

CANADA / JUDGMENT

R. v. Grabowski

2006 BCSC 1124

COURT

Supreme Court of British Columbia

DECIDED

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2006 BCSC 1124err1 R. v. Grabowski

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Grabowski

2006 BCSC 1124

Date: 20060721

Docket: 111263

Registry: Victoria

Regina

v.

Kenneth Alexander Grabowski

Before: The Honourable Madam Justice Bennett

Reasons for Judgment

Counsel for the Crown

J. Doyle

Counsel appearing as Amicus Curiae

K. Bastow

Appearing on his own behalf

K.A. Grabowski

Date and Place of Hearing:

May 3, 4, 8, 10, 12, 15, 19

& June 5-9, 15-16 and 29-30, 2006

Vancouver, B.C.

[1] Kenneth Grabowski was convicted by a jury on February 23, 2004 of 9 counts of arson-related offences. A directed verdict of acquittal was made in relation to the first count on the indictment. Mr. Grabowski has a history of fire setting and, as a result, the Crown is seeking to have him declared a dangerous offender.

[2] The indictment on which the convictions were entered is as follows:

Count 2

On or about the 25th day of May 2000, at or near Victoria, Province of British Columbia, he did intentionally or recklessly cause damage by fire or explosion to property, a boat shed, situate at 388 Harbour Road, not owned in whole or in part by Kenneth Alexander Grabowski, contrary to s. 434 of the Criminal Code of Canada.

Count 3

On or about the 25th day of May 2000, at or near Victoria, Province of British Columbia, he did intentionally or recklessly cause damage by fire or explosion to property, Revelstoke Home Centre situate at 280 Bay Street, not owned in whole or in part by Kenneth Alexander Grabowski, contrary to s. 434 of the Criminal Code of Canada.

Count 4

On or about the 25th day of May 2000, at or near Victoria, in the Province of British Columbia, he did intentionally or recklessly cause damage by fire or explosion to property, a room at the Traveller's Inn situate at 120 Gorge Road East, knowing or being reckless of the fact that the property was inhabited or occupied, contrary to s. 433(a) of the Criminal Code of Canada.

Count 5

On or about the 25th day of May 2000, at or near Victoria, Province of British Columbia, he did intentionally or recklessly cause damage by fire or explosion to a property, a room at the Traveller's Inn situate at 120 Gorge Road East, not owned in whole or in part by Kenneth Alexander Grabowski, contrary to s. 434 of the Criminal Code of Canada.

Count 6

On or about the 25th day of May 2000, at or near Victoria, in the Province of British Columbia, he did intentionally or recklessly cause damage by fire or explosion to property, a dwelling house situate at 3082 Washington Street, knowing or being reckless of the fact that the property was inhabited or occupied, contrary to s. 433(a) of the Criminal Code of Canada.

Count 7

On or about the 25th day of May 2000, at or near Victoria, Province of British Columbia, he did intentionally or recklessly cause damage by fire or explosion to property, a dwelling house situate at 3082 Washington Street, not owned in whole or in part by Kenneth Alexander Grabowski, contrary to s. 434 of the Criminal Code of Canada.

Count 8

On or about the 25th day of May 2000, at or near Victoria, in the Province of British Columbia, he did intentionally or recklessly cause damage by fire or explosion to property, a garage and dwelling house situate at 3175 Carroll Street, knowing or being reckless of the fact that the property was inhabited or occupied, contrary to s. 433(a) of the Criminal Code of Canada.

Count 9

On or about the 25th day of May 2000, at or near Victoria, Province of British Columbia, he did intentionally or recklessly cause damage by fire or explosion to property, a garage and dwelling house situate at 3175 Carroll Street, not owned in whole or in part by Kenneth Alexander Grabowski, contrary to s. 434 of the Criminal Code of Canada.

Count 10

On or about the 22nd day of June, 2000, at or near the Municipality of the District of Saanich, Province of British Columbia, he did intentionally or recklessly cause damage by fire or explosion to property, Pacific Forestry Centre situated at 506 Burnside Road West, not owned in whole or in part by Kenneth Alexander Grabowski, contrary to s. 434 of the Criminal Code of Canada.

MULTIPLE CONVICTIONS

- [3] The first issue is whether the convictions should be registered on all counts or whether what is referred to as the principle in *R. v. Kienapple* (1974) 15 C.C.C. (2d) 524 (S.C.C.) applies. There were three fires set on May 25, 2000 which attracted two counts each. These are counts 4 & 5 (Traveller's Inn), 6 & 7 (Washington Street) and 8 & 9 (Carroll Street). Mr. Grabowski was convicted of both causing damage by fire to property and causing damage by fire to property knowing it was occupied.

[4] The applicable principles are set out in *R. v. Prince* [1986] 2 S.C.R. 480. An accused is not to be convicted of multiple counts arising from the same delict. In determining whether the matter falls within these principles, two requirements must be satisfied: is there a factual nexus between the charges and is there a sufficient nexus between the offences?

[5] In this case, the same fire underlies both counts where the issue is raised. Therefore the factual nexus is established.

[6] At pages 489-499, the Court said this in relation to the second requirement:

[T]he requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the Kienapple principle.

[7] The Code sections read as follows:

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.

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.

[8] It is apparent that the only additional or distinguishing feature of section 434, which is the offence sought to be conditionally stayed, is the ownership of the property. It does not seem that is an element which should prevent the application of the rule against multiple convictions.

[9] I conclude that the rule in Kienapple does apply and therefore order that the convictions on counts 5, 7 and 9 be conditionally stayed. I add that the decision to conditionally stay these offences has no bearing on the outcome of the sentence in this case.

FACTS RELATING TO THE WINNIPEG FIRES

[10] Mr. Grabowski was previously convicted of a number of counts of arson in Winnipeg, Manitoba. He was convicted on January 19, 1989 of breaking and entering and committing an indictable offence. This involved setting a fire. Sentence was suspended and he was placed on probation for three years. He was on probation when he committed the next series of offences. He was convicted on June 25, 1991 of nine counts of setting fire to property and on appeal received a sentence of two years on each count concurrent. He was also convicted of two counts of mischief endangering life, also in relation to fires, and sentenced to eight years which was upheld on appeal. An agreed statement of facts in relation to these fires was filed and is reproduced below:

SEPTEMBER 23, 1988

On September 23rd, 1988, Charlene Folster lived in unit #2, 79 Hallett Street, in Winnipeg, Manitoba, with her two children, aged 8 and 6 years. They had resided there for approximately four or five months prior to this date, which is when Ms. Folster met Mr. Grabowski (who was already residing at that address). Ms. Folster and her children were residing in their suite at all material times, as was Ms. Folster's mother, who was visiting from out of town.

The property at 79 Hallett Street consisted of a residential dwelling containing a series of four apartments. The Folsters' residence was a one room unit located on the ground floor. There was also a detached wood framed garage located approximately eight feet from the house at the rear of the property adjacent the laneway.

Prior to September 23rd, 1988, Kenneth Grabowski and Ms. Folster socialized with each other, and Mr. Grabowski also socialized with Ms. Folster's boyfriend Riley Evans. Mr. Grabowski also socialized briefly with Ms. Folster's sister Stephanie, who lived with Ms. Folster but was rarely at home. Mr. Grabowski had expressed some interest in going to a movie or having a coffee with Stephanie.

On the evening of September 22, 1988, Mr. Grabowski had been socializing in his suite at the 79 Hallett Street residence with Charlene Folster and several other acquaintances. All were consuming alcohol and smoking marijuana, including Mr. Grabowski. Mr. Grabowski was described as being jovial. Later in the evening, between 11:00 and midnight, Mr. Grabowski asked Ms. Folster where Stephanie was, and she told him Stephanie was at her boyfriend's residence. Ms. Folster says Mr. Grabowski then got very quiet, and no one was talking, and so she decided to leave. Riley Evans also left, and went to his residence (two houses away). Mr. Grabowski later said he was angry that night about not being paid by these people for some marijuana he had given them.

In that context, on September 23rd, 1988, Kenneth Grabowski set a series of fires at 79 Hallett Street at approximately 4:00 a.m. These fires involved the following:

Charlene Folster was awakened by her mother, who heard a noise from the kitchen area. Ms. Folster smelled matches. She saw Mr. Grabowski outside her window, trying to light newspapers on fire. The newspapers were crumpled up and were between the sill and the bottom of the window. The window, which slid vertically and had no locking mechanism, was propped open about four inches by a candleholder she recognized as belonging to Mr. Grabowski. The window had not been in that condition before, nor had there been newspapers there. She said "Ken", and Mr. Grabowski ran back to his suite. Burnt matches were located on the window sill, as was a candleholder belonging to Mr. Grabowski that was propping the window open. The newspapers were slightly singed, and Ms. Folster pushed them out the window. The bottom of the kitchen drapes was singed.

The only entrance to the Folster suite is located just inside the front door to the house. After Charlene Folster noticed the attempt to light the newspapers described above, she left the suite and went two doors away to Riley Evans' house to use a telephone (she did not have one) to call 911. She sent Mr. Evans to help her mother get the kids out of the house. Mr. Evans dressed while she was on the phone. When Mr. Evans got to the house, there was a pail normally kept on the porch which had newspapers placed into it, and the newspapers were on fire - it had not been there when Ms. Folster left to call 911. Mr. Evans kicked the pail away, and was putting out the fire when Ms. Folster got back; she then went in to get her children and mother, who were still in the suite.

Within a few minutes of the fire at the front of the house, it was noted that the garage located at the rear of 79 Hallett Street was on fire. The Winnipeg Fire Department attended and extinguished the fire and saved the structure. A window at the rear of the garage that was covered with a sheet of plywood had been burned. Charring was noted to the window sill and the wood around the window up toward the roof. Inside, burnt paper was found on the floor underneath the window as well as charring on the wall from the window up toward the ceiling.

The police attended immediately upon the 911 call, observed the damage, and arrested Mr. Grabowski in his suite at approximately 4:23 am.

On January 19th, 1989, in the Provincial Court (Criminal Division) of Manitoba before Lismer, PCJ, Mr. Grabowski was sentenced, having plead guilty to one count under the Criminal Code of break and enter and commit an indictable offence. This charge relates to the fires set at 79 Hallett Street, Winnipeg, Manitoba on September 23rd, 1988, mentioned above.

MARCH 3, 1990

At all material times, Frank Thiessen was the owner and occupier, along with his wife, of residential property situated at 104 Dunraven Avenue, in the City of Winnipeg, Province of Manitoba.

The property at 104 Dunraven Avenue consisted of a residential dwelling and an automobile garage and attached storage shed situated at the rear of the property adjacent to the alley. At the relevant time, the garage/shed door was unlocked. The garage/shed area was lit at night by a street lamp on a pole located beside the garage in the alley.

The storage shed various household items stored within, including cardboard boxes, a roll of carpet, paper, and a golf cart. Frank Thiessen's 1979 Ford LTD was stored in the garage.

On the 3rd day of March, 1990, Mr. Grabowski set fire to materials inside the garage/shed at 104 Dunraven Avenue. The Winnipeg Fire Department received an alarm of fire at approximately 3:00 am and attended and suppressed the fire. Newspapers, cardboard and a roll of carpet stored in the shed were noted to have been burned. The wall near these items which separates the storage area from the automobile area was charred as were the rafters directly above that area. The automobile stored in the garage received significant smoke and soot damage. Total damage to

the garage/shed and contents was approximately \$1,000.

On June 25, 1991 in Manitoba Court of Queen's Bench before Mr. Justice Ferg, Mr. Grabowski was sentenced, having earlier plead guilty, to the Criminal Code offence of unlawfully and wilfully setting fire to the shed situated at 104 Dunraven Avenue on or about the 3rd day of March, 1990.

At all material times, Norman MacDonald was the owner and occupier of residential property situated at 112 Stranmillis Avenue, in the City of Winnipeg, Province of Manitoba.

The property at 112 Stranmillis Avenue consists of a residential dwelling and an automobile garage situated at the rear of the property adjacent to the alley and the street. The garage had room for one automobile, was a wooden structure and had no door on the automobile entrance. The garage is lit at night by a lamp on a pole located across the street.

Stored in the garage were pieces of lumber and boards kept up in the rafters, a hoe and rake and a rubber tire, also stored up in the rafters, a cardboard box filled with rags kept on the floor, and two large sheets of cardboard leaning against one wall.

On the 3rd day of March, 1990, Mr. Grabowski set fire to materials inside the garage at 112 Stranmillis Avenue. The Winnipeg Fire Department received an alarm of fire at approximately 3:06 a.m. and attended. They extinguished the fire and saved the structure. The fire occurred up in the rafters and charred the inside of the roof. Noted by Norman MacDonald after the fire on the floor of the garage was a pile of burnt lumber from the rafters along with other charred but unidentifiable items. The cardboard box with the rags and the two large sheets of cardboard could not be located. Approximately \$300 damage was done.

On June 25, 1991 in Manitoba Court of Queen's Bench before Mr. Justice Ferg, Mr. Grabowski was sentenced, having earlier plead guilty to the Criminal Code offence of unlawfully and wilfully setting fire to the garage situated at 112 Stranmillis Avenue on or about the 3rd day of March, 1990.

At all material times, Howard Laxson was the owner and occupier, along with his wife and two children, of residential property situated at 222 Roger Street, in the City of Winnipeg, Province of Manitoba.

The residential property at 222 Roger Street consists of a dwelling with an automobile garage situated at the rear of the property adjacent to the alley. The garage was an older structure, had room for one automobile, and was of wooden construction. The interior walls were lined with a cork-like material known locally as 'buffalo board' and was insulated with newspapers which were visible due to the holes in the disintegrating buffalo board sheeting. The Laxsons kept their 1989 Pontiac automobile stored inside but the garage had no door on the automobile entranceway. The garage area is illuminated at night by a light on a pole located in the alley near the garage.

On March 3rd, 1990, Mr. Grabowski set fire to materials inside the garage situated at 222 Roger Street. The Winnipeg Fire Department received an alarm of fire at approximately 3:46 am and attended but the garage and the automobile stored inside were totally consumed by fire. The garage was completely destroyed, and approximately \$3,000 damage was caused to the garage and materials. The Pontiac automobile, worth approximately \$16,000, was also completely destroyed.

On June 25, 1991 in Manitoba Court of Queen's Bench before Mr. Justice Ferg, Mr. Grabowski was sentenced, having earlier plead guilty to the Criminal Code offence of unlawfully and wilfully setting fire to the garage situated at 222 Roger Street on or about the 3rd day of March, 1990.

At all material times, Antonio Trujillo was the owner and occupier, along with his wife and three children, of residential property situated at 226 Horace Street, in the City of Winnipeg, Province of Manitoba.

The residential property at 226 Horace Street, consisted of a residential dwelling and an automobile garage situated at the rear of the property adjacent to the alley. The garage was of wooden construction with a metal sliding automobile door. There is a light mounted on a pole across the alley from the garage that provides for good visibility at night in the garage.

Stored in the garage were camping equipment, piles of paper, a metal gas can, tools, and a 1980 Mercury Zephyr station wagon. The station wagon had papers in the glove box. The metal automobile door to the garage was never locked.

On March 3rd, 1990, Mr. Grabowski set a fire within the car at 226 Horace Street, lighting papers from the glove box. The Winnipeg Fire Department received an alarm of fire at approximately 3:57 am, attended the scene, and extinguished the fire. The station wagon, worth approximately \$2,000, was completely destroyed and written off by the insurance company. The interior portion of the back of the garage (closest to the alley) sustained extensive burning to the walls and up into the rafters. The front of garage where the camping equipment, piles of paper, a metal gas can, and tools were stored was not damaged.

On June 25, 1991 in Manitoba Court of Queen's Bench before Mr. Justice Ferg, Mr. Grabowski was sentenced, having earlier plead guilty to the Criminal Code offence of unlawfully and wilfully setting fire to the garage situated at 226 Horace Street on or about the 3rd day of March, 1990.

At all material times, Roland Ouimet was the owner and occupier of residential property situated at 221 Eugenie Street, in the City of Winnipeg, Province of Manitoba.

The residential property at 221 Eugenie Street consisted of a dwelling and an automobile garage situated at the rear of the property adjacent to the alley. The garage was of wood framed construction and had room for one automobile where Mr. Ouimet stored his 1978 Oldsmobile Delta.

Stored in the garage were tools, gardening equipment, sports equipment, a gas lawn mower, automobile parts, and a barbeque. Some items were stored in cardboard boxes. Mr. Ouimet is a teacher and his car had school papers and books inside it. The car and the garage were never locked.

On March 3rd, 1990, Mr. Grabowski set a fire to materials inside the garage situated at 221 Eugenie Street. The Winnipeg Fire department received an alarm of fire at approximately 3:57 am and attended the scene. However, the garage and automobile were completely destroyed by the fire. The garage was valued at approximately \$7,000; the Oldsmobile at approximately \$1,000. Due to the size of the fire, an adjacent garage at 219 Eugenie Street also suffered approximately \$1,000 damage.

On June 25, 1991 in Manitoba Court of Queen's Bench before Mr. Justice Ferg, Mr. Grabowski was sentenced, having earlier plead guilty to the Criminal Code offence of unlawfully and wilfully setting fire to the garage situated at 221 Eugenie Street on or about the 3rd day of March, 1990.

At all material times, Maureen Fritz-Lonergan was the owner of property situated at 287 Provencher Boulevard, in the City of Winnipeg, Province of Manitoba.

The property at 287 Provencher Boulevard consists of a two-story apartment block with a full basement containing a total of eleven rental suites. The building has two entrances, one on the front of the building facing Provencher Boulevard, and one at the rear of the building facing onto the alley. In March, 1990, the 11 suite building was fully occupied and approximately 12 people resided there at that time. The entrances to the building are never locked and were well lit at night.

The basement at 287 Provencher Boulevard has three rental suites, a laundry room, a boiler room, and a storage room. The storage room is utilized as an area where tenants can keep personal belongings. It contains eleven lockers. The lockers were in two rows, are of a wooden construction, and any contents were visible.

On March 3rd, 1990, Mr. Grabowski entered an unlocked back door of 287 Provencher, went to the storage area in the basement, entered an unlocked storage locker and set fire to material, including clothing. The Winnipeg Fire department received an alarm of fire at approximately 4:27 a.m. and attended the scene. All the tenants had been evacuated and the fire was suppressed by a sprinkler system.

Signs of fire noted in the storage room consisted of several lockers in a row being burnt and charred. Most of the damage was to one locker which had the remains of its door badly charred and all of the contents were charred. The lockers on either side received burn damage but to a lesser degree. The total damage from the fire was approximately \$1,500.

On June 25, 1991 in Manitoba Court of Queen's Bench before Mr. Justice Ferg, Mr. Grabowski was sentenced, having earlier plead guilty to the Criminal Code offence of committing mischief by wilfully damaging property by setting fire to property situated at 287 Provencher Boulevard on or about the 3rd day of March, 1990.

At all material times, Angelo Balbo was the owner of residential property situated at 509 De La Morenie Street, in the City of Winnipeg, Province of Manitoba.

The residential property at 509 De La Morenie Street consists of a residential dwelling and a two bay automobile garage with an attached shed situated at the rear of the property adjacent to the alley. The garage and shed were of wooden construction with wood siding. The garage was unlocked at the relevant time. Inside was a 1967 Mustang automobile and a 1983 Ford pick-up truck.

Mr. Balbo is a commercial painter and kept paint and the tools of his trade and paint stored in the garage. Also stored were many personal items in cardboard boxes and a couch.

On March 3rd, 1990, Mr. Grabowski set fire to materials inside the garage at 509 De La Morenie Street. The Winnipeg Fire department received an alarm of fire at approximately 4:35 am and attended the scene. The garage and contents were destroyed or damaged by the fire. The damage to the garage was approximately \$10,000; the Mustang, worth approximately \$5,000, was destroyed; and the Ford pick-up was damaged, to a value less than \$1,000. An adjacent garage, at 513 De La Morenie, was damaged to a value of approximately \$1,000 due to the size of the fire at 509 De La Morenie.

On June 25, 1991 in Manitoba Court of Queen's Bench before Mr. Justice Ferg, Mr. Grabowski was sentenced, having earlier plead guilty to the Criminal Code offence of unlawfully and wilfully setting fire to the garage situated at 509 De La Morenie Street on or about the 3rd day of March, 1990.

The total value of the damage caused by the fires on March 3, 1990 was approximately \$50,000. All the incidents took place in the early morning hours of that day, and severely stretched the resources of the Winnipeg Fire Department.

Mr. Grabowski had no connection or relationship to any of the persons or properties involved in the fires on March 3, 1990.

During the evening prior to setting the fires on March 3, 1990, Mr. Grabowski had been socializing at the residence of Darlene Houssin, located at 285 St. Anne's Road, Winnipeg. He had arrived there the evening of March 2, and stayed for about two hours, leaving some time around 10:30 pm.

Both Ms. Houssin and Mr. Grabowski were consuming a considerable amount of vodka and beer on March 2. At times during that evening with Ms. Houssin, Mr. Grabowski was angry, but Ms. Houssin does not know why. Ms. Houssin recalls Mr. Grabowski being pretty drunk when he left.

In March and April, 1990, Mr. Grabowski resided at 277 Provencher Boulevard in Winnipeg.

MARCH 20, 1990

At all relevant times, the Roman Catholic Archdiocese of Winnipeg was the owner of St. Boniface Holy Cross Parish, located at 252 Dubuc Street (Dubuc and Enfield Streets), in the City of Winnipeg, Province of Manitoba. The property consists of the Holy Cross Roman Catholic Church building situated on a corner lot at Traverse Street. It is a two story wood frame structure containing a church, auditorium, and residence.

On March 20th, 1990, Mr. Grabowski set a fire in a stairwell of the Holy Cross Roman Catholic Church building. The Winnipeg Fire department received an alarm of fire at approximately 12:30 p.m., attended the scene and suppressed the fire.

At the time of the fire, a group of about 8 people was meeting in a basement area of the church and had to be evacuated. There were no injuries.

Upon inspection, it was noted that a small storage room and the nearby stairway adjacent to the main part of the church had suffered heavy fire damage and is believed to be the place where the fire originated. This room was used to store sheet music, art supplies and materials used by the altar boys. It was accessible from the street by entering through an unlocked door and climbing a small set of stairs.

In addition to the damage noted above, the adjoining wall and most of the roof and attic suffered extensive fire damage. The majority of the church suffered damage from smoke and water. The total damage was approximately \$500,000.

On June 25, 1991 in Manitoba Court of Queen's Bench before Mr. Justice Ferg, Mr. Grabowski was sentenced, having earlier plead guilty to the Criminal Code offence of unlawfully and wilfully setting fire to the Holy Cross Roman Catholic Church situated at 252 Dubuc Street on or about the 20th day of March, 1990.

Mr. Grabowski had no connection to the Church at 242 Dubuc.

MARCH 26 and 27, 1990

At all material times, Eddie Foubert was the owner of residential property situated at 251 Provencher Boulevard, in the City of Winnipeg, Province of Manitoba.

The property at 251 Provencher Boulevard consists of a residential dwelling containing six rental suites and an automobile garage situated at the rear of the property adjacent to the alley.

The garage was of wooden construction with tongue and groove boards for siding. The interior was not insulated and the walls were covered with a cardboard sheeting. There was one automobile door, one 'person' door, and two glass windows on either side. The 'person' door was not locked. No items were stored in the garage and it was completely empty.

On March 26th, 1990, Mr. Grabowski set a fire in the garage situated at 251 Provencher Boulevard. The Winnipeg Fire department received an alarm of fire at approximately 11:38 pm, attended the scene and suppressed the fire. Upon inspection, it was noted that the cardboard sheeting on one side interior wall was scorched. A burn mark approximately 1.5 to 2 feet wide ran from the ground up to the roof. The rafter at the top of the scorch mark was also burnt and had to be replaced. Ashes from paper or cardboard were observed on the ground at the base of the burn mark. Approximately \$500 damage was done.

On June 25, 1991 in Manitoba Court of Queen's Bench before Mr. Justice Ferg, Mr. Grabowski was sentenced, having earlier plead guilty to the Criminal Code offence of unlawfully and wilfully setting fire to the garage situated at 251 Provencher Boulevard on or about the 26th day of March, 1990.

At all material times, Michel Jounot was the owner and occupier, along with his wife and three children, of residential property situated at 255 Dumoulin Street, in the City of Winnipeg, Province of Manitoba.

The residential property at 255 Dumoulin Street consists of a residential dwelling and an automobile garage situated at the rear of the property adjacent to the alley. The garage was a wooden frame construction with boards covered with stucco on the exterior. It had one automobile door, one 'person' door, and two glass windows. The garage door was unlocked at the relevant time.

Stored in the garage were bicycles, lawn chairs, a motorcycle, two 12 foot long rolls of carpet on brackets on the side wall, and lumber scraps.

On March 27th, 1990, Mr. Grabowski set fire to materials in the garage situated at 255 Dumoulin Street. The Winnipeg Fire department received an alarm of fire at approximately 12:02 a.m., attended the scene and suppressed the fire. Mr. Jounot observed that the end of a roll of carpet nearest the 'person' door had been burned. Located under the burnt end of the carpet roll was a pile of burnt wood scraps. A lawn chair stored in that area also had the nylon webbing burnt. The structure itself suffered no fire damage but there was smoke damage to much of the contents. The total value of the damage was approximately \$500.

On June 25, 1991 in Manitoba Court of Queen's Bench before Mr. Justice Ferg, Mr. Grabowski was sentenced, having earlier plead guilty to the Criminal Code offence of unlawfully and wilfully setting fire to the garage situated at 255 Dumoulin Street on or about the 27th day of March, 1990.

Mr. Grabowski had no connection or relationship to any of the persons or properties involved in the fires on March 26 and 27, 1990.

APRIL 24, 1990

At all material times, Robert Fillion was the owner and occupant, along with his wife, of residential property situated at 277 Provencher Boulevard, in the City of Winnipeg, Province of Manitoba.

The residential property at 277 Provencher Boulevard consists of a residential dwelling containing the Fillions living quarters on the main floor and a series of individually rented rooms. Two of the rented rooms, suites #4 and #5, are located side by side in the basement. In April 1990, Suite #4 was occupied by Kenneth Grabowski. Suite #5 was occupied by a woman named Jamie Lee, who vacated her suite on approximately April 17, 1990.

Ms. Lee's boyfriend, Rheal Brick, who was a "biker", would stay at 277 Provencher from time to time, and was staying in Suite 5 on April 24, 1990, Ms. Lee having moved out and the two no longer being a couple. Mr. Fillion says that Mr. Grabowski "had feelings" toward Ms. Lee; during his sentence, Mr. Grabowski stated he was "in love" with Ms. Lee at the relevant time.

A few days prior to April 24, and before Ms. Lee moved out, there was a party at 277 Provencher. At one point, Mr. Grabowski followed Ms. Lee to her room when she was going to bed. This startled Ms. Lee, and when she yelled out Mr. Brick came upstairs and "roughed up" Mr. Grabowski.

On April 24th, 1990, Mr. Grabowski set a series of fires in the dwelling at 277 Provencher Boulevard. At the time of the fires there were four residents in the premises, in addition to Mr. Grabowski.

A fire was set in a closet in the southeast corner basement storage room shortly after midnight. The fire alarm in the house sounded and Robert Fillion attended to the basement to investigate. He observed smoke and flames in the storage room. He used a fire extinguisher to try to suppress the fire but was unsuccessful. Robert Fillion then went outside to get the garden hose. He observed Kenneth Grabowski and Rheal Brick sitting outside drinking beer together. He enlisted their assistance in putting out the fire in the basement with the garden hose. Noted was a burnt cardboard box against the wall with charring up the wall to the ceiling at the area of the natural gas meter.

A short time later, Robert Fillion, Rheal Brick, and Kenneth Grabowski were sitting in the Fillions' kitchen. Kenneth Grabowski left and went to his room. Shortly thereafter, around 12:30 am, Rheal Brick could smell smoke coming from the basement. A fire was burning in suite #5 and Robert Fillion could see smoke coming from the mattress and box spring. The garden hose, still nearby, was utilized to suppress the fire. Rheal Brick and Robert Fillion moved the mattress and box spring outside and ventilated the basement. The total damage for this fire was approximately \$200.

Robert Fillion, Rheal Brick, and Kenneth Grabowski returned to the Fillions kitchen where they consumed several beer each. At approximately 3:00 am, Kenneth Grabowski excused himself and went to bed. Rheal Brick went downstairs shortly after Kenneth Grabowski and, observing a third

fire, alerted Robert Fillion. Mr. Fillion attended the basement and saw flames and smoke coming from the three garbage bags containing Jamie Lee's clothing, which she had left in the storage room. Robert Fillion used the garden hose to suppress the fire after calling the Winnipeg Fire Department. Noted was more charring to the nearby wall as well as burnt cardboard and clothing.

After the third fire was suppressed, Kenneth Grabowski was in his suite. Robert Fillion attempted to talk to Kenneth Grabowski to confront him about the fires but the door was closed and locked. He then observed Mr. Grabowski open the door and run out of the residence, dressed but with no shoes on. Mr. Fillion called 911. Mr. Grabowski returned later that day, and was arrested.

On June 25, 1991 in Manitoba Court of Queen's Bench before Mr. Justice Ferg, Mr. Grabowski was sentenced, having earlier pled guilty to the Criminal Code offence of unlawfully committing mischief by wilfully damaging property by setting fire to property situated at 277 Provencher Boulevard on or about the 24th day of April, 1990.

OTHER GENERAL MATTERS

On April 10, 1990, Mr. Grabowski admitted to Ms. Houssin that he set some of the above fires. After he was arrested, Mr. Grabowski gave several statements to Sgt. Mirwaldt of the Winnipeg Police.

In his statements, Mr. Grabowski acknowledged that the fires were set by the use of an open flame from a lighter, applied to combustible materials (usually paper products) which he found at the scene of each fire. With respect to the garage fires, he said that he just "walked around and lit them with my lighter" as he was walking home. He was mad at Mr. Brick because they had been in a fight.

FACTS RELATING TO THE SUBSTANTIVE OFFENCES

- [11] The facts relating to the substantive offences were determined, at the request of the parties, at a date prior to the commencement of the dangerous offender hearing. This was done in order to provide the psychologists and psychiatrists who testified with the factual foundation for the current offences. The full reasons may be found at 2006 BCSC 636. I reproduce the facts below:
- [12] The findings of facts herein are solely from the evidence called at trial. Other findings of facts will be found once all of the admissible evidence is considered for the purpose of the imposition of sentence. The facts are challenged with respect to one fire, at 3082 Washington St., which I will address when discussing those Counts.

[13] The main issue at trial was identification. Much of the evidence called at trial related to proving the identification of Mr. Grabowski as the perpetrator. Further, much evidence was called regarding the cause of the fires. Given the convictions, it is clear the jury was satisfied beyond a reasonable doubt that Mr. Grabowski set the fires. The findings of fact below assume this and therefore the evidence relating to proof of identification is not reviewed at length.

[14] Mr. Grabowski did not testify at trial.

May 25th 2000 Fires

[15] On May 25th 2000, five fires were set by Mr. Grabowski in Victoria, B.C. He was arrested at around 5:45 a.m. that morning and made certain statements which assist in tracing his steps earlier that morning.

[16] On the evening before, Mr. Grabowski was in the Legends Nightclub with his friend and room-mate, Paul Bonnatteau. The nightclub is located at 919 Douglas Street in downtown Victoria.

[17] The last patrons of Legends left around 2:30 a.m., according to the night manager, Rheal Bard. Mr. Grabowski told the police that he had an argument with Paul Bonnatteau over a girl he met in the bar. I find that this argument occurred. Mr. Grabowski then decided to walk home. When he was arrested, he had sufficient money in his possession to take a taxi to his house at 4022 Carey Road. He also had more than enough time to walk home, and indeed his whereabouts for about an hour and a half is unknown.

Revelstoke Home Centre Fire

[18] This charge is found in Count Three of the indictment and reads as follows:

On or about the 25th day of May 2000, at or near Victoria, Province of British Columbia, he did intentionally or recklessly cause damage by fire or explosion to property, Revelstoke Home Centre situate at 280 Bay Street, not owned in whole or in part by Kenneth Alexander Grabowski, contrary to s. 434 of the Criminal Code of Canada.

[19] I find that Mr. Grabowski left Legends Nightclub and walked to the area of the Revelstoke Home Centre, which was a building supply store located at 280 Bay Street, Victoria, B.C. The store was surrounded by a fence, but entry could be accomplished by climbing under or over the fence.

[20] At the rear of the store was a shed in which two large trucks and many supplies, such as plywood, gyproc, presto logs, rolls of polypropylene carpet, cedar shims, metal sheds in cardboard boxes and sona tubes, were kept. A fire was started in this shed with an open flame to combustible materials.

- [21] Inside the store there were many highly flammable items, as one might expect in a building supply store.
- [22] Ms. Wickham had been outside of her house, which is behind the store, at 3:15 a.m. and did not see any fire. About ten minutes later, she heard shouting outside from neighbours, came outside and saw flames all over the roof of the shed, some 20 to 30 feet in height. She called 911 at 3:25 a.m. At this point, the fire was burning rapidly.
- [23] Fire crews were dispatched, however the fire spread very quickly and the entire store burned to the ground. The loss was \$3.8 million dollars, of which \$2.8 million dollars was covered by insurance. The building has never been replaced.
- [24] Fire crews from Saanich were also dispatched to assist the Victoria fire department in battling the fire.
- [25] I find as a fact that this fire was set first.
- [26] I find as a fact that the fire was intentionally, as opposed to recklessly, set by Mr. Grabowski.

Whitehall Boat Reproductions Fire

- [27] Count 2 of the Indictment sets out the next fire:

On or about the 25th day of May 2000, at or near Victoria, Province of British Columbia, he did intentionally or recklessly cause damage by fire or explosion to property, a boat shed, situate at 388 Harbour Road, not owned in whole or in part by Kenneth Alexander Grabowski, contrary to s. 434 of the Criminal Code of Canada.

- [28] After setting the fire at the Revelstoke Home Building Centre, Mr. Grabowski walked over to Harbour Road, which is a relatively short distance. There he came upon a shed which was adjacent to Whitehall Boat Reproductions which was storing a mould of a fibreglass boat. The shed was not closed tightly because the boat mould was too big for it.
- [29] The Port Hope Shipyard is across the road from Whitehall Boats. Mr. Hanlon was a security guard working for Port Hope. He was listening to the police radio and heard the call regarding the Revelstoke fire. He stepped out of his guardhouse and saw flames coming out of the top of the small shed in front of Whitehall Boats. He called 911 at 3:29 as he walked towards the shed. The door of the shed was open and fire was dripping down the side of the walls. Fire fighters arrived and quickly put out the fire.
- [30] The fire was started by an open flame to combustible materials. There were a number of fluorescent lights in the shed, and the cardboard containers were burned. I find that the fire was started by lighting the cardboard containers on fire. In order to light the cardboard on fire, Mr. Grabowski had to enter the shed and light the cardboard. I find that this fire was intentionally, as opposed to recklessly, set.

- [31] Had the fire spread to the main building, which was adjacent to the shed, there were large quantities of wood and fibreglass inside. There was teak sawdust everywhere.
- [32] I find that this fire was set after the Revelstoke fire. This is because when the Revelstoke fire was noticed, it was burning significantly. The Whitehall fire was noticed right away and only a small fire had erupted.

The 3175 Carroll Street Fire

- [33] This fire, also set on May 25, 2000 was the subject of two charges, Counts 8 and Count 9:

Count 8:

On or about the 25th day of May 2000, at or near Victoria, in the Province of British Columbia, he did intentionally or recklessly cause damage by fire or explosion to property, a garage and dwelling house situate at 3175 Carroll Street, knowing or being reckless of the fact that the property was inhabited or occupied, contrary to s. 433(a) of the Criminal Code of Canada.

Count 9:

On or about the 25th day of May 2000, at or near Victoria, Province of British Columbia, he did intentionally or recklessly cause damage by fire or explosion to property, a garage and dwelling house situate at 3175 Carroll Street, not owned in whole or in part by Kenneth Alexander Grabowski, contrary to s. 434 of the Criminal Code of Canada.

- [34] Between 5:10-5:14 a.m., while at the Revelstoke fire, police and fire fighters observed a large column of smoke to the north. Sergeant Bond immediately headed towards the smoke, and a minute later, the report of a fire at 3175 Carroll Street came into the dispatch.
- [35] The fire was started in a garage, which was a separate building from the house. The garage was engulfed and the flames were impinging on the house, melting the siding. This fire was caught on video by a local television station. It was a significant fire.
- [36] Mrs. MacDonald and her teenage daughter were asleep in the house. Shortly after 5:00 a.m., she was awakened by someone pounding on her front door shouting that she had a fire. She ran outside, saw the fire, returned to the house, called 911 and got her daughter out of the house. Fortunately neither was injured. The 911 call was recorded at 5:12:26 a.m.
- [37] The garage was made of wood. It contained a quantity of combustible material including rolled Astroturf carpet outside (which is highly flammable), peat moss, stacks of old newspapers, clothes, toys and an old bed and mattress.
- [38] I find that Mr. Grabowski intentionally, as opposed to recklessly, set this fire by the use of an open flame to combustible material.
- [39] At the front of the house were garbage cans, flower pots, a barbeque and toys. There were draperies in the windows. The jury found that Mr. Grabowski knew or was reckless of the fact that the property was inhabited or occupied. This was a residential neighbourhood. The

evidence shows that the property was obviously occupied. I am satisfied beyond a reasonable doubt that Mr. Grabowski knew that the house was occupied when he set fire to the garage. I am satisfied beyond a reasonable doubt that Mr. Grabowski intended to set the fire in the garage. I am satisfied beyond a reasonable doubt that he was, at the very least, reckless, when he caused the fire to the house at 3175 Carroll Street.

- [40] This house is surrounded by tall trees and the possibility of the fire spreading to the trees and then to the apartments nearby was a real concern for the fire fighters. Fortunately, the fire fighters were able to extinguish the fire in the garage and house before it spread.
- [41] The garage was destroyed by the fire, as were the contents, which included some personal treasures of Mrs. MacDonald.

The 3082 Washington Street Fire

- [42] Moments later, a fire was discovered at 3082 Washington Street, which is located near 3175 Carroll Street. The following two charges were laid in relation to this fire:

Count 6:

On or about the 25th day of May 2000, at or near Victoria, in the Province of British Columbia, he did intentionally or recklessly cause damage by fire or explosion to property, a dwelling house situate at 3082 Washington Street, knowing or being reckless of the fact that the property was inhabited or occupied, contrary to s. 433(a) of the Criminal Code of Canada.

Count 7:

On or about the 25th day of May 2000, at or near Victoria, Province of British Columbia, he did intentionally or recklessly cause damage by fire or explosion to property, a dwelling house situate at 3082 Washington Street, not owned in whole or in part by Kenneth Alexander Grabowski, contrary to s. 434 of the Criminal Code of Canada.

- [43] Patrick O'Keefe lived at 3082 Washington Street, with his wife and three children ages 7 years, 2 years and 4 months. A tenant also lived in the upstairs of the house and she had an 18 month old baby.
- [44] The house was well-kept with toys and flower pots in the front of the house. The property was heavily treed. There was a picnic table, a swing and toys in the back yard. There is a path through the back yard that people take to get to the Galloping Goose trail. 3175 Carroll Street is behind and north of this house. Mr. Grabowski could have entered the property either from the rear or front. Either way, it was clear that the property was occupied.
- [45] The evening before, Mr. O'Keefe had put three to four plastic bags with paper trash beside his house. There was a pile of material for recycling neatly placed against the side of the house. There was an empty suitcase, a broken plastic chair, used carpeting and pink fibreglass insulation stacked up that he was throwing out.

- [46] Robert Gallagher was walking his puppy before he went to work. As he approached 3082 Washington Street he saw a fire beside the house. The flames were approximately 13-15 feet high and were catching on to the stucco on the side of the house. He pounded on the front door, and after a couple of minutes Mr. O'Keefe came to the door. Mr. O'Keefe grabbed his cell phone and fire extinguisher. He saw that the white chair and carpet had been moved. He called 911 and then grabbed his garden hose. The 911 call was received at 5:13:56 a.m., which was about a minute and a half after the call to Carroll Street. The Saanich fire department had to assist with this fire as well.
- [47] The fire had gone into the structure of the house, but fortunately the fire fighters found it by pulling some of the siding from the building. The house was an old, wooden structure. Had the fire taken hold under the stucco exterior, the house would have burned down in a very short time. In other words, had Mr. Gallagher not noticed the fire when he did, there was a serious threat to the occupants of the house. No one was injured in this fire.
- [48] Mr. O'Keefe observed that the garbage bags had been opened and garbage had been strewn around. The plastic chair had been moved from where it was against the wall of the house. The material was by an overhang in the wall, which was an extension of one of the rooms. Most of the burning occurred under the overhang. The basement window had been opened.
- [49] The Crown submitted that Mr. Grabowski moved the material under the overhang and set fire to it. The defence submits that this fact cannot be proved beyond a reasonable doubt. According to Mr. O'Keefe, the garbage and recycling was already in the area of the overhang, and the chair had been moved away from the wall.
- [50] I agree the evidence does not show that the material was moved right under the overhang. However, the fire was set right next to the wall of a house that was clearly occupied. I find that Mr. Grabowski intentionally, as opposed to recklessly, set the fire with an open flame to combustible material. He clearly knew the home was occupied and he intentionally set the fire knowing that the house would catch fire.
- [51] I find that this was the fourth fire set that morning.

The Traveller's Inn Fire

- [52] This was the last fire set on May 25, 2000. This fire involves the following counts on the indictment:

Count 4:

On or about the 25th day of May 2000, at or near Victoria, in the Province of British Columbia, he did intentionally or recklessly cause damage by fire or explosion to property, a room at the Traveller's Inn situate at 120 Gorge Road East, knowing or being reckless of the fact that the property was inhabited or occupied, contrary to s. 433(a) of the Criminal Code of Canada.

Count 5:

On or about the 25th day of May 2000, at or near Victoria, Province of British Columbia, he did intentionally or recklessly cause damage by fire or explosion to a property, a room at the Traveller's Inn situate at 120 Gorge Road East, not owned in whole or in part by Kenneth Alexander Grabowski, contrary to s. 434 of the Criminal Code of Canada.

- [53] The Traveller's Inn is a large motel consisting of two buildings, both two storeys high. It is not very far from 3082 Washington Street. Robert Joly had been staying in room 308 for about nine months. He had access to a small kitchenette which adjoined his room. Room 309 was on the other side of the kitchenette, but the occupants of that room did not have access to the kitchen.
- [54] There is a window in the kitchenette which faces the rear of the motel.
- [55] On the morning of May 25, 2000, Mr. Joly was not sleeping very well. He heard a sound in the kitchenette, got up and looked inside and saw someone in the room. He also saw a beam of light. He closed the door and then opened it again. This time he saw someone, who we now know was Mr. Grabowski, leaving through the window.
- [56] Mr. Joly tried to chase the person, but was unsuccessful. He returned to the motel about five minutes later. In the meantime, the occupant of 309 reported a fire in the kitchenette. The fire department was called at 5:18:36 a.m. by the night clerk. The night clerk attended with fire extinguishers and managed to quell the fire.
- [57] Inside the kitchenette there were old pizza boxes, crackers boxes and other things which were combustible and had burned. A chair was destroyed and other damage occurred. The screen had been pulled off the window.
- [58] The occupant of 309 was sent to the hospital due to uncontrollable coughing.
- [59] It was readily apparent that someone had been using the kitchenette when Mr. Grabowski entered it. Further, the motel obviously had guests staying there. I find that Mr. Grabowski intentionally set the fire at the Traveller's Inn with an open flame to combustible material.
- [60] Mr. Grabowski was arrested shortly after this fire was reported. He had been in a corner store buying food and was stopped outside the store. There was evidence that suggested he had been drinking, but was not showing any signs of intoxication at this time.
- [61] These fires were set intentionally, but it appears opportunistically. There is no suggestion that Mr. Grabowski planned to set these fires in advance. As he walked around, he found premises in which he could easily set a fire with an open flame. When he was arrested, he had three books of matches in his possession.

- [62] The fires also escalated in terms of dangerousness. The first fire was clearly the worse in the sense of damage to property. However, it was a business premise. The next fire was also a business premise. The next three fires however, were residential premises in residential neighbourhoods. The first fire was set in a garage which was in close proximity to the house. The next fire was set right next to an occupied house and could very likely have caused loss of life if Mr. Gallagher had not noticed the fire.
- [63] The last fire occurred as a result of Mr. Grabowski actually entering premises and setting the fire. This was in an occupied motel where many lives were at risk had Mr. Joly not heard Mr. Grabowski in the kitchenette.
- [64] These fires also put the citizens of Victoria and Saanich at risk. Almost, if not all of their resources were used, including calling people in from home, to deal with these fires. Other nearby fire departments were also called in to assist. Had there been other major calls, the fire departments would not likely have been able to respond.
- [65] Mr. Grabowski was eventually released from custody and placed under surveillance.

The Pacific Forestry Centre Fire - June 22, 2000

- [66] There was evidence showing that Mr. Grabowski was familiar with the trails around his house and Victoria, such as the Galloping Goose Trail and the Colquitz River Regional Trail. He had also taken the Colquitz River trail by the Pacific Forestry Centre on at least one occasion.
- [67] The Pacific Forestry Research Centre is owned by the Federal Government. It is a large research facility which operates to study plants. There were several buildings on the property and several shade houses and greenhouses and a potting shed. There were hundreds if not a thousand Styrofoam seed boxes stored along side the shade houses. These are highly flammable. Polyethylene sheeting formed part of the back of shade house #3. It is also highly flammable. The shade houses backed onto a wooded area which then backed onto the Colquitz River Trail.
- [68] At approximately 10:58 on the evening of June 22, 2000, Mr. Grabowski was seen leaving his house by the back lane. Mr. Grabowski headed westbound on McKenzie Street at a quick pace. There were only two officers on surveillance that night and they lost Mr. Grabowski within a few minutes.
- [69] There are trails which Mr. Grabowski could easily access from McKenzie Street. At 11:20, the police officer observed a large cloud of smoke and called for the Saanich fire department to attend the area. The night watchman at the Pacific Forestry Centre had done his rounds at 11:00 pm, and then noticed the fire at 11:15 pm. The large shade house was on fire.

- [70] A police dog was called and tracked from the Pacific Forestry Centre along the trails, coming out at Columbine Street. However at this juncture, too many people had come out of their houses and the police dog handler stopped the track. He was minutes from Mr. Grabowski's house.
- [71] In the meantime, Mr. Grabowski was seen returning home, going up his lane, and looking over his shoulder every few steps. He was arrested at 11:33 pm. He showed no signs of intoxication, except a reference at some point of an observation of bloodshot eyes. I find that Mr. Grabowski was not under the influence of alcohol at this time.
- [72] The fire had spread quickly and caused significant damage to the shade houses. The potting shed also burned. There was a barbeque and propane tank in the potting shed. Had the propane tank exploded, it is very likely that there would be either serious injury or loss of life to the fire fighters.
- [73] The construction damage was in the range of \$150,000. The total damage was around \$500,000 including loss of research. The Federal government does not carry insurance.
- [74] This fire was intentionally set by Mr. Grabowski, with an open flame to combustible material, either the Styrofoam boxes or the sheeting at the back of shade house #3.
- [75] When Mr. Grabowski left his home, he clearly had a purpose in mind. Given the time frame and the distance, he left home, went directly to the Pacific Forestry Centre, set the fire and returned home. This was not an opportunistic fire.
- [76] There is no evidence that Mr. Grabowski planned to set the fire beyond his actions on the night in question. However, he clearly left his house intent on setting the fire that night.
- [77] That completes the findings of fact for the purpose of establishing what facts the convictions were founded upon.

STATUTORY FRAMEWORK FOR DANGEROUS OFFENDERS AND LONG TERM OFFENDERS

- [78] The relevant statutory provisions are as follows:

Criminal Code, R.S.C. 1985, c. C-46

Sentencing Principles

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
- (a) to denounce unlawful conduct;
 - (b) to deter the offender and other persons from committing offences;
 - (c) to separate offenders from society, where necessary;

- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
- (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,
- (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,
- (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
- (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
- (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or
- (v) evidence that the offence was a terrorism offence shall be deemed to be aggravating circumstances;
- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

Dangerous Offender

752. In this Part,

"court"

"court" means the court by which an offender in relation to whom an application under this Part is made was convicted, or a superior court of criminal jurisdiction;

"serious personal injury offence"

"serious personal injury offence" means

- (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
 - (i) the use or attempted use of violence against another person, or
 - (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,

and for which the offender may be sentenced to imprisonment for ten years or more, or

- (b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

753. (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find the offender to be a dangerous offender if it is satisfied

- (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
 - (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,
 - (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or
 - (iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint;
- or

- (b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.
- (4) If the court finds an offender to be a dangerous offender, it shall impose a sentence of detention in a penitentiary for an indeterminate period.
- (5) If the court does not find an offender to be a dangerous offender,
 - (a) the court may treat the application as an application to find the offender to be a long-term offender, section 753.1 applies to the application and the court may either find that the offender is a long-term offender or hold another hearing for that purpose; or
 - (b) the court may impose sentence for the offence for which the offender has been convicted.

Long-Term Offender

753.1 (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that

- (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
- (b) there is a substantial risk that the offender will reoffend; and
- (c) there is a reasonable possibility of eventual control of the risk in the community.

CORRECTIONS AND CONDITIONAL RELEASE ACT, S.C. 1992, c. 20

Long-Term Supervision Orders

2.1 A person who is required to be supervised by a long-term supervision order is deemed to be an offender for the purposes of this Part, and sections 3, 4, 23 to 27, 55 and 56, subsections 57(2) and 66(3), sections 68, 69, 76, 77 and 79 to 82, paragraph 87(b) and sections 90 and 91 apply, with such modifications as the circumstances require, to the person and to the long-term supervision of that person.

- 23. (1) When a person is sentenced, committed or transferred to penitentiary, the Service shall take all reasonable steps to obtain, as soon as is practicable,
 - (c) any reasons and recommendations relating to the sentencing or committal that are given or made by
 - (i) the court that convicts, sentences or commits the person, and

(ii) any court that hears an appeal from the conviction, sentence or committal;

134.1 (1) Conditions for long-term supervision

Subject to subsection (4), every offender who is required to be supervised by a long-term supervision order is subject to the conditions prescribed by subsection 161(1) of the Corrections and Conditional Release Regulations, with such modifications as the circumstances require.

(2) Conditions set by Board

The Board may establish conditions for the long-term supervision of the offender that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender.

(3) Duration of conditions

A condition imposed under subsection (2) is valid for the period that the Board specifies.

(4) Relief from conditions

The Board may, in accordance with the regulations, at any time during the long-term supervision of an offender,

- (a) in respect of conditions referred to in subsection (1), relieve the offender from compliance with any such condition or vary the application to the offender of any such condition; or
- (b) in respect of conditions imposed under subsection (2), remove or vary any such condition.

161.(1) For the purposes of subsection 133(2) of the Act, every offender who is released on parole or statutory release is subject to the following conditions, namely, that the offender

- (a) on release, travel directly to the offender's place of residence, as set out in the release certificate respecting the offender, and report to the offender's parole supervisor immediately and thereafter as instructed by the parole supervisor;
- (b) remain at all times in Canada within the territorial boundaries fixed by the parole supervisor;
- (c) obey the law and keep the peace;
- (d) inform the parole supervisor immediately on arrest or on being questioned by the police;
- (e) at all times carry the release certificate and the identity card provided by the releasing authority and produce them on request for identification to any peace officer or parole supervisor;
- (f) report to the police if and as instructed by the parole supervisor;
- (g) advise the parole supervisor of the offender's address of residence on release and thereafter report immediately

- (i) any change in the offender's address of residence,
- (ii) any change in the offender's normal occupation, including employment, vocational or educational training and volunteer work,
- (iii) any change in the domestic or financial situation of the offender and, on request of the parole supervisor, any change that the offender has knowledge of in the family situation of the offender, and
- (iv) any change that may reasonably be expected to affect the offender's ability to comply with the conditions of parole or statutory release;
- (h) not own, possess or have the control of any weapon, as defined in section 2 of the Criminal Code, except as authorized by the parole supervisor; and
- (i) in respect of an offender released on day parole, on completion of the day parole, return to the penitentiary from which the offender was released on the date and at the time provided for in the release certificate.

CIRCUMSTANCES OF MR. GRABOWSKI

- [79] Mr. Grabowski gave a lengthy statement to the court at the end of the hearing and told me a great deal about himself. Other information about his background is drawn from correctional records.
- [80] Mr. Grabowski was born on April 19, 1966. He was told that he was found in a dumpster. He was malnourished and his lack of nutrition may have contributed to his learning problems at a later time. He was adopted by Eve and Wally Grabowski when he was about nine months old. Mr. & Mrs. Grabowski were in their fifties when they adopted him. Mr. Grabowski has four adopted siblings, all of whom were grown-up when he came into the family. He was told that his siblings did not think it was a good idea for their parents to adopt him, and he has felt personal rejection because of this attitude. He met some members of his biological family in recent years, however, has not maintained contact with them.
- [81] Mr. Grabowski has no complaints about his treatment from his parents. His mother was very supportive of him. However, he had a great deal of difficulty in school, failing two grades. This is in spite of having tested as an average intelligence. (There are contradictory reports in the corrections documents which suggest that Mr. Grabowski did not fail any grades). A neuropsychological report, which I will refer to later, indicates that he has some cognitive difficulties. These were not discovered when he was a child. Mr. Grabowski was sexually abused by a cousin when he was 8 or 9 years of age. This also coincides with the time he started having difficulty in school.
- [82] Mr. Grabowski had childhood incidents of fire-setting which are referred to in the material. The Crown is not relying on these incidents as part of its application, and I therefore do not take them into account and will make no further reference to them.

- [83] Mr. Grabowski took a vocational landscape course in high school. He completed grade 11 and worked at the Manitoba legislature for a year as part of this program. He worked at several greenhouses in Winnipeg until his father died in 1985. He says that the death of his father was a very difficult time for him. He then went to work for Wonder Shows, which is a carnival. He worked there for several summers.
- [84] His goal in life was to work as a landscape gardener. His childhood dream was to work at Butchart Gardens in Victoria. When he was released from prison he wanted to attend horticultural school. He returned to Winnipeg in 1999 to visit his family and obtain his high school records to submit for admission.
- [85] Mr. Grabowski believes there is hope for his rehabilitation and does not think that success in life will be accessible to him if he is declared a dangerous offender.
- [86] Mr. Grabowski has not admitted the offences, although on several occasions he has alluded to committing them. I am aware that he is not discussing the offences because he has an appeal pending and no one could tell him with certainty whether evidence of an admission could be used on an appeal or on a subsequent trial. The fact he does not admit the offences at this stage is essentially a neutral factor in sentencing. It is not an aggravating factor nor is it a mitigating factor. Admission of wrong-doing is the first step toward rehabilitation, however for the purpose of the sentencing hearing, as noted, it is neutral. He has also at times protested his innocence. This conduct is consistent with his previous conduct when incarcerated. During the 1991 incarceration Mr. Grabowski went through a period of denial of his offences and then eventually admitted committing the arsons. I do not see his conduct of declaring his innocence as either an aggravating or a mitigating factor.

CORRECTIONAL RECORDS AND ASSESSMENTS

- [87] Mr. Grabowski was initially incarcerated at Stony Mountain Institution. The early correctional records from his 1991 incarceration describe Mr. Grabowski as someone who lacks self-confidence and had difficulty dealing with his emotions. This is a common thread which continues throughout the correctional history.
- [88] An initial diagnosis of pyromania has since been discounted by all of the other psychologists and psychiatrists who have dealt with Mr. Grabowski. His motivation for setting fires is anger and to seek revenge, which are not characteristic of so-called "pyromaniacs" who are seen to have a fascination with fire. It is also clear that the pathology defining fire-setters is not settled.
- [89] The following was said in a psychiatric evaluation in 1991:

It appears he has a serious and significant pattern of setting fires as the result of the inadequate coping skills and maladaptive attempts to raise his low self esteem and vent frustration.

- [90] In spite of these comments associated with the misdiagnosis of pyromania, these observations made by Dr. Milanese are repeated by others.
- [91] Treatment recommendations included programs to assist with emotional stability and impulse control, vocational training and psychiatric counselling.
- [92] Mr. Grabowski took a welding course and was placed on a waiting list for several treatment programs. In 1992 he waived his day parole hearing as he had not yet taken the programs.
- [93] In 1992, Mr. Grabowski's mother died of cancer. She had been visiting him and was supportive of him during his incarceration. His mother's death had an impact on Mr. Grabowski. He was permitted to attend the funeral with the support of his siblings, and in particular, his sister Joan.
- [94] A progress summary on March 24, 1993 reports that Mr. Grabowski was working in the welding shop for a year and a half and had excellent work performance and habits. He had successfully completed "Breaking Barriers" and "Cognitive Living Skills" courses. He still needs to develop self-confidence and self-esteem. He has no behavioural or discipline problems.
- [95] Mr. Grabowski was transferred to British Columbia, at his request, in the fall of 1993. He began weekly counselling and commenced work on his G.E.D. certificate for grade 12 completion. He did not finish it because of poor attendance.
- [96] In January 1994, Mr. Grabowski was transferred to the Regional Psychiatric Centre (now called the Regional Treatment Centre) at his request, to take a nine month intensive treatment course called "Social Skills". The purpose of this program was for the inmate to identify the predisposing factors in his "crime cycle", or in other words, what leads him to commit crime and to develop behaviours to address these factors and prevent the crimes from being committed.
- [97] Dr. Hunter was the supervising psychiatrist for the Social Skills program. Mr. Grabowski had a "low mood" but did not have features of significant depression. He did not have any psychiatric illness. He presented to Dr. Hunter initially as shy and "avoidant", but became less reserved as he became more involved in the program.
- [98] The modules for the program included social thinking skills, anger management, communications and autobiography. Mr. Grabowski was also given an opportunity to work with horticulture during this program and enjoyed it very much.
- [99] He was offered anti-depressant medication, but declined.

- [100] When he was discharged from this program, Dr. Hunter concluded that alcohol was a factor in his crimes, which had not been previously identified. Mr. Grabowski did not meet clear cut criteria for certain personality disorders, but had some characteristics. He felt at that time that Mr. Grabowski had moderately reduced his risk by becoming more aware of the crime cycle or pattern of offending. He also identified lack of assertiveness and difficulty expressing anger as issues for Mr. Grabowski.
- [101] He recommended the following:
1. He could benefit from more work on assertiveness, substance abuse, anger management, confronting his feelings of entitlement and his self centeredness.
 2. He could benefit from a supportive and structured setting where he should be encouraged to continually clear the air with small difficulties. Should he withdraw, begin to drink, become more socially isolated or become angry, he would be at acute high risk of reoffending.
 3. He could benefit from further substance abuse programming. This problem was not actively addressed here in the program.
 4. He has shown an aptitude and interest in horticulture as a vocation, and this might be a good avenue for him to pursue.
- [102] I mention these recommendations, as his prediction in point 2 above was prophetic in terms of Mr. Grabowski committing the Victoria offences.
- [103] Dr. Hunter diagnosed Mr. Grabowski as possibly having an avoidant personality. He did not diagnose an antisocial personality. He testified that there is a Violence Prevention Program in the penitentiary that is about six months duration and addresses cognitive behaviour in terms of recurring violent behaviour. There are no programs specifically designed for fire-setters.
- [104] After completion of this program, Mr. Grabowski transferred to William Head Institution in the Victoria area.
- [105] A Progress summary report was done on March 14, 1995, by John Waye, the case management officer, for Mr. Grabowski's pending parole hearing. By the time of this report, Mr. Grabowski had also taken the "Living Without Violence Program". He was seen to have made significant gains in the area of emotional stability. A report by Dr. Sutker from March 3, 1995, is summarized in Mr. Waye's report, and filed in these proceedings. Dr. Sutker recommended a strongly confrontative program to emphasize social skills and the dynamics around his fire-setting. He also recommended counselling after release and horticultural vocational training. Dr. Sutker also said, "there is much more that needs to be done" and he saw Mr. Grabowski as a "relatively high risk to reoffend in this very dangerous way, if not given adequate treatment."

[106] The issue addressed in this report was whether Mr. Grabowski had made sufficient progress to be released in the community. His crime cycle was identified as involving allowing his anger and frustration from disappointments to build up to a point where he seeks revenge and release in setting fires.

[107] The conclusion by Mr. Wayne was:

Mr. Grabowski has been a well behaved and cooperative inmate who has made progress in addressing his criminogenic factors [crime cycle]. It does not appear, however, that he has progressed enough to make the risk manageable in the community. Although he has not caused physical or psychological harm to his victims, his is the type of crime that could easily result in dire consequences. He needs more work on his social skills and assertiveness. In addition, he would be released to a community where he has no support network and he has not committed to abstaining from alcohol. At this point, he is seen as a moderate to high risk of reoffending.

[108] Needless to say, parole was denied.

[109] After being turned down for parole, Mr. Grabowski took the Pre-Release Program and the Leisure Education course. He was screened for a substance abuse program, but he was deemed not to be a primary candidate for such a course at that time. The confrontative program recommended by Dr. Sutker was not available at William Head and Mr. Grabowski did not want to return to the Regional Psychiatric Centre.

[110] In January 1996, Mr. Grabowski completed an Anger and Emotions Management Program. He did well in this course, and this was seen as a primary course for him to take given his crime cycle.

[111] On January 29, 1996, Mr. Wayne prepared another report for the Parole Board. This time he recommended day parole. In this report, Mr. Wayne noted that Mr. Grabowski had disclosed the childhood sexual abuse. Mr. Wayne found that Mr. Grabowski had been following his correctional plan and was making progress. He concluded that the community would be better protected with a gradual release of Mr. Grabowski under supervision in a Community Residential Facility (CRF).

[112] The Parole Board denied day parole, but requested a review in four months. The Parole Board also requested an updated psychological report, which was prepared by Dr. Kuc on May 9, 1996.

[113] Dr. Kuc performed a number of psychological tests on Mr. Grabowski. He found that he ranked very low on the psychopathy scale. The fact that Mr. Grabowski was unassertive, had difficulty dealing with stressors and permitted his anger to build up was again identified as his main problem. Dr. Kuc opined that Mr. Grabowski needed to learn to keep his stressors at a manageable level. He felt that Mr. Grabowski was making progress and was a low-moderate risk to re-offend. He stated that it takes many years for a person to change their habits and to learn new coping and life skills. Dr. Kuc said that some people need to take the treatment programs more than once. Mr. Grabowski clearly needed the support and

structure offered in the Community Residential Facility, plus he needed to obtain employment. Dr. Kuc recommended that Mr. Grabowski take counselling for the childhood sexual abuse he suffered and that he take assertiveness training courses and stress management courses. He should also take a cognitive skills refresher.

- [114] Mr. Grabowski has average intelligence and in the opinion of Dr. Kuc, could take college and university level courses.
- [115] As a result, Mr. Grabowski took one to one counselling for the sexual abuse, he completed a substance abuse program as well as other programs as recommended.
- [116] Mr. Grabowski was granted day parole in July 1996 and went to reside at Manchester House in Victoria. He was also referred to one to one counselling with a psychologist employed by the Parole Board. He performed well for a while, spending his time looking for work and learning daily living skills from the staff at the half-way house. In November 1996, he produced a "hot" urine sample and admitted using marijuana. He was not suspended, but his curfew was changed and he was referred to more counselling. He began to spiral downwards. Mr. Grabowski was not attending his volunteer work and was found to have continued to use marijuana. His parole was suspended January 16, 1997. He was released again to a Salvation Army CRF on the understanding that he take the substance abuse program.
- [117] Things did not go well at the Salvation Army CRF. He began using marijuana again and he was transferred back to Manchester House in March. He got along fairly well at Manchester House. He was seen by the staff there as a great help. He sometimes seemed depressed and anti-depressant medication was recommended, but again, Mr. Grabowski did not want to take it.
- [118] Mr. Grabowski made a number of efforts to find employment, but was generally unsuccessful, except for odd jobs here and there. He did not return to Manchester House one night in May 1997 and his parole was again suspended. His parole was revoked on July 11, 1997.
- [119] There is no suggestion that Mr. Grabowski set any fires during his release.
- [120] On December 1, 1997, Mr. Grabowski was accepted to a work release program, however, he was found to be unreliable and was let go.
- [121] Mr. Grabowski requested to be released to a CRF in Kelowna, however it was determined that the Howard House in Vernon would best meet his needs. It offered a substance abuse program as well as a Forestry program. In the meantime, Mr. Grabowski completed a Substance Abuse Treatment Program in April 1998.

- [122] Mr. Grabowski was granted day parole on April 30, 1998 to the Howard House CRF. Mr. Grabowski remained clear of alcohol and marijuana until June 13, 1998 when he returned smelling of alcohol and admitted having a couple of beers. He was not suspended. On June 21, 1998 he again returned to the CRF under the influence of alcohol. Again, he was not suspended. Mr. Grabowski breached his "no alcohol or marijuana" condition several more times and finally on September 2, 1998, his parole was suspended.
- [123] Mr. Grabowski was not involved in fire-setting while in the community.
- [124] Mr. Grabowski was sent to Kent Penitentiary where he took a "Self-Monitoring Course". This is referred to as a booster of the earlier course on Cognitive Skills taken by Mr. Grabowski.
- [125] Mr. Grabowski was released again on October 8, 1998. However, no CRF in the Victoria area would accept him. As a result he lived in a Salvation Army Hostel until he found a basement suite.
- [126] Mr. Grabowski found a place to live in the Langford area. He did not find employment. He was seeing Dr. Salmon for counselling. He developed a serious infection from a spider bite that set back his job search for several months. His warrant expired on June 24, 1999.
- [127] On July 10, 2000, Mr. Grabowski called Dr. Monkhouse, who is a psychologist with the Correction Service Canada. He had counselled Mr. Grabowski in the past. Mr. Grabowski went to see him on July 13, 2000. At that time he looked terrible. He had been beaten up, his hygiene was poor and he was depressed. Dr. Monkhouse took this as a cry for help. Mr. Grabowski was arrested shortly afterwards and charged with the Victoria fires.
- [128] Mr. Grabowski has spent six years in pre-trial custody. The long delay associated with this case is a stain on the criminal justice system. However, the delay is attributed almost entirely to the conduct of Mr. Grabowski. He repeatedly delayed the proceedings by either firing, or by some other means, severing his relationship with the lawyer who represented him. The history of his representation has been documented elsewhere and I need not repeat it here. It is sufficient to say that in my opinion, every effort was made by Crown counsel, Mr. Doyle, and me to move the trial forward while at the same time balancing Mr. Grabowski's right to a fair trial and his stated desire to be represented by counsel. I was fortunate to have the assistance of three separate counsel who appeared as *amicus curiae* during the trial and the sentencing hearing.
- [129] Mr. Grabowski was held at the Vancouver Island Regional Correctional Centre from July 15, 2000 to February 5, 2003 and he returned on February 28, 2003 until April 10, 2003. He returned one more time on July 21, 2003 until September 12, 2003. This institution is both a remand centre and a centre for serving prisoners. As a result, it has programs available for remand prisoners. Although Mr. Grabowski requested to take programs, he never actually enrolled in any. He went to school between October 25-December 8, 2000.

- [130] The remainder of the six years have been spent at the North Fraser Institution in Port Coquitlam, B.C. There were no programs available for Mr. Grabowski to take at this institution. It is solely a remand centre.

EXPERT EVIDENCE ON DANGEROUS OFFENDER APPLICATION

- [131] Two expert witnesses testified on the application apart from the Corrections psychiatrists and psychologists: Dr. Kuelker and Dr. Lohrasbe. A report from Dr. Posthuma was filed. Dr. Noone saw Mr. Grabowski as a defence psychiatrist, however he was not called as a witness. I draw no inference from this. I mention it only to demonstrate that Mr. Grabowski had the opportunity for an independent assessment.
- [132] When Mr. Grabowski was convicted he consented to the assessment pursuant to s. 752.1. Dr. Kuelker was assigned to perform the assessment. He commenced his work and had an interview with Mr. Grabowski. However, shortly after he began, Mr. Grabowski sought to withdraw his consent to the assessment. His lawyer withdrew and Mr. Grabowski applied to the court to stay the proceedings pending the appointment of counsel (a Rowbotham application). This order was granted and new counsel was appointed. A stay of proceedings was ordered in relation to the assessment, as well as a Pre-Sentence Report. The Crown eventually agreed to the withdrawal of the consent to the assessment. At some point Mr. Grabowski reported his new counsel to the Law Society which resulted in more delay and a second Rowbotham application. This application was dismissed. An application pursuant to s. 752.1 was made and I was satisfied that Mr. Grabowski should be remanded for an assessment.
- [133] Unbeknownst to me, in the interim, Dr. Kuelker had a dispute with the Forensic Psychiatric Services Commission (FPSC) over the level of pay psychologists receive compared to psychiatrists for what he perceives to be the same work. Further, he took issue with the manner in which FPSC assigned dangerous offender hearings and believed that he was not getting his fair share of the assignments. These issues are in arbitration, so I say no more about them.
- [134] As a result, also unknown to me at the time, FPSC tried to reassign the file to someone else when the new order was issued. Somehow Dr. Kuelker convinced FPSC that my order required him personally to complete the assessment. I made no such order, however it made sense that since he started the assessment, he should finish it. In any event, the file was returned to Dr. Kuelker and he completed and filed an assessment report in relation to Mr. Grabowski.

- [135] This all came to light when counsel interviewed Dr. Kuelker before he was called as a witness. Dr. Kuelker told counsel about his on-going fee dispute with FPSC and said his assessment of Mr. Grabowski was objective, however he was concerned that he would not be able to maintain his objectivity and testify in a complete and thorough way. He testified before me that in spite of this he tried to be objective and if he was not able to concentrate on something he would ask for clarification.
- [136] Dr. Kuelker was of a view that he was getting less referrals for dangerous offender assessments because he was seen as "soft on D.O.'s" because one of the first findings of a Long Term Offender was on one of his cases.
- [137] All of this was going on in relation to Mr. Grabowski's assessment and during the time Dr. Kuelker was doing Mr. Grabowski's assessment.
- [138] After counsel met with Dr. Kuelker they advised me of the problem. I ruled that Dr. Kuelker was required to testify as s. 752.1 says the report is to be used as evidence.
- [139] This background presents a rather unique problem, which is what weight do I give to Dr. Kuelker's opinion given his comments regarding his testimony. Dr. Kuelker was on the witness stand for five days. His evidence was probed and prodded by the amicus. After hearing him for a week, it was apparent that at times he had difficulties following complex questions due, I suspect to stress. However, there is nothing in his evidence to suggest that he was not being objective when it came to Mr. Grabowski's assessment. He may not be objective regarding FPSC, but that is a different matter. I saw no bias on his part and his evidence both helped and hindered Mr. Grabowski's position. I say this taking into account the possibility he might unconsciously try to demonstrate that he is not "soft on D.O.'s".
- [140] As a result, I do not give his opinion less weight due to his unfortunate dispute with FPSC. The weight I attribute to it will be determined in the context of all of the other evidence, including that of Dr. Lohrasbe.
- [141] I propose to summarize the findings of Dr. Kuelker's opinion as well as review pertinent points raised in cross-examination. I see no need to review his five days of evidence in detail.
- [142] Dr. Kuelker, a registered psychologist, was able to interview Mr. Grabowski on one occasion. Mr. Grabowski refused to be interviewed a second time. Dr. Kuelker administered a number of tests to Mr. Grabowski, many similar to those which he had already been exposed to during his eight years in the Federal penitentiary. He scored low on the pscopathy test and high on the violence assessment (referred to as a VRAG). None of these tests have been validated for fire-setters and Dr. Kuelker used some literature on fire-setters to interpret the results. Mr. Grabowski bears little resemblance to those persons on which the studies were based as they were primarily persons who were prisoners diagnosed as mentally ill. Therefore any predictions based on these instruments must be weighed carefully.

- [143] Dr. Kuelker is of the opinion that Mr. Grabowski is a high risk to re-offend.
- [144] Dr. Kuelker suggested that Mr. Grabowski responded poorly to the substance abuse programs because he relapsed into substance use right away. It is important to recognize that alcohol was not seen as a factor in his crimes until much later in his incarceration. Mr. Grabowski is not an alcoholic or a drug-addict. Alcohol was identified as a factor on the basis that it is a disinhibitor. When Mr. Grabowski is angry and frustrated, alcohol acts as a disinhibitor for him when it comes to setting fires. Obviously it is something he should avoid.
- [145] I add that at trial the evidence suggested alcohol was not a factor during the Pacific Forestry fire. In fact there was evidence that was alluded to during the sentencing hearing that Mr. Grabowski was consuming alcohol earlier in the evening before that fire was set.
- [146] Dr. Kuelker indicated that Mr. Grabowski's denial of the offences makes him a poor candidate for treatment. However, in the bigger picture, Mr. Grabowski in the past denied the offences, and later admitted them. He has an appeal pending. I am not going to assume that the denials will be maintained throughout his incarceration. If it is, it will no doubt be a factor on whether he is released on parole.
- [147] Dr. Kuelker suggests that Mr. Grabowski is a high risk to manage in the community. He states this on the assumption that Mr. Grabowski would be living on his own. When Mr. Grabowski lives on his own he clearly has difficulties managing his crime cycle. When Mr. Grabowski was in a CRF he did not set any fires. He was provided with a supportive environment and outlets through counselling to vent his frustration and anger.
- [148] In the end, I concur with an evaluation that Mr. Grabowski is presently at a high risk to re-offend. I agree that he is a risk to manage in the community if he is not provided with resources. I have been told by the witnesses that resources are available to individuals with Long Term supervision orders, and in particular, for supervision in the community. I will explore this further in a moment.
- [149] Dr. Lohrasbe also prepared a report at the behest of the Crown. Mr. Grabowski would not agree to an interview with Dr. Lohrasbe prior to the preparation of the report. After Dr. Lohrasbe's evidence in chief, Mr. Grabowski requested that he be interviewed, however Dr. Lohrasbe was not prepared to interview him at that juncture.
- [150] Dr. Lohrasbe opined that Mr. Grabowski is at a high risk to reoffend and the ability to manage him in the community in the foreseeable future is low. Dr. Lohrasbe stated that all things being equal, past behaviour is the best predictor of future behaviour. In Mr. Grabowski's case, he has set many fires in the past.
- [151] Dr. Lohrasbe does not give much weight to actuarial assessments, so did not pay much attention to the tests performed by Dr. Kuelker or others.

- [152] Dr. Lohrasbe noted that there are repeated themes of Mr. Grabowski's crime cycle, but little from Mr. Grabowski in terms of how he felt during the sequence of events that led up to his fire-setting.
- [153] Dr. Lohrasbe referred specifically to the connection between substance abuse as a disinhibitor and the commission of a crime. However, in Mr. Grabowski's case, the connection is not clear, in his opinion. He stated that Mr. Grabowski's marijuana use will affect his ability to develop acceptable coping skills for the stresses he faces in life.
- [154] Dr. Lohrasbe candidly stated that he does not know if treatment works for any offenders, much less, fire-setters. Other doctors have indicated that a person may have to take programs more than once to achieve a change in behaviour.
- [155] Dr. Lohrasbe also said that if fire-setting is a stress releaser for Mr. Grabowski then his stresses must be addressed, including employment, lack of self-esteem and lack of a community, for example. He points out that even well adjusted people fall back into destructive habits.
- [156] Dr. Lohrasbe also said that Mr. Grabowski may be a person who directs his behaviour to land him in prison where he feels safe. He has essentially been in prison since he was 22 years old.
- [157] A neuropsychological report was prepared by Dr. Posthuma and filed in these proceedings. It identifies learning difficulties with respect to Mr. Grabowski's ability to recall information given to him verbally. Indeed, unless something was written down, he had a great deal of difficulty remembering the information. In some areas in this regard he scored very low on the tests given to him.

PRINCIPLES APPLICABLE TO A DANGEROUS OFFENDER AND LONG TERM OFFENDER

- [158] In *R. v. Johnson* [2003] 2 S.C.R. 357, the Supreme Court of Canada described the interplay between a dangerous offender application and a long-term offender application. The Court pointed out that almost every person who is a dangerous offender will satisfy the first two criteria of a long-term offender. The criteria are almost identical and are as follows.
- [159] The dangerous offender must have committed a serious personal injury offence and constitute a threat to the life, safety or physical or mental well-being of other persons. This may be established by showing, amongst other things, a pattern of repetitive behaviour and a likelihood, by failing to restrain this behaviour, of causing death or injury to other persons.

- [160] The long-term offender will receive at least a two year sentence and there is a substantial risk he or she will re-offend based on the same criteria noted above for the dangerous offender. However, there is a reasonable possibility of eventual control of the risk in the community.
- [161] Prior to declaring a person a dangerous offender, the court must consider whether the offender can meet the final criteria of the long-term offender which is whether "there is a reasonable possibility of eventual control of the risk in the community". The sentencing court must consider whether it can craft a sentence which will satisfy the final criteria. If so, the court will impose the sentence rather than declare the person a dangerous offender. Once declared a dangerous offender, the court, under the revised legislation, has no discretion but to impose an indeterminate sentence.
- [162] The purpose of the dangerous offender sentencing structure is the protection of the public. In *R. v. Lyons* [1987] 2 S.C.R. 309, the court said that the dangerous offender legislation emphasises the importance of prevention of crime through detention and the other objectives of sentencing, such as rehabilitation and deterrence, are given less significance.
- [163] In a Federal government publication, *Sentence Calculation: A handbook for Judges, Lawyers and Correctional Officials* 3rd ed. 2005, the following is said regarding Long Term Offenders at p. 18 (footnotes omitted):

Every long-term offender is subject to standard conditions such as keeping the peace. The National Parole Board (NPB) has authority to impose specialized conditions to ensure close supervision of the offenders. The Correctional Service of Canada (CSC) provides the supervision.

The NPB or CSC have authority to suspend and order the apprehension of an offender who has breached a long-term supervision order, a standard condition or a condition it has imposed or where the NPB or CSC is satisfied that the suspension is necessary or reasonable to prevent a breach of a condition or protect society. Suspension of long-term supervision may be up to a maximum period of 90 days. After its review of the case, the NPB may cancel the suspension and order the resumption of the long-term supervision with or without additional conditions or recommend that an information be laid charging the offender with the offence of breaching an order of long-term supervision. The offence carries a maximum sentence of imprisonment of 10 years.

The running of the long-term supervision of an offender who receives a new custodial sentence is interrupted until the expiration of the sentence. New custodial sentences of an offender under a long-term supervision order are served in penitentiary regardless of length.

New sentences other than sentences of imprisonment, such as probation or conditional sentences, are served concurrently with long-term supervision.

The court that hands down a sentence of imprisonment to the offender subject to a long-term supervision order has authority to terminate or reduce the length of the long-term supervision.

[164] Thus, a breach of a long-term supervision order may attract a further Criminal Code charge which carries a maximum sentence of 10 years. Further, if at the expiration of the long-term supervision order, the authorities still have concerns regarding risk, they may apply to the court for a further order of supervision pursuant to section 810 of the Criminal Code. This last point was addressed in *R. v. Wormell* 2005 BCCA 328; leave to appeal refused [2005] S.C.C.A. No. 371.

APPLICATION OF THESE PRINCIPLES AND THE PRINCIPLES OF SENTENCING TO KENNETH GRABOWSKI

[165] Mr. Grabowski meets the first two criteria of both the dangerous and long term offender. The evidence overwhelmingly supports this finding. The issue is whether there is a reasonable possibility of eventual control of Mr. Grabowski in the community.

[166] Mr. Grabowski has never actually injured anyone physically. However, that has everything to do with good luck and early morning dog walkers than with Mr. Grabowski. I do not mean to sound facetious about the dog walkers. The fires on Carroll Street and Washington Street were both observed by early morning walkers who alerted the residents in time to get them out safely.

[167] I turn for a moment to refer to the victim impact statements.

[168] Victim Impact Statements were filed by the residents of Washington Street, Carroll Street, the manager of the Revelstoke Home Centre, the owner of Whitehall Boats and the Supervisor of the greenhouse and grounds at the Pacific Forestry Centre. Many of these people were also witnesses at the trial.

[169] Those who were awakened to find their home on fire suffered nightmares and anxiety for a considerable time afterwards. The residents of Washington Street all moved at considerable expense. The loss to the workers at Revelstoke was considerable. All lost their jobs, including Mr. Ruffle who had been there for thirty years. All had to find new employment and some had to leave the Victoria area. It was very distressing for them. The Pacific Forestry Research Centre lost not only buildings, but several years worth of research which may not be replaced or replicated.

[170] Several of the victims questioned how anyone could have done these horrible acts. They question how someone could put their, and more importantly, their children's lives in danger. They ask how someone could cause, in the case of the Revelstoke Home Building Supply and the Pacific Forestry Research Centre, such a colossal loss of property which affected the lives of many in terms of lost jobs and opportunities.

[171] I cannot, nor do I think anyone can with certainty, answer the question of why Mr. Grabowski set these fires. I expect he probably cannot even answer the question. However, the answer may lie in a society that drives a young mother to leave her baby in a dumpster, one that allows an 8 year old child to be sexually assaulted, an education system that did not

identify early learning problems and a community that would not give a person trying to re-enter society an opportunity for employment. Mr. Grabowski must obviously take responsibility for his actions, however, perhaps some of his background will explain the "why" to those who have been truly harmed, both emotionally and financially, by his actions and they will understand perhaps how these dreadful events came about.

- [172] If Mr. Grabowski is released into the community he is, at this time, a high risk to re-offend. The question is whether a sentence of a substantial length, which he would attract regardless given his criminal record, combined with a ten year long-term supervision order will provide a reasonable possibility of eventual control of Mr. Grabowski in the community. I have concluded that the answer is yes. I say this on the basis that Mr. Grabowski made every effort to rehabilitate himself while in prison. He did not set fires while in the CRF. When he has support in the community he appears to be able to handle the stressors of life which have led him to set fires. If he drinks or takes drugs, which he must avoid, he will be returned to the penitentiary. These are not matters that go undetected.
- [173] In terms of crafting a sentence, it is necessary to comment on Mr. Grabowski's pre-trial custody. As noted, Mr. Grabowski has spent over six years in pre-trial custody. Normally when imposing a sentence, that time is taken into consideration and often doubled. A doubling of his sentence will not in my view permit me to impose the sentence which I believe is necessary to protect the public, which is the focus of this sentencing hearing. I am alive to the fact that I must take into account the fundamental purpose and principle of sentencing, as well as the other codified principles. I have mentioned them above and I will not repeat them here. While rehabilitation, deterrence and proportionality are all vital in any sentencing proceeding, in a long-term offender sentencing, the sentence must first and foremost be crafted to reduce the risk to the public as much as possible. If not, the only other option is to sentence Mr. Grabowski to an indeterminate sentence.
- [174] Mr. Grabowski served eight years on his early offences and did not receive sufficient treatment or learn skills to prevent him from re-offending. The experts have indicated that a person may need to take a program more than once and that it may take years to change long-standing behaviours. I have decided that in order to impose a fit sentence, taking into account the principles of sentence, I can only credit Mr. Grabowski with one year credit for each year he has served. I find that a twenty-one year sentence for the offences pursuant to s. 433(a) is the fit sentence. I come to this conclusion based on Mr. Grabowski's criminal record, but also on the egregious circumstances of these offences. It was obvious that children lived at the Washington Street house, and that the fire there could have killed everyone in the house. The fire at the Traveller's Inn put many people's lives in jeopardy. The occupants of Carroll Street managed to escape before the fire spread. Given all the circumstances and the principles of sentencing, twenty-one years is a fit sentence.

[175] Therefore, taking into consideration the pre-trial custody, I have concluded that a sentence of fifteen years imprisonment followed by a ten year long-term supervision order will provide sufficient protection to the public, provided the supervision order contains a number of conditions. A sentence of ten years concurrent is imposed on the offences pursuant to s. 434. I am alive to the fact that I cannot impose these conditions, however, I understand that the National Parole Board will give serious consideration to my recommendations. Mr. Grabowski is now 40 years old. He will be 65 years old when his sentence expires provided he is not convicted of any further offences. The authorities have the ability to extend the supervision order if necessary.

[176] Mr. Grabowski should live at a CRF for a substantial period of his long-term supervision order. There he will have support and be given an opportunity to develop a community.

[177] He should not be permitted to drink alcohol. I assume use of illicit drugs is automatically prohibited since it is an offence.

[178] He should not be permitted to carry matches, lighters or any incendiary device.

[179] Mr. Grabowski should be encouraged to upgrade his horticultural skills so when he is released he will be able to find meaningful work in an area that he enjoys.

[180] There are of course, other terms, such as a curfew and other restrictions which will no doubt be part of his long-term supervision. I leave that in the capable hands of the Corrections authorities.

[181] In summary:

Mr. Grabowski is a long-term offender. He is sentenced as follows:

Count 2: 10 years

Count 3: 10 years

Count 4: 15 years

Count 5: Conditional stay of proceedings

Count 6: 15 years

Count 7: Conditional stay of proceedings

Count 8: 15 years

Count 9: Conditional stay of proceedings

Count 10: 10 years.

All of the sentences are to run concurrent, one with the other. The sentences are followed by a long-term supervision order for a period of ten years.

[182] In addition I impose the following orders:

- i) An order pursuant to s. 109 of the Criminal Code prohibiting Mr. Grabowski from possessing any firearm, cross-bow, restricted weapon, ammunition and explosive substance for life. He will have one day to surrender any such items. I assume he has none.
- ii) An order for production of a DNA sample pursuant to s. 487.052. It is in the best interests of justice to require Mr. Grabowski to provide such a sample given his history of fire-setting.
- iii) A copy of all reports and testimony given by psychiatrists, psychologists, criminologists and other experts and all of my reasons, plus a transcript of the trial be forwarded to the Correctional Service of Canada pursuant to s. 760.
- iv) Victim Fine Surcharge is waived. He has no means to pay such a surcharge.
- v) There is no possibility for Mr. Grabowski to pay restitution for the significant financial loss he has caused. I make no order for restitution.

"E.A. Bennett, J."

The Honourable Madam Justice E.A. Bennett

July 24, 2006 - Revised Judgment

Corrigendum to the Reasons for Judgment issued advising that on page 64, paragraph 182 (ii) should read:

"ii) An order for production of a DNA sample pursuant to s. 487.052. It is in the best interests of justice to require Mr. Grabowski to provide such a sample given his history of fire-setting."

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