

CANADA / JUDGMENT

R. v. Calderon

2025 BCSC 1635

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 1635 R. v. Calderon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Calderon,

2025 BCSC 1635

Date: 20250821

Docket: 27314-2

Registry: Nelson

Rex

v.

Alejandro Eytcheson Calderon

Before: The Honourable Madam Justice Lyster

Oral Reasons for Judgment

Counsel for the Crown:

K. Schechter

Counsel for the Accused:

J. Michi

Place and Dates of Trial:

Nelson, B.C.

June 23-27 and 30, 2025

Place and Date of Judgment:

Nelson, B.C.

August 21, 2025

Introduction.. 2

Witnesses. 3

Facts. 4

Analysis. 18

Governing Legal Principles. 18

Arson Contrary to s. 433(a) 19

Remaining Counts. 30

Application of Kienapple Principle. 32

Introduction

- [1] On December 5, 2022, at around 5:30 p.m., the accused, Alejandro Calderon, broke the window on the front door of the Home Hardware store in Kaslo, British Columbia, and attempted to light the store on fire.
- [2] Mr. Calderon stands charged with four counts in relation to that incident. On Count 1, he is charged with intentionally or recklessly causing damage by fire or explosion to the Home Hardware store, knowing or reckless to the fact that it was inhabited or occupied, contrary to s. 433(a) of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. On Count 2, Mr. Calderon stands charged that he intentionally or recklessly caused damage by fire or explosion to the store, contrary to s. 434 of the Code.
- [3] On Count 3, Mr. Calderon is charged with breaking and entering the store and committing an indictable offence therein, namely mischief, contrary to s. 348(1)(b) of the Code. On Count 4, Mr. Calderon is charged with committing mischief by wilfully damaging the building and merchandise belonging to the Home Hardware, with a value in excess of \$5,000, contrary to s. 430(3) of the Code.
- [4] There is little dispute about what happened at the Home Hardware on December 5, 2022. The defence admits that Mr. Calderon should be convicted on Count 2, arson contrary s. 434 of the Code. The chief issue in dispute is whether the Crown has proven beyond a reasonable doubt that Mr. Calderon had the specific intent necessary to commit arson contrary to s. 433(a) of the Code. The defence submits that Mr. Calderon was in a state of advanced intoxication and, therefore, did not have the requisite intent under s. 433(a).

- [5] There is also no dispute that Mr. Calderon committed the offence of breaking and entering and committing mischief and, therefore, should be convicted of Count 3, subject to the application of the Kienapple principle. However, the defence submits that the Crown has failed to prove that Mr. Calderon caused more than \$5,000 in damage, and that he should therefore be acquitted on Count 4.
- [6] Depending on which counts Mr. Calderon is ultimately found guilty of, I will have to consider the application of the Kienapple principle and thus whether some convictions should be conditionally stayed.

Witnesses

- [7] Two employees of Home Hardware, Fawn Geche and Juanita Nielsen, both of whom were working at the time of this incident, testified for the Crown, as did their friend who was also present inside the store, Katheryne Boehlke. Steve Jaksitz, who saw the incident unfold and tried to apprehend Mr. Calderon, testified. So too did Ivo Gmur, who was one of two civilians who rushed to put out the flames. They both testified about their observations and actions.
- [8] The manager of the store, Richard Hewat, was not present at the time of the incident, but testified about the layout of the store, and damage caused by the fire to the store and its merchandise. Brendan McIntyre testified about seeing Mr. Calderon a few minutes before the incident, walking towards Kaslo with a jerry can in his possession.
- [9] The two police officers who attended the scene, and were involved in the arrest of Mr. Calderon and the investigation of these alleged offences, Cpl. Venema and Cst. Wilson, testified.
- [10] I found all of the Crown's witnesses to be credible and generally reliable. To the extent I have any concerns about the reliability of any specific parts of any witness's evidence, I will address that in the course of making my findings of fact.
- [11] Mr. Calderon testified on his own behalf. Mr. Calderon testified that he had no memory of being at the Home Hardware, smashing the front door, or setting the fire. His evidence focussed on his personal circumstances, his recollection of events earlier in the day, and his consumption of alcohol. I will return to my assessment of Mr. Calderon's evidence in the course of my findings of fact, and in particular when I come to my analysis of his intoxication defence.
- [12] In addition to the witnesses, the evidence before me consisted of an agreed statement of facts with respect to the evidence of Cassandra Todd, who is the owner of the numbered company that owns the Home Hardware business, and Rose-Blanche Hudon, who worked at the Kaslo BC Liquor Store, and sold some alcohol to Mr. Calderon on December 5, 2022. A number of photographs of the store and its merchandise after the fire were also entered as exhibits.

Facts

- [13] Mr. Calderon had lived in or near Kaslo for some time prior to this incident, having moved there in 2017 from Vancouver. Prior to the events of December 5, 2022, Mr. Calderon had been a long-time customer of the Home Hardware. He previously had a store account, and continued to shop there regularly. He testified that he shopped there weekly and sometimes daily.
- [14] Mr. Calderon lived on a property he purchased in Sheddy Bench, approximately ten kilometres north of Kaslo. He had a travel trailer and a tiny home which he had built and joined together with the trailer to create a living space. He was entirely off grid. He put in his own gravity water lines from the creek that ran through his property, and had a generator and rudimentary solar system array. He heated his home with a wood stove.
- [15] Mr. Calderon testified about his upbringing and history of alcohol use. At the time of trial he was 53 years of age. He was born in Montreal and moved to Los Angeles and later Saskatoon as a child. He moved to British Columbia in 2001 and to the Kaslo area in 2017.
- [16] Mr. Calderon testified that he had a tumultuous childhood. His parents divorced when he was six or seven. There was domestic violence in the home and his father had a problem with alcohol. Mr. Calderon first drank alcohol when he was about eight or nine years of age.
- [17] Mr. Calderon testified that he had a long-standing problem with alcohol abuse. He did not receive any treatment or attend any alcohol support groups until after his arrest on these charges, when he was released on bail to a recovery house. Since then, he testified that he has maintained sobriety.
- [18] In 2022, Mr. Calderon testified that he was drinking fairly significantly after an extremely distressing personal event the year before. He had taken to drinking every day and in a fair amount. He testified that just to keep from shaking he was probably drinking upwards of one and a half to two 40-ounce bottles of hard liquor a day. He was not working very much or earning much money so this level of alcohol consumption was not financially feasible to maintain. He built a still to brew hard liquor at home at a much lower cost. He also was using cannabis, but no other drugs.
- [19] The Kaslo Home Hardware store is located on Front Street. On December 5, 2022, the Home Hardware was open from 9:00 a.m. to 5:30 p.m. These were its regular hours of business, Monday to Saturday, and they were posted on a sign affixed to the top of the front door. The store occasionally changed its hours due to issues such as staff shortages, but these were its consistent regular hours of business. Ms. Geche and Ms. Nielsen were both working that day from 9:00 a.m. to 5:30 p.m. Ms. Geche was the de facto assistant manager, and was responsible for operations that day, including overseeing closing procedures.
- [20] Some time earlier, in about February 2022, Ms. Geche had spoken with Mr. Hewat about the fact that she did not want to serve Mr. Calderon. They developed a plan, which was that if Mr. Calderon came in the store while Mr. Hewat was working, she would leave the till and

Mr. Hewat would serve Mr. Calderon. Their plan, if Mr. Hewat was not working, was that Ms. Geche would tell Mr. Calderon that he would need to come back the next day when Mr. Hewat was working. Ms. Geche worked Monday to Friday, and Mr. Hewat worked Tuesday to Saturday.

- [21] They had acted in accordance with this plan on a number of occasions between February and December 2022. No one had told Mr. Calderon this was the plan; they simply did it. There had never been a previous occasion, however, when Mr. Calderon had come in when Mr. Hewat was not working and Ms. Geche had refused him service.
- [22] Sometime during the late morning of December 5, Mr. Calderon came into the store. The store was busy, as it was the Christmas retail season. Ms. Geche saw Mr. Calderon come in, pick up some candles, and stand in line. When he reached the till she was working at, she put up her hand with the palm facing outwards, in a "stop" gesture, and told him words to the effect of "I'm sorry Alejandro, I can't serve you, you'll have to come back tomorrow when Rick is here".
- [23] Mr. Calderon testified about this interaction. He said that he asked why she would not serve him, but she refused to give him an answer.
- [24] Mr. Calderon was very familiar to Ms. Geche, who had known him for some years at this time.
- [25] Mr. Calderon did not say anything in response to Ms. Geche. Ms. Geche recalled that he seemed to smirk, almost like he enjoyed the fact that he had been refused service, because he was going to respond by calling the police, and he was going to enjoy that phone call.
- [26] Mr. Calderon called the police on his cell phone. Cpl. Venema arrived about ten minutes later. During the intervening period, Mr. Calderon went back and forth from the inside of the store to the outside. He did not interact with Ms. Geche.
- [27] Ms. Nielsen was present throughout this incident, but did not play any direct role in it.
- [28] On his arrival, Cpl. Venema spoke to Mr. Calderon and then to Ms. Geche. Cpl. Venema had never met Mr. Calderon before. According to Cpl. Venema, Mr. Calderon told Cpl. Venema what had happened from his point of view. Cpl. Venema described Mr. Calderon's demeanour at this time as calm and resolute. Mr. Calderon did not refer to the store or its employees in a negative manner at this time.
- [29] Cpl. Venema then left Mr. Calderon outside while he went in the store and spoke with Ms. Geche to get her side of the story. He formed the view that nothing unlawful had occurred. He told Ms. Geche she had the right to refuse service.
- [30] Cpl. Venema then went outside to speak with Mr. Calderon again. Cpl. Venema testified that he explained Ms. Geche's position to him. He told Mr. Calderon he could return to the store the next day. In response, Mr. Calderon immediately became very elevated. He was yelling, demanding a card and a file number. Cpl. Venema asked him to come over to his police

truck to see if he had any business cards. He did not. Mr. Calderon referred to Ms. Geche and Ms. Nielsen, saying that "they're fucking cunts" more than once, as loudly as that could be said. Cpl. Venema apologized to Mr. Calderon for not having any business cards with him, and told him he could come down to the police station where he would give him the file number. Mr. Calderon did not do so at that time. Cpl. Venema asked him to lower his voice and to stop swearing, and they had a discussion about what the meaning of swearing is. As he was leaving, Mr. Calderon said to Cpl. Venema, "this isn't over yet". Mr. Calderon's tone and aggression appeared to have come down by this point, and Cpl. Venema characterized this statement as more like a statement of fact. Cpl. Venema did not say anything in response. Mr. Calderon walked east along Front Street. Cpl. Venema wrote up his report in his police truck and then did a few patrols around the block, as he was concerned that Mr. Calderon might try to re-engage with the employees in the Home Hardware.

- [31] Mr. Calderon testified about his interaction with Cpl. Venema. He testified that he had called the police because there had been other incidents in town when other business owners had barred him. He had spoken with Cst. Wilson about that issue, and according to Mr. Calderon, Cst. Wilson told him that if it happened again, he should call him. When he called the police on this occasion, he hoped to speak to Cst. Wilson, but it was Cpl. Venema who appeared on scene. Mr. Calderon testified that his experience on this occasion with Cpl. Venema was unpleasant and adversarial, and that Cpl. Venema was condescending. In direct examination, Mr. Calderon said that he did ask for Cpl. Venema's card and badge number. He also testified that at the end of the interaction, he said "this isn't over". He testified that he said that because he intended to call a staff sergeant at the Nelson RCMP detachment to see if he could moderate his situation because he believed that law enforcement in Kaslo was behaving less than appropriately towards him.
- [32] In cross-examination, Mr. Calderon testified that of course he was upset when he was refused service, and that he was upset with the situation, and that after speaking with Cpl. Venema he was angry. He testified that he was more upset with the situation and potential outcomes than he was with the persons involved. He admitted using the vulgarity about the women working in the Home Hardware that Cpl. Venema testified about in his conversation with him. He said that it was part of their heated debate about synonyms and homonyms. According to Mr. Calderon, when Cpl. Venema asked him not to yell or use swear words, he gave him several examples, apparently including calling the staff "fucking cunts", in, as I understood his evidence, an attempt to use examples of derogatory terms. When asked if his use of the word "cunt" was a reflection of the fact he was upset with the Home Hardware staff, Mr. Calderon said that he was upset with the situation and with them, in particular with their behaviour. He testified that his upset grew to anger after speaking with Cpl. Venema.

- [33] Neither Ms. Geche nor Cpl. Venema observed anything in Mr. Calderon's behaviour, speech or demeanour during this period which suggested he had been drinking or was impaired by alcohol. Mr. Calderon did not testify that he had been drinking to this point on December 5, 2022. I find that Mr. Calderon was not impaired to any degree by alcohol during the events of the morning of December 5, 2022. I find that he was angry about being refused service by Ms. Geche, and that he was angry both at the women working at the store, and at the way Cpl. Venema dealt with his complaints.
- [34] Mr. Calderon went to the BC Liquor Store sometime later on the morning of December 5, 2022. According to the agreed statement of facts, Ms. Hudon placed the timing at around noon. According to Ms. Hudon, Mr. Calderon was telling everyone in the store that he had just been refused service at the Home Hardware and that he was not happy. She did not feel alarmed or threatened as this was "just his normal attitude". Mr. Calderon talked for seven to ten minutes about it. Ms. Hudon recalled that Mr. Calderon bought some alcohol, but she could not be specific about what. She said that "it's not like out of the ordinary, like, like a classic person would buy a six pack and a small bottle of booze". He put what he purchased in his backpack as he was hitchhiking. He left the liquor store between noon and 12:30 p.m.
- [35] Mr. Calderon testified that he bought two four-packs of Strongbow cider in 500 ml cans and a 26 ounce bottle of Fireball, a kind of cinnamon whiskey. He testified that he was pretty upset while he was at the liquor store and he was almost certain he said something about the staff at the Home Hardware and Cpl. Venema's behaviour.
- [36] It is clear that Mr. Calderon continued to be angry with both the staff at the Home Hardware and Cpl. Venema at this time. I find that he purchased the amount and type of alcohol he described.
- [37] Mr. Calderon testified that he walked towards his home in Sheddy Bench, which he testified is about ten km north of Kaslo. He walked along the only road going north, Highway 31. Highway 31 descends steeply into Kaslo for the last four kilometres. There is a brake check just before the steep descent. It is a narrow, at times winding, two-lane road. There is no artificial light once out of Kaslo. Mr. Calderon testified that he walked the highway regularly, as he did not have a vehicle, and that it always took him about an hour and 20 minutes.
- [38] While Mr. Calderon was walking along Highway 31, he started to drink the alcohol that he had purchased at the liquor store. He did not start drinking until he was far enough out of town for the police not to see him with an open drink. At the same time that he was drinking, he testified that he searched on his cell phone for the Nelson RCMP phone number. He called it and testified that he asked for the staff sergeant and spoke to several people. He could not remember any of their names. He called back four or five times either because he was hung up on, because he was belligerent, or he lost cell service. He said that he was very upset because he truly expected the police officers to assist him and he did not believe a person should be refused service without being told why. On one occasion, he said that whoever he was speaking to asked him to lower his voice or calm down.

- [39] In cross-examination, Mr. Calderon described his mood in this period as erratic at best. I find that he was still angry at the staff at the Home Hardware, Cpl. Venema, and now the Nelson RCMP's treatment of his complaints.
- [40] In direct examination, Mr. Calderon testified that after he got to the brake check at the top of the descent going into Kaslo his memory started to get patchy. He testified that he had been drinking alcohol quite furiously while he was walking down the highway. I will return to the evidence about the amount Mr. Calderon had to drink, its effect on his memory, and whether he was in a state of advanced impairment when he returned to the Home Hardware later in my reasons.
- [41] Mr. Calderon testified that he did not make it home. He was pretty inebriated and decided to stop at his friend Sheila McGregor's home, which is located at the very beginning of Sheddy Bench. Ms. McGregor was not home. He went inside and continued to try to call the police and testified he drank a whole bunch of liquor out of her liquor cabinet. He could not say how much. Ms. McGregor did not testify, and the evidence does not reveal just how much alcohol Mr. Calderon drank at her home.
- [42] Mr. Calderon testified that at this point, it gets difficult to describe what occurred because his memory is incomplete and consists of just still frames, some of which may not be in chronological order. He knows that he went back to his house, but he cannot say for how long. Mr. Calderon testified he trashed his house looking for more booze, and that he found two bottles of Pinot Grigio hiding somewhere. He did not specifically testify that he drank that wine, but that is the impression he gave in his testimony.
- [43] In cross-examination, Mr. Calderon appeared to have a little more memory of the events of that afternoon than he did in direct. He said that at the brake check, he still had about a 1/3 bottle of Fireball when he went down to Ms. McGregor's.
- [44] Mr. Calderon testified that he knew that at some point he decided to return to Kaslo. He recalled walking on the highway, and thought that someone in a black pick up truck had likely picked him up. In cross-examination, he agreed it was possible that he had walked the whole way back to Kaslo.
- [45] Mr. McIntyre, who also lived in Sheddy Bench, estimated that it was about a five-minute drive there from Kaslo. Mr. McIntyre worked at Kaslo Automotive at this time. It is located about a block from the Home Hardware. He finished work at around 4:45 p.m. on December 5 and left Kaslo Automotive shortly thereafter. He stopped at the liquor store to buy some beer and drove home along Highway 31. He did not initially remember that he stopped at the liquor store to buy some beer, but his memory was refreshed in cross-examination when he was provided his statement to police. His lack of recall of that detail does not adversely affect my assessment of the reliability of his evidence. Somewhere along the highway, Mr. McIntyre saw Mr. Calderon walking on the other side of the road in the opposite direction towards Kaslo with a red jerry can. Mr. McIntyre thought it was a ten-litre jerry can. When he saw Mr. Calderon, he was closer to Kaslo than Sheddy Bench. Mr. McIntyre did not stop

or slow down. He knew Mr. Calderon from seeing him around town, and he was 90% sure the person he saw walking towards Kaslo with a jerry can was Mr. Calderon.

- [46] I accept Mr. McIntyre's evidence that he saw Mr. Calderon walking down Highway 31 towards Kaslo carrying a red jerry can. This occurred sometime around 5:00 p.m. Mr. Calderon did not remember if he was carrying a red jerry can. He did acknowledge that he owned a red ten-litre jerry can that he kept gasoline in beside his generator on his property. I find that Mr. Calderon took the jerry can with gasoline in it from his home and carried it into Kaslo.
- [47] Meanwhile, it was getting close to closing time at the Home Hardware. Ms. Nielsen and Ms. Geche were both still on duty. Their friend, Ms. Boehlke, had also joined them and was there to chat. They started their closing procedures at about 5:20 p.m. Ms. Nielsen and Ms. Geche began by bringing seasonal items, such as sleds and shovels, into the store from outside. They brought in a red trolley that had bags of ice melter stacked on it inside.
- [48] The door to the Home Hardware is recessed in a small alcove. The door was covered in a single piece of glass with a metal push bar to open and close the door located horizontally across the middle. There was a letter sized laminated poster with the store hours affixed to the top part of the door, but it was otherwise clear. There were two large display windows on either side of the door, with merchandise and Christmas decorations displayed in them. There were light fixtures hanging above each window, that remained illuminated at all times. On the street, there were streetlights and lit Christmas decorations. It was getting dark, but the area was generally well lit.
- [49] It is possible to see from inside the store to the outside, and from outside to inside. It is more difficult to see inside the store if the store lights are off, but it is still possible to do so if one peers in. A person cannot see the interior of the entire store from outside; Mr. Calderon testified, for example, that there is an office in the back that cannot be seen from the outside.
- [50] Shortly before 5:30 p.m., Ms. Nielsen went out the front door and looked right and left down Front Street. This was to see if there were any late customers who might be hurrying to get into the store before closing time. She saw a figure about a block to the right, whom she could not identify. The figure did not appear to be hurrying to the store, so she went back inside and locked the front door. Ms. Nielsen was not sure if she had turned the store lights off before she did this, although Ms. Geche believed she had. I find that it is likely that Ms. Nielsen had turned the store lights off before locking the door. The lights in the front windows remained illuminated.
- [51] As Ms. Nielsen was turning around from the locked door she heard three loud bangs on the door. She turned around and saw the legs of a person outside the door, dressed in dark work pants. She was shocked, and crouched down and moved to her right, reaching for the store's cordless phone.

- [52] Ms. Geche was standing behind till 2 at this time, talking to Ms. Boehlke and starting to cash out. Till 2 faces the toy aisle. It is about 15 feet from the front door. If Ms. Geche turned her body, she had an unobscured view of the front door. Ms. Geche heard glass smashing so she turned her head and looked towards the front door. She saw Mr. Calderon smashing the glass in the bottom part of the door with an axe. She saw his face and recognized him. Mr. Calderon was bent down in a crouch and swinging an axe like a baseball bat. When she first looked over, the glass was not yet broken, but had cracks in it. She saw him strike it two more times after the first strike that she heard.
- [53] Ms. Boehlke was standing beside the counter where Ms. Geche was counting cash. She was about ten feet from the front door. She testified that seconds after Ms. Nielsen locked the front door there was a big crashing sound with glass breaking. It was very alarming. She saw the head of an axe go through the glass door once. Ms. Boehlke saw Mr. Calderon outside the door, kind of crouched down and in profile. She saw him make a sweeping motion, crouch down and heard the smashing glass.
- [54] Ms. Boehlke knew Mr. Calderon from around town and testified that she had seen him only a few minutes before at Sunnyside, a health food store in Kaslo. It is four store fronts down from the Home Hardware, on the other side of Front Street. She saw him there between 5:00 and 5:20 p.m. She was buying some vitamins at the till, and Mr. Calderon was sitting on a stool beside her at a coffee bar. They were very close, perhaps two feet away from each other, for about five minutes. Mr. Calderon was trying to talk to Ms. Boehlke. He was calling her by a different name, "Jen". Ms. Boehlke told him she was not "Jen" and she was not going to have a conversation with him. She did not notice any smell of alcohol on his breath and did not notice any signs of impairment. Ms. Boehlke did not know Mr. Calderon personally, but had been in his presence a lot, and believes she would have been able to tell if he was acting differently or was impaired by alcohol.
- [55] Mr. Calderon testified that he did not remember being in Sunnyside.
- [56] I accept Ms. Boehlke's evidence about her interaction with Mr. Calderon at Sunnyside. I do not place significant weight on her evidence about whether Mr. Calderon was impaired by alcohol, but I specifically accept her evidence that she did not smell alcohol on his breath.
- [57] Returning to Mr. Calderon smashing the front door of the Home Hardware, Ms. Geche froze. Ms. Boehlke said that they had to go and "get out of there". Ms. Geche fumbled for her phone and car keys. The three women ran out the back door of the store and got into Ms. Geche's car. She called 911 on her cell phone, and then they drove to the police station, which was only about a block away. None of the women observed the jerry can or the fire being started.
- [58] Meanwhile, Mr. Jaksitz was walking down Front Street. He was going to the Kaslo Hotel, which is located directly opposite the Home Hardware on Front Street, for a special dinner. He knows Mr. Calderon from seeing him around town. He saw Mr. Calderon between him and the Home Hardware while he (Mr. Jaksitz) was about a block away from the store. They were both walking in the same direction, toward the Home Hardware, but on opposite sides

of the street. Mr. Jaksitz was crossing the street to get to the hotel, and Mr. Calderon was crossing in the opposite direction towards the store. Mr. Jaksitz thought Mr. Calderon was carrying a small red jerry can in one of his hands.

- [59] Mr. Jaksitz watched as Mr. Calderon walked straight to the Home Hardware, smashed the bottom out of the glass front door, stuffed the jerry can in through the opening thus created, thereby inserting the top part of his body through the broken door, and lit the jerry can on fire. Initially, Mr. Jaksitz did not see what Mr. Calderon was using to hit the glass, but when he got closer he saw a hatchet, with a handle a couple of feet long. He was ten feet away when he first saw Mr. Calderon hitting the door, reach in through the broken door, and light the jerry can on fire. He saw flames, which were initially a few feet high.
- [60] Mr. Calderon started to back out of the door. Mr. Jaksitz was not sure if Mr. Calderon saw him, but Mr. Calderon reached for the hatchet. Mr. Jaksitz grabbed Mr. Calderon and brought him up from his crouching position, and held him up against the wall. As he did so, he kicked the hatchet out of Mr. Calderon's hands. As he pulled him up against the wall, Mr. Calderon appeared to recognize Mr. Jaksitz and said "oh it's you".
- [61] Mr. Jaksitz asked Mr. Calderon what he was doing, to which he replied that he was burning the place down. At that point, the jerry can exploded. The flames were now past the top of the door. During this exchange, the two men were face-to-face. Mr. Jaksitz did not smell alcohol on Mr. Calderon's breath. There was nothing about his speech or actions, including the way he walked across the street, which indicated to Mr. Jaksitz that Mr. Calderon was impaired.
- [62] Mr. Jaksitz testified that Mr. Calderon was wanting to fight, but he ran into the hotel, looking for a fire extinguisher, running into the restaurant, where people were gathered for the dinner, shouting that there was a fire and asking them to get fire extinguishers. Two men, Jason Rempel and Ivo Gmur, found fire extinguishers and ran over to the store while Mr. Jaksitz continued to look for a fire extinguisher. By the time Mr. Jaksitz got back to the Home Hardware, Mr. Gmur was in the process of going inside the store through the broken glass in the door to make sure the fire was extinguished and crawling back out through the door.
- [63] I accept and rely upon all of Mr. Jaksitz' evidence.
- [64] Mr. Gmur also testified about these events. He was the maintenance man at the Kaslo Hotel, and was there for the special dinner. All of sudden the door opened and Mr. Jaksitz came in calling for fire extinguishers. Mr. Gmur knew that the biggest fire extinguisher was in the kitchen, and went and grabbed that and ran across the street to the store. It took him no more than a minute to do so. He could see smoke coming out of the bottom of the door and flames inside. The flames were reaching to the ceiling of the store. Mr. Gmur immediately began to spray the fire extinguisher on the flames inside, which were about one and a half to two metres from the door. Mr. Rempel and Mr. Gmur were both spraying the flames for about two minutes. They were switching off because they had to hold their breath because of the smoke coming out of the door. After about two minutes, Mr. Rempel's extinguisher

was empty. They could no longer see any flames, but Mr. Gmur crawled in through the broken glass window and sprayed from inside to make sure the flames were out. He could only stay in for perhaps ten seconds because he had to hold his breath. Mr. Gmur described it as "very smoky", "heavier high up than at the bottom". By the end, both of their fire extinguishers were completely empty and the fire was out as far as he could tell.

- [65] Mr. Jaksitz remained at the store for about 20 minutes, until the fire marshal arrived. He left before the fire trucks arrived. Mr. Gmur remained at the store until the firefighters arrived, which he estimated was about 20 minutes.
- [66] It is not necessary to recount all of the police evidence about Mr. Calderon's arrest and the investigation of this matter. Cpl. Venema was the first police officer on scene. Cpl. Venema saw the half-burnt jerry can, which smelled strongly of gasoline, just inside the store, and the axe was laying on the sidewalk, to the west of the door to the store. Cst. Wilson arrived shortly thereafter. Cpl. Venema spoke to witnesses on scene and learned that Mr. Calderon had been present. Mr. Calderon was considered a suspect at this point. Cpl. Venema seized the jerry can and the axe.
- [67] Cst. Wilson knew Mr. Calderon and where he lived and drove in that direction to see if he could find him. Cst. Wilson found Mr. Calderon walking on Highway 31 approximately four to five kilometres north of Kaslo. Mr. Calderon was hitchhiking. It was snowing and dark. The road was narrow, twisty and slippery, with lots of hills and descents. There is a steep incline beside the east side down to Kootenay Lake. Cst. Wilson observed Mr. Calderon's footprints in the snow for several hundred metres on the east side of the highway. The footprints were in a straight line.
- [68] Cst. Wilson detained Mr. Calderon and patted him down. He could smell liquor from Mr. Calderon's mouth as they approached one another. Cst. Wilson did not note any other indicia of impairment at this time. Mr. Calderon told Cst. Wilson that he had been attacked by someone from the hotel and had lost his phone.
- [69] Cst. Wilson transported Mr. Calderon to the Kaslo RCMP detachment. He did not recall smelling alcohol in his police vehicle on the approximately five-minute trip. He met up with Cpl. Venema there. Based on Cpl. Venema's investigation to this point, Mr. Calderon was arrested for breaking and entering and arson. I will note that no Charter challenges have been raised with respect to any aspect of Mr. Calderon's detention and arrest. After Cst. Wilson read Mr. Calderon his s. 10 rights, Mr. Calderon said that he had a lawyer, Mr. Don White, and he wanted to call him. The police facilitated a private call between Mr. Calderon and Mr. White at the detachment after they searched him and lodged him in cells.

- [70] At the detachment, Cst. Wilson smelled alcohol on Mr. Calderon, but did not detect any other indicia of impairment. He could tell he had been drinking, and thought that if Mr. Calderon had been driving, he would probably have been a warn or a fail, due to the smell of alcohol. Cst. Wilson described Mr. Calderon as cooperative and not agitated at the detachment.
- [71] Cst. Wilson was the main officer dealing with Mr. Calderon at the detachment. Cpl. Venema did not smell alcohol on Mr. Calderon or note other indicia of impairment. I place little weight on Cpl. Venema's evidence that he did not smell alcohol, both because he was not dealing with Mr. Calderon as closely as Cst. Wilson was, and because he seems to have been quite focussed on the strong smell of gasoline emanating from the half-burnt jerry can. I accept Cpl. Venema's evidence that he did not detect any sign of impairment in Mr. Calderon at the detachment, and that Mr. Calderon seemed calmer and more rational than when he had dealt with him earlier that day.
- [72] As mentioned earlier, Mr. Calderon testified he had no memory of the events at the Home Hardware at about 5:30 to 5:45 p.m. on December 5, 2022. He testified that he did not remember being arrested, and did not really remember talking on the phone to his counsel from the Kaslo police station. He testified that his next memory was being woken up by a sheriff, while he was wearing long johns and a t-shirt, to pick him up (I take it from the police lock-up in Kaslo) and take him to Nelson. He did not say when this happened.

Analysis

Governing Legal Principles

- [73] As in every criminal trial, the accused, Mr. Calderon, is presumed innocent and the Crown bears the burden of proving every essential element of the offences charged beyond a reasonable doubt. The burden never shifts to Mr. Calderon, and Mr. Calderon does not need to prove anything.
- [74] The Crown's burden relates to each essential element of the offence and not to the individual pieces of evidence led by the Crown: *R. v. Doran*, 2022 BCSC 1697 at para. 21, citing *R. v. Morin*, [1988] 2 S.C.R. 345, 1988 CanLII 8 and *R. v. Arp*, [1998] 3 S.C.R. 339, 1988 CanLII 769.
- [75] A finding of guilt or innocence is based on the evidence as a whole. Mr. Calderon testified in his own defence. As in *Doran*, an arson case where the accused also testified, this is not a classic credibility case. Ultimately, there is no dispute about what happened at the Home Hardware store in the late afternoon of December 5, 2022. The main purpose of Mr. Calderon's evidence was to seek to establish how much alcohol he had to drink on December 5, 2022, and the effects it had on him, including on his memory.
- [76] As such, I agree with the defence that, as in *Doran* at para. 23, the classic formulation for the assessment of credibility from *R. v. W.(D.)*, [1991] S.C.R. 742, 1991 CanLII 93 is not entirely applicable, although the principles which underlie it must guide my analysis. What it is

essential to keep in mind is that the burden of proof always remains on the Crown.

Regardless of whether I believe Mr. Calderon's evidence in all of its particulars, if, on the whole of the evidence, including that led by the defence, I have a reasonable doubt that the Crown has met its burden of proving every element of the offences with which Mr. Calderon is charged, I must acquit.

Arson Contrary to s. 433(a)

[77] Mr. Calderon is charged with two different counts of arson. Count 1 is under s. 433(a) of the Code, which provides:

433 Every person who intentionally or recklessly causes damage by fire or explosion to property, whether or not that person owns the property, is guilty of an indictable offence and liable to imprisonment for life where

(a) the person knows that or is reckless with respect to whether the property is inhabited or occupied;

[78] Count 2 is under s. 434 of the Code, which provides:

434 Every person who intentionally or recklessly causes damage by fire or explosion to property that is not wholly owned by that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[79] Mr. Calderon concedes that the Crown has established that he should be convicted of Count 2. He disputes that he had the specific intent required for a conviction under Count 1.

[80] As explained by Justice Ker in Doran at para. 15, s. 433 is the most serious arson charge in the Code. It is frequently referred to as arson with disregard for human life. The seriousness of the charge is reflected in the fact that the maximum sentence under s. 433 is life imprisonment.

[81] The essential elements of arson under s. 433(a) are, and I paraphrase from Ker J.'s decision in Doran at para. 28:

- a) First, that Mr. Calderon is the person who actually committed the offence - this is the element of identity;
- b) Second, that the offence occurred at the time and place set out in the indictment - this is the time/date/jurisdiction element;
- c) Third, that Mr. Calderon caused damage to the Home Hardware store by fire;
- d) Fourth, that Mr. Calderon intentionally or recklessly caused the damage by fire; and
- e) Fifth, that Mr. Calderon knew or was reckless with respect to whether the Home Hardware was inhabited or occupied.

- [82] In *R. v. Tatton*, 2015 SCC 33, the Supreme Court of Canada dealt with the mens rea or mental element of arson contrary to s. 434 of the Code. It held that s. 434 creates a general intent offence. As such, a defence of intoxication is not available to an accused under s. 434.
- [83] As explained by Ker J. in *Doran* at paras. 29-31, by contrast, s. 433(a) creates a specific intent offence. That means that a defence of intoxication is available under s. 433(a).
- [84] In the case at bar, the evidence establishes beyond a reasonable doubt that Mr. Calderon was the person who lit a fire inside the Home Hardware in Kaslo on December 5, 2022. He intentionally or recklessly caused damage to the store. Mr. Calderon admits as much. However, he submits that he lacked the capacity to know or be reckless as to whether the store was inhabited or occupied due to a state of advanced intoxication. The Crown admits that there is an air of reality to that defence, but submits that it has proven beyond a reasonable doubt that Mr. Calderon, in the words of the Court of Appeal in *R. v. Eng* (1995), 56 B.C.A.C. 18 (CA) at para. 100, 1995 CanLII 1794, either knew that the store was occupied, or he was aware of the risk that it was occupied and nevertheless took the chance that it was not.
- [85] In *R. v. Crossley*, 2025 BCCA 224, the Court summarized the defence of intoxication in the context of the specific intent offence of murder. At paras. 31-33, Madam Justice Dewitt-Van Oosten wrote the following about the applicable legal principles:
- [31] In *R. v. Daley*, 2007 SCC 53, the Supreme Court of Canada explained that a person who is not "so intoxicated as to lack [any] capacity" to form intent, may nonetheless raise a reasonable doubt on the Crown's proof of a specific intent by arguing that intoxication impacted their ability to exercise that capacity: at para. 40, emphasis added.
- [32] Daley made it clear that with a specific intent offence (including murder), the defence of intoxication will not succeed on evidence of "mild" intoxication: at para. 41. This is because "mild" intoxication will generally cause a person's "inhibitions and socially acceptable behaviour" to be relaxed but will not negate specific intent: at para. 41. Instead, a successful intoxication defence requires evidence of "advanced" intoxication: Daley at para. 41.
- [33] What does that mean? Daley did not specify the kind of evidence necessary to meet this threshold or identify specific indicia of impairment that must be present for the defence to succeed. Instead, the focus of the "advanced" intoxication inquiry is the overall impact of intoxication on the accused's state of mind at the time of the offence, as borne out by the entirety of the evidence. In the murder context, evidence of "advanced" intoxication is evidence that reasonably supports a finding that intoxication impaired the accused's "foresight of the consequences of [their] act sufficient to raise a reasonable doubt about the requisite mens rea": Daley at para. 41. In other words, it is evidence that reasonably raises a doubt as to whether the accused intended to kill the victim or meant to cause the victim bodily harm that the accused knew was likely to cause their death and was reckless as to whether death ensued.

- [86] Those same principles apply under s. 433(a) of the Code, with the specific intent in question being whether the accused knew that the property was occupied or was aware of the risk that it was occupied and nonetheless took the chance that it was not.
- [87] Madam Justice Dewitt-Van Oosten went on to write at paras. 36-37 of Crossley the following with respect to the assessment by the trier of fact of whether evidence of intoxication reasonably supports the defence:
- [36] Deciding whether evidence of intoxication reasonably supports the defence is determined case-by-case. What is critical in the murder context is that whatever the evidence might consist of, it must be sufficient to raise a reasonable doubt as to whether intoxication by drugs or alcohol impaired the accused's foresight of the consequences of their actions: Daley at para. 41. As aptly articulated by this Court in R. v. Ruff, 2019 BCCA 412, the evidence must be sufficient to "reduce" the accused's "appreciation of the consequences of [their] actions, at the time of the act": at para. 21.
- [37] In making this assessment, the trier of fact may consider: the nature of the act(s) that caused death; the manner in which those acts were committed; the quantity of alcohol or drugs consumed before the offence; whether the accused was displaying impairment at the time of the offence and to what extent; evidence of purposive behaviour before, during, and after the offence; and any expert evidence that may be adduced specific to intoxication, including its likely effect on the accused's ability to appreciate the consequences of their actions: Sundman at para. 108. This is not a closed list. There may be other types of evidence relevant to the assessment. Again, as explained in R. v. Matchatis, 2020 ABCA 435, "[d]etermining whether an accused's level of intoxication rises to the level of impairing an accused's foresight of the consequences of their acts is a highly factual and contextual exercise": at paras. 26-27. The trier of fact:
- [32] must weigh and consider all of the evidence of intoxication in a contextual manner to determine whether the accused's intoxication crossed the line from mere loss of inhibition, impaired judgment and increased bravado to the point where they are left with a reasonable doubt as to whether the intoxication was severe enough that its effect might have impaired the accused's foresight of the consequences of their actions.
- [Matchatis, emphasis added.]
- See also R. v. Rogers, 2024 NSCA 100 at paras. 56-57.
- [88] With adjustments appropriate to the context of arson, I consider those factors in assessing whether the Crown has proven beyond a reasonable doubt that Mr. Calderon had the requisite intent under s. 433(a).

- [89] The nature of the act, and the manner in which it was committed, in the present case are that Mr. Calderon took an axe and swung it several times to smash out the glass in the front door of the Home Hardware. He then put the top part of his body through the broken glass door, put the jerry can inside the Home Hardware store, and lit it on fire. The jerry can exploded, and damage was caused to the floor of the store and its merchandise.
- [90] The evidence is imprecise as to exactly how much alcohol Mr. Calderon had ingested prior to committing these acts. I accept his evidence that he bought two four-packs of Strongbow cider and a 26 ounce of Fireball and consumed them between noon and 5:45 p.m. I accept that he likely drank some more alcohol at his friend Ms. McGregor's home and at his own home in that period. His evidence does not establish how much more alcohol he had to drink in that period.
- [91] I find that Mr. Calderon was not displaying impairment at the time of the offence. Mr. Jaksitz did not observe any signs of impairment when Mr. Calderon walked across the street to the Home Hardware, or in his close dealings with Mr. Calderon immediately after he lit the fire. He did not smell alcohol on Mr. Calderon's breath. Mr. Calderon spoke to him, apparently recognizing him and saying words to the effect of "oh it's you". When Mr. Jaksitz asked him what he was doing, Mr. Calderon said that he was trying to burn the store down, which is an accurate description of his immediately preceding actions.
- [92] Shortly before the incident, Ms. Boehlke did not smell alcohol or notice any signs of impairment when she interacted with Mr. Calderon at Sunnyside.
- [93] Cst. Wilson encountered Mr. Calderon on Highway 31 approximately four to five kilometres north of Kaslo shortly after the incident, sometime after 6:00 p.m. Mr. Calderon was hitchhiking north in the direction of his home. It had been snowing, and Cst. Wilson could see Mr. Calderon's footprints in the snow. They were in a straight line. When Cst. Wilson patted Mr. Calderon down prior to putting him in the back of his police vehicle, he could smell liquor from Mr. Calderon's mouth. There was nothing about Mr. Calderon's demeanour, walk or speech which indicated to Cst. Wilson that he was impaired by alcohol. Cst. Wilson did not recall smelling alcohol in his vehicle while he transported Mr. Calderon back to the RCMP detachment in Kaslo, but he did smell it again at the detachment.
- [94] Cst. Wilson has experience as a police officer dealing with people impaired by alcohol. He was formerly stationed in Surrey where he worked for six years on the mental health team and the mobile street team, where he dealt with people with addictions. Based on his experience, Cst. Wilson could tell that Mr. Calderon had been drinking. He thought if he had been driving he would probably have been a warn or a fail. It was solely the smell of alcohol that informed that opinion.

- [95] I place a great deal of weight on Cst. Wilson's evidence. Taken together with Mr. Calderon's own evidence, as well as Mr. Jaksitz' evidence, and to a lesser extent Ms. Boehlke's evidence, I find that Mr. Calderon had been drinking alcohol the afternoon of December 5, 2022. However, the evidence from these Crown witnesses establishes that Mr. Calderon was not exhibiting signs of significant, if any, impairment by alcohol at the time of the offence or shortly before or after it. He smelled of alcohol, but no more.
- [96] I have already recounted Mr. Calderon's evidence about the amount of alcohol he had to drink that afternoon. He testified that his memory was patchy due to the consumption of alcohol from about the point that he reached the brake check on his walk home. He testified that he had no recollection of the subsequent events at the Home Hardware.
- [97] I find that Mr. Calderon has exaggerated the extent to which his memory was impaired by the consumption of alcohol on December 5, 2022. At the time, Mr. Calderon was regularly drinking substantial amounts of alcohol every day. On his evidence, he needed to drink one and a half to two 40-ounce bottles of hard liquor each day just to keep from shaking. He was operating a home still to produce sufficient alcohol to drink in a cost-effective manner. The established amount of alcohol that he drank that day, two four-packs of Strongbow and a 26 ounce bottle of whiskey, would not constitute a substantial amount of liquor for Mr. Calderon to drink at this point in his life. Accepting that he likely drank some additional alcohol at Ms. McGregor's home and at his own home, I find it unlikely that he drank a sufficient amount of alcohol to produce the alcohol-induced amnesia that he describes.
- [98] That said, I accept that it is possible that Mr. Calderon did suffer from the alcohol-induced amnesia that he testified about. In other words, I have a reasonable doubt about whether Mr. Calderon remembers his actions at the Home Hardware store.
- [99] Alcohol-induced amnesia, without more, does not constitute a defence to a specific intent offence. In *R. v. Daley*, 2007 SCC 53, the Supreme Court of Canada considered an appeal with respect to the adequacy of the trial judge's charge to the jury in a murder case. The appellant was drunk at the time he killed his spouse. His defence was based on his evidence that he had no memory of what happened at the time of the killing due to the consumption of alcohol. He denied that he had the intent necessary to commit murder. In his charge to the jury, as quoted at para. 72 of the majority reasons, the trial judge stated that:

Amnesia, while it may reflect extreme drunkenness, is not a defence. It is his ability to form the necessary criminal intent at the time that you must focus on. In this regard you must remember what I said about the burden of proof. There is no burden on the accused to prove he was so drunk he couldn't form the necessary intent. The question of drunkenness having been raised, and upon the evidence properly so, the onus is on the Crown to prove beyond a reasonable doubt that he had the necessary intent, notwithstanding his drinking. [A.R., at pp. 17-19]

- [100] In *Daley*, the defence had called expert evidence about the effect of alcohol on the human brain. The defence relied on that evidence for its theory, described as follows at para. 91:

(1) Mr. Daley could not remember the events surrounding the homicide. (2) This is proof that he was in a state of alcoholic amnesia. (3) Persons in a state of alcoholic amnesia experience a shut down of judgment and the ability to evaluate the appropriateness of actions. (4) Persons whose judgment is no longer functioning are unable to foresee the likely consequences of their actions. (5) Persons who cannot foresee the likely consequences of their actions lack the specific intent to be found guilty of second degree murder. Counsel for Mr. Daley says that if all the propositions upon which the above theory is based are made out, then the evidence of amnesia must be central to his case. This is because the evidence in support of amnesia, if accepted, would bring one to the conclusion, by following the steps in the reasoning I set out above, that Mr. Daley lacked the requisite intent.

[101] At para. 92, the majority of the Supreme Court of Canada held that the expert evidence in that case failed to make out a link between the loss of capacity for judgment and the evaluation of appropriateness and the loss of the ability to foresee the consequences of one's actions. The majority held that "without that link, I find that it was acceptable for [the trial judge] to stipulate that amnesia is not a defence": Daley, at para. 92.

[102] Those passages from Daley were relied upon in *R. v. Pangan*, 2014 ONCJ 229 at paras. 37-38 for the proposition that:

In the absence of additional supporting evidence, the fact that the accused suffered from a blackout - or alcoholic amnesia - is not, on its own, evidence that he did not intend the consequences of his action at the time of the offence.

[103] Returning to the facts of the case at bar, I am doubtful that Mr. Calderon was experiencing the substantial and lengthy period of alcohol-induced amnesia that he described in his evidence. Even if he did, that alone would not serve as a defence. The ultimate question remains whether the Crown has proven beyond a reasonable doubt that Mr. Calderon either knew that the store was occupied, or he was aware of the risk that it was occupied and nevertheless took the chance that it was not. Evidence about Mr. Calderon's memory, or lack thereof, is relevant to but not determinative of, that question.

[104] Mr. Calderon's behaviour and comments to Cpl. Venema and at the liquor store around noon show that he was angry about the fact he had been refused service at the Home Hardware. He called the female staff who had refused him service "fucking cunts". He told Cpl. Venema that this "was not over". Mr. Calderon told everyone at the liquor store that he had just been refused service at the Home Hardware and that he was not happy about it. Mr. Calderon testified, and I accept, that he was upset with how Cpl. Venema dealt with him. While there is no evidence to corroborate it, I accept that Mr. Calderon likely attempted to speak with the RCMP in Nelson about his concerns. But that does not negate the fact that Mr. Calderon was angry about being refused service, and specifically, was angry at the female staff who had refused him service. All of this suggests that Mr. Calderon had a motive for wanting to harm the Home Hardware, and the staff who had refused him service.

- [105] Mr. Calderon displayed purposive behaviour before, during, and after the offence. He chose to leave his home in Sheddy Bench. He took with him the red ten-litre jerry can filled with gasoline that he kept beside his generator. It is very probable he took with him the axe; there is no evidence that he obtained the axe anywhere other than from his home, and given his off-grid lifestyle, including heating his home with wood, he would certainly have had an axe at his home.
- [106] Mr. Calderon then walked, or perhaps in part hitch-hiked, the ten kilometres from his home to Kaslo. He was able to do so in winter conditions which included snow on Highway 31.
- [107] At the Home Hardware, Mr. Calderon crouched down and took at least three swings with the axe to break the glass door. He inserted the upper part of his body through the hole he had created, put the jerry can in the store, and lit it on fire.
- [108] When Mr. Jaksitz confronted him, Mr. Calderon spoke to Mr. Jaksitz. He appeared to recognize him, saying "oh its you". When asked what he was doing, he told Mr. Jaksitz he was burning down the Home Hardware. He was certainly aware of what he was doing and why at the time.
- [109] In the ensuing chaos, it would appear that Mr. Calderon then chose to return to his home in Sheddy Bench. He walked back partway before being apprehended by Cst. Wilson. Cst. Wilson testified that Mr. Calderon's footprints in the snow were in a straight line.
- [110] In short, Mr. Calderon engaged in a sequence of purposeful behaviours before, during and after the offence. Those purposeful behaviours are consistent with Mr. Calderon having formed the intention that he was going to burn down the Home Hardware store, and taking a series of actions designed to achieve that end.
- [111] Unlike in Daley, there is no expert evidence in this case specific to intoxication.
- [112] Having reviewed the types of evidence Dewitt-Van Oosten J.A. identified in Crossley at para. 37 as relevant to the intoxication defence, I return to the question of whether the Crown has proven beyond a reasonable doubt that Mr. Calderon had the requisite specific intent to commit arson contrary to s. 433(a) of the Code.
- [113] The Crown has not proven beyond a reasonable doubt that Mr. Calderon knew that the Home Hardware was occupied. Ms. Geche and Ms. Boehlke both saw and were able to identify Mr. Calderon as the person who was breaking the glass door with an axe. But neither of them testified that they believed that Mr. Calderon saw them. It is possible that Mr. Calderon saw one or more of the three women while he was breaking the door, but it has not been proven beyond a reasonable doubt.

[114] I turn to the question whether Mr. Calderon was reckless with respect to whether the Home Hardware was occupied. I have already cited the decision of the Court of Appeal in Eng, where the Court described this element as whether he was aware of the risk that it was occupied and nevertheless took the chance that it was not. This is consistent with the description of recklessness in *Sansregret v. The Queen*, [1985] 1 S.C.R. 570 at 581-82, 1985 CanLII 79, where Mr. Justice McIntyre held that:

recklessness, to form part of the criminal mens rea, must have an element of the subjective. It is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and takes the chance .

[115] The Home Hardware store's regular closing time was 5:30 p.m. Its hours of business were posted on the very door that Mr. Calderon broke with the axe. Mr. Calderon was very familiar with the Home Hardware. He was a regular customer who had formerly had a store account. He was familiar with its layout, including the fact that there were areas one could not see from outside the store by looking through the glass door or the front windows. He knew where the flammable items were stored. Mr. Calderon had been in the store only hours before the offence was committed.

[116] Ms. Nielsen's evidence was that shortly before 5:30 p.m., she went outside and looked left and right to see if there were any late customers. There was an unidentified person to her right, who did not appear to be hurrying to get to the store. She turned around, went back inside, and closed and locked the door. Ms. Nielsen was not sure if she turned the interior lights off before she locked the door, but Ms. Geche testified that Ms. Nielsen turned the lights off before she locked the door. I prefer Ms. Geche's evidence on this point.

[117] Almost immediately, Mr. Calderon started to swing the axe to break the glass door. Ms. Nielsen testified that she had just turned around from locking the door when she heard three loud bangs on the door, turned back towards the door, and saw the legs and dark work pants of a person crouched at the door. Ms. Boehlke testified it was only seconds after Ms. Nielsen locked the door that there was a big crashing sound and she saw Mr. Calderon swinging the axe. Ms. Geche testified that she was standing at the till doing closing procedures when she heard glass smashing so she turned her head and looked towards the front door. She saw Mr. Calderon smashing the glass in the bottom part of the door with an axe. Mr. Calderon was bent down in a crouch and swinging the axe like a baseball bat.

[118] Clearly, Mr. Calderon started swinging the axe to break the glass door very shortly after Ms. Nielsen had locked the front door. Likely it was not yet 5:30 p.m. If it was past 5:30 p.m., it was very shortly thereafter.

- [119] Given Mr. Calderon's familiarity with the Home Hardware, its posted business hours, and Mr. Calderon's knowledge of its hours, I find that he was aware that there was a real risk, if not a high probability, that the store would still be occupied at the time he broke the glass door and lit the jerry can on fire. It would, in fact, still have been occupied at the time he put the jerry can through the opening and lit it on fire had the three women not acted very quickly to get out the back door.
- [120] Given the evidence as a whole, and in particular the evidence of his anger at being refused service, his purposive behaviour before, during and after the offence, and the Crown evidence that he was not significantly impaired, if at all, at the time he committed the offence, I find that the Crown has proven beyond a reasonable doubt that Mr. Calderon was reckless of the fact the Home Hardware was occupied at the time he committed this offence. I, therefore, find that Mr. Calderon is guilty of Count 1 on the indictment, arson contrary to s. 433(a) of the Code.

Remaining Counts

- [121] Given my findings, it follows that Mr. Calderon is also guilty, as he conceded through counsel, of the lesser and included offence under Count 2, arson contrary to s. 434 of the Code.
- [122] I turn to Count 3, which alleges that Mr. Calderon broke and entered into the Home Hardware store and committed mischief therein. There is no dispute that Mr. Calderon committed this offence. By breaking the door with the axe, Mr. Calderon entered the store within the meaning of s. 350(a) of the Code, which provides that "a person enters as soon as any part of his body or any part of an instrument that he uses is within any thing that is being entered". Further, he put the top part of his body physically inside the store when he put the jerry can on the floor and lit it on fire. He caused damage to the door by breaking it and damaged the building and merchandise by setting the jerry can alight, thereby destroying or damaging property and committing mischief contrary to s. 430(1)(a) of the Code. By breaking and entering into the store and committing mischief within, Mr. Calderon acted contrary to s. 348(1)(b) of the Code.
- [123] I turn to Count 4, which alleges that Mr. Calderon committed mischief by wilfully damaging the building and merchandise of a value in excess of \$5,000, contrary to s. 430(3) of the Code. Mr. Calderon submits that the Crown has failed to prove that the value of the damage he caused was in excess of \$5,000.
- [124] It is true that the Crown did not introduce evidence of the specific value of the damage to the store and its merchandise. Most of the evidence about the damage done to the store and merchandise came from Mr. Hewat, including the photographs he took in the hours and days after the arson. The door was broken and had to be replaced. The fir wood floor in the area in front of the door was damaged by fire and had to be replaced. The store was damaged by soot from the burning gasoline in the jerry can and the contents of the fire

extinguishers used to put the fire out. The combined result included a curious black cobwebbing effect high up on much of the store's walls. As a result, the store had to be repainted.

- [125] Merchandise was damaged. In the immediate area of the fire, some merchandise, such as plastic crazy carpets and the plastic wrap covering Christmas wrapping paper, melted. Other merchandise was covered in residue from the fire and the fire extinguishers.
- [126] In the initial aftermath of the fire, Mr. Hewat started to tabulate the value of the damaged merchandise by creating an account and ringing up the retail value of the damaged items. He testified that he believed that there was about \$60,000 in damaged merchandise rung up, but there was no documentary evidence entered to substantiate that figure. Within a few days, a remediation company retained by the store's insurers took over the process of determining what merchandise was unsaleable due to the effects of the fire, cleaning the store, and undertaking the necessary repairs. Mr. Hewat did not know what the ultimate value of the items deemed unsaleable was, nor the cost of the cleaning and repairs. The store was closed for about a month for cleaning and repairs to be undertaken, with the store reopening on January 3, 2023. Mr. Hewat estimated that at most the store achieved about 5% of its normal December sales in 2022.
- [127] Photographs were entered into evidence of the back of a cube van partially loaded with damaged merchandise that the remediation company took away. Mr. Hewat understood that this merchandise was removed because it was no longer saleable due to damage from the fire.
- [128] Notwithstanding the fact that the Crown did not lead precise evidence of the value of the damage done to the store and its merchandise, I have no difficulty concluding that it has proven beyond a reasonable doubt that the value exceeded \$5,000. Mr. Hewat's evidence, including the photographs taken of damage to the store and merchandise, amply establish, on any common sense view of the matter, that the damage was in excess of \$5,000. This does not include the store's lost revenue due to being forced to be closed for almost a month over the busy Christmas season. Remediation efforts, including cleaning and painting the store, repairing the damaged floor area, and replacing the broken door, and the value of the merchandise rendered unsaleable, would easily have exceeded \$5,000 in value.
- [129] Mr. Calderon, please stand. I find you guilty as charged on Counts 1, 2, 3, and 4 of the indictment. You may have a seat.

Application of Kienapple Principle

- [130] I must now determine which counts, if any, must be conditionally stayed pursuant to the Kienapple principle.

[131] The Court of Appeal provided a very helpful overview of the Kienapple principle in its recent decision in *R. v. Baptiste*, 2025 BCCA 208. At paras. 30-31, Justice MacNaughton summarized the principle as follows:

Kienapple Principle

[30] Kienapple sets out the legal principle precluding multiple convictions for offences involving the same "delict" (criminal act or criminal wrong). It provides that when an accused is found guilty of multiple offences with the same or substantially the same elements, the accused should be convicted of only the most serious of the offences, subject to Parliament's clearly expressed intention to provide for multiple convictions: *R. v. Prince*, [1986] 2 S.C.R. 480 at 489, 491, and 500, 1986 CanLII 40. If Kienapple applies, the conviction for the less serious offence should be conditionally stayed.

[31] Whether Kienapple applies is case-specific and contextually informed: *R. v. Mohsenipour*, 2023 BCCA 6 at para. 283. *Prince* establishes the analytical framework to be applied in deciding whether a conviction should be conditionally stayed. The framework involves determining first if there is a factual nexus between the offences at issue, and if so, whether there is also an adequate legal nexus between them.

[132] Justice MacNaughton went on to summarize at para. 32 the factual nexus aspect as follows:

[32] The answer to whether there is a factual nexus between the offences at issue is generally determined by considering whether the same act grounds each of the charges: *Prince* at p. 492. In some cases the factual nexus will be obvious. However, it is not always easy to determine when one act ends and another begins. In cases involving a continuing offence in which the offending behaviour occurred over a period of time, determining whether a factual nexus exists may require consideration of factors such as: the remoteness or proximity in time and place between offences; the presence or absence of relevant intervening events; and whether the acts underlying the offences were related to each other by a common objective: *Prince* at p. 492-493.

[133] At paras. 33-35, MacNaughton J.A. described the legal nexus aspect in the following terms:

Legal Nexus

[33] If a trial judge is satisfied of a factual nexus, they must then consider whether there is also an "adequate legal nexus" between the relevant offences. This is because an accused's single act "can involve two or more delicts against society which bear little or no connection": *Prince* at p. 494-495.

[34] There will only be an adequate legal nexus between offences if there is "no additional and distinguishing element" that requires proof to make out the count sought to be stayed: *Prince* at p. 498-499.

[135] When offences are both factually and legally connected, but distinguishable because they are of "unequal gravity", it may be appropriate to conditionally stay the lesser offence if that offence does not include "additional and distinct" elements from the more serious offence: Prince at p. 499.

[134] At para. 37, MacNaughton J.A. cited R. v. Heaney, 2013 BCCA 177 at para. 26 for the following three factors that:

subject to Parliament's clear intention to the contrary, will generally "defeat a claim that different offences have the legal nexus to warrant the application of Kienapple". They are: (a) where the offences are designed to protect different societal interests; (b) where the offences involve violence against different victims; and (c) where the offences proscribe different consequences:

[135] With that overview of the applicable principles in mind, I turn to a consideration of whether any of Counts 2-4 should be conditionally stayed.

[136] The parties submit, and I agree, that Count 2 must be conditionally stayed pursuant to the Kienapple principle. Count 2 is a lesser and included offence of Count 1. It involves precisely the same set of facts, with Count 1 only having the additional element of the accused knowing or being reckless as to whether the building was occupied or inhabited. Both the necessary factual and legal nexus are present. I order a conditional stay of Count 2.

[137] As I understood their submissions, the Crown submits that Count 3 should not be conditionally stayed, while the defence submits that it ought to be pursuant to the Kienapple principle.

[138] The defence relied on two cases in support of its position. The first was R. v. Dingwall, 2018 BCSC 1041. At para. 10, Mr. Justice Abrioux, then of this court, quoted the Crown's submission that the count of mischief pursuant to s. 430(1)(a) was Kienappled by the count of arson pursuant to s. 434. Mr. Justice Abrioux accepted that submission, and ordered a stay in respect of the mischief count, but no reasons for that conclusion were provided.

[139] The second decision relied upon by the defence on this issue was R. v. Bastien, 2017 BCCA 210. At para. 33, the Court held:

the offence of mischief may in some circumstances be an included offence where a person is charged with arson that does not involve damage to property of which the person is the sole owner.

[140] The Court referred to the decision of the Manitoba Court of Appeal in R. v. Pascal, 1994 CanLII 16628, where the Court held that mischief was an included offence with respect to arson under s. 433, although it noted that the Manitoba court had provided no explanation. In the circumstances of Bastien, however, s. 429(3)(b) was engaged such that the offence under s. 430 was not an included offence as arson as charged under s. 434.1, which concerns arson of the accused's own property, with the result that no stay was appropriate:

at para. 33.

- [141] Neither of the cases relied upon by the defence is determinative of whether Count 3 of the indictment should be stayed. I will apply the principles as set out in Baptiste. I find that the necessary factual nexus is present between Counts 1 and 3. Mr. Calderon's acts of breaking the door, putting the jerry can inside the store and setting it on fire were part of a single continuing act that occurred within a very brief period of time. They were related to a common objective of setting the store on fire, reckless as to whether it was occupied at the time.
- [142] The question of whether the two counts share an adequate legal nexus is more difficult. Breaking and entering is an additional and distinguishing element to Count 3 that is not necessary to establish Count 1. In other words, Count 1 could be proven in the absence of proof of breaking and entering. For example, Count 1 (unlike Count 2) does not depend on the property in question not being owned by the accused. A person could commit arson contrary to s. 433(a) of one's own property, accessed without breaking and entering.
- [143] Further, I find that the two offences address distinct societal harms. Arson contrary to s. 433(a), while requiring proof of damage to property, is focussed on the intentional or reckless endangering of human life by arson. That is what primarily distinguishes it from arson contrary to s. 434. The intentional or reckless endangerment of human life is not part of the focus of breaking and entering and committing mischief contrary to s. 348(1)(b). The latter is a pure property crime, focussed on protecting the sanctity of private property from unlawful interference from persons having no right to enter that property.
- [144] For these reasons, I find that the Kienapple principle does not apply to Counts 1 and 3 and decline to order a conditional stay of Count 3.
- [145] Finally, I turn to Count 4, committing mischief by damaging a building and merchandise of a value in excess of \$5,000. As I understood their submissions, both parties were of the view that this count should be conditionally stayed. The Crown based the difference in its position with respect to Counts 3 and 4 on the basis that that Count 4 lacks the distinguishing element of breaking and entering.
- [146] Notwithstanding the Crown's position, I must determine, as a matter of law, whether the Kienapple principle applies to Count 4.
- [147] I accept that there is the necessary factual nexus between this count and Count 1. They both address the same continuous criminal act. Again, the real question is whether there is the necessary legal nexus between the two counts. I agree with the Crown that the absence of the element of breaking and entering is an important distinguishing factor from Count 3. Arson is the means by which mischief was committed in this case.
- [148] At the same time, there are other factors which suggest that the necessary legal nexus is not present between Count 1 and Count 4. Count 4 requires that the damage caused be in excess of \$5,000. Count 1 requires damage to property, but does not require any minimum

value of damage. Again, this is because arson, contrary to s. 433(a), is focussed on the intentional or reckless endangerment of human life. Mischief in excess of \$5,000 is focussed on damage to property. The two offences are addressed to distinct societal harms. For these reasons, I decline to order a conditional stay of Count 4.

[149] In summary, I have found Mr. Calderon guilty of all four counts on indictment 27314-2. A conditional stay will be entered in respect of Count 2.

"L.M. Lyster J."

LYSTER J.

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