

# In the Provincial Court of Alberta

**Citation: R v Nault, 2020 ABPC 27**

**Date:** 20200203  
**Docket:** 150830404P1  
**Registry:** Calgary

Between:

**Her Majesty the Queen**

- and -

**Kevin Joseph Nault**

## **Decision of the Honourable Judge S.E. Pepper**

### **BACKGROUND**

[1] Kevin Joseph Nault is charged with offences pursuant to ss. 433(a), 434, 86(2), 92(1), and 2 counts of 445.1(1)(a) of the *Criminal Code* arising from an incident on June 23, 2015 at 6313 24<sup>th</sup> Avenue N.E., Calgary (Pineridge duplex). A single count of 145(3), count 5 on the information, was stayed at the beginning of the trial.

[2] On June 23, 2015, Mr. Nault's long-time partner, Sheena McMillan, called 911 to report a fire at the Pineridge duplex she shared with Mr. Nault. Ms. McMillan had been living with Mr. Nault at the duplex for several years until she left him the week prior. The fire department arrived soon thereafter, by which time the majority of the fire had already self-extinguished. The firefighters removed Mr. Nault and two dogs from the home. Mr. Nault had serious burns to his legs and the dogs were suffering from smoke inhalation. The unit adjoining the duplex was occupied by a family.

[3] The Crown alleges that Mr. Nault set fire to his half of the duplex causing damage to the home and endangering the residents in the other half of the duplex as well as injury to his two dogs. The Crown also alleges that Mr. Nault had an improperly stored firearm in his possession at the time of the incident with no valid firearm's license.

[4] Mr. Nault testified in the trial. He denied intentionally starting the fires and alleged that Ms. McMillan started the fires in an effort to either kill or injure him.

[5] The trial started on October 21, 2019 and continued for 5 days concluding on October 25, 2019. During the course of the trial there was a *voir dire* to determine the admissibility of a 911 audio recording. The 911 call was made by Sheena McMillan on June 23, 2015. On October 24,

2019, I ruled the 911 call admissible under the traditional *res gestae* exception to hearsay. However, Mr. Nault argues that this call should not be considered in this trial because it is a prior consistent statement and should be given no weight.

### **ISSUES:**

[6] This case is largely an assessment of the credibility of the two key witnesses; Sheena McMillan and Kevin Nault. The issues to be resolved are:

1. Who started the fires?
2. What uses can be made of the 911 call?

### **EVIDENCE:**

#### **Sheena McMillan**

[7] Sheena McMillan testified that she was in a long-term romantic relationship with the accused, Mr. Nault. They first met in 2000 when they dated on and off and then resumed their relationship in 2010. They moved into the Pineridge duplex in 2012. They have a child together, Scarlett who is 7 years old. Ms. McMillan has two other children, Isabel (15) and Emery (14). Ms. McMillan testified that they all lived in the Pineridge duplex until June of 2015 although there were periods where she and the kids would move out. They shared the home with two dogs, Schon and Taz.

[8] The Pineridge home was a duplex which had a shared wall with another unit. It had a main floor and a basement. Ms. McMillan and Mr. Nault rented the Pineridge duplex and they were both named tenants on the lease. The couple on the other side of the unit had a child and a baby and they rented their basement out to another person.

[9] Ms. McMillan testified that she ended the relationship with Mr. Nault on June 17, the Wednesday before the fire. She explained that she had been planning on leaving Mr. Nault at the end of June but with the sudden passing of her mother, her leave date was moved up. So, on that Wednesday, Ms. McMillan packed up her children and they moved to her mother's home in Vulcan.

[10] Ms. McMillan next saw Mr. Nault on Friday, June 19, 2015. She attended at the Pineridge duplex to speak with Mr. Nault. She wanted to tell him about her mother passing away and to let him know that she would be back for some personal items. Ms. McMillan said the tone of the conversation was "nice and respectful" [Trial Transcript (TT) 10/21, p. 11; line 10] and that she was there for about half an hour. Ms. McMillan said that Mr. Nault seemed "sad because the relationship ended but otherwise he was himself" [TT 10/21, p. 11; lines 14-15].

[11] Ms. McMillan next saw Mr. Nault on the day of the fire, Tuesday June 23, 2015.

[12] She testified that she arrived at the Pineridge duplex between 4:30 and 4:45. p.m. She had already told Mr. Nault that she was there to retrieve some photo albums to put together a slide show for her mother's funeral. The photos were in the basement. She testified that:

When Mr. Nault opened the door he did not seem like himself, he was loopy, if I can use that term. Kind of holding himself against the wall to kinda keep himself up. [TT 10/21, p. 11; lines 35-36] ....

He did slur some words here and there, however...he was still having full conversations, making full sentences, that kind of thing” [TT 10/21, p. 13; lines 31-32].

[13] The couple stepped into a little front porch where she had a cigarette and he had a cigar. He wanted to talk about the relationship but she indicated that she did not want to have that discussion. Ms. McMillan said that Mr. Nault told her that he had taken some pills and some liquor “in hopes that he wouldn’t wake up that day” [TT 10/21, p. 12; lines 3-4]. She encouraged him to think about their daughter Scarlett and reminded him that he had reasons to live. Ms. McMillan recalled that he said he took 27 pills and drank a bottle of liquor [TT 10/21, p. 14; lines 33-34].

[14] Ms. McMillan testified that after their smoke, they went in the house and on the way to the basement, she observed some photographs and an empty bottle of liquor on the deep freezer. Mr. Nault appeared upset by the photos and he wanted to know why she had these photos; “He was – you could tell that he was getting mad and upset about these pictures” [TT 10/21, p. 15; lines 25-26]. While Ms. McMillan could not remember all of the photos that day, she did recall that one was a picture of her ex-husband and herself on their wedding day. The photos were not on the deep freezer after the fire.

[15] Ms. McMillan stated that before they went to the basement, they went back outside for a second smoke. She testified that at that time, “Mr. Nault was trying to use his matches to light his cigar and it wasn’t working and so I handed him my lighter and he used my lighter to light his cigar” [TT 10/21; p. 22, lines 15-17]. She did not get the lighter back from Mr. Nault. That lighter was found near Mr. Nault in his downstairs bedroom and can be seen in photos 40-42 in exhibit 4.

### **Basement**

[16] After the second cigarette, they went back inside and Mr. Nault followed Ms. McMillan to the basement.

[17] The basement of the home was unfinished but Mr. Nault had built a bedroom in the back which had a door. There were also three large shelving units, the first two of which contained boxes of personal items belonging to Ms. McMillan and her children. Ms. McMillan testified that she first observed that her personal boxes had been removed from the shelf and her items had been dumped on the floor. These boxes contained many photographs that she was there to collect. She said that Mr. Nault asked her if she was angry about the mess and she said no as she did not want to start a fight. She found an empty box and began picking up pictures and putting them in the box.

[18] Ms. McMillan testified that “when I was picking up the pictures – and I only got maybe five or six pictures into the box at that time, something just felt off and I turned around and Mr. Nault was then still standing behind me but with a jerry can in his hand” [TT 10/21, p. 19; lines 16-18]. She said “what are you doing?” and he replied “What do you think?” He then

“proceeded to start pouring it on the floor.” [TT 10/21, p. 20; lines 23-24]. Mr. Nault was standing closer to the bedroom when this happened.

[19] Ms. McMillan said that “when I saw him pouring out what I assumed was gasoline I ran and I ran fast” [TT 10/21, p. 24; line 11]. She ran to her car. She testified that she remembers being at the car “and I had my phone on me and I remember calling 911. And when I looked up towards the front of the house Mr. Nault was standing at the front door with what I call one of his looks, which is not a good look but it’s a look, where he then shut the door and that was the last time I saw him. I then jumped in my car and moved it across the street” [TT 10/21, p. 24; lines 27-31].

[20] Ms. McMillan testified that she could not recall when she dialed 911 – whether it was while she was going down the front steps or when she got to the car, but she remembers standing by the car while on the call. She said that from the time she started running to the time she made the call would have been around 30 seconds.

[21] Ms. McMillan said that while initially she did not see any smoke, she did see black smoke while on the phone to 911.

[22] She described the can as a regular jerry can with a yellow spout.

### **Dogs**

[23] Ms. McMillan testified that when she arrived at the house that day, the dogs came running to the front door but then Mr. Nault told them to go lay down and she didn’t see them after that time.

### **Firearms**

[24] Ms. McMillan testified that she did not own any firearms. She testified that Mr. Nault did own firearms; mostly hunting rifles. She said that he kept his firearms at Terry and Eileen McInnis’s house so that he could borrow them at any time.

[25] Ms. McMillan identified the firearm found in Mr. Nault’s basement room and photographed in photograph 44 and 45 in exhibit 4 as belonging to Mr. Nault. She was able to identify it due to its distinctive strap.

[26] Ms. McMillan said that she was unaware of whether there were any guns in the residence on this day and she denied bringing any guns to the home herself.

### **Damage**

[27] Ms. McMillan testified that the fire caused at least \$10,000 worth of damage to the residence.

### **Cross Examination**

[28] In cross examination, Ms. McMillan was confronted with the fact that she did not call an ambulance upon learning about Mr. Nault’s consumption of alcohol and pills.

Q. I'm gonna suggest to you the reason you didn't call an ambulance is because you weren't – you didn't actually care what happened with Mr. Nault, isn't that right?

A. I did care what happened to Mr. Nault. I cared then, I cared before, and I cared after. [TT 10/21, p. 69; lines 34-36].

[29] Mr. Nault's counsel put his version of events to Ms. McMillan and she denied all allegations [TT 10/21, pp. 84-86]:

Q. Okay. You then both went outside to have a smoke?

A Correct.

Q I'm gonna suggest to you that after you guys had a smoke Mr. Nault actually went back to the couch and laid down and you were in the kitchen for a while?

A That is -- I disagree. We were both in the kitchen. He was pointing out the pictures to me on the on the deepfreeze.

Q I'm gonna suggest to you that Mr. Nault actually fell asleep on the couch?

A No, he was wide awake. He was there in the kitchen. He followed me down the stairs. He was down in the basement with the jerry can in his hand. He was there. He was not sleeping.

Q I'm gonna suggest to you that after a little while you shook Mr. Nault awake from the couch?

A No, he was awake the entire time. Again, we were out front having a smoke, in by the kitchen, down in the basement. He was there.

Q You asked Mr. Nault to come downstairs with you and he followed you downstairs?

A I went downstairs, he followed behind me.

Q I'm gonna suggest to you that as he came downstairs you told him there's a shotgun in the chair over there?

A I strongly disagree. I never knew that there was a shotgun in the house. I didn't know it was in the corner, I didn't know it was there period.

Q I'm gonna suggest to you at that point in time you took him by the shoulders and you put a lighter in his hand and a cigarette in the other?

A. First of all, he doesn't smoke -- he only smoke cigars. He doesn't smoke cigarettes. I don't have cigars. Never like them, never had them, didn't have them on me that day. I had cigarettes. And, no, that's not how it happened. Again, he - - I was standing over on my side getting my pictures. He was behind me.

Q I'm gonna suggest that while you gave him a lighter you had another lighter still on you?

A I did not have another lighter on me that day.

Q I'm gonna suggest that then you left from the basement and you set several other fires around the home?

A I did not.

Q I'm gonna suggest that you then exited the house through the front door, is that right?

A That is correct, I exited the front of the house.

....

Q I'm gonna suggest to you that when you left the house you shut and locked the door behind you?

A No, I did not.

Q And then you called 911?

A No. I ran up the stairs and when I got to the car Mr. Nault was standing at the door and I was on the phone with 911 at that time.

Q I'm going to suggest to you that you never saw Mr. Nault at the front door?

A I did see Mr. Nault at the front door.

Q I'm gonna suggest you never saw Mr. Nault with the jerry can?

A I did see Mr. Nault with the jerry can.

Q And I'm gonna suggest to you that you're the one who poured the gasoline around the house while Mr. Nault was asleep on the couch?

A No. I've never poured gasoline around anywhere in that house ever.

### **Expert Arson Investigator: Detective Tyler Sloane**

[30] The Crown called an expert arson investigator, Detective Tyler Sloane. Detective Sloane testified that there were 7 separate fires set in the home. He described their locations and marked them as fires 1 through 7 in exhibit 2. Fires 1 through 4 were on the main floor and fires 5-7 were in the basement. He characterized all the fires as minor except fire number 4 which was in the upstairs door way of the bedrooms as depicted in exhibit 2.

[31] Detective Sloane was clear that each fire was set separately and intentionally. He was of the view that most of the fires burned themselves out in a couple of minutes. Fire number four would have burned the longest at between 5 and 10 minutes.

[32] All of the fires were very likely set with an accelerant consistent with gasoline. Detective Sloane testified that the door to the bedroom downstairs where Mr. Nault was found was probably more closed than open.

[33] Detective Sloane was not able to determine the order in which the fires were lit. He did testify that at each fire site, except for fire 7 where Mr. Nault was located, there was no obvious ignition source found. The only lighter in the house that was discovered was near fire 7 and Mr. Nault causing Detective Sloane to remark that this lighter "caught my attention as a possible ignition source" [TT 10/22, p. 26; lines 7-11].

[34] Detective Sloan testified that it would not take a long time to light 7 fires; “as quickly as one could walk from one to the next creating that spark of flame that is – take a minute, two minutes kind of things on that – on the quick end” [TT 10/23, p. 35; lines 2-5].

### **Firefighter First Responders**

[35] Firefighters Girvan Smith and Darcy Peters attended the scene and pulled Mr. Nault and his dogs out of the house. Their evidence was relatively consistent. They testified that they discovered the dogs in an upstairs bedroom first. The dogs were in significant distress. They then went down to the basement where they announced themselves as Calgary Firefighters at least twice. They heard a voice telling them to go away. That individual, Mr. Nault, then began throwing things at them or in their general direction. They were about to retreat, when Mr. Nault finally asked for help. They then took him and the dogs out of the residence.

[36] They also described an encounter with Ms. McMillan when they got to the residence. She gave them a key to the front door and either she or they unlocked the door.

[37] Darcy Peters recalled that Ms. McMillan presented as “very panicky. She was distraught, very out of sorts” [TT 10/22, p. 53; lines 1-2].

[38] They testified that there were no visible flames when they arrived but there was very heavy smoke in the residence. There was one spot fire downstairs that they put out and that was fire #6. Windows of the home were also being broken to allow ventilation of the smoke.

[39] They describe a jerry can just inside the front door of the residence. Mr. Smith said the jerry can was red [TT 10/22, p. 21; line 35, and p. 22; lines 12-13]. Mr. Peters said that the jerry can was red and burnt [TT 10/22, p. 54; lines 34-35].

### **Kevin Nault**

[40] Mr. Nault testified that the whole event began a few days prior to the fire when Ms. McMillan signaled to him that she was ending the relationship. He was working at Sobys part time as a meat cutter and Ms. McMillan dropped off his lunch at the front of the store. She also left him a bus pass. For him, the transit ticket “meant that Sheena had left me and taken the vehicle and the bus ticket meant that I had to find my own way home” [TT 10/24, p. 9; lines 25-26].

[41] Mr. Nault immediately quit his job and took a taxi home. He could not pay the taxi driver so he left his debit card with the driver along with his PIN number. He arrived home to find Ms. McMillan and Bella loading up the SUV with clothes and other items. They then left.

[42] For the next couple of days, Mr. Nault described spending his time watching movies and playing video games. He testified that he was sad and a little depressed and waiting for Ms. McMillan to come back and explain why she had left.

[43] A few days before the fire, Ms. McMillan came over and she informed him that her mother had died. They talked for about half an hour. The next day, Mr. Nault said he went and bought a bottle of Royal Reserve. He spent the weekend drinking and lamenting his life. He realized he could not afford the rent and would need to move but had no money.

[44] On Saturday, he went downstairs and “created a very large mess in the middle of the aisle” by dumping some of Ms. McMillan’s boxes out on the basement floor [TT 10/24, p. 17; lines 8-9].

[45] By Tuesday, June 23<sup>rd</sup>, Mr. Nault was considering suicide. He began to put some items in boxes; keepsakes for his children and his mother. He overfed the dogs and locked them in the bedroom. He wrote several suicide notes leaving one on the deep freezer (although no suicide note was found in the home). He took a bottle of sleeping pills from a prescription he had; 27 in total. He then lay down on the couch and fell asleep.

[46] Mr. Nault woke up when Ms. McMillan came banging on the door. He wanted to discuss the relationship but she did not want to have such a conversation. They sat on the front step and had a cigarette. He told her he had taken a bunch of pills to commit suicide. He says he showed her the suicide note. She said that she was there to pick up some pictures for her mother’s funeral.

[47] At this point the evidence given by Mr. Nault diverges significantly from that given by Ms. McMillan.

[48] Mr. Nault testified that Ms. McMillan went downstairs by herself and he went back to the couch and fell asleep. He testified that she shook him awake at one point and when he looked up “she crooked her finger like, you know, come here and she said come here” [TT 10/24, p. 16; lines 17-18]. He followed her downstairs. He testified to the following version of events [TT 10/24, pp. 17-18]:

I asked her if she was mad, she said no, and she just kept walking to the bedroom. So because I was following, I just kept following. So I kept going, got past, just past the shelves and I had some boxes that were organized and they were dumped all over the ground. So I didn't quite understand because why they would be like that. So I was still following Sheena to the bedroom and what I was thinking to ask her, you know, like what happened to my boxes. Sheena was standing inside the bedroom and I was looking at her proceeding to the bedroom and I noticed there was a box of shotgun shells on the movie shelf and they were open and they shouldn't have been there. So I was going to ask Sheena why are those shells there. I was in the bedroom at that point. I had my back to most of the bedroom, like the direction of the couch. I was facing Sheena. She had her back to the closet wall, if you want to call it that, where the movies and the video games were stored, and I was -- was going to ask her about those shelves and **she says, There's a shotgun on the chair -- or there's a shotgun over there.** And I went to turn and look because that gun shouldn't have been in there.

And what she did is she placed her hands on my shoulder. I was turning to my left to look, and she straightened me up again and she gave me a cigarette and her lighter, but she had given it in the wrong hands because I hold my cigars in my left hand and light with my right but she had put the cigarette in my right and the lighter in my left. And because my fingers weren't working, I was trying to help her put the cigarette in my hand but we were -- we weren't coordinated. So I stopped, she put it in, and she folded my fingers and my thumb over the cigarette and then she said, **You know what to do.**



At the time I thought well, of course I know what to do, I know how to light a cigarette, but I had a lot of time to think and I think **she was implying to use the gun on myself**. So I went to light it but again my coordination wasn't there so I had to put the cigarette in my mouth and I had to put my left hand on my right hand to line up the flame with the cigarette. But when I flipped -- **well, she had run away at that point, right**. I assumed she was going to the car to get more cigarettes because I had taken her last one. Normally we don't smoke in the house but I thought well, this is an exception, right.

So when I went to light that cigarette it didn't -- the flame didn't come. It was -- it was a spark and everything was in slow motion at that point and that spark went up and it come down and it got to about knee height and the area I was standing in caught fire....

So I bent down to put the flames out because my legs were on fire and I singed a little bit on my eyebrows and my hair and as I was patting it out my hands started to hurt from the flames. So I stood up and I leaned to my right because my right leg was the worst, and I tried to pat it out again but when I leaned down the heat would dry my eye out. I breathed in and it just -- it took all the oxygen out of my lungs so I was leaning and I was trying to put the flames out and they wouldn't go out.

So I stood up and I thought, well, okay, you know, I had taken the pills, I'm on fire, so I just stood there. I was crying.

[49] Mr. Nault then described hearing the dogs come running down the stairs. They were yelping. He surmised that as he had locked them up, someone else had let them out. He also thought that perhaps they had been thrown or kicked down the stairs as he heard a thump. He testified that "because the room was on fire I shut the bedroom door to protect them" [TT 10/24, p. 20; lines 35-41].

[50] He heard some smashing on the other side of the door and he assumed it was Sheena and possibly some friends coming there to do him harm. He testified that "I didn't know what the next step was, what they were planning. I thought maybe they'd come in, smash some more stuff -- maybe they're going to hurt me. So I was laying by the video games. So I grabbed the video games off the -- and just I'm throwing them at the door. I was trying to make noise and I was yelling at them to go away" [TT 10/24 p. 21; lines 17-22].

[51] In reality, it was not Ms. McMillan and her friends but the firefighters who were, at that time, in the basement trying to help Mr. Nault. When one of the firefighters smashed the window of the basement bedroom, Mr. Nault recognized that person as a first responder and asked for help. He was then removed from the residence suffering serious injuries.

## **Firearm**

[52] Mr. Nault agreed that the firearm found in his downstairs bedroom was his firearm although he said he bought the gun for Ms. McMillan. He agreed that that firearm was not properly stored with a trigger lock or in a cabinet. He also agreed that he did not have a firearm's license at the time and that all of his 12 firearms were registered to his friend Adam

and then moved to his friend Terry's house. Mr. Nault admitted that the firearms were with Terry so that he could use them occasionally.

### Cross Examination

[53] In cross examination, Mr. Nault admitted that the 27 sleeping pills he took would have affected his memory of events. He also agreed that he had never before seen a spark come off of a lighter and descend to knee height.

### 911 Call

[54] The Crown also led evidence of the call made by Ms. McMillan to 911.

[55] There is no certified transcript of the call and what follows is my transcription of what I hear on the call. In a review of the audio you can hear Ms. McMillan speaking quickly and breathlessly. The call is placed to 911 at 4:22 p.m. It is approximately 7 minutes long and proceeds in the following manner;

**Operator:** 991 for what city?  
**McMillan:** Hi, my boyfriend is going to set the house on fire.  
**Operator:** Okay, do you need the Police then?  
**McMillan:** Yes please.  
**Operator:** Stay on the line.  
**McMillan:** [States address].  
**Operator:** Okay ma'am, we are going to put you through to Police. Stay on the line okay?  
**Dispatch:** Calgary Police, the nature of the emergency? Hello?  
**McMillan:** Hello, I need umm, Police sir. Ambulance – err – He's gonna set the house on fire.  
**Dispatch:** What's your address?  
**McMillan:** He's got the gasoline and he is pouring it everywhere.. (0:30)  
**Dispatch:** What's your address?  
**McMillan:** I live at –we are at [address].  
**Dispatch:** Say that one time more for me. Say your address.  
**McMillan:** [Address].  
**Dispatch:** What's your phone number? What's your phone number ma'am?  
**McMillan:** [Audio appears to cut out].  
**Dispatch:** What's your last name?  
**McMillan:** McMillan. M-C-M-I-L-L-A-N.  
**Dispatch:** First name?

**McMillan:** Sheena. I also go by Flewelling. F-L-E-W-E-L-L-I-N-G.

**Dispatch:** Are there any weapons involved or mentioned? (1:05)

**McMillan:** Not that I know of.

**Dispatch:** Right now are you, or anyone else, in immediate danger?

**McMillan:** Since I [indiscernible] I'm outside. I ran out...  
Oh my God, it's on fire – It's on fire.  
He did it – He set it on fire.

**Dispatch:** Can you listen to me ma'am?

**McMillan:** Oh my God.

**Dispatch:** Is this your husband or your boyfriend? [Asks four times.]

**McMillan:** Sorry?

**Dispatch:** Is it your husband or your boyfriend? Who is this?

**McMillan:** Boyfriend. Technically ex-boyfriend, I left him last week and I just came back for some stuff, cause my mom passed away – so I came to collect pictures and stuff – The dogs are in there – I came and he was just out of it he took a whole bunch of pills and he has been drinking.  
Oh my God, he set it on fire.

**Police:** CPS – We're on the way. We are holding back though.

**Dispatch:** Any violence?

**McMillan:** He set the house on fire.

**Dispatch:** Ma'am.

**McMillan:** I'm okay.

**Dispatch:** Has there been any violence?

**McMillan:** Yes there has been in the past.

**Dispatch:** Has there been today?

**McMillan:** Not today.

**Dispatch:** Okay.

**McMillan:** Not today.

**Dispatch:** Where is he right now?

**McMillan:** He's in the house.

**Dispatch:** So he set the house on fire and he is inside of it?

**McMillan:** I just ran out and – and I had my phone – and I called you guys.

**Operator:** Did you say that he is in the house?

**McMillan:** Yes, he's in the house.

**Operator:** Okay.

**Dispatch:** Okay, what is his name?

**McMillan:** Kevin. Nault. N-A-U-L-T.

**Dispatch:** How old is he?

**McMillan:** 43.

**Dispatch:** How tall?

**McMillan:** Uhh...

**Dispatch:** Do the best you can.

**McMillan:** Just under six feet. I'm 5'7", he's a little over, so like 5'9". (2:45)

**Dispatch:** So how old is he – He's 5'9", that's his height?

**McMillan:** Yeah, he's about 5'9".

**Dispatch:** That's how tall he is right? 5'9".

**McMillan:** Yes.

**Dispatch:** How old is he?

**McMillan:** He's 43.

**Dispatch:** Right. And his build? (2:52)

**McMillan:** Umm, 200 pounds.

**Dispatch:** What's he wearing today?

**McMillan:** Umm, jeans and a t-shirt.

**Dispatch:** Does he have a vehicle?

**McMillan:** No he does not. Uhh, and I have a – He's wearing a black vest as well.

**Dispatch:** Okay. And you and your kids are outside?

**McMillan:** My daughter is at school and my other daughter is at the day home, but I'm outside.

**Dispatch:** Okay well help is on the way okay?

**McMillan:** Okay thank you.

**Dispatch:** Alcohol or drugs involved? Alcohol or drugs involved?

**McMillan:** Sorry?

**Dispatch:** Alcohol or drugs involved?

**McMillan:** He said he took a whole bunch of pills and he drank a bottle of – rye or rum – or R and R or something. He's been talking about killing himself...

**Dispatch:** So he wanted to killing himself?

**McMillan:** Yes. Cause I left him. I took the kids and I left him. For the final time.

**Dispatch:** Are you safe where you are?

**McMillan:** Yes. I'm just outside – and – and I'm staying at my mom's cause she passed away [indiscernible]. [Crying] Oh God.

**Dispatch:** Okay. Are you safe where you are right now though?

**McMillan:** Yes. I'm outside. And some of the neighbours are out here with me as well.

**Dispatch:** So you're in front of the house so when the Police come they'll be able to see you?

**McMillan:** Yes.

**Operator:** We're well on the way here ma'am – Fires almost there. You're gonna hear them any sec now okay?

**Dispatch:** Be aware that the Police are called [maybe?].

**McMillan:** Yeah okay – we gotta go help our neighbours – she's got some children and babies. [Sound of running].

**Operator:** Are they in the duplex next door ma'am?  
It's a duplex CPS.

**Dispatch:** Is there children next door?

**McMillan:** Yes, yeah. We've got ... [indiscernible].  
[Neighbours can be heard saying, "put your shoes on" twice].  
[Sirens are heard]. (5:08)

**McMillan:** Okay, I see them. I see them.

**Dispatch:** Has anyone been injured that you know of? Sheena? Sheena? Can you hear me Sheena?

**McMillan:** Yes. Barely but yes.

**Dispatch:** Has anyone been injured?

**McMillan:** No. Not that I could tell. Not that I could tell.

**McMillan:** The Firefighter department is here.

**Dispatch:** Right, just stay on the line with me okay?

**Operator:** Have the other people made it out of the house ma'am?

**McMillan:** Uhh, at school and the day home.

**Operator:** Have the adjoining people made it out of the house?

**McMillan:** Hold on one second. I think they're going into the wrong house. Umm, there they go.

**Dispatch:** Is there flame?

**McMillan:** [Indiscernible, speaking to someone else]. (6:13).

**Dispatch:** Sheena.

**McMillan:** Hold on.

**Police:** CPS – My number for fire is 6218.

**Dispatch:** Got EMS too?

**Police:** EMS – 2766

**Dispatch:** You on 4752.

**Police:** 4752. It looks like we've gone in as far as fire is concerned. Just so you know, EMS will probably be holding back here.

**Dispatch:** Are you still there Sheena?

**McMillan:** [Speaking to someone else]. He poured gasoline all of the place – he started it. Shit (7:14).

**Firefighter:** [Muffled by mask] What?

**McMillan:** He poured gasoline down in the basement. (7:14).

**Firefighter:** Is someone in the home?

**McMillan:** Yes.

**Firefighter:** There is right now?

**McMillan:** Yes. Yes.

**Firefighter:** Okay. Engine 27, [Indiscernible] There is a lady in the front saying there is someone in the home right now.

**Radiochatter:** Okay copy, I've got that already.

**Firefighter:** Will he be in the basement?

**McMillan:** I don't know. That's where he started it. His name is Kevin.

**Firefighter:** Kevin?

**McMillan:** Yeah. [Panting, panicked]. (7:55).

**Dispatch:** Still there? [Pause].

**McMillan:** Okay. Are you still there?

**Dispatch:** Yeah I'm still here.

**McMillan:** Okay, they are just going into the house now.

**Dispatch:** Is the fire department there?

**McMillan:** Yeah. Yeah, they're going in now.

**Dispatch:** Okay. Can I get you to back away far from the house?

**McMillan:** Yeah, everybody is across the street.

**Dispatch:** Did you hear what I said Sheena?

**McMillan:** Yes, we are away from the house.

**Dispatch:** You're a long ways away from the house?

**McMillan:** Yes. We are across the street. [Sobbing].

**Dispatch:** What's that?

**McMillan:** We are across the street. And we are safe. Everybody is safe – out here.

**Dispatch:** Okay. You're doing an awesome job okay? I'm just gunna get you to keep me on the line here and make sure you guys are safe.

**McMillan:** Okay [sobbing].

**Dispatch:** They're gunna be there in a minute too.

**McMillan:** Okay [sobbing].

**Dispatch:** You let me know if anything changes here in the meantime okay?

**McMillan:** Oh God. [sobbing].

**Dispatch:** What's going on now?

**McMillan:** There is a Police officer here.

**Dispatch:** Okay, I'm gunna let you go okay?

**McMillan:** Okay.

## LEGAL ANALYSIS

### Prior Consistent Statements

#### The Rule

[56] Ms. McMillan's statements on the 911 audio recording are prior consistent statements because what she said on the witness stand is the same as what she said in the recording. Prior consistent statements are presumptively inadmissible because they are typically viewed as self-serving and lacking probative value (*R v Stirling*, 2008 SCC 10, at para. 5; *R v Evans*, [1993] 2 SCR 629 (SCC), at p. 643).

[57] Prior consistent statements are deemed to lack probative value because mere repetition does not enhance truthfulness (*R v Sylvain*, 2014 ABCA 153, at para. 82). As the Manitoba Court of Appeal put it in *R v L. (D.O.)*, 1991 CarswellMan 10, 13 WCB (2d) 412, at para. 116, "consistency is a quality just as agreeable to lies as to the truth."

[58] There are two important rules which apply to restrict the use that can be made of a prior consistent statement: (1) the prohibited inference; and (2) the rule against corroboration.

[59] The prohibited inference is that a witness is more likely to be telling the truth because she repeated the same thing more than once (*R v Khan*, 2017 ONCA 114, at para. 41; David Paciocco, “The ‘Perils and Potential’ of Prior Consistent Statements: Let’s Get it Right” (2013) 17:2 Can Crim L Rev 181, [herein after simply “Perils and Potential”], at p. 186).

[60] The rule against corroboration states that it is an error to treat the prior consistent statement as self-corroborating (*Khan*, at para 41; *R v Dinardo*, 2008 SCC 24, at para. 40; “Perils and Potential”, at p. 186). In order for a piece of evidence to be confirmatory or corroborative of another, the two pieces of evidence “require some root in independent sources” (*Sylvain*, at para. 85). Prior consistent statements cannot logically be corroborative because the evidence originates from the same source (“Perils and Potential”, at p. 186).

### Exceptions to the Rule

[61] Just as the presumptive rule against the admissibility of hearsay has multiple exceptions, the rule against prior consistent statements is also subject to numerous exceptions. Whereas hearsay is admissible when it “presents minimal dangers and its *exclusion*, rather than its admission, would impede accurate fact finding” (*R v Khelawon*, 2006 57, at para. 2, [emphasis in original]), prior consistent statements are admissible when “the purposes that underpin the general exclusionary rule would not be served by excluding the evidence” (*R v C(M)*, 2014 ONCA 611, at para. 60; *R v Gill*, 2018 BCCA 275, at para. 66). As always, relevance and materiality is the threshold requirement for a prior consistent statement to be admitted.

[62] Prior consistent statements are therefore subject to exceptions to the rule. When employing exceptions, it is crucial that the Court avoid the two common logical pitfalls: the impermissible reasoning that a statement repeated is more likely true, and the rule that corroborative evidence must have an independent source.

[63] In his article, “Perils and Potential” Justice Paciocco sets out the various instances where prior consistent statements are admissible and analyzes how this evidence can be used without offending the prohibited reasoning underlying the exclusionary rule.

[64] In “Perils and Potential” at p. 182, Justice Paciocco wrote that the exceptions to the rule against prior consistent statements *include*:

1. Prior consistent admissible hearsay;
2. Prior consistent statements as circumstantial evidence;
3. Pure narrative;
4. Narrative as circumstantial evidence;
5. Recent fabrication;
6. Prior consistent statements that provide context for admissible statements;
7. Exculpatory statements when found in possession of contraband;
8. Exculpatory statements made on arrest; and
9. Identification evidence.

[65] There is significant overlap in the above listed categories but they all are capable of avoiding the impermissible inferences. There are three exceptions from this list to the



presumptive inadmissibility of prior consistent statements which are applicable to this case. So long as these exceptions are not used to draw the inference that Ms. McMillan is telling the truth merely because she has repeated herself or that her testimony is corroborated by the prior statement, there are uses that can be made of the 911 recording under these exceptions.

### **Prior consistent admissible hearsay**

[66] The 911 audio recording has been admitted into evidence in the trial proper under the *res gestae* exception to the hearsay rule. A *res gestae*, or spontaneous statement is a traditional exception to the presumptive inadmissibility of hearsay.

[67] The Alberta Court of Appeal in *Sylvain*, considered the admissibility and use of a 911 call made by a complainant in a sexual assault case. The court found that the call was made while the complainant was under the pressure of a shocking event and the absence of an opportunity to concoct a story provided the 911 call with indicia of reliability. Although admitted for the truth of its contents under the *res gestae* exception, the Court went on to consider the use that could be made of the 911 call. The Court acknowledged the call's character as a prior consistent statement as the complainant testified in that case. The Court declined to consider fully whether a prior consistent statement which is also admitted for the truth of its contents under a *res gestae* exception becomes an exception to the rule against the admissibility of prior consistent statements. The Court did however make the following comments:

In this case, at a minimum, the 911 call had probative value beyond mere repetition. It was evidence of the sequence and timing of events and both the emotional state, and physical state, of the complainant at the time of the call (*Sylvain*, at para 43).

[68] As Justice Paciocco wrote, and the court in *Sylvain* agreed, it is the same indicia of reliability found in spontaneous statements which permits a court to use that statement, admitted as a prior consistent statement, to add weight to the subsequent in-court testimony (*Sylvain*, at para. 86; “Perils and Potential”, at p. 194). To be clear, it is not the words contained in the prior consistent statement that has weight—indeed Paciocco wrote that the “hearsay part” adds no weight—it is how and why the original statement was made which has probative value and therefore adds weight (“Perils and Potential”, p. 194).

[69] Ms. McMillan is clearly under great stress during the 911 call. Her voice is panicked and she expresses a tone of shock and concern. The call's nature as a spontaneous statement means that it can be trusted as reliable because Ms. McMillan had little opportunity to concoct her comments on the call. She is merely reacting to events as they are unfolding in real time. As a spontaneous utterance, the circumstances of the call therefore have significant indicia of reliability.

[70] The recording is evidence of Ms. McMillan's emotional state at the time of the incident, i.e. panic, shock and concern. As such it adds weight to her in-court testimony that she “did care what happened to Mr. Nault. [She] cared then, [she] cared before, and [she] cared after” (TT 01/21, p. 69; line 36).

[71] This is a factual claim made by Ms. McMillan in Court, under oath: she cared about Mr. Nault. Ms. McMillan also adamantly testified that she did not start the fires herself or pour the gasoline.

[72] The evidence in the 911 call that demonstrates her distress can be used to rebut the defence's theory that Ms. McMillan orchestrated the fire in an effort to kill Mr. Nault, or to encourage him to kill himself. Her distress and worry about Mr. Nault's safety on the call speaks against the defence's claim that she wished to do him harm.

[73] To be clear, it is not what she says on the call that gives rise to this rebuttal, but the inferences that can be drawn from her emotional character on the call.

### **Prior consistent statements as circumstantial evidence**

[74] The prior consistent statement as circumstantial evidence exception follows a similar line of reasoning and carries the same resultant use as the exception via the *res gestae* admission of hearsay.

[75] In "Perils and Potential" Justice Paciocco cites two cases in which the circumstantial evidence exception was properly used (at pp. 187 – 188). In both cases, the declarant's state of mind at the time of the prior consistent statement had been put at issue (*R v Edgar*, 2010 ONCA 529; and *R v Pattison*, 2011 BCSC 1594). In both cases, the court put no weight on *what* was said by the declarant in the prior consistent statement, but did put weight on *how* it was said.

[76] Again, a centrally relevant issue in this case is whether Ms. McMillan poured the gasoline throughout the house and handed Mr. Nault her lighter with the intention that he set the house and himself on fire.

[77] Ms. McMillan's apparent distress, as demonstrated in the 911 call, at the knowledge that Mr. Nault had set the house on fire while he was inside is a relevant circumstance to consider in deciding whether Ms. McMillan orchestrated the fires as alleged in the defence theory. Her concern on the call appears contrary to a desire for Mr. Nault to die in the fire and is available to rebut the defence theory.

### **Narrative as circumstantial evidence**

[78] The British Columbia Court of Appeal's decision in *Gill* is illustrative of how this exception may be used. The accused was charged with shooting a man at a wedding. He argued that the shooting was done in self-defence. Mr. Gill told the court that he had been set upon by the victim and his family before recovering the pistol from one of his attackers. He testified that he was stabbed between his thumb and index finger in the assault.

[79] In *Gill*, the Crown's theory was that the Accused's hand wound was caused by his skin being pinched by the hammer mechanism of the revolver when he fired it sometime after the fight. The Accused's niece testified that her uncle told her immediately after the shot was fired that he had been stabbed in the hand. This was a prior consistent statement from the Accused. At para. 64, the Court held that the statement was admissible under the narrative as circumstantial evidence exception:

...for the limited and permissible purpose of showing the fact and timing of the appellant's complaint that he had been stabbed, which evidence could assist the trier of fact in assessing the truthfulness of the appellant's in-court testimony: *R v Dinardo*, [2008] 1 SCR 788, 2008 SCC 24 (S.C.C.) at para. 37.

[80] Here the probative value of the statement lies in the inferences that can be drawn from the timing and circumstances of the statement, rather than the simple fact that the [witness] has said the same thing before.

[81] The audio recording of the 911 call is real-time evidence of the sequence and timing of events. Ms. McMillan testified that she made the 911 call immediately after having witnessed Mr. Nault pour gasoline in the house. At about one minute into the call, Ms. McMillan exclaims, “Oh my God, it’s on fire.” The firefighters arrive about 5 minutes into the call. The firefighters go into the home around the 7-minute mark. These time frames can be used to evaluate the evidence before the court.

### 1. What uses can be made of the 911 Call?

[82] In summary, the 911 call has already been admitted for the truth of its contents under the *res gestae* exception to hearsay. Its use, however, in the trial must also conform with the rules for the proper use of prior consistent statements. The 911 call cannot be used to corroborate the in-court testimony of Ms. McMillan. It is not corroborative because it comes from the witness herself and not from an independent source. Similarly, the 911 call does not offer confirmatory support for Ms. McMillan’s in-court evidence simply because she said the same thing on that prior occasion. The 911 call can however be used to add weight to the in-court testimony of Ms. McMillan for the limited purpose of evaluating her state of mind at the time of the events and for determining the timing and sequence of events.

[83] Having determined how the 911 call can be used, I turn now to an assessment of credibility and finding of facts.

### Credibility Assessment of Witnesses

[84] Both the Crown and defence agreed that the core issue in the trial is how the fires started and who started them. If Mr. Nault is found to have started the fires, most of the counts on the information would be proven. In order to answer this question, the credibility of the witnesses including Mr. Nault must be examined.

### Standard of Proof

[85] Pursuant to s. 11(d) of the *Canadian Charter of Rights and Freedoms*, an accused person is presumed to be innocent. The Crown has the burden of proving the guilt of the accused beyond a reasonable doubt. That burden never shifts away from the Crown.

[86] In the case of **R. v. Lifchus** [1997], 3 SCR 320, 1997 CarswellMan 392, at para 31, the SCC explains what is meant by the phrase “beyond a reasonable doubt.” A reasonable doubt is not a doubt based upon sympathy or prejudice. It is a doubt based on reason and on common sense and it is logically connected to the evidence or absence of evidence. A reasonable doubt is not, however, imaginary or frivolous in nature. In **R. v. Starr**, 2000 SCC 40, at para 242 the Supreme Court considered the meaning of reasonable doubt and concluded that beyond a reasonable doubt would lie much closer to absolute certainty than to a balance of probabilities. Proof beyond a reasonable doubt means that a trier of fact cannot convict by finding that the accused is **probably guilty**, they must be **sure** that the accused committed the offence.

However, to be **sure** of something is not to be absolutely certain. That again would be too high a standard.

### **Credibility and Reliability**

[87] Determining whether the Crown has proven the offence beyond a reasonable doubt will depend on the credibility and reliability of the witnesses, including the accused if he testifies.

[88] Credibility and reliability are separate and distinct concepts. Credibility refers to a witness's veracity; reliability to their accuracy. Reliability and accuracy will depend on a witness's ability to observe, recall, and recount the events properly. A credible witness **can** be an inaccurate or unreliable witness. A witness must be both credible and reliable to be believed.

### **WD Framework**

[89] When the accused testifies, any credibility analysis proceeds through the "WD framework". This framework was first outlined in the SCC case of *R v WD*, [1991] 1 SCR 742. Several subsequent cases have served to further explain and refine the analysis. Most recently, the Alberta Court of Appeal considered the test in *R. v. Ryon*, 2019 ABCA 36 and *R. v. Achuil*, 2019 ABCA 299.

[90] The purpose of WD is to explain what reasonable doubt means in the context of conflicting testimony. The conflicting testimony is not only that evidence given by the accused, but also other exculpatory evidence from other sources. At the same time, the WD analysis refers only to exculpatory evidence, and not to inculpatory or neutral evidence.

[91] The test for a Judge sitting alone can be formulated thusly:

First, if I believe the evidence of the accused or other exculpatory evidence on the elements of the offence that must be proved, I must acquit.

Second, even if I do not believe the evidence of the accused or other exculpatory evidence on the elements of the offence, but am left in a reasonable doubt, I must acquit.

Finally, even if I reject the evidence of the accused or other exculpatory evidence, or even if it fails to raise a reasonable doubt, I must still ask myself whether, on the basis of the evidence I do accept, the Crown has proven each and every element of the offence beyond a reasonable doubt.

[92] A proper application of the **WD** test requires an evaluation of the credibility and reliability of the evidence. As Justice Martin says in *Ryon*, (para 51) the trier of fact should attempt to resolve conflicting evidence bearing on the guilt or innocence of the accused. If, however, after a careful consideration of all of the evidence, a trier of fact is unable to decide whom to believe, they must acquit

### **FINDINGS**

[93] I have considered Mr. Nault's evidence in the context of all of the evidence. I find that I do not believe his evidence and it does not raise a reasonable doubt.

## **Kevin Nault**

### **Impaired Perception/Memory**

[94] It is clear from the evidence, that Mr. Nault was highly intoxicated during these events. He took 27 sleeping pills after a weekend of drinking. Ms. McMillan observed symptoms of intoxication and he admitted that his behavior was altered by the drugs. This intoxication has undoubtedly affected not only his memory but also his perception of the events at the time.

[95] An example of this impairment, is his recounting of the firefighter's entry into the home. As he is lying on the floor badly burned, he hears smashing noises and he assumes that it is Ms. McMillan and her friends come to harm him or wreck his property. In reality, he is in a heavily smoke-filled home and the noises he hears are firefighters announcing their arrival. He is telling them to go away not because he wants to die (at least in that moment) but because he thinks it is Ms. McMillan come to harm him. The level of his misperception of the events is indicative of the unreliability of his overall account.

[96] Mr. Nault testified that he locked his dogs in the upstairs bedroom. Mr. Nault also testified that they got out of the room and ran downstairs where he says he shut the door to save them. Somehow though they ended up back in the upstairs room where he placed them and where they were found later by the firefighters. It is clear that Mr. Nault is describing something that did not happen.

### **Cinematic Recall**

[97] Indeed, much of Mr. Nault's evidence takes on a cinematic, dreamlike quality. He testified that Ms. McMillan wakes him and crooks her finger at him saying "come with me." She then takes him to the basement where she points out a gun sitting on a chair. She gives him a cigarette which he has trouble lighting. She grabs him by the shoulders and says "you know what to do?" She then runs away and at that very moment – "everything was in slow motion" - a spark flies off the lighter and travels all the way to his lower leg where it ignites the gasoline that Ms. McMillan had left there.

[98] Mr. Nault admits that he was suicidal that day and the days leading up to the fire. Yet apparently, in the same moment that he was suicidal, Ms. McMillan was homicidal. Homicidal enough to pour gasoline all over the house occupied by their two dogs. And yet, not homicidal enough to just light the gasoline in which he is standing. That task - she leaves to Mr. Nault and the one-of-a kind spark.

[99] His evidence on the key points around the starting of the fire is fantastical and completely unreliable.

### **Crown's Evidence**

[100] As I have found Mr. Nault's evidence to be unbelievable and therefore incapable of raising a reasonable doubt, I turn now to assess the Crown's case.

## Sheena McMillan

[101] Ms. McMillan denies that she started the fire. She says that she was there to get some items when she turned around and saw Mr. Nault pouring gasoline on the floor in the basement. She ran out the front door and called 911.

[102] I found Ms. McMillan to be a credible and reliable witness. While there were discrepancies in her evidence (i.e. timing of events; colour of the lighter, whether she heard the gas being poured or saw it) between her testimony in this trial and in her earlier statements, I do not find those differences to be consequential or surprising given the length of time that has passed.

[103] One discrepancy that defence counsel argued was a key point, was that Ms. McMillan did not mention to the police that Mr. Nault gave her “a look” while he was standing at the door. In this trial, she testified that she saw Mr. Nault give her a look while he was standing at the front door and then she moved the car. Defence counsel suggests that this should shed doubt on whether Mr. Nault was ever upstairs and whether she did in fact see him.

[104] Ms. McMillan was cross examined extensively on whether Mr. Nault gave her a look and she was adamant that she did observe this look. I find that this did occur and her failure to mention it to the police was an oversight.

[105] Defence counsel also argued on behalf of Mr. Nault, that Ms. McMillan is unreliable because she testified in the trial before me that she saw smoke coming from the residence. Yet, firefighter Darcy Peters said he did not see smoke coming out of the residence when he arrived. He did however say that the inside of the Pineridge duplex was permeated by very heavy smoke.

[106] The 911 call is instructive in evaluating this evidence. It is clear on the call that Ms. McMillan sees something that makes her think a fire has started. She is clearly shocked by this observation in the recording;

**Dispatch:** Right now are you, or anyone else, in immediate danger?

**McMillan:** Since I [indiscernible] I'm outside. I ran out...

Oh my God, its on fire – Its on fire.

He did it – He set it on fire.

**Dispatch:** Can you listen to me ma'am?

**McMillan:** Oh my God

[107] Whether Ms. McMillan saw smoke coming out of the house, could see it through the window, or could smell it, we know for a fact that the house was on fire. I do not find that Ms. McMillan was exaggerating her evidence in so stating in her in-court testimony. Her state of mind on the call is consistent with a person who sees the shocking event of a fire.

## State of Mind

[108] Contrary to Mr. Nault's assertion that she wanted him to either die or suffer, I find that Ms. McMillan did care about his well-being. She testified that she cared about him and that testimony is demonstrated by her actions that day in calling 911 and helping the firefighters gain access to the residence.

[109] Her genuine concern is also evidenced in the 911 call. She does not come across as someone who is faking interest in Mr. Nault's well-being. She comes across as someone who is panicked and upset by the events that she is witnessing in real time.

[110] That panic and upset is also observed by first responder Darcy Peters.

[111] It is clear from the 911 call that she is shocked that the house is on fire. The evidence in the 911 call that demonstrates her distress can be used to rebut the defence theory that Ms. McMillan orchestrated the fire in an effort to kill Mr. Nault, or to encourage him to kill himself. Her distress and worry about Mr. Nault's safety on the call speaks against the defence's claim that she wished to do him harm.

[112] To be clear, it is not what she says on the call that gives rise to this rebuttal, but the inferences that can be drawn from her emotional character on the call which is contrary to the mental state of someone who had - just moments before - started the fire herself.

### **Sequence of the Fires**

[113] Defence counsel also suggested that the sequence of the fires is more suggestive of Ms. McMillan having started them. In this scenario, Ms. McMillan poured gasoline around the house, woke Mr. Nault, then she started the fires in the basement (except for the 7<sup>th</sup> fire that he started) ending with the main floor. In this scenario, she left the gas can by the door on her way out.

[114] While Detective Sloan cannot say for certain in which order the fires were started, he can say that it would not have taken very long to pour gasoline around the home and start fires. Given that each of the fires 1 through 6 fire were started separately using an ignition source that was not located near that particular fire; given that the only ignition source found was the lighter discovered near Mr. Nault; and given that the only active fire was downstairs, I find that it is more probable that the downstairs fires were started last.

[115] It is not necessary, however, for me to determine beyond a reasonable doubt the precise order in which the fires were started. It is necessary for me to determine beyond a reasonable doubt that Mr. Nault started the fires.

### **Count 1, 2, 6 and 7:**

[116] I find as fact that Mr. Nault started the fires. I find as fact that he was depressed and suicidal in the days leading up to the fire. As a result, he drank a bottle of whiskey that weekend. While intoxicated he dumped out pictures belonging to Ms. McMillan. On Tuesday, June 23<sup>rd</sup> he took 27 sleeping pills determined to kill himself. He brought Ms. McMillan downstairs and asked her if she was mad about the pictures. Then he picked up a gas can that he had downstairs for camping and he began pouring it around. Ms. McMillan saw him and fled calling 911. Mr. Nault followed her upstairs where she observed him and he shut the front door.

[117] In the next minutes, Mr. Nault poured gasoline upstairs and lit fires, likely starting with fire number 4 as it burned the longest and caused the most damage. He then lit the remaining fires on the upstairs level (1,2, and 3). He then left the gas can by the door as he had already poured gas downstairs. He lit the fires on the basement landing (5) and the fire near the tv (6)

finally arriving at his bedroom where he lit the final fire (7). A fire which could easily have ended his life if a final survival instinct had not kicked in when he asked for help.

[118] If I am wrong about the precise order of fire setting, I am not wrong about the identity of the fire setter. It is Mr. Nault.

[119] I find that Mr. Nault committed arson and intentionally lit the fires in the duplex, causing substantial damage to the duplex. I find as well that he knew that he had neighbours who lived just across the adjoining wall and was thus reckless as to their well-being.

[120] I find Mr. Nault, in starting the fires, caused his two dogs' unnecessary pain and suffering.

**Count 3 and 4:**

[121] As to counts 3 and 4, the Agreed Statement of Facts marked as exhibit 5 states that an operable firearm (20 gauge, CIL pump-action shotgun) was seized in the home. There are pictures (photo 43, 44 of exhibit 4) of this firearm and Ms. McMillan identified it as belonging to Mr. Nault. Mr. Nault admitted that he owns this firearm and that he uses it and other firearms on occasion despite having no valid Firearm's Possession and Acquisition License. That firearm is also stored improperly contrary to regulation. I find that Mr. Nault had possession of the firearm that day. It was in his home and in his room and I accept Ms. McMillan's evidence that she did not place it there. I find that Mr. Nault knew that this improperly stored firearm was in the room because he placed it there himself.

[122] I find Mr. Nault guilty on all charges before the Court.

Dated at the City of Calgary, Alberta this 3<sup>rd</sup> day of February, 2020

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S.E. Pepper  
A Judge of the Provincial Court of Alberta



**Appearances:**

B. Brandon  
for the Crown

R. McIntyre  
for the Accused