must subjectively believe that force or a threat of force was being used against him. That belief must be held on reasonable grounds. As stated at para. 57 of *Khill*, the question is what a reasonable person with the relevant characteristics and experiences of the accused would perceive.
- [226] At the initial stages of this incident, Mr. Willness would not have had a basis to believe on reasonable grounds that force was being used or threatened against him. Mr. Willness was wandering the streets of Nelson. He was upset and angry about being sprayed in the face. He was intoxicated. Mr. Difore testified that he heard Mr. Willness yelling as he walked up Josephine Street, complaining about pain in his eye and shouting that he wanted to "fuck

someone up" or was going to "fuck someone up". Mr. Willness' behaviour was sufficiently aggressive and concerning to Mr. Difiore that he retreated to the entrance of his hotel.

- [227] After Mr. Willness turned onto Baker Street, he walked haphazardly to and fro, with little discernible purpose. All eyewitnesses testified that he was shouting things, like he wanted to "fuck someone up" or "I'll fuck you up" or "I'll fucking kill you" and other profanities. Mr. Willness did not deny shouting things of this nature. His behaviour was disturbing to all of those who had been enjoying their evening on the patio of the Cantina. Ms. Phillips was sufficiently concerned that she told Mr. Willness and his party that she was going to call the police.
- [228] Mr. Young was disturbed by Mr. Willness' behaviour. He yelled at Mr. Willness and his party from the patio. Versions of his exact words varied, but they were along the lines of, "I'm trying to have dinner with my wife" and "I've had enough of this." At worst, he might have said, "I've had enough of this shit" or "shut the fuck up."
- [229] Mr. Young decided to go out onto the street and crawled over the patio railing to do so. Mr. Willness moved out onto the street faster than Mr. Young did, meeting him in approximately the middle of the street. Karmangah Tait testified that he heard Mr. Young say, once he was in the street, that, "You guys have to stop" and to "relax." Karmangah Tait heard Mr. Willness tell Mr. Young to "fuck off". Karmangah Tait was seated closest to where Mr. Young and Mr. Willness were, and I accept his evidence on this point. There is nothing to indicate that Mr. Willness was afraid. He was, as Mr. Coons testified, looking for a fight.
- [230] The defence submits that Ms. Howe and Ms. Sparrow both testified that Mr. Young swung and hit or punched Mr. Willness. That is not my interpretation of their evidence.
- [231] Ms. Howe testified that Mr. Young almost threw a hand in the direction of Mr. Willness. She did not know if Mr. Young tried to strike Mr. Willness or to stop him or to tell him to stop, but she said that Mr. Young's right hand came out and up. She said that his punch almost went upwards, not into, Mr. Willness. Because Mr. Young's back was to her, she could not say if he hit Mr. Willness. It looked like he meant to punch him, but it went up and over his shoulder. According to Ms. Howe, Mr. Young's fist went across the centre line of the street at the same time that Mr. Willness stepped back and his skateboard came up.
- [232] Ms. Sparrow said that she knew Mr. Young did not hit or physically touch Mr. Willness because he stumbled. She also said that she did not know if he tried to grab Mr. Willness or if there was a swing. The pillar of the patio was in the way of her line of sight. They were advancing towards one another, but Mr. Young was hit with the skateboard, in her words, "before it began."
- [233] Taken together, both Ms. Howe and Ms. Sparrow were unsure whether Mr. Young swung at Mr. Willness, and, if he did, whether he made contact.

- [234] In direct, Mr. Willness testified that Mr. Young attacked him, was trying to fight him, and took a swing at him. In cross-examination, he testified, in response to a question about the video, that it looked like Mr. Young swung at him and he kind of blocked it. He maintained that he only hit Mr. Young once.
- [235] The defence submitted that Mr. Willness testified that he remembered taking a punch from Mr. Young. The Crown submitted that Mr. Willness did not testify that he received a punch from Mr. Young. I have reviewed Mr. Willness' evidence carefully. I agree with the Crown on this point. Mr. Willness did testify that Mr. Young swung or punched at him, not that he received a punch from him. This is in contrast to when Mr. Willness was apprehended by the men from the patio, when he clearly testified that they punched and kicked him.
- [236] The video shows that Mr. Young raised his right hand as he walked towards Mr. Willness. As I have previously said, it is simply not possible to know what he was trying to do. He may have been gesturing with his hand, as he had been while on the patio. It is possible he was trying to grab or punch Mr. Willness, although the latter seems somewhat unlikely, given the height difference between the two men.
- [237] I do not believe Mr. Willness' evidence that Mr. Young was trying to attack him or fight him and that he was trying to defend himself, but I do have a reasonable doubt about whether a person in Mr. Willness' situation could, on reasonable grounds, have believed that there was a threat of force being made against them. This doubt is based on the fact that Mr. Young was raising his right hand and the equivocal nature of the eyewitness evidence about what Mr. Young was doing. The two men did not know each other, so Mr. Willness would have had no insight into Mr. Young's likely intentions. It is possible that a person in Mr. Willness' position could have reasonably believed that Mr. Young was taking a swing at him or trying to grab him.
- [238] Therefore, with respect to Mr. Willness' initial action in hitting Mr. Young with the skateboard across the side of Mr. Young's body, I find that the Crown has not proved, beyond a reasonable doubt, that the first element of self-defence does not apply.
- [239] The same is not true for the remainder of Mr. Willness' actions, in particular in striking Mr. Young across the head with his skateboard. Mr. Young had been knocked down. He was struggling to get to his feet. He was no threat to Mr. Willness by that point. Even if Mr. Willness initially did believe that Mr. Young was attacking him, no reasonable person in Mr. Willness' position could have believed that Mr. Young posed any further threat after he had been knocked down and was struggling to get to his feet.
- [240] Therefore, with respect to Mr. Willness' action in striking Mr. Young across the head with the skateboard, I find that the Crown has proven beyond a reasonable doubt that the first element of the defence does not apply. This is sufficient to find that Mr. Willness was not acting in self-defence when he struck Mr. Young on the head with the skateboard.

The Motive

- [241] The second inquiry is whether Mr. Willness' actions were for the purpose of defending or protecting himself from the use or threat of force. At para. 59 of Khill, the court stated that this is a subjective inquiry that goes to the root of self-defence. If there is no defensive or protective purpose, the rationale for the defence of self-defence disappears.
- [242] At para. 61 of Khill, the Court explained that an accused's purpose for acting may evolve as an incident progresses or escalates. The Court further explained, still at para. 61, that:
- [61] great care is needed to properly articulate the threat or use of force that existed at a particular point in time so that the assessment of the accused's action can be properly aligned to their stated purpose. Clarity of purpose is not meant to categorize the accused's conduct in discrete silos, but instead appreciate the full context of a confrontation, how it evolved and the accused's role, if any, in bringing that evolution about.
- [243] In respect of the first part of the interaction, I do not believe that Mr. Willness swung his skateboard at Mr. Young for a defensive purpose. Mr. Willness had created this situation by his aggressive and confrontational behaviour, behaviour which disturbed everyone who observed it. While he was initially shouting about wanting to "fuck someone up" indiscriminately, his words and conduct had a direct effect on everyone who heard him. Ms. Phillips was sufficiently concerned about his behaviour that she told him she was going to call the police. It was Mr. Willness who chose to cross the street to meet Mr. Young, thereby escalating the encounter, when he could simply have continued to walk down Baker Street and to try and get himself to Castlegar.
- [244] It is true that Mr. Young raised his hand. But given the context and Mr. Willness' role in bringing this situation about, I do not accept that Mr. Willness' purpose in swinging his skateboard was defensive. He was angry and he wanted to, as he had repeatedly shouted, "fuck someone up." The skateboard he had in his hand was an effective tool to do so, and it is for that purpose that he swung it at Mr. Young's body. I have no reasonable doubt about the lack of a defensive purpose in this action.
- [245] All of that is even more apparent with respect to Mr. Willness' action in swinging the skateboard down on Mr. Young's head. There could be no defensive purpose to that action, given that Mr. Young posed no threat at that time. Mr. Willness' purpose was not to defend himself, but to use his skateboard in anger and in doing so to hurt Mr. Young.
- [246] Therefore, I find that, with respect to all aspects of Mr. Willness' conduct, the Crown has proven beyond a reasonable doubt that the second element of the defence does not apply. This is sufficient to find that Mr. Willness was not acting in self-defence at any stage of this incident. I will nonetheless go on to consider the third element.

The Response

- [247] The third inquiry is whether Mr. Willness' conduct was reasonable in the circumstances. At para. 62 of Khill, the Court stated that this inquiry operates to ensure that the law of self-defence conforms to community norms of conduct.
- [248] At paras. 64-65, the Court further explained the nature of the third inquiry as follows:
- [64] Through s. 34(2), Parliament has also expressly structured how a decision maker ought to determine whether an act of self-defence was reasonable in the circumstances. As the language of the provision dictates, the starting point is that reasonableness will be measured according to 'the relevant circumstances of the person, the other parties and the act'. This standard both casts a wide net of inquiry covering how the act happened and what role each person played and modifies the objective standard to take into account certain characteristics of the accused -- including size, age, gender, and physical capabilities (s. 34(2)(e)). Also added into the equation are certain experiences of the accused, including the relationship and history of violence between the parties (s. 34(2)(f) and (f.1)).
- [65] Nevertheless, the trier of fact should not be invited to simply slip into the mind of the accused. The focus must remain on what a reasonable person would have done in comparable circumstances and not what a particular accused thought at the time
- [249] In assessing the reasonableness of the act, the court shall consider all of the factors set out in s. 34(2) which are relevant to the case. As stated at para. 69 of Khill:
- [69] Once a factor meets the appropriate legal and factual standards, it is for the trier of fact to assess and weigh the factors and determine whether or not the act was reasonable. This is a global, holistic exercise. No single factor is necessarily determinative of the outcome.
- [250] In assessing the reasonableness of Mr. Willness' acts, I will consider each of the relevant statutory factors set out in s. 34(2) in turn, as well as any other circumstances relevant to Mr. Willness, Mr. Young, and Mr. Willness' acts.
- (a) The nature of the force or threat
- [251] I have already considered the nature of the force or threat posed by Mr. Young at some length. Mr. Young was upset by Mr. Willness' conduct. He wanted him to stop disturbing the people on the patio. He yelled at Mr. Willness to try to get him to stop and, in doing so, Mr. Young may well have sworn at Mr. Willness. Mr. Young climbed over the railing and walked towards Mr. Willness, as Mr. Willness walked towards him. Mr. Young raised his hand, his purpose in doing so being unclear. Even if Mr. Young was trying to punch or grab Mr. Willness, he did not pose a significant threat to Mr. Willness.

- [252] I do not accept the defence's submission that Mr. Young was the instigator of this incident or the author of his own misfortune. While others, such as Stuart Tait, took the wiser course of not getting involved, and Ms. Howe did tell Mr. Young that he should sit down, Mr. Young was merely trying to get Mr. Willness to stop disturbing his evening with his wife, and that of everyone else on the patio. It was Mr. Willness, not Mr. Young, who wanted to "fuck someone up."
- [253] The defence relies on the decision of our Court of Appeal in *R. v. Kandola*, 1993 CanLII 774 (B.C.C.A.) at para. 27, where the Court stated that a person defending themselves is not required to weigh to a nicety the exact measure of the defensive action required.
- [254] As further stated at para. 28:
- [28] It would be inconsistent with this principle to expect a person, who is under an attack of sufficient magnitude to warrant resort to potentially deadly force, even though no deadly intent is present, to stop and reflect upon the risk of deadly consequences which might result from taking such defensive action.
- [255] The fact is that after Mr. Willness had swung his skateboard and hit Mr. Young on the side, propelling him to the ground, Mr. Young posed no threat to Mr. Willness whatsoever. While events moved very quickly, Mr. Willness was not under attack and there was no need for him to stop and reflect about what defensive action was required. Simply put, there was no defensive action required.
- (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force
- [256] At all times, Mr. Willness had other means available to respond to any potential threat of the use of force by Mr. Young. He could have chosen not to cross the street to meet Mr. Young, and simply continued down Baker Street. Even once he crossed to the middle of the street, he could have turned and continued on his way down Baker Street. This is not to say that Mr. Willness was required to retreat before engaging in self-defence, but far from retreating, he chose to move towards any threat that Mr. Young might have posed.
- [257] Once facing Mr. Young in the middle of the street, Mr. Willness could have taken a step back rather than continuing to move towards him. He could have swung his skateboard in a defensive manner, as he did later when the men from the patio tried to effect their citizen's arrest. He could have raised his hands to try to block or grab Mr. Young, rather than using the skateboard. Once Mr. Young was down and struggling to get up, Mr. Willness could easily have walked away, rather than choosing to strike Mr. Young on the head with the skateboard.
- (c) the person's role in the incident
- [258] At para. 82 of *Khill*, the Court stated that:

[82] in choosing the broad phrase 'the person's role in the incident', Parliament signaled that the trier of fact should consider the accused's conduct from the beginning to the end of the 'incident' giving rise to the 'act', as long as that conduct is relevant to the ultimate assessment of whether the accused's act was reasonable. . . .

[259] At para. 83, the Court continued:

[83] This broad temporal frame allows the trier of fact to consider the full context of the accused's actions in a holistic manner. Parliament made a choice not to repeat the freeze-frame analysis encouraged by such concepts as provocation and unlawful assault. Rather than a forensic apportionment of blows, words or gestures delivered immediately preceding the violent confrontation, the 'incident' extends to an ongoing event that takes place over minutes, hours or days. . . .

[260] At para. 84, the Court stated that:

[84] The phrase 'role in the incident' includes acts and omissions, decisions taken and rejected and alternative courses of action which may not have been considered. . . .

[261] At para. 85, the Court continued:

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

The phrase 'role in the incident' captures this principle and also ensures that any role played by the accused as an originator of the conflict receives special consideration. . . .

[262] In the present case, Mr. Willness' role in the incident began with his earlier conduct, swearing, uttering threatening words, and wandering down the street. He was angry. He was intoxicated. He was looking for a fight. He wanted to "fuck someone up".

[263] Mr. Willness was the author of this situation. He instigated the confrontation with Mr. Young. At para. 89 of Khill, the Court referred to the language of the person's "role in the incident" as:

[89] 'protection [that] is hopefully present to prevent self-defence from becoming too ready a refuge for people who instigate violent encounters, but then seek to escape criminal liability when the encounter does not go as they hoped and they resort to use of a weapon.'

[264] Those words are directly applicable to Mr. Willness' conduct in instigating a violent encounter with Mr. Young, an encounter that led to Mr. Young's death and to him now pleading self-defence as a means to escape liability.

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

[265] Mr. Young was unarmed. Mr. Willness used his skateboard as a weapon twice.

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

[266] At the time of the incident, Mr. Willness was 26 years old. He was six foot three inches tall, and he testified that he weighed between 160 and 180 pounds, and was underweight in comparison to his current healthier weight of roughly 190 pounds. He acknowledged that he was pretty strong. In contrast, Mr. Young was 55 years old. He was about five feet eight inches tall, and KGH records indicate that he weighed 165 pounds. Both men were intoxicated.

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

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

[267] The two men had no prior relationship. I have already discussed the words spoken by each of Mr. Willness and Mr. Young leading up to the altercation.

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

[268] In my view, Mr. Willness' use of his skateboard as a weapon was disproportionate to any threat Mr. Young posed at any stage of this incident. Mr. Young was empty-handed. The use of a skateboard with sufficient force to knock Mr. Young to the ground was disproportionate to the threat posed by his raised right hand. The use of a skateboard to strike Mr. Young in the head when he was struggling to get to his feet, with sufficient force to knock him unconscious and send him to the ground with his head hitting the pavement with force, was entirely disproportionate to the non-existent threat Mr. Young posed at that time.

[269] Having considered the evidence as a whole and all relevant circumstances surrounding Mr. Willness, Mr. Young, and Mr. Willness' acts, I am satisfied beyond a reasonable doubt that the Crown has established that the third element of the defence does not apply. Mr. Willness' acts throughout the incident, and including both his first and his second use of his skateboard, were not reasonable.

[270] For these reasons, I conclude that the Crown has disproven the defence of self-defence beyond a reasonable doubt. Mr. Willness did not act in self-defence.

Verdict

[271] Mr. Willness, would you please stand. Mr. Willness, I find that you are guilty of committing the manslaughter of Allan Young contrary to s. 236(b) of the Code. Mr. Willness, you may have a seat.

"L.M. Lyster J."

LYSTER J.

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