
CANADA / JUDGMENT

R. v. Porsch

2007 BCSC 1621

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 1621 R. v. Porsch

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Porsch,

2007 BCSC 1621

Date: 20071106

Docket: 52952-2

Registry: Chilliwack

Between:

Regina

And

Steven Ryan Porsch

- and -

Docket: 52954-3

Registry: Chilliwack

Between:

Regina

And

Steven Ryan Porsch

- and -

Docket: 52082-2

Registry: Chilliwack

Between:

Regina

And

James Kyle Bacon, Tamara Correen Dafoe,

Steven Ryan Porsch and James Potgieter

- and -

Docket: X070309-1

Registry: New Westminster

Between:

Regina

And

Robert Banez, Matthew Gordon Campbell, Jason William Donald Kilbach,

Michael Brent Krzysztofik and Steven Ryan Porsch

- and -

Docket: 52953-2

Registry: Chilliwack

Between:

Regina

And

Steven Porsch

Before: The Honourable Madam Justice Dillon

Reasons for Sentence

Counsel for the Crown

T. Buziak

Counsel for the Accused

D. Silverman

J. Ray

Date and Place of Trial/Hearing:

September 24, 25, 27, 2007

and October 12, 2007

Vancouver, B.C.

[1] Steven Ryan Porsch ("Porsch") has plead guilty to ten counts on five indictments as follows:

1. Court file number 52952-2, Chilliwack Registry - count 3, counsel to commit arson contrary to sections 434 and 22 of the Criminal Code; count 5, counsel to commit arson contrary to sections 434 and 22 of the Criminal Code; count 9, counsel to commit arson contrary to sections 434 and 22 of the Criminal Code; count 11, counsel to commit arson knowing or being reckless with respect to whether the property was inhabited or occupied contrary to sections 433(a) and 22 of the Criminal Code;
- 2 Court file number 52954-3, Chilliwack Registry - count 4, assault causing bodily harm contrary to section 267(b) of the Criminal Code;
3. Court file number 52082-2, Chilliwack Registry - count 1, robbery contrary to section 344(b) of the Criminal Code; count 4, possession of a loaded restricted firearm without authorization contrary to section 95(1) of the Criminal Code;
4. Court file number X070309-1, New Westminster Registry - count 1, transfer of a firearm knowing that he was not authorized contrary to section 99(1)(a) of the Criminal Code; count 10, conspiracy to traffic weapons, namely firearms, contrary to section 465(1)(c) and 99(1) of the Criminal Code;
5. Court file number 52953-2, Chilliwack Registry - count 2, possession of a firearm knowing that the serial number had been defaced contrary to section 108(1)(b) of the Criminal Code.

Circumstances of the Offences

1. Indictment 52952-2

[2] In January 2005, the Abbotsford Police Department commenced an investigation into six fires directed at a residential complex and various business properties in Abbotsford between November 22, 2004 and January 6, 2005. The business properties were all owned by one prominent Abbotsford businessman, Paul Esposito ("Esposito"), whose property losses were in excess of \$9 million. Through various investigative techniques including undercover operations, authorizations to intercept private communications and statements by other parties, police ascertained that Porsch had hired and counselled Shaun Fitzgerald ("Fitzgerald") to commit the arsons on behalf of an unknown third party and that Fitzgerald had hired others to assist him in setting the fires.

- [3] Porsch was the subject of a Mr. Big operation by police from June 11, 2005 to February 10, 2006. He told the undercover operative that a third individual had wanted various businesses in Abbotsford burnt down for business purposes. Porsch was hired to carry out the arsons and was paid between \$5000 and \$7500 for each arson. Porsch hired Fitzgerald to carry out the arsons for between \$500 and \$2500, depending on how complete the fire damage was. When Fitzgerald was asked about Porsch's role, he said that Porsch was making \$1000 per arson and he was making \$2000. Porsch had said that he charged less because the person who hired him "opened a door" for him, the door being an entry into the illegal gun trade.

Count 9

- [4] The first fire occurred on November 22, 2004 at 01:57 at a fourplex housing accommodation for lower socioeconomic and transient citizens of Abbotsford. The fire was started with an accelerant in the crawlspace, causing residents to flee. The building was unsafe to inhabit and residents relocated. The intensity of the fire damaged adjacent property. A second fire occurred on December 27, 2004 at 18:18 at the same complex, which was then uninhabited. Fire personnel found a container smelling of gasoline, a propane torch, and matches at the scene. On December 28, 2004 at 10:28, a third fire occurred at the complex. Fire personnel found a cloth soaked in gasoline. The building was demolished.

Count 3

- [5] On December 2, 2004 at 23:55, a fire was started on the loading dock of a building in Abbotsford containing a liquor store, recycling depot and convenience store. Fire personnel smelled gasoline and found a burning jerry can. Smoke filled the interior of the building. The bay door of the loading dock was damaged. The building was owned by Esposito who incurred damage to the structure of \$21,000.

Count 5

- [6] On December 11, 2004 at 5:27, a fire was reported at Wild Bill's Pub in Abbotsford. By the time that fire fighters arrived, the patio and inner perimeter were in flames and within ten minutes the roof began to collapse, forcing fire fighters to evacuate. A flammable liquid had been used to start the fire on the veranda and it quickly spread to the games room, lounge area, and bar area. A window had been broken and a jerry can thrown into the building. Eighty percent of the structure was damaged and the entire building received heat, water, and smoke damage. The building was owned by Esposito. Damage was estimated at \$1.38 million.

Count 11

- [7] On January 6, 2005 at 07:58, police and fire departments responded to 911 calls concerning a fully engulfed structural fire at Finnegan's Pub located in a complex known as King's Crossing, which also housed a cold beer and wine store, a restaurant, an eighteen room

hotel, and a banquet facility. It was owned by Esposito. Conditions were treacherous in the cold snow. Six hotel staff and guests were evacuated. A housing complex to the south with mostly senior citizens also had to be evacuated. The fire had been started with the use of an accelerant at three different locations in the pub. All available fire fighting manpower of the City of Abbotsford was called in to fight the fire. Attendance was also required of crews from emergency ambulance, hydro, gas, police, public works, victim services, the Salvation Army and social services. The entire King's Crossing structure was demolished because of damage estimated at \$8.1 million. The effect of the fire trickled throughout the community in business lost, employment lost, and physical risk.

[8] Fitzgerald had been captured the day before the fire on video surveillance purchasing a siphon pump and police located a stolen vehicle after the fire which contained personal items of Fitzgerald along with receipts for the siphon, a gas container, and other incriminating items. Other surveillance videos located Fitzgerald near the pub just before the fire.

2. Indictment 52954-3

[9] On November 2, 2005, Porsch had decided to teach Lawrence Hinds ("Hinds") a lesson for stealing 1 3/4 ounces of drugs that Hinds had been supposed to sell for Porsch and others, the result of which caused Porsch to be out a sum of money. Porsch's friends took Hinds to an undisclosed location where Porsch beat Hinds and attempted to cut off part of his left pinkie finger with a pair of scissors. Hinds suffered a laceration to his finger that required medical attention. Porsch later told the undercover operative of a "funny story" involving someone who had ripped him off of drugs and money and whom he had beaten and attempted to cut off his finger.

3. Indictment 52082-2

Count 1

[10] Between March 31 and April 13, 2005, police were involved in the investigation of a robbery of a marijuana grow operation located in a dwelling house within Abbotsford. It happened by circumstance as police had Porsch under surveillance in the ongoing investigation of the arsons. Police followed Porsch and two others to a farming area around 23:58 on March 31st. The sole occupant of the house was awakened by a masked person who entered by a window and who carried a black 9 mm semi-automatic pistol. He was joined by two or three others wearing balaclavas. The occupant was placed on his stomach, handcuffed, and his head covered. The man with the pistol remained with the occupant while others removed marijuana and electrical ballasts from the house and put them into a truck.

[11] Police followed the truck to Porsch's residence where it was backed into the garage and the marijuana and ballasts were unloaded.

Count 4

- [12] Police executed a search warrant on Porsch's residence on April 13, 2005, and seized a loaded .45 calibre pistol and a quantity of 9 mm and .45 calibre pistol ammunition from Porsch's bedroom. The gun was found under the mattress. Police also seized electrical ballasts and 191 grams of marijuana bud and a large green bag of discarded marijuana shake.
- [13] Porsch was charged with this robbery and possession of a firearm on April 21, 2005. He was released on recognizance of bail on May 2, 2005, with surety bail in the amount of \$180,000 and with nine conditions, including a nightly curfew, to have no contact with James Bacon or James Potgieter and to not be in the possession of any firearms or prohibited weapon, device or ammunition.

4. Indictment X070309-1

- [14] Following Porsch's release on bail after the robbery and firearms charges in Indictment 52082-2, police continued with the investigation of the arsons. On June 27, 2005, Porsch asked the undercover operative if he was interested in purchasing firearms. At this point, the nature of the police investigation expanded into an investigation into the trafficking of illegal firearms conducted by the Combined Forces Special Enforcement Unit. The undercover operative told Porsch that if he was to buy, he wanted 15 guns or more. The police used wiretap authorizations, audio and video recordings, and undercover operatives to ascertain the following facts.

Count 1

- [15] Porsch asked a third person to get a .40 calibre pistol and agreed to share the profits from the sale of the pistol, expressing the expectation that if things went well, the door would be opened as the undercover operative was a frequent buyer of many. On July 20, 2005, Porsch sold the undercover operative an operable Czech .40 calibre semi-automatic pistol, the serial number completely removed, for \$2500. The pistol is a restricted firearm.
- [16] On August 25, 2005, Porsch agreed to sell a 9mm firearm with two cartridge magazines for \$3000. Porsch advised the operative that he was the middle man on the sale. Porsch sold a fully automatic, operable Sten Mk. II sub-machine gun, a prohibited weapon, along with one 34 round 9mm cartridge magazine containing 34 bullets, a prohibited device. The machine gun was disassembled in a hockey bag. It is capable of firing at the rate of 550 bullets per minute. Porsch informed the undercover operative that he had six more such firearms for sale.
- [17] On August 30, 2005, Porsch sold six fully automatic, operable Sten Mk. II 9mm sub-machine guns and six 34 round 9mm cartridge magazines for \$17,400.

- [18] On September 29, 2005, Porsch offered the undercover officer another firearm that he described as "not your regular thing". Later that day, he showed the operatives a computer laptop image of a Bren Mk. I machine gun and advised that it came with cartridge magazines and .303 calibre ammunition. Porsch said that he would "go through his buddy who would then contact the supplier". On September 30, 2005, Porsch met the undercover operative at the agreed place and removed a bag from his car. He showed the undercover officers a fully automatic, operable .303 calibre Bren Mk. I machine gun, saying "It's fuckin' bad ass. That shit will fuckin' kill man". He assembled the firearm and showed the operative how to operate it. The undercover operative paid \$5000 for the machine gun and two 30 round .303 calibre cartridge magazines. This event was audio and video recorded. The machine gun is a prohibited firearm and the magazines are prohibited devices. Although the gun did not come with bullets, the .303 calibre bullet is high powered, capable of piercing Kevlar body armour. The machine gun has a rate of fire of 540 bullets per minute.
- [19] On October 1, 2005, Porsch met with two individuals involved in the gun trade and then met with the undercover operative. He sold five fully automatic, operable .303 calibre Bren Mk. I machine guns along with ten 30 round .303 calibre cartridge magazines for \$25,000. Porsch boasted that he was aware of crates of guns and three Sten guns available to him. He offered to sell the Sten guns for \$2800 each.
- [20] On October 6, 2005, the undercover operative told Porsch that he had a customer who wanted two to four pistols with silencers. Porsch said that he would be meeting with his "buddy" and would let the undercover operative know if they were available. Porsch called back later and said that only one gun was available and that he had been confused by the earlier conversation, thinking that the operative wanted the Sten guns. Porsch said that his "buddy" would sell his own Sten gun if the operative wanted it. The operative said that he did. Porsch advised that there would be 20 more Sten guns available soon. Porsch met with the undercover operative later that day and sold one fully automatic, operable Sten Mk. II 9mm sub-machine gun with two 34 round 9mm cartridge magazines for \$2900. The machine gun is a prohibited weapon and the magazines are prohibited devices.
- [21] On November 10, 2005, the undercover officer asked Porsch for some "hard stuff". Porsch hand signalled that he had a gun with a silencer and said that he had six to sell. Porsch said that the price to him was \$4600 and that he would sell them for \$5000.

Count 10

- [22] Following the meeting on November 10, 2005, Porsch made a series of calls to various individuals that were intercepted by police and which were agreed to establish his involvement in a conspiracy to traffic in firearms. In these calls, Porsch put together an order for five or six pistols with silencers. On November 16, 2005, Porsch told the undercover officer that he had three pistols with silencers available, one Sten gun with silencer, an AR-15 rifle and 18 to 20 more pistols that he could get for \$2200 each. Porsch then had discussions with a co-conspirator about getting the guns and whether they would

sell all 20 at \$2200 or keep a few for themselves.

- [23] On November 16, 2005, Porsch sold five guns to the undercover officer for a total of \$25,000. These included: one fully automatic, operable Sten Mk. II 9mm sub-machine gun with silencer attached, a prohibited firearm, along with one 34 round 9mm cartridge magazine, the silencer and magazine both prohibited devices; one fully automatic, operable .223 Remington calibre Colt AR-15 assault rifle, a prohibited weapon, along with one 30 round .223 Remington calibre cartridge magazine, a prohibited device; two operable, semi-automatic .40 calibre Beretta 96D pistols with serial numbers removed, restricted firearms, with silencers and cartridge magazines, prohibited devices; and one operable, semi-automatic .380 auto calibre Taurus PT 58S pistol, a prohibited firearm, with silencer, a prohibited device.
- [24] Later on the same day, November 16, 2005, Porsch learned from his co-conspirators that there were 16 pistols and one Sten gun available and called the undercover operative. He told him that "there are 16 small and one of those big ones with a muffler on it" referring to 16 pistols and one Sten gun with a silencer. He offered to sell them for \$2200 each for the pistols and \$5000 for the Sten gun. The police accepted the offer and met with Porsch. He removed a large plastic tube from his car that contained the guns and received \$38,000. The guns were: one fully automatic, operable Sten Mk. II 9mm sub-machine gun with serial number removed, a prohibited firearm, along with silencer and one 34 round 9mm cartridge magazine, prohibited devices; five operable, semi-automatic .40 calibre Smith and Wesson 40C pistols with cartridge magazines, all prohibited firearms and devices; one operable semi-automatic 9x19mm Browning Arms pistol, a restricted firearm, with cartridge magazine, a prohibited device; one operable, semi-automatic .45 calibre WITNESS-P pistol, a prohibited firearm; one operable, semi-automatic .40 calibre Bersa Mini Fire Stoem 45 pistol, a prohibited firearm; three operable, semi-automatic 9x19mm Taurus Millennium Pro PT 111 pistols, prohibited firearms; and four operable, semi-automatic .45 ACP calibre Cobra Ent Inc. Patriot pistols prohibited firearms.
- [25] This is not all. On December 5, 2005, the undercover operative told Porsch that he wanted to purchase more firearms. Porsch contacted his co-conspirator and was told that there were four pistols with silencers that could be obtained that day and others would be brought in from Toronto. On December 7, 2005, Porsch agreed to sell the four pistols with silencers for \$4900 each and mentioned that there were 30 more brand new pistols in a box. His co-conspirator called Porsch later to enquire whether he had asked about the 30 additional pistols. Porsch replied that he was not sure if the undercover operative would buy them, but he would show him a sample.
- [26] On December 8, 2005, Porsch met with the undercover operative and gave him four pistols with silencers in a bag. He also showed him a Norenc NP-22 pistol that he said was his but there were 30 more available. The undercover operative gave Porsch \$19,600 for the pistols. They were: one operable, semi-automatic 9x19mm Ruger P-85 pistol, a restricted firearm, with cartridge magazine and silencer, prohibited devices; one operable, semi-automatic .40

calibre Ruger P-95 DC pistol with silencer, a prohibited firearm and prohibited device; one operable, semi-automatic .40 calibre Beretta 96D pistol with serial number removed, a restricted firearm, with silencer and cartridge magazine, prohibited devices; and one operable, semi-automatic 9x19mm Beretta 92D pistol with serial number removed, a restricted firearm, with cartridge magazine and silencer, prohibited devices.

[27] The police operation resulted in the recovery of 40 firearms including 23 pistols, ten sub-machine guns, six machine guns, one assault rifle, nine silencers, and 36 cartridge magazines. Five of the guns had the serial numbers removed. Police paid \$138,400 for the guns. None of the money was recovered.

5. Indictment 52953-2

[28] Police arrested Porsch on February 10, 2006 at the Abbotsford airport parking lot. At the time of his arrest, he was found in possession of an operable, chambered bullet, semi-automatic 9x19mm Norinco NP-22 pistol, the serial number removed, with cartridge magazine. The gun was fully loaded and ready to fire. At no time was Porsch lawfully entitled to possess or transfer any firearm.

Circumstances of the Offender

[29] Porsch was 20 years old when he committed most of these offences. He is now 22 years old. He has been in a common law relationship for 6 years. His parents separated when he was young but he had a stepfather within a few years who was kind. His mother took in foster children and Porsch felt deprived of attention and put upon by his two brothers. He stole when young and had a bad temper. His family has been supportive throughout and his mother describes him as "perfect" and as a roll model for youth to emulate. However, Porsch admittedly led a double life that shielded his family from his criminal activities that began when he was about 15. Based upon family letters of support, it is apparent that there is a gap between perception and reality within the family.

[30] His criminal record is minimal with two convictions for failure to comply with an undertaking in 2004 and two convictions for driving while prohibited, one in 2005 and one in 2006. However, Porsch's self-described "trade" of selling and stealing drugs, criminal enforcement, and selling stolen materials was such that he considered himself "a criminal entrepreneur". He admitted to selling crystal meth, cocaine and heroin. He told the forensic psychiatrist for his pre-sentence report that he "needed notoriety had to do jobs" including arson, mischief, extortion, and assault, for which he volunteered in order to gain a significant reputation within the criminal community. He ran his own circle of drug pushers and enjoyed the reputation that he carefully built. He described his criminal involvement as "a facilitator, not a perpetrator". I understand this to mean that Porsch was positioning himself to be within the high criminal ranks where he could fulfill his thrill seeking ambitions.

- [31] Porsch misled the probation officer, who prepared a pre-sentence report, into concluding that he had graduated with honours from secondary school and was in the leadership programme. However, his transcript reveals an average student who excelled only in acting and career planning. He also led the probation officer to report that he had been employed since leaving home at the age of 17 and left the impression that he had been employed at the time of his arrest. However, his employment records indicate that he had been employed for 9 months in 2001-2002, and for 12 months in 2002-2003. He has not been legitimately employed since he graduated from high school in June 2003.
- [32] Porsch uses marijuana, Percocet, and OxyContin for recreational purposes and has had access to marijuana and OxyContin while imprisoned. He is in enforced remission.
- [33] Porsch is aware that law enforcement officials are interested in knowing who contracted for the arsons, but he has chosen not to cooperate for fear of being perceived as a "rat". Instead, he has identified himself as being within the upper ranks of incarcerated individuals and says that few people interfere with him. He pays others to work for him in prison. The forensic psychiatrist who interviewed Porsch for a pre-sentence report concluded that this behaviour has earned him a reputation for intimidation and manipulation.
- [34] Porsch has not participated much in institutional programming while awaiting sentence. He has completed only one programme for violence prevention. While it is acknowledged that pre-sentence incarceration does not facilitate real rehabilitation, it appears that Porsch's efforts have been minimal and focused on maintaining his criminal reputation. Porsch has expressed the desire to obtain a university education while in prison. He stated that he wants to pursue higher education so that he can obtain a high status and high paying job that provides excitement and stimulation. He could not imagine how he could change his lifestyle.
- [35] The forensic psychiatrist concluded that involvement with pro-social elements would encourage more pro-social behaviour and that the pursuit of a university education is a realistic goal. Porsch is influenced by his environment and should be housed with others who are focused on personal rehabilitation and reintegration into the community if his lengthy sentence is to have rehabilitative effect. He has no psychopathy and there are no historical factors to suggest a high risk of recidivism and violence. The planning involved in his crimes does not suggest that Porsch is impulsive.
- [36] Porsch breached the terms of his bail many times. He contacted persons with whom he was ordered not to have contact. He possessed firearms. He consumed illicit drugs. He also drove while prohibited from driving. He told the psychiatrist that he breached the terms of his supervision orders because he had to return to his criminal occupation to pay his bills. Most significantly, Porsch was on bail conditions when he committed assault causing bodily harm (Indictment No. 52954-3), when he dealt extensively in firearms (Indictment No. X070309-1), and when he was found upon arrest in possession of a loaded handgun (Indictment No. 52953-2). From the circumstances of those crimes, it is apparent that Porsch

also disregarded the term of his bail that he be in his residence at night after eight o'clock.

[37] The probation officer reported that Porsch minimized his role and the impact of his actions in these offences. However, he has gained perception that he was motivated by monetary gain and the need for recognition. Although he stated that he did not wish to hurt anyone, he also said that the risk was part of the business and he was following orders. In a letter to the Court, Porsch described his offences as "indiscretions" and "negative activity", expressing sorrow for the pain and loss that he caused. He explained that the cause of his conduct was peer pressure. Although he said that he did not seek the respect of "incorrigibles" while in prison, his behaviour as described to the forensic psychiatrist suggests otherwise. He asked for understanding, compassion and clemency. In his statement to this Court, Porsch expressed sorrow for being involved.

[38] Porsch has been in custody since February 13, 2006 on these charges.

Impact on Victims

[39] Porsch's crimes of arson have had a devastating impact upon Esposito, who gave his statement orally to the Court. He is the Abbotsford businessman whose business interests were targeted by Porsch upon instructions from an unknown person. The arsons, aimed at destroying Esposito's business to eliminate him as a source of competition, terrorized Esposito and his family. Prior to the arsons, Esposito worked hard to create a business where his young sons could join him in a successful family enterprise. His King's Crossing complex grew commensurate with his passion, work ethic and community involvement. After the first arson, he said that his personal life changed forever and he has become fearful, anxious, overwhelmed, and sick. The once confident, successful man cries easily, has lost his hair, and suffers from high blood pressure and internal bleeding. He has incurred very large personal security costs in addition to property security costs imposed as a condition of any insurance. Circumstances were that his insurance had not been augmented to add coverage for recent renovations to the pub so his personal financial losses were great, almost \$2 million. He described his present state as follows:

As I write this statement, sleep and being safe are a constant concern. I constantly worry about my family, their safety, the loss of so many jobs, the loss of our properties, the devaluation of our business, the inability to acquire insurance, the challenges of dealing with insurance adjusters, the demands of dealing with the insurance requirements from the insurance underwriter, the difficulty of trying to gain insurance policy renewals, the placing of our primary liquor licenses in the dormant stage, the on-going challenges in dealing with the liquor control and licensing issues, the frustrations of dealing with the municipal departments regarding rebuilding, the increased costs of construction, the inability to hire good trades at a reasonable price and the tremendous loss of so many loyal, long-time employees and the continuous growing financial burden that have risen from these senseless, violent acts.

- [40] Over 100 employees lost their jobs. People were put at risk from the fires and lost their homes. The resources of the Abbotsford community were strained to fight the fires.

Position of the Crown

- [41] With respect to Indictment 52952-2, four counts of counselling to commit arson, the Crown takes the position that Porsch should receive eight to ten years. The benchmark was set for Fitzgerald, Porsch's hired arsonist, who received eight years and two months as a global sentence after pleading guilty to three counts of arson. Fitzgerald's girlfriend who played a lesser role in the fires, was fully cooperative, plead guilty to three counts, and received an overall sentence of three years and four months (R. v. MacDonald (May 28, 2007) No. 63741-2C (B.C. Prov. Ct.)). Another minor player in the pub fire who was not a ringleader and did not participate in other fires received a sentence of two and a half years (R. v. Hall, 2007 BCPC 125 (Hall)). Another minor participant in one arson received a sentence of two and a half years (R. v. Munro, 2007 BCPC 178 (Munro)). In R. v. Eng, 2000 BCCA 31, 137 B.C.A.C. 163 (Eng), the accused was involved in nine fires and a sentence of 11 years was appropriate when there were poor prospects for rehabilitation. In R. v. Kelly, [2000] B.C.J. No. 2381 (Prov. Ct.) (QL) (Kelly), youthful first offenders received six and seven years for 18 fires with lesser damage than in this case and less risk to life. In a case involving counselling to commit arson in a premeditated attack on a competitor by a first offender with a positive work record, the court imposed a sentence of three years and nine months in a situation with far lesser damage than in this case (R. v. Basque, [1995] N.B.J. No. 214 (Basque)).
- [42] With respect to Indictment 52082-2, robbery and possession of a loaded restricted firearm, the Crown seeks a global sentence of four to five years, including three years for the robbery and two years for possession of the restricted firearm. The Court of Appeal has set a range of five to eight years for "home invasion" type robberies where a masked accused entered a dwelling house, assaulted the occupant with a weapon, and unlawfully confined him (R. v. Dang, 2002 BCCA 304, 172 B.C.A.C. 1 (Dang)). In this indictment, a youthful co-accused who had no criminal record, who was a nationally ranked athlete, and who taught school received a sentence of three years after a joint submission (R. v. Bacon (April 2, 2007), Chilliwack No. 52082-1 (B.C.S.C.) (Bacon)). Another youthful co-accused with no prior record, who followed strict bail conditions, received one year for the robbery and one year consecutive for firearms offences plus three years probation (R. v. Potgieter (May 15, 2007), Chilliwack No. X052082-4 (B.C.S.C.) (Potgieter)).
- [43] With respect to Indictment No. 52954-3, assault causing bodily harm, the Crown seeks a sentence of between five and six years. In a similar, but more serious case involving cutting off a finger to collect a drug debt, a youthful offender with a significant record received a sentence of eight years (R. v. Payne, 2006 BCSC 1651 (Payne)).
- [44] With respect to Indictment No. X070309-1, transferring a firearm and conspiracy to traffic in firearms, the Crown seeks a global sentence of eight to ten years. In a recent sentencing in this Court for possession of five pistols, two assault rifles, one automatic rifle, and 22

prohibited magazines, a youthful accused with gang associations, but no criminal record, received a sentence of five years following a guilty plea and a joint submission (*R. v. Lee* (September 7, 2007), Vancouver No. 24245-4 (B.C.S.C.)). The Crown points out that there were double the numbers of firearms here. The Ontario Court of Appeal stressed community safety and deterrence in sentencing an accused to three years for possession of a fully-loaded, ready to fire, semi-automatic .45 calibre handgun in *R. v. Lawes*, 2007 ONCA 10. The possession of a fully loaded pistol was indicative of readiness and willingness to use deadly force when the accused, although young with positive rehabilitation potential, was involved in multi-faceted criminal activity, resulting in a global sentence of two years less a day in *R. v. Syed* (2005) 195 O.A.C. 229 (C.A.) (Syed). In *R. v. Bijelic* (2001), 150 O.A.C. 292 (C.A.) (Bijelic), the accused was a principal in a criminal enterprise and motivated by greed to sell fifteen to twenty handguns to criminals. He was sentenced to four years. Recent cases have expressed intolerance for gun violence (*R. v. L.B.*, 2007 ONCA 596 at paras. 79-80; *R. v. B. (A.)* (2006), 204 C.C.C. (3d) 490 at para. 1, 35 C.R. (6th) 249 (Ont. S.C.J.) (B. (A)); *R. v. D. (Q.)* (2005), 199 C.C.C. (3d) 490 at para. 77, 201 O.A.C. 138 (C.A.) (D. (Q.)); *R. v. Raglon*, 2001 ABCA 261 at para. 4 (Raglon)).

- [45] With respect to Indictment No. 52953-2, possession of a firearm with the serial number defaced, the Crown asks for a sentence of two to three years. The British Columbia Court of Appeal approved a sentence of two years less one day for possession of a loaded prohibited handgun in *R. v. Jarsch*, 2007 BCCA 189, 239 B.C.A.C. 28, where the offender had a minor criminal record. The court found rehabilitation to be a secondary concern with public safety and general and specific deterrence paramount, expressing that courts had been too lenient in sentencing for possession of restricted weapons that patently have some illicit purpose (see *R. v. Nguyen*, 2005 BCCA 115, 209 B.C.A.C. 133 at para. 5). The same paramount principle was recognized in *R. v. Thompson*, 2007 ONCJ 342 (Thompson), where 20 months was given to an accused with a prior record who was under a s. 109 prohibition.
- [46] In consideration of the totality principle, Porsch's age, and his guilty plea, the Crown seeks a global sentence of 16 to 17 years minus 40 months credit for time in custody.
- [47] The Crown also seeks a restitution order pursuant to s. 738(1) of the Criminal Code in the amount of \$393,956 for replacement costs to Esposito that were not reimbursed through insurance.

Position of the Defence

- [48] The defence seeks a global sentence of 12 years minus 40 months credit for time served in custody. Stress was placed on the exercise of judicial restraint for youthful offenders, the totality principle, recognition of parity with co-accused, and the need for rehabilitation.

- [49] The defence cites *R. v. Borde* (2003), 63 O.R. (3d) 417 at paras. 36-37, 172 C.C.C. (3d) 225 (C.A.) (Borde) for the principle that the length of a first penitentiary sentence for a youthful first offender should rarely be determined solely by the objectives of denunciation and general deterrence and that the court should impose the shortest possible sentence that achieves relevant objectives. The defence argued that Porsch's youth should be treated as equal to the principles of denunciation and general deterrence in the circumstances here.
- [50] The parity principle has real application here when others involved in Porsch's crimes have been sentenced (*R. v. Doren* (1982), 36 O.R. (2d) 114, 66 C.C.C. (2d) 448 (C.A.)). Reliance is placed upon the sentences given to Potgeiter (two years plus three years probation) for robbery and possession of a prohibited weapon and Bacon (three years) for the robbery. Others involved in the December 2004 arson related to Esposito's pub received a sentence of 30 months (Hall) and those involved in the January 2005 arson related to another pub owned by Esposito received 30 months (Munro). MacDonald plead guilty to three arsons and received 40 months. Fitzgerald, who plead guilty to three arsons, received eight years and two months.
- [51] With respect to Indictment No. X070309-1, the defence maintains that Porsch was only a conduit for the guns, an errand boy, and not the lynchpin of the operation. Porsch says that he is equivalent to Burzese in *R. v. Tuck* (February 10, 2006), (Ont. C.J.) [unreported] (Tuck) where a youthful co-accused with no criminal record charged with possession and sale of nine guns was sentenced to four years. In that case, the youthful Tuck with no record but who had breached bail conditions and who obtained the guns was sentenced to six years on the weapons charges after appeal (*R. v. Tuck*, 2007 ONCA 495).
- [52] The defence opposes the imposition of a restitution order. Porsch states that he has no means or future ability to pay (*R. v. Yates*, 2002 BCCA 583, 169 C.C.C. (3d) 506 (Yates)). He also refuses to consider payment for increased construction costs that have not been incurred.

Analysis

- [53] In sentencing Porsch, I must first have regard to the purpose and principles of sentencing established in ss. 718, 718.1, and 718.2 of the Criminal Code. The importance of denunciation, deterrence, rehabilitation, and promotion of responsibility and acknowledgment for crime will vary according to the nature of each of Porsch's crimes and his circumstances generally and in relation to those crimes. Denunciation of unlawful conduct means that the sentence should communicate society's condemnation of the offender's conduct for encroaching on society's basic values (*R. v. M.* (C.A.), [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327 (C.A.M. cited to S.C.R.); *R. v. Khosa*, 2003 BCCA 645, 180 C.C.C. (3d) 225). Deterrence means that Porsch and others who would be like him should know that they will receive sentences that reflect the seriousness of their crimes.

- [54] The principle of proportionality, that similar sentences will be imposed for similar offenders and similar offences, requires that I consider the sentences that have been imposed upon others who participated in Porsch's crimes and sentences that have been imposed generally for similarly serious crimes, given the circumstances of that particular offender. Intentionally caused harm warrants more severe punishment (C.A.M. at p. 530). The proportionality principle reflects itself in the totality principle wherein a sentencing judge who orders an offender to serve consecutive sentences for multiple offences must ensure that the cumulative sentence does not exceed the overall culpability of the offender (C.A.M. at p. 531). Therefore, once I pass a series of sentences for Porsch's crimes and have properly made them consecutive as required, I must then review the aggregate sentence to ensure that it is just and appropriate (C.A.M. at p. 531). The totality principle will be offended, generally, if the aggregate sentence is substantially above the normal level of sentence for the most serious of the individual offences involved or if the sentence is crushingly not in keeping with the offender's record and prospects. In application of the totality principle in this case, I have considered Porsch's likely parole eligibility, his need to expend rehabilitative effort, and the requirement for continued supervision for safety of the public.
- [55] The rehabilitative goal is always important when, as here, there is a youthful offender with a relatively minor unrelated criminal record. In *Borde*, an eighteen year old offender had plead guilty to possession of a loaded weapon, aggravated assault, and using a firearm in the commission of an indictable offence. *Rosenberg J.A.* said at para. 36:

Aside from the gravity of the appellant's crimes, the overwhelming factor is his youth. In my view, the trial judge erred in principle in focusing almost exclusively on the objectives of denunciation and general deterrence, given the appellant's age and that this was his first adult prison sentence and his first penitentiary sentence. The length of a first penitentiary sentence for a youthful offender should rarely be determined solely by the objectives of denunciation and general deterrence. Where, as here, the offender has not previously been to penitentiary or served a long adult sentence, the courts ought to proceed on the basis that the shortest possible sentence will achieve the relevant objectives. (*my italics*)

However, specific deterrence was an important factor in that case because, among other things, the youth had repeatedly breached the terms of his probation. The string of offences, two involving a loaded handgun, meant that a lengthy penitentiary sentence was required.

- [56] Rehabilitation of a youthful offender may be secondary to the principles of protection of the public, denunciation, and deterrence when the crime involves intimidation and violence and when an offender indicates lack of awareness, responsibility, or accountability (*Dang* at para. 23). *Payne* at para. 26, rehabilitation was of secondary importance when the offence was extremely serious, involved violence and weapons, and the behaviour was part of a pattern that targeted vulnerable individuals for profit and was intended to intimidate. In *Thompson* at para. 7, rehabilitation of a youthful offender with a criminal record took second place to considerations of deterrence and denunciation when he was found in illegal possession of a loaded handgun.

- [57] From the cases reviewed, the range of sentence for arson is from two years for a single count to eleven years for multiple counts (see Kelly; Eng; and R. v. Basque (1995), 163 N.B.R. (2d) 49 (Prov. Ct.) (Basque)). Arson for financial gain is most blameworthy (Basque at 62). Porsch committed multiple arsons for hire. Even though he was focused and paid by another, Porsch was the ringleader and the facilitator who counselled Fitzgerald to hire others and who paid Fitzgerald dependent upon the amount of damage that was caused. Aggravating factors in this case are: the number of arsons; motivation of financial gain and the desire to elevate himself in the criminal world; significant pre-meditation and planning, especially as it related to the elimination of Esposito as a competitor to an unknown contractor; property damage in excess of \$9 million, the loss of jobs, and financial loss; and recklessly putting the physical safety of others at risk. In this case, two of Porsch's co-accused who plead guilty to one count each received 30 months for minor roles. Another minor player who plead guilty to three counts, but who had made great rehabilitative effort, received a sentence of 40 months plus one year probation. Porsch's right hand man in the arsons received a sentence of eight years and two months.
- [58] The previous sentences given to Porsch's co-accused in the robbery might suggest that the offence was not considered to be a 'home invasion'. The range of sentence for home invasions is now five to eight years (R. v. Bernier, 2003 BCCA 134, 177 C.C.C. (3d) 137; Dang at para. 20; R. v. Monteiro, 2005 BCSC 1201 at para. 24). That range must, however, be placed in the context of all sentencing principles and can be discounted by mitigating factors such as a guilty plea and minimal criminal record, as exist here. However, the fact that masked and armed men entered a dwelling house, confined the occupant, stole equipment and marijuana, and then delivered the goods to Porsch's home, cannot be forgotten here. Porsch's co-accused had plead guilty, had no criminal records, and followed the terms of bail.
- [59] The assault of one of Porsch's drug pushers with laceration of the finger was calculated brutality and intended to ensure Porsch's control over the criminal business that he was building. The violence was deliberately planned to intimidate, certainly an aggravating factor. In Payne, this type of conduct attracted a sentence of eight years when the finger was totally cut off and the offender had a criminal record. The range of sentence for deliberate assault causing bodily harm is between two years less one day to six years or more, depending on the personal circumstances of the offender and the degree of violence used (R. v. Biln, 1999 BCCA 369, 125 B.C.A.C. 254 at para. 24).
- [60] Porsch's firearms offences including the transfer of firearms and conspiracy to commit weapons trafficking by transfer of firearms are the most serious of any in the cases that I reviewed. Forty firearms were transferred including 23 pistols, nine with silencers, and six machine guns including one that fired 550 bullets per minute. This is a stunning, shocking assault on community values. These guns are used only as offensive weapons against other persons. As Porsch said, it will kill. The nature and number of the firearms and devices involved here is clearly an aggravating circumstance. Porsch was motivated by greed and the

desire to move up in the criminal hierarchy. These offences are further aggravated by the fact that Porsch flaunted the terms of his bail.

- [61] The circumstance of these firearms offences must place Porsch in the upper range of sentence for offences of this kind. I reject the suggestion that Porsch was just an errand or delivery boy. He offered guns for sale, made the deals, and contacted the sellers. He was the one with the contacts and sources in the criminal world and knew how to get what he wanted on short notice. Some of the guns were modified with serial numbers removed and equipped with silencers.
- [62] Community safety and the need to send a message of deterrence to those who threaten that safety must be paramount here. Recognition must be given to the prevalence of gun violence in this city and elsewhere in Canada and the public's intolerance of it (Tuck, B. (A.); Raglon). The Ontario Court of Appeal has said that courts must address the principles of denunciation and deterrence for gun related crimes in the strongest possible terms (D. (Q.) at para. 78). In Bijelic, an offender was given three years for importation, possession, and delivery of 15 to 20 handguns and several large capacity magazines. In Tuck, the offender received six years for possession of nine weapons. The circumstances here are far worse.
- [63] There are then the two occasions, on April 14, 2005 and February 10, 2006, when Porsch was found in possession of a loaded firearm. The possession of these weapons in the circumstances of Porsch's involvement in a criminal hierarchical group suggests that he was ready and willing to use deadly force in the course of his criminal activities. In similar circumstances, an offender was given three years (Syed). The possession of a handgun by someone on court order release not to possess firearms was said in *R. v. J.G.*, [2005] O.J. No. 4599 at para. 37 (Ont. S.C.J.) (QL) to be outrageous and a clear danger. The court continued to say:

38 in terms of general deterrence, if weapons prohibition orders are to have any meaning and effect, the violation of such orders must be taken very seriously. It cannot be left in any doubt to those persons who are subject to such orders that if they choose to violate those orders, that choice will attract serious consequences.

39 Parliament has decreed that the maximum penalty for the more serious of these offences, namely possession of a loaded, prohibited firearm and breach of a prohibition order, is ten years. It must be assumed that, in setting that maximum, Parliament was of the view that there was going to be conduct deserving of such a penalty. In J.G.'s case, I am faced with his criminal record including two prior convictions for possession of a prohibited weapon, his possession in this case of a loaded handgun in violation of numerous prohibition orders, and his many violations of the terms of his release. There is precious little that is present here to mitigate against the negative impact of those facts.

In that case, the offender was sentenced to six years for possession of a loaded handgun when he was prohibited under s. 109 of the Criminal Code.

- [64] In this case, Porsch's guilty pleas as mitigation are tempered by the reality that the Crown had a strong case against him. Although I accept that Porsch has expressed regret for his actions and attempted to explain his conduct as peer pressure, he failed to acknowledge the seriousness of his conduct, referring to his action as "indiscretions", "anti-social behaviour", and "negative activities". He failed to understand the danger that he represents to public safety. His promise to back up his good intentions with action has not yet materialized as he has made little effort to rehabilitate in the 20 months since he has been incarcerated. Whether his remorse is genuine remains to be seen. He has not cooperated with police.
- [65] Neither of the two pre-sentence reports expressed optimism for rehabilitation. The pre-sentence report from the probation officer did not recommend any programmes for rehabilitation, explaining that the accused was intellectually gifted, socially aware of his surroundings and his choices, and chose to participate in these offences while cognizant and accepting of outcomes, positive or negative. The forensic psychiatrist addressed rehabilitation plans, noting that Porsch did not view his drug use as a problem and expected to continue to use opiates and marijuana. He expressed no concept of how he would change his lifestyle. His conduct in prison suggests that he is maintaining his position in what he perceives to be the upper ranks of the incarcerated. Although the rehabilitative potential for Porsch is uncertain, I acknowledge that I should give the shortest possible sentence that achieves relevant objectives.
- [66] Overall, I have concluded that rehabilitation must take a secondary role in sentencing Porsch. Specific and general deterrence as well as denunciation are the paramount sentencing objectives in all of the circumstances here. I am mindful of Porsch's youth and lack of relevant criminal record. However, the seriousness of his crimes, their number, the flaunting of bail terms, and his chosen criminal lifestyle is simply overwhelming.
- [67] The Crown also seeks restitution to Esposito's company, the Frosty Mug Pub Ltd., in the amount of \$393,956 pursuant to s. 738(1) of the Criminal Code. When imposing sentence upon a convicted offender, the Court may, in addition to any other measure imposed, order the offender to pay restitution for damage or loss to property in an amount not exceeding the replacement value of the property as of the date that the order is imposed. I accept that the figure put forward by the Crown accurately represents the replacement value of the arsoned property. The power to make an order for restitution as part of a sentence is discretionary and should be made with restraint and caution (*R. v. Zelensky*, [1978] 2 S.C.R. 940 at 961, 86 D.L.R. (3d) 179, *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005 at 1012, 55 C.C.C. (3d) 449 (*Fitzgibbon*)). Restitution may be an effective means of rehabilitation in some cases (*Fitzgibbon* at 1012; *R. v. Yates*, 2002 BCCA 583, 169 C.C.C. (3d) 506 (*Yates* at para. 11)).
- [68] Restitution is part of punishment. A restitution order, formerly called a compensation order, can reduce a sentence of imprisonment where it is a particularly apt form of sanction, but it must be included within the totality of the sentence to ensure that it is not excessive overall (*R. v. Hoyt* (1992), 77 C.C.C. (3d) 289, 19 B.C.A.C. 231 (C.A.); *Yates*). As the incarceratory sentence becomes longer, the futility of a restitution order becomes increasingly apparent

(Yates at para. 11). The means of the offender is an important factor in determining whether restitution will be ordered, although it is not a controlling factor in every case (Yates at para. 11). This includes present means and future ability to pay.

- [69] The jurisprudence involving discussion of restitution orders in conjunction with lengthy periods of incarceration is heavily focused on offences such as theft and fraud. However, there have been cases in British Columbia in relation to arson and other related offences. In *R. v. Bourque*, 2005 BCSC 1459, an offender who received 7.5 years for manslaughter and two years for arson was not ordered to pay restitution of \$90,000 to the insurer in consideration of the length of sentence imposed and the inability of the offender to pay any amount in the foreseeable future. In *R. v. Deen* (1997), 120 C.C.C. (3d) 482, 99 B.C.A.C. 46 (C.A.), a restitution order in excess of \$3,000,000 was upheld in the face of a sentence of two years for arson because the limitation period for a civil remedy had expired. The practical futility of a restitution order when an offender faced six years in prison for fraud in excess of \$1.2 million was expressed by the Manitoba Court of Appeal in *R. v. Wuckert*, 2000 MBCA 5, 145 Man. R. (2d) 181, when it overturned a restitution order for the amount of the fraud. The court said that the victims deserved better but had no hope of recovery. In the end, the order would provide no more reparation for the victims than it would contribute to the rehabilitation of the offender.
- [70] The same can be said here. Esposito deserves to be compensated for his losses and I would certainly like to enable his receipt of payment. It is unknown whether civil proceedings have been instituted. However, in these proceedings, the punishment of Porsch within the principles and goals of sentencing is foremost. Porsch will be imprisoned for a long time, he has no assets or means, and his future ability to pay anything is unlikely given his uncertain prospect for rehabilitation. Given these circumstances, the imposition of restitution in a reasonable amount would not reduce the term of imprisonment significantly and is unlikely to discourage Porsch from a life of crime. Any restitution order would be purely symbolic and may impair Porsch's chance for rehabilitation.
- [71] Steven Porsch, I sentence you to the following:
1. for the four counts of counselling to commit arson, a global sentence of nine years imprisonment;
 2. for the assault causing bodily harm, five years imprisonment to be served consecutively to the sentence for arson;
 3. for robbery and possession of a loaded restricted weapon, a global sentence of four years imprisonment to be served consecutively to the sentence for assault causing bodily harm;
 4. for transfer of a firearm and conspiracy to traffic in weapons, a global sentence of nine years imprisonment to be served consecutively to the sentence for robbery; and

5. for possession of a firearm knowing that the serial number had been defaced, three years imprisonment to be served consecutively to the sentence for transfer of a firearm and conspiracy.

[72] The total aggregate sentence of 30 years must be reduced under the totality principle to justly represent the seriousness of Porsch's crimes given his age, guilty plea and minimal criminal record. The total sentence of imprisonment will be reduced to sixteen years, minus credit of forty months for time served awaiting sentence. There will be a lifetime prohibition from the possession of any firearms or other weapons as set out in s. 109(3) of the Criminal Code. In addition, Porsch will be required to provide a sample of DNA pursuant to s. 487.051(1)(a)(b) of the Criminal Code.

"Dillon J."

The Honourable Madam Justice Dillon

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