

CANADA / JUDGMENT

R. v. Spencer

2024 BCSC 1474

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1474 R. v. Spencer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Spencer,

2024 BCSC 1474

Date: 20240715

Docket: 96333-2

Registry: Kelowna

Rex

v.

Brian Edmund Spencer

Before: The Honourable Madam Justice Ker

Oral Reasons for Judgment

(Appearing via video conference)

Counsel for the Crown:

J.M. Kaay

Counsel for the Accused:

N. Selamaj

Place and Date of Trial:

Kelowna, B.C.

September 18-19, 2023

February 5-7, 14-16, 2024

June 25-26, 2024

Place and Date of Judgment:

Kelowna, B.C.

July 15, 2024

- [1] These reasons for judgment were delivered as oral reasons. They have since been edited for distribution.

Introduction

- [2] At approximately 5:30 a.m. on June 3, 2021, the building manager of the apartment complex at 1019 Harvey Avenue in Kelowna, BC was awoken by the sound of a smoke detector, and then fire alarm bells in the building. He was also receiving numerous telephone calls and text messages about a possible fire on the second floor of the complex. Mr. Thomas Crews, the building manager, went to investigate. He attended at apartment 211, managed to open the apartment door, and saw smoke and the accused with something in his hand. Mr. Crews then left to evacuate the other tenants.
- [3] The accused, Brian Edmund Spencer, was the sole tenant and occupant of apartment 211. He stands charged with one count of arson, contrary to s. 433(a) of the Criminal Code, R.S.C., 1985, c. C-46 [Code].
- [4] The fire's point of origin was traced to a clothing closet in the accused's bedroom. A fire investigator, Cst. Christopher Richards, then of the Kelowna RCMP, provided expert opinion evidence at the trial. He opined that the fire in the closet was man made, not accidental. Based on his observations on June 3, 2021, when he responded to the initial tone alert from the Kelowna RCMP dispatch, the fire was reignited on at least three occasions in the course of the Kelowna Fire Department's efforts to extinguish it.
- [5] On this trial, there are two issues for the Court to determine. First, has the Crown proven beyond a reasonable doubt that Mr. Spencer set the fire in his closet and reignited it? Establishing the actus reus in this offence rests entirely on circumstantial evidence. No one directly observed Mr. Spencer light or reignite the fire. Nevertheless, he was the only occupant of the suite at the time of the fire.
- [6] The defence contends that the evidence of Cst. Richards has a number of problematic features, and that, in the end, there are a number of reasonable inferences inconsistent with guilt being the only possible reasonable conclusion. The defence urges an acquittal should be entered, as the Crown has failed to prove the actus reus of the offence beyond a reasonable doubt.

- [7] Not surprisingly, the Crown contends otherwise. The Crown acknowledges that, as this is a circumstantial case, the Court must be satisfied beyond a reasonable doubt that the only reasonable inference to be drawn in the circumstances is that Mr. Spencer caused the fire in his apartment. When the evidence is considered in its totality and assessed logically, and in light of human experience, the Crown asserts that it excludes any reasonable alternative other than the fact that Mr. Spencer caused the fire in the bedroom closet of his apartment.
- [8] If the Court is satisfied that the Crown has established the *actus reus* of the offence beyond a reasonable doubt, the second issue for the Court to determine is whether Mr. Spencer had the requisite intent or *mens rea* for the offence for which he is charged. On this point, the parties are *ad idem* based on the evidence of Dr. Robert Lacroix, a forensic psychiatrist, called by the defence. The Crown concedes that the defence has met the burden of establishing on a balance of probabilities the second branch of the defence of not criminally reasonable by reason of mental disorder ("NCRMD"), as contained in s. 16(1) of the Code.
- [9] Dr. Lacroix's meticulous and comprehensive expert report, coupled with the detailed explanations provided in his *viva voce* evidence, clearly established that if Mr. Spencer committed the *actus reus* of the offence, he is not criminally responsible for the offence of arson on account of mental disorder. Mr. Spencer has been diagnosed as suffering from a mental illness--schizoaffective disorder, bipolar type--for decades.
- [10] In Dr. Lacroix's opinion, Mr. Spencer's mental illness was actively extant such that at the time of the offence, his mental disorder rendered Mr. Spencer incapable of knowing that his actions at the time were wrong. Dr. Lacroix's expert opinion is supported by a number of objectively observed facts, none the least of which being the bizarre behaviour exhibited by Mr. Spencer at the time of the fire, including:
- a) His lack of response or acknowledgement as to the presence of the first responders trying to rescue him from his apartment.
 - b) A neighbour and the building manager overhearing comments from Mr. Spencer indicative of mental distress.
 - c) When members of the Kelowna Emergency Response Team ("ERT") tried to extract Mr. Spencer, he threw liquid at them, picked up a lighter, and then brandished a knife.
 - d) Mr. Spencer was unphased and unresponsive to interventions of CS gas pellets, a taser, and sponge bullets that the ERT officers used to try to get a knife out of his hand. Indeed, Mr. Spencer was not extracted from the bedroom where the fire was burning until Cst. Lafleur punched Mr. Spencer in the face three times in order to get Mr. Spencer to release the knife he was wielding at the officers.
 - e) Mr. Spencer's bathroom and kitchen sink were covered in blood, and Mr. Spencer had a significant self-inflicted neck wound.

The First Issue: Has the Crown Established Beyond a Reasonable Doubt that Mr. Spencer Caused the Fire in His Apartment?

- [11] Before addressing the evidence on whether the Crown has established that Mr. Spencer caused the fire, I will briefly outline the principles that govern the analysis in a purely circumstantial case.
- [12] In *R. v. Villaroman*, 2016 SCC 33, Justice Cromwell, writing for the Court, outlined the modern statement on the law regarding circumstantial evidence. Notably, the Court held that the previous view that inferences of innocence must be based on proven facts was no longer correct. As Cromwell J. explained:
- [35] At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts": see *R. v. McIver*, [1965] 2 O.R. 475 (C.A.), at p. 479, aff'd without discussion of this point [1966] S.C.R. 254. However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614, 14 C.R. (7th) 149, at para. 28. Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.
- [13] In *Villaroman*, the accused took his laptop to a computer store for repairs for the power button and battery. During the course of examining and repairing the laptop, the technician found images and videos of child pornography in an anomalous music folder. The technician contacted the police. The laptop was seized and searched. The accused was charged with possessing child pornography. It was admitted at trial that the accused owned the computer, and that the 36 files at issue found in the computer's music folder constituted child pornography. The main issue at trial was whether the evidence established that Mr. Villaroman was in possession of the child pornography. The trial judge found that the only reasonable inference in the circumstances was that the accused had knowledge of and control over the child pornography, and the accused was convicted. The Alberta Court of Appeal allowed the conviction appeal and entered an acquittal, finding that the trial judge had misstated the law in respect of circumstantial evidence, and that the verdict was unreasonable.

- [14] The Crown appealed, and the Supreme Court of Canada set aside the acquittal and remitted the case back to the Alberta Court of Appeal to address the accused's ss. 8 and 24(2) Charter issues. Justice Cromwell reviewed the genesis of what is referred to as the "Rule in Hodge's Case", and the evolving approach to "the problem of circumstantial evidence", particularly when instructing a jury: Villaroman at paras. 17-22.
- [15] The purpose of the circumstantial evidence instruction, linked as it is to the concept of reasonable doubt, is to ensure that juries or the trier of fact do not "fill in the blanks" or "jump to conclusions" so as to avoid too readily drawing inferences of guilt: Villaroman at paras. 27-30. On this point, Cromwell J. noted that no particular language was required, so long as the jury is cautioned and instructed on the matter appropriate to the circumstances of the case, such as "that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits": Villaroman at para. 30. Such an instruction would help the jury avoid the risk of "filling in the blanks" by too quickly overlooking reasonable alternative inferences: Villaroman at para. 30.
- [16] After confirming that when assessing circumstantial evidence inferences consistent with innocence do not have to arise from proven facts, Cromwell J. agreed that a reasonable doubt or theory alternative to guilt is not necessarily "speculative" simply due to the fact that it arises from a lack of evidence: Villaroman at para. 36.
- [17] However, while a gap in the evidence may result in inferences other than guilt, "those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience": Villaroman at para. 36. Justice Cromwell went on to endeavor to divine the distinction between a "plausible theory" and "speculation", noting that it was not an easy line to draw: Villaroman at paras. 37-42. He concluded that other plausible theories or other reasonable possibilities must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation: Villaroman at paras. 37-38.
- [18] Accordingly, in order to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative: Villaroman at paras. 40-41. The circumstantial evidence does not have to totally exclude other conceivable inferences, nor should the trier of fact act on alternative interpretations of the circumstances that it considers unreasonable; alternative inferences must be reasonable, not just possible: Villaroman at para. 42.
- [19] In examining the trial judge's decision in Villaroman, Cromwell J. concluded that the trial judge's reasons, read as a whole, did not support the respondent's position. In concluding that the trial judge made no legal error in relation to his assessment of the circumstantial evidence, Cromwell, J. wrote:
- [50] When dealing with the defence position, the judge correctly stated the law, in my opinion. The judge properly noted that "the accused cannot ask this Court to rely on supposition or conjecture, that flows from a purely hypothetical narrative to conclude that the Crown has

not proven he is guilty of the offences with which the Crown has charged him": para. 47. The judge's citation of *McIver* was intended to make the same point, i.e. that a reasonable doubt cannot arise from speculation or conjecture. This is perfectly correct. As the Court said in *Lifchus*, "a reasonable doubt must not be imaginary or frivolous"; need not be proof to an absolute certainty; and must be based on "reason and common sense": paras. 31 and 36. The burden on the Crown does not extend to "negating every conjecture": *R. v. Paul*, [1977] 1 S.C.R. 181, at p. 191.

- [20] With these principles firmly in mind, I turn to an examination and analysis of the evidence addressing the *actus reus* in this case.

Established Background Facts

- [21] There is no issue that Mr. Spencer was the sole occupant of apartment 211. There is also no issue that the only location where there was a fire in the apartment building at 1019 Harvey Avenue in Kelowna, BC on June 3, 2021 was in the bedroom closet of Mr. Spencer's apartment unit.
- [22] Similarly, there is no issue or dispute that Mr. Spencer was an artist who worked with oils to paint canvases, and that he had many works of art, books, and painting supplies, including spray cans, mineral spirits, linseed oil, paintbrushes, rags, and related painting paraphernalia in his apartment at the time of the fire. Mr. Spencer kept his painting supplies throughout his apartment, according to the building manager, Thomas Crews, who frequently visited with Mr. Spencer.
- [23] In terms of painting location, Mr. Crews explained that most of the time, Mr. Spencer would paint inside his apartment near the patio doors, as that location had good light and lit up the living room very well. Pictures of the patio contained in Exhibit 1, photographs number 2 and 7, show how the light from the patio area filled the living room. According to Mr. Crews, Mr. Spencer also really enjoyed reading, and had books, papers, and journals spread throughout the apartment.
- [24] Finally, there is no issue that Mr. Spencer smokes cigarettes, including in his apartment, and that he possessed a number of lighters. According to Mr. Crews, Mr. Spencer smoked throughout the day.

The Fire Alarm and the Response of the Building Occupants

- [25] At 5:30 a.m., Thomas Crews, the building manager of the apartment block at 1019 Harvey Avenue, was awoken by the sound of a smoke detector. In response, he dressed quickly, grabbed his cellphone, and received a number of calls and voicemail messages alerting him to a fire in the building. He was directed to the second floor of the building. When he arrived on the second floor, he saw smoke and could smell it.

- [26] Mr. Crews unlocked the door to Mr. Spencer's apartment. He saw Mr. Spencer coming towards him with something in his hand but could not say what it was, due to the fact that he did not have his eyeglasses on and the smoke in the apartment affected his ability to see clearly. Mr. Crews did notice that Mr. Spencer was wearing a white t-shirt that had a dark stain on it. Mr. Crews asked Mr. Spencer "What's going on", but did not recall if he received an answer. Mr. Crews's interaction with Mr. Spencer was less than a minute in length.
- [27] He agreed with defence counsel that Mr. Spencer's demeanor and conduct was definitely not his usual self. When Mr. Spencer approached him with an object in his hands, Mr. Crews explained that Mr. Spencer came around a corner and brought his hands up above his waist but below his shoulders. When he saw that Mr. Spencer had something in his hands, he decided to leave the entryway of the apartment and urge other residents to leave the building, as the smoke was so bad in apartment 211.
- [28] Mr. Crews did not see any fire in the apartment, but did not attend further inside than the doorway of the apartment. He did see smoke and said that it was bad when he was at the entry to the unit.
- [29] Mr. Crews got the other residents out of the apartment building and dealt with the fire department. He testified that apartment 211 was a write off and had to be completely refurbished. Damages were approximately \$200,000, but insurance covered most of the repairs.
- [30] Jessie Itterman lived with her mother and her mother's partner in apartment 213, next door to Mr. Spencer. Ms. Itterman was awoken just before 6 a.m. on June 3, 2021 by the fire alarm in the building. She went out into the hallway and saw Mr. Crews trying to get into Mr. Spencer's apartment. Mr. Crews was banging on Mr. Spencer's door and asking "Brian, why won't you let me in?"
- [31] Ms. Itterman testified that as she stood in the hallway about seven feet away, she saw Mr. Crews open the door a crack, and grey smoke started to waft out of apartment 211. She heard Mr. Spencer say he tried to kill himself. Ms. Itterman said Mr. Crews's face "kind of went white like he saw something" and then Mr. Crews ran in the direction of the elevator yelling for everyone to get out of the building. Ms. Itterman did not actually see any flames in apartment 211 but did see a lot of smoke coming from the unit.

The Kelowna Fire Department's Response to the Fire in Apartment 211

- [32] Steven Meyer is a firefighter employed with the Kelowna Fire Department. Shortly after 5:30 a.m. on June 3, 2021, Mr. Meyer and his colleagues at the fire department were dispatched to a fire at 1019 Harvey Avenue. Upon arrival at the scene, there was another fire crew in attendance, as well as RCMP officers. Mr. Meyer, dressed in full firefighting clothing, went up the ladder to a balcony and window where people suspected the fire was located. Photograph 2 in Exhibit 1 is the area that Mr. Meyer attended. This was Mr. Spencer's unit.

- [33] Mr. Meyer used his large pry bar tool to smash the patio door window of apartment 211, and smoke started to pour out of the window. This confirmed, for the emergency personnel in attendance, that the fire was in apartment 211. Although smoke billowed out of the living room, there was no fire in that area. Mr. Meyer deployed his thermal imaging camera to look inside the apartment and saw no evidence of a human being in the living room area.
- [34] Mr. Meyer then went down the ladder to the ground, and he and his team then moved the ladder over to the bedroom window to the right of the patio in photograph 2. He went back up the ladder and used the pry bar tool to break the bedroom window open. At this point, Mr. Meyer observed the fire in the closet across the bedroom, and much more smoke in the bedroom. Using a one-and-three-quarter inch standard hose line and firefighting nozzle, Mr. Meyer applied water to the fire to "knock it down". Once he had the fire under control, he again used his thermal imaging camera to look inside the bedroom. He did not see anyone in the bedroom on this first viewing of that area. Mr. Meyer went back down to the ground and waited with the rest of the emergency responders.
- [35] When the fire started to grow again, evidenced it by moving across the ceiling of the closet with more smoke pouring out the window, Mr. Meyer went up the ladder for the third time and "put more water on it". On this second attack of the fire in the bedroom, Mr. Meyer still did not see anyone in the bedroom. The thrust of Mr. Meyer's evidence was that he would go up the ladder and apply water to the fire to knock it down. He did this between three and seven times. After he knocked the fire down, he would return to the ground. The fire would then grow again, and produce more smoke, and he would go back up the ladder and apply more water. After the third or fourth application of water to the fire, when Mr. Meyer was back on the ground, he heard a door slam in the apartment.
- [36] Mr. Meyer went up the ladder again, and although the smoke was very thick, he was able, with the assistance of the thermal imaging camera, to see an individual sitting on the bed, propped up by two pillows resting against the headboard. The person was holding a picture frame, looking at something. The person also had a pocketknife and appeared to be flailing violently about as if to prevent an attack, but there was nobody else in the room. Mr. Meyer tried to coax the person to come to the window and onto the ladder, but the individual was unresponsive, acting as if the fire was not even there.
- [37] The last time Mr. Meyer went up the ladder, he applied copious amounts of water to the fire, directing it towards the top corner of the closet ceiling. When asked what he noticed about the smoke while attacking the fire, Mr. Meyer said:

A It continued to grow. The fire would seem to -- as much as many times that I went up to really knock it down and put water on it, it did seem to keep growing. So, the smoke would get thick. The amount of smoke that would come out the window would grow and then shortly after that we'd see the flames coming across the top of the ceiling again.

Q Did that have any significance to you or cause you any concern as a firefighter?

A Yeah, it usually means that there's -- the fire's got some other means of ignition. Once we really knock it down it should stay pretty well knocked down, but it just kept growing and growing. So, it was just every time we went up there, we'd just keep knocking it down until our guys were actually allowed to go in and get a full extinguishment on the fire.

[38] In cross-examination, Mr. Meyer acknowledged that the fire was not extinguished with the first application of water. He was then asked:

Q And whatever is left there picks up again and -- and you have more smoke and you have more fire without anybody using any igniter for the fire; right?

A Tough to say. I didn't see anything going on up there when I was down on the ground. So, I'm not sure exactly how it got going again, but we could just see that the fire would then start coming across the ceiling again and smoke would pour out, and we would go up and hit it again, but it did keep growing.

Q It did keep growing?

A Yeah.

[39] While Mr. Meyer did not see the fire igniting again, it seemed to grow rapidly, and appeared to be consistent with someone pouring an accelerant on it, adding something to make it grow. He acknowledged that if there were solutions that ignite fire nearby, they could cause the fire to ignite, but added:

A Yeah. Yeah, if the fire was still going -- tough to say exactly how it got going that hard, but I couldn't see what was going on.

The Attendance of Members of the Kelowna RCMP

[40] At approximately 5:57 a.m. on June 3, 2021, members of the Kelowna RCMP responded to a tone alert indicative of a serious incident in progress and attended to 1019 Harvey Avenue. Cst. Daniel Phillips responded and understood the incident to have involved some sort of stabbing. Upon arrival at the apartment building, Cst. Phillips and his partner, Cst. Ryan Dawson, went up to the second floor, accompanied by a firefighter. They attended apartment 211, and when they received no response to their knocks, they kicked the door in. A very dark and thick cloud of smoke immediately filled the hallway, making it difficult to breathe and see. Notwithstanding the smoke, Cst. Phillips could see a male figure in front of him, about two to three feet away, holding what appeared to be an aerosol can. Cst. Phillips perceived this as a threat and deployed his pepper spray into the individual's face. It appeared to have no effect, apart from causing the person to retreat into the apartment.

- [41] What Cst. Phillips was able to see of the individual, apart from the aerosol can, was that the man appeared to be injured with blood on his neck and upper chest area. It was difficult for Cst. Phillips and his partner to breathe. They retreated across the hallway and used an apartment across from apartment 211 as a position where they could take turns getting fresh air, while the other maintained observation of apartment 211 and tried to call the occupant out of the apartment. Both officers had their service pistols in the low ready position.
- [42] Concerned that there might be others in apartment 211, the two officers entered it to clear it. The man they observed at the doorway entered the bedroom and closed the door. Cst. Phillips saw the man one more time when the man opened the bedroom door and retrieved something from a dresser. Cst. Phillips never saw any flames from the fire, but did see dark, thick smoke coming out from under the door to the bedroom at the rear of the unit. Cst. Phillips heard the firefighters put water into the bedroom area to extinguish the fire. When this occurred, the smoke turned to a softer grey colour.
- [43] Cst. Phillips and his partner were on the second floor outside apartment 211 for approximately an hour. Given the male's failure to respond to any communication, coupled with the fact that he had barricaded himself in the bedroom and was believed to be armed, it was determined that members of the Kelowna RCMP ERT team should be deployed to extract the male.
- [44] Cst. Phillips explained that what caused him to believe that there was the potential for violence was the fact that:
- a) the man was armed with an aerosol can;
 - b) he appeared intent on using it on the officers, though Cst. Phillips could not recall if he was sprayed;
 - c) the apartment appeared to be on fire;
 - d) the male had blood around his neck and chest area;
 - e) the male was non-responsive to the officer's efforts to communicate with him and get him out of the apartment; and
 - f) the man did not try to exit the apartment as one would expect any reasonable person to do in the circumstances.
- [45] As Cst. Phillips tried to clear the apartment for other occupants, he noticed what appeared to be a significant amount of blood on the counter and floor of the bathroom of the unit.

The Efforts of Members of the Kelowna ERT to Extract Mr. Spencer

- [46] Cst. Landon Weekes and Cst. Danny Lafleur, both members of the Kelowna RCMP ERT, were dispatched to 1019 Harvey Avenue to respond to an incident described as an individual with a self-inflicted knife wound who had set his apartment on fire. Both officers were dressed in

their full tactical gear, including body armour, helmets, and gas masks. Upon arrival, they learned that the man may have had a knife and had not been heard from or seen for about 30 minutes. Cst. Weekes tried to establish communication with the occupant, but the occupant was unresponsive to his police announcements.

- [47] Cst. Weekes was concerned there was a risk that the man was dying or dead, and so it was urgent that a plan to extract the man be implemented quickly. A number of different tactics to try and extract the man were employed.
- [48] First, Cst. Weekes used a 40-millimeter launcher to fire CS gas pellets, a substance similar to pepper spray, through the top of the closed bedroom door. Approximately three pellets were fired. The only effect was to cause the bedroom door to partially open, but there was no response or reaction to the irritant gas going into the bedroom.
- [49] The second step involved Cst. Weekes and Cst. Lafleur entering the apartment, clearing it to ensure there were no other occupants, and then entering the bedroom. When Cst. Weekes opened the bedroom door, he saw Mr. Spencer lying on the bed, and it looked as though his throat had been slit. Cst. Weekes announced "Police," which caused Mr. Spencer to sit up. He was holding a plastic bottle with liquid in it. Mr. Spencer threw the liquid at Cst. Weekes, and then retrieved a lighter. Cst. Weekes thought the liquid could be flammable. He directed Cst. Lafleur to fire a sponge bullet to try and change Mr. Spencer's behaviour. Cst. Lafleur fired a 40-millimeter round to Mr. Spencer's right thigh, but Mr. Spencer did not really react, apart from a slight flinch.
- [50] Mr. Spencer then reached for a knife at the bedside table and held it in his right hand. Cst. Weekes asked Mr. Spencer to drop the knife. When he failed to comply, Cst. Weekes fired his taser, but that also failed to cause Mr. Spencer to drop the knife. Cst. Weekes moved in to grab Mr. Spencer's right arm to pin it to the bed. Cst. Lafleur climbed over Mr. Spencer to get his left arm. Seeing the knife in Mr. Spencer's right hand, Cst. Lafleur fired a second sponge bullet, this time to Mr. Spencer's right shoulder, but this too had no effect.
- [51] Cst. Lafleur feared death or grievous bodily harm with the knife in Mr. Spencer's hand. Given that nothing else had worked, Cst. Lafleur delivered three blows to Mr. Spencer's face. This caused Mr. Spencer to stop struggling, and Cst. Weekes was able to get the knife away from him. During the course of this struggle with Mr. Spencer, the fire continued to burn in the closet beside the bed. Cst. Weekes estimated it took 30 to 45 minutes to subdue and extract Mr. Spencer.
- [52] In cross-examination, Cst. Weekes was asked if the bottle containing the liquid was possibly a water bottle, and was shown photograph 10 in Exhibit 1, which depicts a clear bottle with a black cap that appears to have liquid in it. Cst. Weekes believed the substance was flammable, given Mr. Spencer's reaching for a lighter after throwing the liquid. It was suggested to him that it could possibly be a water bottle, and the officer appeared to concede it might be. While photograph 10 in Exhibit 1 might cause one to think it is a water bottle, I find that, in fact, it was a different photograph of the bottle of linseed oil depicted in Exhibit

16A and B. A comparison of the bottles in the two photographs reveals a clear bottle with the same colour and type of cap. The bottle is the same shape, size, and has a remarkably similar label to the linseed oil bottle. The position of the bottle in the two photographs is slightly different, but still on the bed. In the circumstances, I conclude that it is the same bottle.

- [53] Significantly, there is no sign of a water bottle on the bed where Mr. Spencer had been lying. I find it unlikely, given the chaotic nature of the circumstances and rapidly unfolding events in trying to subdue Mr. Spencer after he threw the liquid, grabbed the lighter, and then a knife, that Mr. Spencer managed to throw linseed oil and then secure the cap back on the bottle. However, located on the floor beside the bed, as depicted in photograph 17 of Exhibit 1, is an empty plastic bottle with no cap labelled "mineral spirits". In the circumstances, it is entirely reasonable to infer that the liquid that Mr. Spencer threw at Cst. Weekes was from this bottle.
- [54] Cst. Weekes and Cst. Lafleur both remarked that there was a lot of blood in the bedroom. Cst. Lafleur noted that Mr. Spencer had a wound to his neck. Once Mr. Spencer was subdued, he was removed from the suite and handed over to EHS personnel.

The Execution of the Search Warrant on June 4, 2021

- [55] Cst. Steven McBride was the exhibit officer who collected and secured various items from Mr. Spencer's apartment. Once Mr. Spencer had been removed from the apartment and the fire extinguished, the scene was secured. Officers returned the next day to execute a search warrant, seize items, and the assigned fire investigator, Cst. Richards, examined the scene. Cst. McBride was the assigned exhibit officer, and seized a number of items from Mr. Spencer's bedroom, including:
- a) a knife on the right side of the bed;
 - b) a knife on a portrait on a side table;
 - c) two blue lighters from a nightstand beside the bed;
 - d) a lighter with blood on it found on the floor beside the bed, as depicted in Exhibit 9;
 - e) another black lighter also found on the floor beside the bed; and
 - f) an uncapped empty plastic bottle labelled mineral spirits on the floor to the left of the bed, near a nightstand between the closet and the bed, as depicted in photograph 17 of Exhibit 1, as well as Exhibit 10.

The Evidence of Constable Christopher Richards

- [56] Cst. Christopher Richards is a member of the RCMP. In June 2021, he was stationed with the Kelowna RCMP, and had recently achieved certification as a fire investigator. Before joining the RCMP, he was a volunteer firefighter for approximately ten years outside Nelson, BC

with the North Shore Fire Department. Following a contested voir dire, Cst. Richards was qualified as an expert capable of providing opinion evidence in respect to the investigation of fires, including opining on the cause and location of ignition, the pattern and course of fire, and the presence and use of accelerants.

- [57] Cst. Richards responded to the tone alert on June 3, 2021, and attended 1019 Harvey Avenue in his capacity of working general duties. He had with him his fire investigation mask. Upon arrival at the scene, which he described as "pretty chaotic", Cst. Richards spoke to his corporal. He was directed to attend inside the building to relieve and assist the other members, in part due to the fact that he had a proper mask.
- [58] Cst. Richards went to apartment 211 and joined his colleagues and observed their efforts to call Mr. Spencer out of the apartment. At one point, Cst. Richards saw the male occupant moving from the living room into the bedroom area and close the door. Thereafter, he observed a build up of smoke coming from the bedroom. Cst. Richards radioed down to his corporal outside the building and told him to tell the firefighters to "hit the fire," meaning pour water on it.
- [59] Before water was put into the bedroom area, Cst. Richards observed the smoke from the area to be black, signifying the burning of objects. Once water was applied, the smoke turned white, signifying steam. The male opened the door to the bedroom and stood in the doorway but did not respond to the call outs by Cst. Phillips or Cst. Dawson. The male disappeared from view. Cst. Richards then observed the smoke change from white back to black, which signified reignition of the fire. This happened on at least two occasions after the first hit of water by the fire department.
- [60] Cst. Richards did not enter the apartment on June 3, 2021, and did not see any flames, only the smoke and its changing colours when water was added and then when the fire appeared to reignite.
- [61] On June 4, 2021, Cst. Richards reattended to apartment 211, this time in his capacity as the member assigned to conduct the fire investigation. He was tasked to complete a cause and origin examination of the apartment, meaning to determine the cause of the fire and where it started. Cst. Richards attended apartment number 211 and examined all of the rooms. Cst. Richards examined the entire apartment and determined that the fire in apartment 211 was incendiary, meaning it happened in an area where it would not usually occur, which was a sign of arson. Cst. Richards determined that the spray can in photograph 5 of Exhibit 1, an accelerant, had not been used in the fire given the carbon buildup around the can, and no carbon deposits under the can. All he could say about the spray can was that it was in the position on the dresser during the fire.
- [62] Cst. Richards examined the kitchen, living room, and bathroom areas, and found no signs of fire damage or fire patterns in any of these areas.

- [63] Cst. Richards then went into the bedroom to examine it. Although the bedroom had a lot of carbon deposits throughout it, the bed and most of the bedroom had no visible fire damage or burn patterns. On the bed, as depicted in photograph 10, were the folding doors from the closet. Cst. Richards had no information as to when or how they were moved to the bed. Of significance to him was the fact that the bottom part of the door was burned away. Also significant to Cst. Richards, as depicted in photograph 10, was the fact that the wall where the headboard of the bed was located had varying amounts of carbon deposits on the wall, filling in the areas where paintings had previously hung.
- [64] Photograph 10 and the data Cst. Richards collected indicated to him that one of the paintings had been knocked off the wall during the fire department's efforts to extinguish the fire. As carbon deposits had accumulated within the area where the painting had been hanging, it suggested to Cst. Richards that the fire was restarted, which allowed more carbon deposits to accumulate. Cst. Richards marked on a copy of photograph 10 the line of demarcation--or V pattern--that pointed to the area of origin. This was marked as Exhibit 13, and it shows a line pointing down to the closet. As a fire burns, it burns outwards, and smoke rises out from the fire, such that the carbon deposits are more concentrated above the line of demarcation, and so the V pattern in this case pointed down to the closet. Significantly, nothing else in the area was burnt.
- [65] Based on the data he collected and his examination of the apartment, Cst. Richards determined that the fire's area of origin was in the bedroom closet adjacent to the bed. After he examined the closet, and dug it out by removing the debris, he determined the point of origin was in the back left corner of the closet. The closet had to be dug out, as the firefighters' efforts to extinguish the fire resulted in them pulling drywall and items off the walls.
- [66] Photograph 16 in Exhibit 1 and Exhibit 14 best depict the point of origin of the fire in the closet. Charring of the wall studs was confined to a portion of the back-left corner of the closet. At the point of origin, Cst. Richards located the remnants of a box of painting supplies and solvents on the floor of the closet. There was a strong odour of an accelerant at the point of origin. Included in the material were remnants of paint brushes and possibly a paint roller. Cst. Richards ruled out an electrical fire as being the cause of ignition, as there were no electrical outlets in the vicinity.
- [67] Outside the closet, located next to the bed, was an empty bottle of mineral oil or mineral spirits, a known accelerant (depicted in photograph 17 of Exhibit 1). Cst. Richards found multiple cigarette lighters, a source of ignition, in the bedroom, including on the nightstand next to the bed (depicted in photograph 13 of Exhibit 1). Cst. Richards was of the opinion that the fire was started multiple times in the closet. He based this opinion on:
- a) his observations of the multiple changes in the colour of the smoke on June 3 when the firefighters tried to knock it down and it appeared to reignite; and

- b) the shadowing on the walls where the picture frames had been, but also had carbon deposits in areas where the frame had been but was knocked off the wall.
- [68] Cst. Richards was thoroughly and extensively cross-examined about his observations, his opinion, and alternate explanations for the fire.
- [69] Cst. Richards agreed that a fire could cause more smoke than flame when you starve it of oxygen but disagreed that the clothing on the hangers inside the closet on the floor could have caused an abundance of smoke if they fell on the point of origin. Rather, they would starve the fire of oxygen.
- [70] Cst. Richards explained that a fire can reignite if more accelerant is poured on the point of origin, and a source of ignition is applied to it. While lithium-ion batteries could cause the fire to reignite, there was no evidence of that type of battery in this case. While hot spots not extinguished could cause a fire to reignite, because the affected area was so small in this case, it was not plausible given that all the clothing and everything in the closet was wet from the firemen's efforts to extinguish the fire. Cst. Richards was not of the opinion that the clothes falling down on the point of origin reignited the fire. The size of the fire was too small for that to happen. Rather, the clothes would have smothered the fire and extinguished it. The fact that the fire pattern was confined to the closet and did not extend outside the closet supported his thesis that this fire was relatively small in size.
- [71] Although the drywall and part of the studs in the back corner of the closet were burned, the fire did not extend from the closet into the bedroom. Cst. Richards was unable to say when the clothing fell to the floor from the rod or dowel that had supported the items. The clothing was burned and on the floor, but he could not say whether they fell during the fire, after the fire, or came down because the hooks or the doweling failed due to the firefighters' efforts to extinguish the fire.
- [72] Given the size of the closet and small nature of the fire in the closet, and given the amount of water that the firefighters were pouring into the closet to hit the fire, Cst. Richards was not of the opinion that the fire reignited due to the interaction of hot spots and paint solvents. While he did not see how much water was being applied, based on Mr. Meyer's evidence and the size of the hose used, it is reasonable to infer that a not insignificant amount of water was being forced into the closet each time Mr. Meyer tried to knock the fire down. Cst. Richards was of the opinion that the fire would have been drenched given the amount of water used, and the small, confined space of the closet. Everything would have been completely wet or dampened, making it impossible for the fire to self-ignite again.
- [73] Cst. Richards was shown a photograph that was a different orientation from photograph 10. This photograph, Exhibit 16A and B, depicts the bottle of linseed oil lying on the bed. He agreed that linseed oil was fairly flammable, and that in certain circumstances, it can spontaneously combust without the assistance of a flame source. He agreed that if linseed oil is placed on a cloth rag that is then tightly balled up it can self-generate heat. Cst. Richards conceded he did not actually see the bottle of linseed oil in his examination of the

apartment, and so did not consider it in his hypothesis about the fire. He conceded it might be possible that if a tightly balled rag with linseed oil was in the back of the closet, it might be possible to spontaneously combust and then start a fire. However, he testified that the presence of the linseed oil did not change his opinion. The following exchange occurred in cross-examination:

Q What reflection do you have on it for the court as an expert now that you saw that it was on the -- at the scene? What implications does it have for your opinion?

A It doesn't change my opinion due to the fact that linseed oil -- if you remove the heat from it from that first ignition, then it's still going to not -- it's not going to reignite.

If, for instance, you have a rag of it in -- for instance, if you wanted to say in the -- in the back left-hand corner of the closet, and it's thrown in there, it's going to be -- even if it was the initial cause of the fire, you've then got to then add more accelerant to then get something to reignite. So the final -- it doesn't match with all of the evidence.

Q So hypothetically speaking, a rag with linseed oil baled [phonetic] together could have been the start of the fire, correct, in that closet, if rags of that nature were within that box that you found, the remnants of what you found, let's start there, correct?

A So if, for instance -- so if -- this doesn't happen immediately, right? We're not talking linseed oil immediately will combust if it's put into a tight rag, it happens -- because it has to self-generate that heat. So if, for instance, a ball -- that ball was thrown into the closet and -- and obviously, it's going to depend on how tightly that area is -- or that rag is balled up into, it's going to depend on how much oxygen is pumped into the area, a lot of other factors. But for -- if that rag was in there and balled up tightly, and -- it could have spontaneously combusted, there's no doubt about that.

Q And then all the papers that are around it would then start to generate fire, right? There's more fuel around.

A It would, yes.

Q That's possible?

A It is possible, yes.

Q Such that it's not a manmade-started fire?

A If that was the -- the case, I would be extremely surprised, based on the timeline of everything, but if linseed oil spontaneously combusts, then that is not a -- a manmade fire, no.

Analysis

- [74] Counsel for Mr. Spencer contends that I ought to have a reasonable doubt that Mr. Spencer ignited the fire in the first instance, and further, that Mr. Spencer reignited the fire on the occasions when the smoke turned from the light colour steam-based smoke back to the dark colour fire-based smoke as explained by Cst. Richards and Mr. Meyer in their evidence.
- [75] On the reignition point, counsel argues that no one, including Mr. Meyer, the firefighter who attacked the fire, saw Mr. Spencer reignite the fire. While this point is true, it cannot be examined in isolation. Mr. Meyer descended from the ladder and returned to the ground after each dousing of the fire and had to remount the ladder and hit the fire again after the smoke changed back to black. No one was able to see Mr. Spencer reigniting the fire due to the fact that he was largely barricaded in his bedroom and unresponsive to interventions by the emergency responders. The fact that no one saw Mr. Spencer reignite the fire is largely immaterial.
- [76] What is material is the following that must be considered as a whole and in the totality of the circumstances. Mr. Spencer was the only occupant of apartment 211. The fire was knocked down by Mr. Meyer on at least three occasions, and then reignited and started back up again, which required Mr. Meyer to climb the ladder and hit the fire again. Accelerants, including an empty bottle of mineral spirits, were found in the bedroom. At one point, Mr. Spencer threw liquid at Cst. Weekes and appeared to pick up a lighter as the officers were trying to extract him from the bedroom. Cst. Richards rejected the suggestion that the fire reignited through hot spots in the closet based on his scene examination, including the fire pattern and burn marks; the small size of the closet; the wet, burnt clothing on the floor, still on hangers; and the large volume of water that would have been poured into the room by Mr. Meyer hitting the fire each time.
- [77] The presence of multiple lighters and accelerants, including the uncapped empty mineral spirits bottle on the floor between the bed and the closet in the bedroom, coupled with the observations of the officers and Mr. Spencer's observed behaviours, when considered collectively and in light of human experience, support the inference that the fire was reignited by the sole occupant of the apartment, Mr. Spencer. Cst. Richards was clear and unshaken in his evidence that the fire was not caused by an electrical issue or spontaneous ignition of batteries, and while he agreed it might be possible for spontaneous combustion of rags and linseed oil to have started the fire, respectfully, that possibility on the evidence is so remote as to amount to speculation. There is a complete absence of any sort of evidentiary foundation to support what is nothing more than a speculative inference in the circumstances.
- [78] As Cromwell J. noted in *Villaroman* at paras. 37-42, "alternative inferences must be reasonable, not just possible". And, as noted by Chief Justice McEachern in *R. v. To*, 16 B.C.A.C. 223, 1992 CanLII 913 (C.A.) (cited to CanLII):

41 It must be remembered that we are not expected to treat real life cases as a completely intellectual exercise where no conclusion can be reached if there is the slightest competing possibility. The criminal law requires a very high degree of proof, especially for inferences consistent with guilt, but it does not demand certainty

[79] While a gap in the evidence may result in inferences other than guilt, those inferences must be reasonable on the evidence and absence of evidence, assessed logically, and in light of human experience. Moreover, the circumstances said to point to other reasonable inferences cannot be considered in isolation. Rather, the totality of the circumstances must be examined. Here, the sole occupant of the apartment very clearly tried to harm himself as evidenced by the blood in the apartment bathroom and kitchen, and his comment of trying to kill himself overheard by Ms. Itterman. In addition, Mr. Spencer's responses to the intervention efforts by emergency responders to extract him from the very dangerous circumstances he was in were completely abnormal, atypical, and contrary to any reasonable individual caught in a situation where a fire started accidentally or spontaneously. Mr. Spencer actively resisted assistance and appeared not to register that there was a fire burning beside him as he sat on the bed and responders tried to get him to come out.

[80] When the facts are considered in their totality and assessed logically and in light of human experience, the only reasonable inference available in the circumstances is that Mr. Spencer set the fire in the closet of his apartment and reignited it after Mr. Meyer tried to hit it back. I am satisfied beyond a reasonable doubt that the Crown has proven the actus reus in this case.

The Second Issue: Has the Defence Established, on a Balance of Probabilities, that Mr. Spencer was NCRMD at the Time of the Offence?

[81] The second issue to resolve in this case is whether the mens rea for the offence of arson has been established beyond a reasonable doubt; or whether the verdict is more appropriately that Mr. Spencer was not criminally responsible for the arson because he was suffering from a mental disorder that rendered him incapable of appreciating the nature and quality of the act, or of knowing that it was wrong. As the defence has raised the issue, they bear the burden of establishing this on a balance of probabilities, as outlined in ss. 16(2) and (3) of the Code. In this case, however, the Crown accepts the expert opinion evidence of Dr. Lacroix, who was called by the defence, and invited the Court to return an NCRMD verdict.

[82] There were actually two forensic psychiatric reports prepared and received in evidence in this case. The first report was ordered by the Court pursuant to s. 672.11(b) of the Code. That occurred on September 19, 2023. Dr. Mandeep Saini completed the report and filed it with the Court on November 21, 2023 (Exhibit 19).

[83] Dr. Saini's report is comprehensive and detailed with respect to Mr. Spencer's long-standing history of care and previous insanity and NCRMD findings since early 1989. However, Dr. Saini was unable to reach a conclusion about Mr. Spencer's mental state at the time of the

offence due to what he described as an absence of information at the time of the events. Dr. Saini was of the opinion that Mr. Spencer's inability to recall the events surrounding the commission of the offence, coupled with the absence of information on Mr. Spencer's presentation from the time of his removal from his apartment until his admission to Kelowna General Hospital, created significant limitations for the doctor. This resulted, in Dr. Saini's view, in an unclear picture of Mr. Spencer's mental state at the time of the offence. Neither the defence nor the Crown rely upon Dr. Saini's opinion, but for completeness, it has been referred to.

- [84] Before addressing Dr. Lacroix's opinion, which I accept without hesitation, I will enumerate the previous findings made with respect to Mr. Spencer when tried for other criminal offences. As I alluded to, Mr. Spencer has a long history of care with the Psychiatric Services Commission. Mr. Spencer is now 70 years old. He will be 71 in November.
- [85] In 1973, at the age of 19 years, Mr. Spencer was involved in a serious motor vehicle accident that left him in a coma for approximately ten days. Family members said that, following this accident, Mr. Spencer's mental health was never the same. Mr. Spencer attended art school for approximately ten months in 1978. He is a gifted painter and identifies with both Vincent Van Gogh and Pablo Picasso, both of whom he describes having a "numerological concurrence" with, as outlined and explained in Dr. Lacroix's report (Exhibit 18, p. 4).
- [86] Psychiatric assessments and reports from 1980 to approximately 2015 characterized Mr. Spencer's mental illness as schizophrenia. Since 2015, the diagnosis has been refined and his treating psychiatrists have diagnosed him as having schizoaffective disorder, bipolar type. Both Dr. Lacroix and Dr. Saini agree that Mr. Spencer has a long-standing and well-documented history of mental illness and agree with the diagnosis of schizoaffective disorder, bipolar type. They also agree that Mr. Spencer's mental illness meets the definition of mental disorder for the purposes of s. 16 in the Code.
- [87] Mr. Spencer has had previous findings of not guilty by reason of insanity, now referred to as NCRMD. Both psychiatric reports outline the details of the lead up to the previous offences and the findings. Summarily, they have been as follows. On July 27, 1989, Mr. Spencer was found not guilty by reason of insanity for the attempted murder of his father and stepmother, committed on February 22, 1989.
- [88] THE ACCUSED: [Indiscernible/remote audio] axe murder my mother.
- [89] THE COURT: Sorry. Mr. Spencer, I have not quite finished my reasons yet.
- [90] From July 27, 1989 until May 10, 1995, Mr. Spencer was held in custody at the pleasure of the Lieutenant Governor and then released on conditions into the community under the supervision of the Review Board. He was discharged absolutely on May 10, 1995. Between 1995 and 2010, Mr. Spencer continued to receive care on an out-patient basis through the adult Forensic Psychiatric Services and then the Kelowna Mental Health Team.

- [91] On December 31, 2010, Mr. Spencer was found NCRMD on one count of assault with a weapon committed on January 27, 2010. From December 31, 2010 to June 27, 2012, Mr. Spencer remained confined to the Forensic Psychiatric Hospital ("FPH"). The Review Board conditionally discharged him to Kelowna on June 27, 2012. He was then under the care of Dr. Nichola Hodelet with the Kelowna Regional Forensic Clinic. On July 24, 2015, Mr. Spencer was found NCRMD in relation to two sexual assaults from February 9 and March 7, 2015. He was returned to the FPH.
- [92] After several visit leaves to Kelowna in 2017, Mr. Spencer was conditionally discharged by the Review Board on July 5, 2017. He remained in the community under out-patient care until May 17, 2019. He was then returned to the FPH until June 11, 2019, due to a deterioration in his mental state. Mr. Spencer was then returned to the community on a conditional discharge and, again, under the supervision of the Review Board on June 11, 2019. He remained in the community until June 3, 2021, the date of the index offence. Coincidentally, Mr. Spencer was scheduled for a Review Board hearing on June 3, 2021.
- [93] Dr. Lacroix's expert report and his viva voce expert opinion evidence vividly documented a number of events that accumulated over the months prior to the commission of the index offence that contributed to Mr. Spencer's increasing paranoid symptoms and developing psychotic state. Throughout the latter half of 2020, Mr. Spencer intermittently endorsed paranoid concerns to his treatment team. By November 2020, Dr. Hodelet noted in a report that Mr. Spencer continued to display symptoms of major mental disorder with fluctuating moods and regular persecutory ideas and delusions. This caused the Review Board to extend Mr. Spencer's conditional discharge from November 27, 2020 to June 11, 2021.
- [94] In January 2021, Mr. Spencer's medication regime was altered in a very significant way that may have unwittingly accelerated a decline in his mental state over the next few months. Prior to January 2021, Mr. Spencer had received two psychotropic medications:
- a) divalproex, a mood stabilizer of 1500 milligrams a day orally; and
 - b) paliperidone, an antipsychotic medication in the form of an injection of 100 milligrams once every four weeks.
- [95] In January 2021, the antipsychotic medication was changed to aripiprazole. Mr. Spencer had never been trialed on this medication and, as Dr. Lacroix explained, both in his report at page 22 and in his evidence, this particular drug has the potential to exacerbate psychotic illnesses in some patients.
- [96] In March 2021, Mr. Spencer's mood stabilizer, divalproex, was cut in half to 750 milligrams a day at Mr. Spencer's request. With Mr. Spencer's increasing elevation in his mood becoming evermore apparent to his treatment team, the mood stabilizer medication was reinstated to its previous level of 1500 milligrams daily on May 31, 2021. However, in Dr. Lacroix's opinion, the change would not have been fully implemented to register a clinical response three days later when the offence was committed.

[97] Dr. Lacroix acknowledged that Mr. Spencer had no memory of the events of June 3, 2021, but did not find this to be something that prohibited an assessment of Mr. Spencer's mental state at the time of the offence. Dr. Lacroix explained that Mr. Spencer's amnesia was likely due to a number of factors, including:

- a) the intensity of his psychotic symptoms extent at the time of the offence;
- b) the effects of smoke inhalation;
- c) the result of being medicated and intubated when admitted to the hospital after he was extracted from his apartment; and
- d) being medicated during the course of his hospitalization and treatment.

Dr. Lacroix added that it was not uncommon for assessments to be conducted even where the subject has memory, reliability, and credibility concerns.

[98] As a result of his interview of Mr. Spencer and his detailed comprehensive review of the case history and materials, Dr. Lacroix opined that Mr. Spencer's fluctuating display of psychotic symptoms reflected a chronically fragile mental state at baseline in the years leading up to the offence. Based on all the information he reviewed, Dr. Lacroix was of the opinion that several specific factors served to further destabilize Mr. Spencer's already fragile baseline mental state in the months preceding the offence, including:

- a) Mr. Spencer's admitted and confirmed (through urine drug testing at Kelowna General Hospital on June 3, 2021) use of cannabis. Cannabis has been specifically noted to destabilize Mr. Spencer's psychotic illness over the years.
- b) Mr. Spencer's escalating use of caffeine and resulting poor sleep. While caffeine alone is not a precipitant of psychosis, Mr. Spencer's excess usage well into the afternoon and evening in the weeks before the alleged offences disrupted his sleep. Sleep disturbances are common precursors to psychotic symptom relapse, particularly in affective psychoses such as Schizoaffective Disorder, Bipolar Type.
- c) Mr. Spencer's anticipatory stress of his June 3, 2021 Review Board hearing. In the literature, both minor daily stressors and majorly adverse life events are implicated in the exacerbation of symptoms of those with established psychotic disorders.
- d) Changes in Mr. Spencer's medication regimen (with both his mood stabilizer and antipsychotic medication) in the months preceding the alleged offences:
 - Mood stabilizer: Mr. Spencer's divalproex was reduced from a total of 1500 milligrams to 750 milligrams per day in March 2021. Although it was increased back to 1500 milligrams on May 27, 2021, this would not have afforded enough time for a clinical response before June 3, 2021.

- Antipsychotic: Mr. Spencer's injectable antipsychotic medication was changed from paliperidone to aripiprazole in January 2021. This warrants some discussion, given aripiprazole's specific pharmacodynamic properties. For nearly three decades, between 1980 and 2009, Mr. Spencer had been treated with first-generation antipsychotic agents, which are potent dopamine-2 (D2) receptor antagonists (i.e. medications that block a type of dopamine receptor in the brain called 'D2' receptors). Paliperidone also provides significant antagonism at the D2 receptor. Chronic use of D2 receptor antagonists can lead to changes in dopaminergic neurons in the brain, including upregulation of D2 receptors. Aripiprazole is a novel antipsychotic with pharmacodynamic properties different than all the other antipsychotics Mr. Spencer had been treated with. It functions as a "partial agonist" at the D2 receptor and thus has a partial stimulatory effect on D2 receptors. In patients with a lengthy history of treatment with D2 antagonists, aripiprazole has the potential to paradoxically exacerbate psychotic illnesses. This phenomenon in the literature is sometimes referred to as "dopamine supersensitivity psychosis." Mr. Spencer was initiated on aripiprazole in January of 2021. In my opinion, there was likely a delay of this dopamine supersensitivity effect for several months as Mr. Spencer's prior antipsychotic, paliperidone, was cleared (injectable antipsychotics typically take several months to clear from the body). Around the time of June 3, 2021, Mr. Spencer would have approached maximum steady-state concentrations of aripiprazole and the D2-blocking properties of paliperidone would have been largely eliminated.
- [99] And although Mr. Spencer had no memory of the events, Dr. Lacroix noted a number of objective signs of mental impairment in the time period both before and after the offence in the materials he reviewed. They were outlined as:
 - a) Mr. Spencer's treatment team observed changes in his mental state in the latter half of May 2021. For example, during a shopping trip with an outreach worker, Mr. Spencer was noted to be grandiose and made remarks about Dr. Hodelet having her head cut off and "women being whores". His case manager, Natalie Mark, noted that Mr. Spencer was worried that his landlord was stealing things from him. Dr. Hodelet assessed Mr. Spencer as being "buoyant" on May 27, 2021. When seen by Ms. Mark a few days later, his mood was noted to be further elevated.
 - b) In the week prior to the offences, co-tenants heard profane yelling, believed to be from Mr. Spencer's suite. Although Mr. Crews testified that another man in the building named "Gary" was known to scream and yell, several of the witnesses specifically attributed the yelling to Mr. Spencer. For example, Ms. Jackson witnessed Mr. Spencer yelling in the parking lot at night. Ms. Itterman, who lived next to Mr. Spencer, testified that the repeated yelling of "foul language" arose from Mr. Spencer's bedroom window.

- c) In the present assessment, Mr. Spencer reported that neighbours were threatening to murder him, worsening in the weeks prior to the alleged offences. He feared they would follow through with these threats. This is consistent with Mr. Spencer's report to Dr. Saini that neighbours were threatening to murder him.
- d) In the present assessment, Mr. Spencer said he suspected the building manager, Mr. Crews, of stealing his artwork in the time leading up to the offences. This is consistent with themes of prior episodes of deterioration.
- e) Mr. Spencer described sexualized thought content, indicative of deterioration of his mental state around the material time, in his description of the nurse providing him with his injection at the clinic. He described the nurse as attempting to induce him to grope her. This is reminiscent of the sexual assault incidents in 2015.
- f) Mr. Spencer's mental state remained departed from baseline for an extended period of time after his return to FPH in June 2021. As detailed in section X (ii) of this report. Mr. Spencer was regularly described as hostile, threatening, and paranoid over an approximately 18-month period. It has only been since early 2023, roughly six months after the paliperidone was re-started, that Mr. Spencer's presentation has improved.

In my opinion, Mr. Spencer's behaviour at the time of the alleged offences - on its own - is direct evidence of his disturbed mental state.

[100] The objective indicia, as well as Mr. Spencer's abnormal reaction to the situation he found himself in--inside a bedroom with an active fire burning beside him, resisting offers of assistance, as noted by the fireman, Mr. Meyer, and Cst. Lafleur--coalesce to confirm Mr. Spencer's very disturbed mental state.

[101] Dr. Lacroix concluded that the dominant cause of Mr. Spencer's mental dysfunction at the time of the offence was his underlying schizoaffective disorder, bipolar type. Dr. Lacroix concluded that Mr. Spencer was suffering from a mental disorder at the time of the offence, noting:

In summary, in my opinion, at the time of the alleged offences of June 3, 2021, Mr. Spencer was suffering from an acute exacerbation of Schizoaffective Disorder, Bipolar Type. The cause of this exacerbation was multifactorial, including stress, recent medication changes, and his resumed use of cannabis. His symptoms included auditory hallucinations and persecutory delusions about his neighbours, including the belief that they would murder him.

[102] Insofar as the two routes to NCRMD are concerned, on the first branch, the ability to appreciate the nature and quality of his actions, Dr. Lacroix opined:

In summary, despite experiencing an exacerbation of his underlying Schizoaffective Disorder, Bipolar type at the material time, in my opinion, Mr. Spencer was not incapable of appreciating the nature and quality of his actions with respect to both charges on the indictment.

[103] On the second branch of the s. 16 test, whether Mr. Spencer had the ability to know the wrongfulness of his actions, Dr. Lacroix concluded and opined that Mr. Spencer was incapable of this. Dr. Lacroix's analysis and opinion are worth reiterating:

iii. Ability to Know Wrongfulness of Actions

In addressing this component of s. 16(1), I am referring to Mr. Spencer's ability to know the moral wrongfulness of his actions at the material time.

Mr. Spencer's pattern of aggressive behaviour over the years, including threats, physical assaults (including with weapons), and sexual offending, has been directly linked with exacerbations of his underlying psychotic illness. There is also a clear pattern of Mr. Spencer incorporating neighbours and community members into his persecutory delusional beliefs during periods of acute illness.

As mentioned earlier, numerous factors coalesced in causing Mr. Spencer to deteriorate in the time leading up to the alleged offences. This included a reduction in his divalproex, a change of his antipsychotic medication from paliperidone to aripiprazole, his progressively worsening sleep, and his use of cannabis. Fearing a return to FPH if he disclosed his paranoid concerns to his treatment team, Mr. Spencer did not inform clinicians of the perceived threats from his neighbours. This is consistent with his past admissions of not disclosing symptoms to his treatment team.

In the weeks leading up to June 3, 2021, Mr. Spencer's perceived reality was dominated by intensifying threats of being murdered by tenants of his apartment complex. He kept these fears hidden from his treatment team, assuming he would be labeled as delusional and be returned to the Forensic Psychiatric Hospital. Compounded his continued use of cannabis, poor sleep, and stress about his upcoming Review Board hearing, these threats became overwhelming and deprived Mr. Spencer of the ability to make rational decisions about how to proceed.

Incapable of rationally assessing his environment or the threats posed within it, it is my opinion that Mr. Spencer's behaviour on June 3, 2021 can most understandably be seen as a series of desperate and psychotically driven steps to kill himself and avoid succumbing to the threats of his neighbours. It is likely that the attempts of first responders to remove Mr. Spencer from his unit reinforced the delusional belief that he was under attack from those in the building.

Ultimately, as a result of the above, it is my opinion that Mr. Spencer was unable to rationally contemplate the wrongfulness of his actions when he ignited and reignited the fire and when he physically resisted officers.

In summary, at the time of the alleged offences of June 3, 2021, as a result of worsening psychotic symptoms of his underlying Schizoaffective Disorder, Bipolar Type, it is my opinion that Mr. Spencer was incapable of knowing the wrongfulness of his actions with respect to both charges on the indictment.

- [104] As the Crown noted in its closing submissions, the crux of Dr. Lacroix's opinion was that, at the time of the offence, Mr. Spencer was suffering from an acute exacerbation of schizoaffective disorder, bipolar type. Mr. Spencer's mental illness is chronic and, while treatable, it is not curable. The cause of this exacerbation was multifactorial, including stress, his resumed use of cannabis, and, most importantly, the impact of changes in his medication.
- [105] Mr. Spencer's symptoms included auditory hallucinations and persecutory delusions about his neighbours, including the belief they would murder him. At the time of the fire, Dr. Lacroix opined that Mr. Spencer was in an acutely psychotic state, driven by persecutory delusions that were not grounded in reality. In short, Dr. Lacroix's opinion was that Mr. Spencer was unable to rationally contemplate the wrongfulness of his actions when he ignited and reignited the fire and when he physically resisted the officers. Dr. Lacroix's opinion was accepted by the Crown, and I see no reason to discount or reject his opinion. It is overwhelmingly substantiated in the evidence. As I noted at the outset of these reasons, Dr. Lacroix's assessment report and analysis are meticulous and comprehensive.
- [106] I am satisfied that the defence has met its burden under s. 16 of the Code and established the second branch of the s. 16 test. Having considered the evidence, the totality of the circumstances and the submissions of counsel, I find Mr. Spencer not criminally responsible for the offence of arson on account of a mental disorder which rendered him incapable of knowing that his actions at the time of the offence were wrong. Accordingly, a verdict of NCRMD should be recorded on the indictment and record of proceedings.
- [107] So, I am going to move to just deferring the matter of disposition to the Review Board and ordering the transcript. So that will be the last part of my reasons, here, counsel. Pursuant to ss. 672.45(1) and 672.47(1) of the Code, I am referring this matter to the Review Board for disposition within 45 days of this verdict.
- [108] Pursuant to s. 672.46(2) of the Code, I order that Mr. Spencer be confined to the FPH pending his disposition hearing.
- [109] Pursuant to s. 672.45(1.1) of the Code, I order that a transcript of these proceedings be transcribed and sent to the Review Board by the registry. Additionally, I order that these reasons for judgment be transcribed on an expedited basis. Once edited for grammar and style, signed and filed with the registry, they too are to be forwarded to the Review Board by the registry.
- [110] Finally, a copy of all the exhibits, including Exhibits 18 and 19, the reports of Dr. Saini and Dr. Lacroix, shall be sent to the Review Board by the registry.
- [111] Is there anything else from the Crown's perspective?
- [112] CNSL M. KAA: No, Justice. I think you've -- you've covered it all. Thank you.
- [113] THE COURT: Thank you. Anything further from your perspective, Mr. Selamaj?

[114] CNSL N. SELAMAJ: No. Thank you, Justice.

[115] THE COURT: All right. Well, let me just say, thank you very much to counsel for their professionalism and compassion in how this case has been conducted. The Court is indebted to you both for your efforts and conduct of this case.

[116] Mr. Spencer, we are concluded and so I am going to say good luck to you and sign off.

[117] Mr. Selamaj, I do not know whether he is going to want to speak to you, but we are finished now. So, thank you very much and good luck, Mr. Spencer.

"Ker J."

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