SUPREME COURT OF NOVA SCOTIA

Citation: *Bidart Estate v. Portage La Prairie Mutual Insurance Company*, 2017 NSSC 126

Date: 2017-05-15
Docket: Syd. No. 355067
Registry: Sydney

Between:

Stephen Bertram Bidart, Personal Representative of the Estate of Michael Bidart

Plaintiff

v.

The Portage La Prairie Mutual Insurance Company, a body corporate

Defendant

Decision

Judge:	The Honourable Justice Robin C. Gogan
Heard:	September 9-16, October 19-20, 2016, in Sydney, Nova Scotia
Written Submissions:	December 14, 2016
Counsel:	Duncan H. MacEachern and Nicholas E. Burke, for the Plaintiff Stephanie Myles and Ian Parker, for the Defendant

By the Court:

Introduction

[1] This proceeding arises from a fire which occurred at the home of Michael Bidart ("**Bidart**") on September 9, 2010. The home is located at 32 School Street in Sydney, Nova Scotia. Bidart notified his insurance company ("**Portage**") of the loss on September 10, 2010, and filed a Proof of Loss on September 2, 2011. Portage investigated and concluded that the fire was intentionally set. It notified Bidart of its intention to deny any further coverage on March 18, 2011.

[2] Bidart commenced this claim against Portage on September 6, 2011. Portage subsequently filed a Notice of Defence on October 17, 2011. Bidart died on December 3, 2011, and his Personal Representative maintains this proceeding (the "**Estate**").

[3] The trial of this matter took eight days over two months and heard from nineteen witnesses. A considerable volume of documentation was admitted by consent. There are competing expert opinions as to the cause and origin of the fire.

[4] There is no contest that a fire loss occurred on September 9, 2010. Nor is any issue taken with the existence of an insurance policy. The real issue in this case is whether Portage has established the defence of arson.

[5] For the foregoing reasons, I conclude that Portage has been successful in establishing that Bidart's fire loss was caused by arson.

Background and Review of Liability Evidence

[6] On September 9, 2010, Bidart was the owner of property at 32 School Street, Sydney Nova Scotia. The property consisted of a home and contents as well as an adjacent garage attached to the home by way of a breezeway. The property is well documented in various photographs. This property served as Bidart's home at the time of the fire. It had been his residence since February 21, 1986.

[7] At the time of the fire loss, Bidart earned income from two main sources. He had been a self-employed locksmith for the previous twenty years. In the year prior to the fire, he averaged earnings of $500 to $1000 a month doing locksmith work. Bidart also worked full time doing property maintenance work for Bencorp Investments and was paid $15.00 an hour.

[8] For some period of time prior to the fire, Bidart had shared his home with his girlfriend Maureen O'Connell. Bidart and O'Connell parted in the days prior to the fire, with O'Connell leaving the home. Many of her things remained in the home waiting for arrangements to be made for removal.

[9] Bidart was involved in legal proceedings with a former spouse. That spouse obtained judgment against him in the amount of $16,024.54 on December 9, 2008. Bidart appealed this decision and his appeal was dismissed on May 26, 2009. According to Bidart, these legal proceedings put him in some financial hardship. His bank accounts had been frozen for a time and he ran up debt on his credit cards. He then fell behind in his debt payments, property tax and water payments.

[10] On September 13, 2010, a credit inquiry on Bidart showed six credit accounts past due for periods ranging from 41 to 449 days. The amounts outstanding ranged from $71 to $44,500, the latter amount secured by a collateral mortgage on the School Street property, then 277 days without payment. As of September 1, 2010, Bidart had a property tax balance outstanding in an amount exceeding $3,500.00.

[11] Bidart's home suffered water damage to the basement in the period preceding August 9, 2009. The adjuster for the claim was Ken MacLeod. Mr.

MacLeod met with Bidart and went into his basement to inspect the damage on August 10, 2009. The claim was settled on March 16, 2010 when Bidart took a cash settlement of $10,000.40.

[12] For some period before the fire, family members became concerned about Bidart's drinking habits. His brother Geoffrey acknowledged a conversation that took place shortly before Maureen left. Geoffrey said that he was asked to talk to Bidart about his drinking and that he did have that conversation.

[13] The day of the fire began uneventfully for Bidart. He followed what appeared to be his normal routine. He was an early riser and typically saw his brother Geoffrey every morning before going about his day. There was no evidence suggesting anything unusual about this particular day.

[14] Bidart arrived home at around five p.m. and entered his house. He grabbed a couple of beer and went to his garage to start some cleaning. Not long after, ten to fifteen minutes at most, Bidart says he went back into the home, took the beer remaining from an eight-pack, and returned to the garage. This is the last time Bidart says that he was in his home before the fire. As he left his home for the last time, the rear steel door and the storm door were closed but not locked. The front door was locked.

[15] Sometime between 8 and 8:30 p.m., Bidart says that he decided to take a break from his work. He exited the garage by way of an overhead door on the east side of the garage. He walked north along his driveway toward the School street side of his home. As he passed the rear breezeway area of his house, he made no concerning observations. He lit a cigarette and "noticed the neighbors were standing across the street…all lined up", "like a parade or something".

[16] As Bidart stood in the driveway near the front corner of his home, someone from the gathering asked if his house was on fire because they could see smoke. He "took their word for it" and called 911. He says it was then that he returned to the rear of the house, heard a "whoosh", and observed the glass blowing out of the kitchen windows. Bidart moved his van away from his house while he was still on the 911 call. The fire trucks arrived while he was still on the call. He says that at some point he used a fire extinguisher to little effect.

[17] Terry Gushue and Ann Curren are husband and wife. They were Bidart's next door neighbors and at home at the time of the fire. There are various photos that show the proximity of the adjacent homes. Both Gushue and Curren recalled the day of the fire.

[18] Gushue said he came home from work sometime after five p.m. He was watching television and waiting for dinner when Curren told him that she smelled smoke. He checked his own home first. Then Gushue exited by way of his front steps and saw smoke coming from the area of Bidart's breezeway and out from underneath the siding on the house. When asked for his observation, Gushue said "… it was obvious that a fire was taking place… enough that it was obscuring the vision of the barn...garage". He ran along the side of Bidart's house, banging on the side of the house and calling Bidart's name. He described doing this quickly, "quite fast", "maybe 45 seconds or so". As he came around the back of Bidart's house, he saw him through the smoke standing at the opposite rear corner of the house, using a cell phone.

[19] Gushue observed Bidart to be distraught. Bidart remained on the phone for a period in the driveway. After he got off the phone, Bidart then had a conversation with a woman from the adjacent Seniors Complex. People then started to gather in front of Bidart's house. Gushue left to move his car. Bidart was still in his driveway. It was his recollection that the fire trucks arrived quickly, "only a few minutes" after he moved his car. Gushue didn't observe Bidart using a fire extinguisher or making any attempt to put out the fire.

[20] Curren recalled that she was sitting in her front room watching television with Gushue when she smelled smoke. She told Gushue about the smell and they went out their front door to look further. Their front door faces School Street. As she exited her home she observed Bidart's home on fire. There was "a lot of black smoke coming right outta the back" in the area of the breezeway. Curren then watched as Gushue went toward the back of Bidart's house. She didn't follow. She recalled that no one was watching from School Street as her husband went toward the rear of the Bidart house. She had a clear view.

[21] Curren remained by her front step until Gushue returned within "not even five minutes" and moved their van. Then they stood on School Street next to the white house on the corner. Curren recalled that people came from Richardson Ave and the senior's residence gathered on School Street shortly after, "maybe five minutes after", and once you could hear the fire trucks. She maintained that people did not begin to gather until Gushue returned.

[22] Curren did not see Bidart until he came and stood on the street in front of the house. She didn't see him move his van.

[23] The fire department extinguished the fire but the home and contents were extensively damaged. Records confirm that the fire department responded to a call

about the fire at 8:45 p.m. and remained on scene until 10:38 p.m. Initial impressions were that the fire had originated in the basement stairwell, then extended upwards into the back entry and kitchen area. No cause was determined initially. The scene was secured for further investigation.

[24] The fire investigation began quickly. Deputy Fire Marshall Vince Penny received a call at about ten p.m. on September 9, 2010, from CBRM Deputy Fire Chief Richard Bully. Deputy Penny attended the scene the following day with Deputy Chief Bully and Sgt. David Morrison. They inspected the building, traced the fire and took photographs. They noted burnt debris at the foot of the basement stairs, including an exploded fire extinguisher and burnt cans. Their visit to the home, and the general condition of the scene, is well documented in photographs taken by Sgt. Morrison.

[25] Bidart notified Portage of the fire loss effective September 10, 2010. Senior Examiner Darlene Hiltz was given responsibility for the claim. She contacted insurance adjuster Shane Walker, who attended the scene on September 10, 2010. Walker entered the premises that afternoon. He surveyed the scene, took photographs and reported to Portage. He observed the general appearance of the

fire, smoke and water damage, and inventoried the contents with photographs. His role was to collect information and report to Portage.

[26] Portage made the decision on September 10, 2010 to contact Mark Wentzell of Wentzell Engineering Limited. Shane Walker made the initial contact. Mr. Wentzell was retained to investigate the loss and prepare a cause and origin report. He was not able to attend the scene until the following week. In the meantime, Bidart received a cash advance from Portage, and arrangements were made for accommodations. Bidart was initially sent to a local hotel where it was noted that his credit card was declined.

[27] On September 13, 2010, Lois Pople, a property underwriter with Portage, did a credit check on Bidart and forwarded the report to Darlene Hiltz. Ms. Pople explained that this was standard procedure in large fire losses of unknown cause and that she likely ran the credit check automatically. The credit information raised what Darlene Hiltz described as “red flags”.

[28] Wentzell attended the scene and conducted his investigation on September 15, 2010. He met briefly with Deputy Penny as well as Shane Walker and Bidart. During this visit, Deputy Penny gave Bidart a police caution and asked him about the smoke alarm. It was Deputy Penny’s observation that the smoke alarm was

disconnected (there was no power supply) and not operable (would not be able to sound an alarm). On this occasion, Deputy Penny only stayed about ten minutes. He had no further contact with Bidart or Wentzell.

[29] Bidart gave a statement to insurance adjuster Shane Walker on September 15, 2010. In it, he claimed no idea about the cause of the fire. His two trips inside the home the evening of the fire were uneventful. When entering the rear door of the house, Bidart would have had a good view of his basement stairway. He said that he had no electrical problems since living in the home. The home contained an alarm and a smoke detector. Bidart had no explanation as to why his alarm system had been disconnected from its power source. It was his recollection that he had last used his alarm three to four months prior to the fire. It had been installed by a local alarm company but was not monitored.

[30] Deputy Penny completed his Fire Investigation Report about a week later and sent a copy to the Fire Marshal's office as required. It was not provided to Portage at that time. Deputy Penny's report noted that the fire had occurred "in the area beneath the stairs serving the second floor" and that the cause was "undetermined" pending further investigation by an electrical engineer.

[31] Mark Wentzell completed his investigation and reported to Shane Walker by October 25, 2010. This information was formally reported to Portage on November 13, 2010. The Wentzell investigation concluded that the fire originated in a cavity underneath the bottom step of the second floor stairway. It further concluded that the cause of the fire was not electrical nor any other accidental heat source.

[32] Portage made the decision to deny Bidart's claim on January 27, 2011. It was the evidence of Darlene Hiltz that as of that date, the only reasonable conclusion based upon the available information was that Bidart had set fire to his own home. Due to an oversight, Portage did not immediately inform Bidart of its decision.

[33] Portage informed Bidart of its decision not to pay the claim in an email from Bill McCann on March 18, 2011. It concluded his rent payments effective the end of April, 2011. Thereafter, Bidart lived in his garage at 32 School Street until his death.

[34] It is not disputed that Bidart took his own life on December 3, 2011.

[35] On June 23, 2015, James O'Donnell prepared a Cause and Origin Report based in part on his examination of the scene on December 15, 2014.

[36] On August 31, 2015, Wentzell Engineering issued a formal Cause and Origin Report with the same conclusions as its earlier report.

[37] In 2015, Deputy Penny received a copy of the report of Wentzell Engineering and a copy of Bidart's statement. Upon review of this information, Deputy Penny issued a supplemental report concluding that the fire was deliberately set using Class A combustibles and open flame.

[38] On February 7, 2016, Contrast Engineering Limited provided an opinion as to cause and origin of the Bidart fire. Mr. Wayne Chapdelaine, who authored the report, did not inspect the scene of the fire until the week prior to Trial.

Issues

[39] There are both liability and damage issues to be determined in this proceeding.

[40] The real issue however, is whether the fire at the home of the insured was intentionally set by Bidart. If so, this action will be dismissed. If not, then damages must be assessed.

Position of the Parties

The Estate

[41] It is submitted on behalf of the Estate that the fire loss was not an intentional act. Its theory is that the fire was caused by either spontaneous combustion, careless disposal of smoking materials or an electrical fire. Any of these fire sources could have ignited combustibles stored on a shelf located underneath the stairs leading to the second floor of the home. Once ignited, the fire caused significant damage to the home and contents. Bidart's losses are covered under a policy of insurance he held at the time with Portage.

[42] It is further submitted that this theory as to the cause and origin of the fire is supported by the opinion evidence offered by Chapdelaine and O'Donnell. Moreover, analysis of the competing opinions of Wentzell and Penny reveal a "rush to judgment" that the fire loss was intentionally set by Bidart.

[43] The Estate says that it is entitled to the proceeds of the insurance policy held by Bidart on the date of the fire loss. It claims full replacement cost of the dwelling and contents, additional living expenses, and costs to repair the garage for

a total claim of $495,000.00, plus costs and interest. There is also a claim for punitive damages.

Portage

[44] Portage takes the position that the fire at 32 School Street was deliberately set by Bidart. It says that the fire was incendiary and that Bidart had a motive and opportunity.

[45] As a result, the loss is not covered under the terms of the insurance policy, statutory conditions and public policy. It offers the opinion of Penny and Wentzell in support of its position.

[46] If a finding is made that the fire was not deliberately set, Portage disputes the amount of damages claimed by Bidart and says that any payments must be in accordance with the terms of the policy and the evidence.

[47] Finally, Portage says that there exists no basis for an award of punitive or aggravated damages.

Analysis

Liability

[48] For the Estate to be successful, the fire loss which occurred to the Bidart property on September 9, 2010 must be covered by the Portage insurance policy. An answer to the coverage question requires consideration of the insurance contract between the parties and whether Portage can establish that Bidart breached the contract. This analysis directly leads to a consideration of whether Portage has established that Bidart himself set the fire. Context however, requires a brief review of the contractual terms and statutory conditions.

Insurance Policy and Statutory Conditions

[49] At the time of the fire loss, the residential insurance policy issued by Portage contained the following provision:

> We do not insure loss or damage:
>
> …
>
> 22. resulting from any intentional or criminal act or failure to act by:
>
> a. any person insured by this policy; or
>
> b. any other person at the direction of any person insured by this policy;…

[50] The *Insurance Act*, R.S.N.S. 1989, c. 231, as amended, also contains relevant provisions:

> Schedule to Part VII
>
> Statutory Conditions
>
> 6(1) *Requirements after loss* – Upon the occurrence of any loss or damage to the insured property, the insured shall, if such loss or damage is covered by the contract…
>
> (a) forthwith give notice to the insurer;
>
> (b) deliver as soon as practicable to the insurer a proof of loss verified by a statutory declaration,
>
> (i) …,
>
> (ii) Stating when and how the loss occurred, and if caused by fire or explosion due to ignition, how the fire or explosion originated, so far as the insured knows or believes,
>
> (iii) Stating that the loss did not occur through any wilful act or neglect or procurement, means or connivance of the insured,
>
> …
>
> 7 *Fraud* – Any fraud or willfully false statement in a statutory declaration in relation to any of the above particulars, shall vitiate the claim of the person making the declaration.

[51] As a matter of public policy, it is well settled that an individual should not benefit from his or her own wrongful act.

The Law

[52] It is well settled that an insurer bears the burden of proving the insured breached a condition of the contract on a balance of probabilities. Care must be exercised in the assessment of criminal conduct in civil cases. Evidence discharging the burden of proof must be clear and cogent. The burden however remains proof on a balance of probabilities (See: ***Continental Insurance Co. v. Dalton Cartage Co***. [1982] 1 S.C.R. 164, at page 169).

[53] There are numerous authorities which set out the required assessment of an allegation of civil arson. The most oft cited in Nova Scotia is the decision of our Court of Appeal in ***Tait v. Royal Insurance Co. of Canada***, [1999] N.S.J. No. 164 (C.A.), which encapsulated the law as follows:

> [8] In considering the insurer's defence that the appellant, or someone acting under his direction, had deliberately set the fire, the trial judge said the following about the burden of proof on the insurer:
>
> > It is not disputed that once the plaintiff establishes the applicable insurance contract and the loss, the burden shifts to the defendant to establish the basis upon which coverage may be declined…
>
> And further:
>
> > In determining whether the defendant has met the onus, in respect of maintaining a defence of arson, there has generally been applied a three-fold test, namely:
>
> 1. Was the fire incendiary in nature;

2. Was there opportunity on the part of the plaintiff to set the fire;

3. Did the plaintiff have motive?

> [9] In defining the extent of the insurer's burden, the trial judge referred, at length, to the case of *Lewis v. Royal Insurance Co. of Canada* (1990), 94 N.S.R. (2d) 166, affirmed on appeal to this court (1990) 99 N.S.R.(2d) 421, and decisions of the Supreme Court of Canada in *Hanes v. Wawanesa Mutual Insurance Co*., [1963] S.C.R. 154 and *Dalton Cartage Co. Ltd. v. Continental Insurance Co*., [1982] 1 S.C.R. 164. On the basis of these authorities, he concluded that, in a civil case, where arson is alleged as a defence to a claim under a fire insurance policy, the insurer is only required to establish the defence of arson on a balance of probabilities. However, since that defence alleges conduct of a criminal nature, the balance of probabilities must be found on clear and cogent evidence which makes it reasonably probable that the crime of arson was perpetrated, and that there is no other reasonable inference.

[54] With these principles in mind what remains is an assessment of the evidence to determine if the defence of arson is established.

Analysis of the Liability Evidence

[55] The assessment of the evidence offered on the issue of arson requires consideration of the credibility and reliability of the evidence of various witnesses and competing opinion evidence. There are several specific evidentiary issues to resolve before moving further. Broadly speaking, these issues relate to (1) the statement Bidart gave to the insurance adjuster, (2) the note left by Bidart at the time of his death, and (3) the existence of a shelf in the basement stairway containing combustibles.

The Statement

[56] I begin with the statement. Bidart gave a statement to Shane Walker on the afternoon of September 15, 2010. Bidart and Walker were in Bidart's garage and the statement was digitally recorded and later transcribed. Both the audio recording and the transcription were in evidence by consent and there is no question that Bidart's death establishes necessity. The statement was provided voluntarily by Bidart as part of the investigation of the fire loss. The statement was not sworn, the transcription not signed, and there is no evidence of any caution given to Bidart by the adjuster. It is acknowledged that Bidart was not told to get legal advice before giving the statement.

[57] As I understand the Plaintiff's submission on this point, the statement should be admitted into evidence for the truth of its contents. The fact that it was both audio recorded and transcribed support its reliability. I interpret other parts of the submission to say that the statement is probative of the issues before the Court and must be admitted.

[58] By contrast, Portage submits that the statement cannot be wholly accepted for the truth of its content. There are aspects of the statement which are either not controversial or are corroborated by other evidence, which enhances reliability in

those instances. There are other portions of the statement which are central to the question of Bidart's involvement in the fire. The ultimate reliability of this evidence is in question given the absence of the opportunity to cross-examine in combination with the existence of a motive to lie.

[59] There is no question that the ultimate reliability of Bidart's statement must be scrutinized carefully. The accuracy of the recording of what he said to the adjuster is only a small part of the reliability assessment. When it is examined in the context of all the evidence offered at trial, I am left with a multitude of concerns respecting this evidence.

[60] First, although the parties consented to admission of the statement and the issues around threshold reliability were therefore not canvassed, I remain concerned about the context in which the statement was given. By context, I mean that it was an unsworn statement given to an insurance adjuster five days after the fire loss. In my view, there exists the possibility that Bidart may have been motivated to lie to the adjuster for his own gain, that the absence of an oath was a failed opportunity to test sincerity, and this possibility cannot now be tested under cross-examination.

[61] There are other reasons for concern. When asked about the timing and sequence of events the night of the fire, Bidart admits to drinking and says to take his account "with a grain of salt" because he "was having a few beer". This evidence alone raises some inherent reliability concerns.

[62] The statement itself is part narrative and part question and answer. Bidart was first given the opportunity to say what happened following which the adjuster asked specific questions. When relating his account, Bidart said that he was in the garage working with the overhead garage door open. It was through this open door that he exited his garage at about 8:30 pm, passed by the breezeway area of his home, and proceeded down his driveway. At the corner of his house, he lit a cigarette and noticed people gathered on School Street. He said repeatedly that it was someone in that group of people that told him his house was on fire. He accepted what he was told and called 911 before even checking his house. He said he was still on the phone with 911 dispatch when he returned to the breezeway and saw the fire. He remained on the phone while he moved his van from his driveway.

[63] Bidart's version of the sequence of differs from that of his neighbors, Curren and Gushue. Although there were slight differences in the evidence of the

neighbors, I attribute those differences to the passage of time. In my view, they said three important things which I accept. First, they were alerted to the fire from the smell of smoke inside their home. Second, both testified that the smoke coming from Bidart's house was readily apparent as soon as they came outside. Third, Curren and Gushue agreed that there was no one gathered on School Street watching the fire when they exited their home. It was Gushue's evidence that he rushed to the back of the Bidart home and saw Bidart at the opposite side of the breezeway already talking on his cell phone. It was Curren's evidence that no crowd started to gather until about five minutes later, when Gushue returned.

[64] Bidart's account is clearly at odds with his neighbors' account. He maintained throughout his statement that he called 911 in response to what he was told by the crowd gathered in front of his home. If this is true, then both Gushue and Curren would have observed this gathering as they exited the front door of their home facing School Street. Given their vantage point, I am not persuaded that they did not see the gathering because they were distracted.

[65] Moreover, if Curren and Gushue were alerted to the fire by the smell of smoke inside their home and the obvious smoke coming from the breezeway area of Bidart's home, then why wasn't Bidart similarly alerted as he worked in his

garage with the garage door open or as he walked past the breezeway down his driveway toward School Street? Why would people gathered on the street in front of his home notice the back of his house was on fire before he did? And why wouldn't any of those people have approached the home instead of just watching it burn? It defies common sense. And it calls into question the credibility of Bidart's account. To the extent that Bidart's statement conflicts with the evidence of Curren and Gushue, I don't accept it.

[66] There are other areas of concern even when Bidart's evidence is not in direct conflict with other evidence. For example, Bidart said that he had done electrical work upgrading the wiring in his basement, and other evidence established that he was in the basement as part of his key cutting business, but he had no knowledge that his alarm was "unplugged" or that the wires to his smoke detector had been cut. Also, Bidart specifically said that he advised the 911 dispatcher to tell the fire department "to be careful of the garage because there is a lot of combustibles". There was no mention then of combustibles inside the home.

[67] In the end, I conclude that certain aspects of Bidart's statement may be relied upon because they correspond with other accepted evidence, they constitute admissions or they are non-controversial. For example, Bidart admitted: (1)

having financial difficulties, (2) his spouse had left him just weeks before the fire, (3) he was drinking beer in his garage on the night of the fire and went back and forth to his kitchen for more beer; (5) his front door was locked at the time of the fire; (6) his back doors were closed but not locked; (7) there were no recent electrical problems in the home; and (8) there was both an alarm and a smoke detector in the home but he had not turned the alarm on in three or four months.

[68] Aside from these points, the version of events related in the statement raises credibility concerns and reliability issues. In my view, Bidart's evidence outside of those areas specifically excepted deserves very little weight in the overall assessment.

[69] Finally, I note the absence of evidence from Bidart that does not bear on his credibility or the ultimate reliability of his statement but leaves a potential evidentiary gap in two important respects.

[70] First, there is no evidence from Bidart to establish that a shelf existed in the basement stairway and, assuming the shelf existed, no evidence of what, if any, materials were stored there at the time of the fire. The adjuster did not ask about the shelf and Bidart did not raise any concern about combustibles stored in the area of the fire. This is only significant in that there is no direct evidence from Bidart to

support the theory of spontaneous combustion or other ignition of combustibles on the shelf.

[71] Second, there is no evidence that Bidart was smoking in his house on the day of the fire. His evidence was that he was out of the house until five p.m., when he arrived home, put beer in the fridge in the kitchen, and went out to the garage. He came back fifteen minutes later for the rest of the beer and returned to the garage. He does not mention smoking until after it is clear the fire had started. And there is no mention of him being anywhere in the house other than the kitchen. If I accept Bidart's sequence of events, then there is no basis upon which to find that careless disposal of smoking materials could have started the fire. As I say this, I note that Bidart was not specifically asked about smoking in the house. But he was asked about when he was in the house and why, and in his answers he did not say he was smoking, or in the basement stairway, at any point in the relevant sequence of events.

The Suicide Note

[72] Bidart took his own life about eight-and-a-half months after being notified that Portage would not indemnify his fire loss. With his living expenses no longer

covered after April 2011, and his house not repaired, Bidart moved into his garage where he remained until he died.

[73] At the time of his death, Bidart left a note which was admitted into evidence by consent. It is not contested that the note was written by Bidart or that he left it as a suicide note. The note contains a denial of the arson allegations and a plea for others to take action in his absence. However, I am satisfied that the note cannot be relied upon for its truth (See: ***M. (L.N.) v. Green***, 1995 CarswellBC 976).

[74] It may be that the note is probative of the state of mind of Bidart at the time of his death but it seems to me that there is little doubt as to his specific state of mind. However, it would be improper to rely on the note for the truth of the denial or to establish some nexus between Bidart's death and his fire loss.

[75] The only other comment to be made about the note relates to the evidence of Geoffrey and Stephen Bidart. The fact that this note exists, and contains the statements it does, is no doubt a powerful influence on Bidart's siblings. This influence must be considered when their evidence is assessed. Their evidence is perhaps most crucial to the next issue involving the existence of a storage shelf in the basement stairway.

The Shelf in the Basement Stairway with Combustibles

[76] One of the most contested facts in this case relates to whether or not a shelf full of combustible materials existed in the area where the fire originated. This became the subject of much evidence notwithstanding that there was consensus that the origin of the fire was the basement stairwell in the general area where the second floor steps met the first floor. Bidart was not asked about whether such a shelf existed and did not mention it in his statement. Nonetheless, other evidence was offered in support of its existence.

[77] On the basis of this evidence, the submission is that the shelf existed and that some of the materials stored there either spontaneously combusted or were otherwise accidentally ignited. The foundation of this submission is contested on the basis of the lack of credibility of the witnesses who say the shelf was there, the lack of detail of this evidence, lack of proximity of this evidence to the relevant time period, and the existing contradictory evidence.

[78] Matthew Lynk was the first to testify about the shelf. Lynk had been employed by Bidart's brother Geoffrey in various capacities for twenty years. Lynk said he also worked part time for Bidart between 1995 and 2010 in the locksmith business. During 2009 and 2010 he said he had occasion to be in

Bidart's basement but "not too often". At some point, he had helped Bidart install a new furnace. When removing the old furnace he recalled that there were shelves in the way. He was shown *Exhibit 12* and commented that the shelf was missing from the photo. He remembered this because of his experience replacing the furnace. He remembered that the shelf was full of stuff but couldn't give particulars. He said that the shelf ran the width of the stairs and extended out into the stairwell about eighteen inches. When cross-examined, Lynk acknowledged that he likely wasn't at Bidart's home in 2009 or 2010, as he was working out west or was home working for Geoffrey Bidart. Lynk was not able to be any more specific about when he was last in Bidart's basement or when the furnace replacement had occurred.

[79] Geoffrey Bidart testified. He is Michael Bidart's brother. He said that he and his brother shared an interest in furniture refinishing. He said that Bidart would refinish larger items in his garage and smaller items in his basement. He said that Bidart stored his refinishing products on the shelves going down the basement stairs. He said that there were products stored on shelves on the left side of the stairway and products on the shelf "right in front, going downstairs".

[80] Geoffrey Bidart explained that his brother stored products in this area because it was a heated space and would prevent deterioration of the products. He described the shelf as being the width of the stairway, eighteen inches deep and completely covered in stored materials. The description of the size of the shelf was exactly the same as that given by Matthew Lynk. The materials on the shelf included rags, lacquers, thinners, and finishes. You could not see beyond the materials on the shelf to the cavity behind. He readily acknowledged that the products on the shelf changed over time. When cross-examined, he expanded the description of the shelf to say that it was an extension of the original tongue and groove floor and that the boards sat on the sill plate. When presented with photos of the area after the fire, he acknowledged what appeared to be a smooth edge to the boards along the sill but maintained that he had seen the shelf there when he visited.

[81] Geoffrey Bidart said that he would go "quite frequently" to his brother's home before the fire. He said his last visit to the basement before the fire was within a month of the fire. As he concluded his direct examination, he was asked what he wanted. He replied that he wanted his brother's house fixed, and his belongings replaced and that "was the least they can do".

[82] When cross-examined, Geoffrey Bidart's evidence revealed inconsistencies. Some of these inconsistencies were less significant than others. In my view, his cross-examination revealed that he didn't fully appreciate his brother's true financial circumstances at the time of the fire. I found that significant. I found the discrepancy in his evidence about his brother's demeanour the morning of the fire less significant. Perhaps most significant was the inconsistency in the evidence about the frequency of visits to his brother's home and the timing of his last visit. He was confronted with the answers he gave to such questions on discovery. His answers then generally revealed much less specific information.

[83] All of this left the impression that Geoffrey Bidart was prepared to amplify evidence that he thought may be helpful or critical. His remaining answers were direct and responsive and forthright and he struck me as an honest witness struggling with a desire to honor his brother's wishes. It left a concern about the weight that should be placed on his evidence on crucial or controversial points.

[84] I conclude from this evidence that at some point prior to the fire there was a shelf in the stairway as described by Geoffrey Bidart. But there is no basis to conclude that it was there at the time of the fire. And Geoffrey Bidart was frank in admitting that the contents of the shelf would be subject to change.

[85] The cumulative evidence offered by Geoffrey Bidart and Matthew Lynk caused me further concern. As already noted, the testimony of these two witnesses as to the location and dimensions of the shelf was identical. Lynk and Goeffrey Bidart had a long time working relationship. I was left with the impression that there had been discussions between them about the shelf. Given my conclusions about Geoffrey Bidart's evidence, I further conclude that Lynk's evidence was likely tainted by the relationship and their discussions. I find it very difficult to believe that both men would have independent and identical recollections of the dimensions of a shelf of no significance to them, six years after the fire and more than six years since they had any opportunity to personally observe it.

[86] The next lay witness was Stephen Bidart. He is another brother of Michael Bidart. It was Stephen Bidart's evidence that he and his brother Michael were close. He said that they saw each other "fairly often" before the fire. Most of these visits would take place at Geoffrey's shop. Stephen Bidart would stop by when he noticed that his brothers' vehicles were at the shop. There were occasional phone calls between Stephen Bidart and his brother Michael. Stephen Bidart also testified that he would sometimes stop by Michael's home to get keys cut or just visit. On direct examination, he said that he was in his brother's basement with "some frequency" and "occasionally" to have something done and to socialize "not

often", "a couple of times a year". Stephen Bidart said that he didn't share his brother's interest in woodworking and refinishing.

[87] Stephen Bidart testified that his last visit to his brother's basement was the long weekend in September 2010. This would have been shortly before the fire. He testified that he recalled a shelf in the basement stairwell. He described where the shelf was located and drew it on *Exhibit 15*. He said he "didn't know exactly what was there" but that the shelf contained "paint related stuff". The shelf was full to the point that it obscured the cavity immediately behind it. It contained products such as "linseed oil" which was specifically mentioned.

[88] When he last visited the home in September 2010, it was Stephen Bidart's evidence that he had gone down the basement stairs to have keys cut. He didn't notice anything missing from the structure during that visit. Mr. Bidart was taken through this evidence repeatedly on direct examination. The answers had small variations but nothing of substance, albeit the answers came in response to leading questions in a number of instances. Mr. Bidart was clearly of the view that a shelf full of combustibles existed at the time of the fire and was completely consumed in the fire.

[89] In my view, there was significant damage done to Stephen Bidart's credibility on cross-examination. There were some minor inconsistencies and some much more significant. On the minor end of the spectrum, he testified that at the time of the fire his brother had multiple sources of income and "a number of avenues" if he needed money. When cross-examined, Stephen Bidart confirmed that he had never been able to obtain his brother's income tax returns or locate any of his business records or financial statements. On this basis, he acknowledged no knowledge of his brother's actual income at the time of the fire.

[90] More troubling inconsistencies existed on two significant points. The first related to Stephen Bidart's last visit to his brother's home in September 2010. He was referred to his 2014 discovery evidence in which he said that he stopped by his brother's home for a short visit, for ten to fifteen minutes, couldn't recall why he was there, and that he thought he just stayed in the kitchen. When faced with the contradiction, Stephen Bidart explained that he had reflected on that last visit since the discovery examination and remembered more. He confirmed not making any attempt to correct the information given at discovery.

[91] The second point was in relation to the shelf and contents. Stephen Bidart repeatedly testified as to his knowledge of a shelf in the basement stairwell and its

contents. He was once again referred to his discovery evidence. In the first passage, he answered that his brother had stored flammables in his "basement" making no specific reference to a shelf in the basement stairway. At this point, he maintained that he considered the location of shelf to be "in the basement". In my view, this was a strained interpretation but not necessarily incredible.

[92] However, after Mr. Bidart once again gave a detailed description of the location of the shelf prior to the fire, counsel referred to a further passage from his discovery evidence:

> Q: Ok, … did you ever look in the space under the stairs there?
>
> A: No
>
> Q: When you were at your brother's house?
>
> A: No.
>
> Q: Ok, no, ok, you don't know what was there?
>
> A: No.

[93] When confronted with this inconsistency, Stephen Bidart acknowledged not mentioning a missing shelf in the basement stairwell during his discovery examination.

[94] I find that Stephen Bidart's evidence is not a safe basis on which to conclude that a shelf existed in the basement stairway at the time of the fire. I hasten to add that this finding doesn't mean that it wasn't there. Rather, this fact has yet to be established. However, there is other evidence which bears on this point which remains to be considered.

[95] Deputy Vince Penny made no remark about the shelf in his direct evidence or in his reports. He was asked about the shelf on cross-examination and replied that "there was no shelf there" when he observed the scene. He did not accept the suggestion that a shelf had been there and had been destroyed in the fire.

[96] Cause and Origin expert O'Donnell visited the Bidart home on December 15, 2014. He examined the fire scene and prepared a report dated June 23, 2015 (*Exhibit 8*). He took photographs of the scene as he found it. The report contains no observation of the remains of a shelf in the area claimed by the Estate. Quite to the contrary, O'Donnell comments in detail at pp. 3, 6, and 7 of his report on his observations of the scene with no mention of the possibility of a burned away shelf.

[97] Cause and Origin expert Chapdelaine visited the fire scene on September 7 and 8, 2016. This was his first and only attendance on scene. It was his evidence

that he observed “notches” on both sides of the basement stairwell where he concluded that boards were missing. It was his conclusion that a structure had existed in the stairwell that extended exactly eighteen inches in depth and across the entire stairwell in width. He was referred to photographs of the stairwell (*Exhibit 6, Tab 34, p. 83*) but said that the “notches” weren’t visible in the photos due to the camera angle. No attempt was made to review the multitude of photographs taken by Wenzell, O’Donnell or Sgt. Morrison of the area to demonstrate the existence of the “notches”. It was his view that this structure had existed prior to the fire, but he could not say whether it was there at the time of the fire.

[98] When cross-examined, Chapdelaine readily acknowledged that there were obvious changes to the scene in the six years’ post fire loss. He was aware of “break ins” to the property. He confirmed that his observations didn’t accord with the photographs of the scene taken by Wentzell a week after the fire (the week being a period during which the scene had been secured). There is no mention of the “notches” in his report of February 17, 2016, nor of the remains of a shelf as alleged, because neither are apparent in the scene photos.

[99] Wentzell is the Cause and Origin expert for Portage. He provided a Cause and Origin report dated August 31, 2015 (*Exhibit 14*) and a Rebuttal Report dated May 11, 2016 (*Exhibit 18*). Wentzell visited the Bidart home on September 15, 2010. He took photographs of the scene which are appended to his reports. He gave evidence relevant to the potential existence of the shelf on both direct and cross-examination.

[100] Wentzell did not observe any evidence of a shelf burned away in the fire and expressed the view that there was no shelf for three reasons. First, he didn't observe the remains of any nailers, fasteners or structure in the space that would have supported a shelf. Second, it was his observation that where the diagonal tongue and groove floor boards extended into the space, they had a cut edge as opposed to the appearance of structure having burned away. Finally, he noted that there were no remains in the area to suggest that a shelf had been there at the time of the fire. This was in contrast to the adjacent space where the remains of the structure were present in spite of it being the area of deepest char. It was Wentzell's view that if such a shelf had existed, some part of it would remain. As he gave his evidence on this point, he referenced photos 34, 35 and 36 of *Exhibit 14* as reflective of his observations.

[101] In my view, the various photographs taken of the immediate fire scene are probative on their own. Many of the photographs show the area where various witnesses said that a shelf had once existed. The clearest photographs of the scene are those taken by Wentzell on September 15, 2010, and appended to his reports. There are also photographs taken by O'Donnell that are of assistance in obtaining various perspectives on the area of the "missing shelf".

[102] Having looked at all the photographs, there are no "notches" evident to me in the sides of the basement stairwell at the level of the first floor. I can see no indentations extending "exactly" eighteen inches in depth on which I can infer that some part of a structure is missing. Nor does the area have the appearance of charred or burned edges as one might expect if such a structure existed at the time of the fire and was burned away. Quite to the contrary, in the relevant area, the photographs show smooth edges, appearing more consistent with a cut edge. It could be the case that the house was built that way or that some structure existed at some point but was cut away prior to the fire.

[103] As I review the photographs, I find the evidence of Wentzell to be most persuasive. He took the photographs close in time to the fire loss. As he gave his

evidence on the relevant points, he referred to the photographs that best demonstrated his recollection of the scene as it appeared to him.

[104] Most importantly, Wentzell's evidence was compelling from a common sense perspective. I found it much more helpful than Chapdelaine's interpretation of Wenztell's photographs or Chapdelaine's observations of the area six years after the fire. If I were to accept the Estate's submission that a shelf had existed at the time of the fire, I would have to accept that a shelf of eighteen inches in depth running the width of the stairway was completely consumed in the fire, leaving nothing but smooth edges at its perimeter. This is not a compelling conclusion.

[105] On the basis on the totality of the evidence adduced on this issue, I conclude that no shelf structure existed at the time of the fire in the area immediately adjacent to the storage cavity underneath the first step of the stairs leading to the second floor. In coming to this conclusion, I consider that the items found in the debris field at the bottom of the stairs likely came from the shelves on the left of the basement stairway (which is not proximate to the origin of the fire) or the storage cavity under the step (the area of the heaviest fire damage). If the shelf was not there at the time of the fire, the fire did not originate there, nor did it start by way of ignition, or spontaneous combustion, of any materials stored there.

[106] Having reviewed the factual issues, I now move to a review of the opinion evidence on the nature of the fire, as well as the evidence of opportunity and motive.

The Defence of Arson Analysis

[107] For Portage to be successful in its defence of arson, it must establish an incendiary fire and that Bidart had opportunity and motive. The evidence supporting such a conclusion must be clear and cogent.

(a) *Was the Fire Incendiary in Nature*

[108] A determination of whether the fire was incendiary in nature requires a review of the competing expert opinions. All opinions agreed generally that the origin of the fire was in the basement stairwell. Beyond that, the origin and cause of the fire were in dispute. Ultimately, the dispute about the specific origin and possible causes resulted in competing classifications of the fire. The opinions offered by Portage were of the view that the fire was incendiary. The Plaintiff's experts opined that the fire must be classified as "undetermined".

[109] Before reviewing the opinion evidence, some context is helpful. The fire occurred inside a house during daylight hours. By the time firefighters arrived, the

fire was well underway with flames apparent and at least one rear window blown out. There was no mystery as to the general origin of the fire. It began in the basement stairwell area. This was clear.

[110] Common sense tells us that the firefighters were diligent in their work and fire suppression methods were applied to the fire scene. There is no evidence to suggest otherwise. These efforts extinguished the fire and moved debris about in the basement stairway area. It is common ground that a debris field existed at the bottom of the basement stairway after the fire. Some of this debris resulted from the fire and some from the fire suppression efforts. In other words, some burned building materials and shelf contents dropped down during the fire. The fire suppression efforts pushed more materials and contents down to the bottom of the stairs and left them in that location, mixed with water.

[111] There was no evidence that the fire suppression efforts altered the scene in any significant way. Although there was significant fire damage, the structure of the basement stairway area, including the adjacent stairs to the second floor, remained largely intact. The fire scene was easily inspected and readily observable. The area under investigation quickly focused in the basement

stairway. In terms of origin, attention was immediately drawn to an area at the bottom of the second-floor stairs.

[112] In my view, on a relative basis, this was not a complex fire investigation. Nevertheless, four experts examined the scene and came to differing conclusions on both origin and cause. All of the experts agreed that the standard for their investigations was the National Fire Protection Association, NFPA 921, "*Guide for Fire and Explosive Investigations*" as it existed at the time of their work. All purported to carry out their investigations in accordance with this standard, albeit with different interpretations as to how the standard applied to their investigations.

Portage's Cause and Origin Opinions

[113] The Defence Cause and Origin opinions came from Penny and Wentzell. Penny was on scene on September 10, 2010, Wentzell on September 15, 2010. In my view, it is significant that both Penny and Wentzell had an opportunity to view the immediate aftermath of the fire scene.

[114] Penny's Cause and Origin Report is dated January 28, 2016 (*Exhibit 16*). At the time of the fire, Penny was the Deputy Fire Marshal and had held this position

since 1984. His experience in the field dated back to 1969 and his expertise came from over 2500 fire investigations, ongoing education, and research in the field.

[115] Penny's testimony conveyed the weight of his many years of experience. His observations of the scene, including demarcation lines and fire patterns, led him to the conclusion that the fire originated in the basement stairwell. The worst damage was around the base of the second-floor stairs which appeared to be an area used for storage of both combustibles and non-combustibles. He observed the remains of non-combustible materials in the storage cavity.

[116] Penny noted the presence of electrical wires in the area of origin. He classified the cause of fire as "undetermined", pending further investigation by an electrical engineer. After reviewing Wentzell's opinion, and Bidart's statement, Penny changed his classification to "incendiary". I reject any submission that it was inappropriate for Penny to rely on Wentzell's opinion to eliminate an electrical cause for the fire. To the contrary, I find this approach consistent with the NFPA standards (*See*: NFPA 921:4.3.4)

[117] In coming to his conclusion that the fire was a set fire, Penny eliminated the careless disposal of cigarettes as a possible cause. In doing so, he noted that (1) there was nothing in Bidart's statement to indicate that he was smoking in the

house or in the area where the fire originated; (2) Bidart had passed by the open stairwell four times in the hours preceding the fire and made no observations of smoke or fire consistent with a slow burning cigarette fire; (3) literature indicates that cigarettes are an uncommon source of ignition as a result of the additives used to control moisture contents and burning rates; and (4) the October 1, 2005 Ignition Propensity Standard for cigarettes did not support this theory.

[118] In support of its position, Portage also offered the Cause and Origin opinion of Wentzell Engineering dated August 31, 2015 (*Exhibit 14*) and Rebuttal Report dated May 11, 2016 (*Exhibit 18*). Wentzell's initial report to adjuster Shane Walker of Claimspro was in evidence as well (*Exhibit 4, Tab 17, pp. 101-105*). I accept that Wentzell was retained immediately after the fire loss (September 10, 2010) to determine cause and origin. His retainer was not restricted to "ruling out electrical as a cause". Wentzell is a professional engineer. He obtained his degree in electrical engineering in 1985 and has been performing fire loss investigations since 1991. He was well qualified to express an opinion in this area.

[119] As noted already, Wentzell began his investigation on September 15, 2010. On that date, he attended the scene, conducted his investigation and recorded it with notes and photographs. His initial report to Shane Walker contained several

important observations: (1) he noted that there was no evidence of a failure in the electrical panel that could have caused the fire; (2) the main power and the battery back up to the security panel had been disconnected rendering it inoperable; (3) the most significant fire damage was located in a small space under the bottom step of the second floor stairway; (4) branch circuit wiring in the adjacent area showed evidence of arcing damage but fire damage in those areas was minimal compared to the area of the stair cavity.

[120] Wentzell concluded that the origin of the fire was the cavity below the bottom stair of the main floor stairway. This was an area accessible from the basement stairway, and functioned as a storage area. Given the area of origin, and considering the fire patterns and location of arcing damage, he further concluded that the electrical arcing was caused by the fire. On this basis, he excluded an electrical cause. Finally, it was his view that there did "not appear to be an accidental source of heat energy that could have caused the fire".

[121] Wentzell's Cause and Origin report was more detailed than his reporting letter to Claimspro. I see nothing inappropriate in this and nothing inconsistent between the two reports. The reports were prepared for different reasons. The initial letter to Claimspro was intended to report the results of the investigation to

the insurer in a timely fashion. It was prepared for a commercial purpose and was not intended to be compliant with Civil Procedure Rule 55. By contrast, Wentzell's formal report contains more detail, was intended to be Rule 55 compliant, and deals with information arising after his initial report. In spite of the differences, his conclusions as to origin and cause remain the same.

[122] After reviewing the Cause and Origin Report prepared by Chapdelaine, Wentzell prepared a Rebuttal report. This report is a defence of the methodology employed in his investigation, a more detailed explanation of his ultimate conclusion, and a criticism of Chapdelaine's opinion. In light of the opinions offered by the Estate, the additional detail offered in Wentzell's rebuttal was of considerable assistance.

[123] There were several points in the Rebuttal report which had resonance. The first dealt with the methodology employed and the use of the scientific method v. "negative corpus". At page 5 of his Rebuttal report, Wentzell comments in relation to Chapdelaine's criticism:

> Generally, the Report takes exception to my work by suggesting that I did not follow the recommended guidelines in NFPA 921. My concerns with the accusations made by Chapdelaine are that simply not elaborating on every detail regarding the thought process in an investigation does not mean that the steps, including the use of the Scientific Method, were not taken into account in arriving at an opinion. Indeed, even if one deviated from the steps identified in NFPA

> 921, I offer the following statement from NFPA 921 and copied beginning at Line 179 of the Report. "*Deviations from these procedures; however, are not necessarily wrong or inferior but need to be justified.*"

[124] The bulk of the Rebuttal report goes on to address specific criticisms raised by Chapdelaine. This information, along with Wentzell's testimony, was persuasive. In my view, Wentzell demonstrated a high degree of comfort with the standards in NFPA 921 and the complexities in its practical application. Although his initial report to his client and his Cause and Origin Report did not elaborate on the applicable standards or the methodology employed, I am satisfied that no real issue exists here. Wentzell clearly employed the appropriate standards and the scientific method to his investigation.

[125] The second important point of resonance related to the elimination of an electrical cause. The rebuttal report contained an expanded discussion on this issue and presented a persuasive analysis as to why an electrical cause was discounted. More will be said about this point later in these reasons. Suffice to say that the counter-points raised in the Rebuttal report, in conjunction with his testimony, and his background as an electrical engineer, result in this aspect of Wentzell's opinion having considerable weight in the overall analysis.

[126] Thirdly, the Rebuttal report contained a clear and concise explanation of Wentzell's use of the scientific method in his investigation. Briefly put, he identified five possible causes of the fire; (1) electrical; (2) careless disposal of smoking materials; (3) spontaneous combustion; (4) lightning strike; and (5) incendiary or intentionally set fire. He reviewed the basis for excluding all but one of those causes and concluded at p. 13:

> As described in the scientific method, I am left with only one hypothesis that cannot be eliminated based upon the available evidence and this is that the fire was deliberately set (i.e. incendiary). This selection should not be confused with negative corpus, as evidence as been taken into consideration in testing the hypothesis.

[127] And at p. 15:

> …it is my opinion that the fire originated under the south side of the bottom step leading to the second storey, which is accessible only from the lower portion of the basement stairwell. The cause of the fire is most probably due to ignition of ordinary combustibles from an open flame device such as a match or lighter. The classification of the fire is incendiary.
>
> …my opinion was and remains consistent in that the electrical system did not cause the subject fire.

[128] I acknowledge that the basis upon which Wentzell excluded possible causes of the fire is strenuously contested by Bidart. In my view, however, there is no

basis to contest his methodology or the list of possible causes he generated in his analysis.

[129] Wentzell was the only expert subject to cross-examination on his opinion. The cross-examination was extensive. Several broad themes emerged. First, Wentzell was challenged as to whether his methodology and opinion met the NAFPA 21 standard. As I have already found, having heard Wentzell's answers, I am not persuaded that he misunderstood or misapplied the standard in any way. Quite to the contrary.

[130] Second, Wentzell was referred to his initial opinion dated October 25, 2010 (*Exhibit 6, Tab 33*) and his conclusion at p. 21 that "*these incidents of arcing were a result of the fire and not the cause*." He was then challenged with academic literature to the effect that it is not possible to determine the difference between a "cause and victim bead". In other words, it is not possible to distinguish whether the arcing damage is the cause or result of the fire.

[131] Wentzell readily agreed with the proposition behind arc bead analysis. There is no way to distinguish between cause or victim beading in isolation. However, he succinctly explained the application of arc bead analysis to his opinion. In his view, when the arching damage is examined in context (ie. the

extent and location of arcing damage, its proximity to the origin of the fire and fuel sources, proximate fire patterns etc.) it is possible to make a distinction between cause and victim beads.

[132] In the present case, Wentzell maintained that the arcing was caused by the fire and not the origin. He referred to his reports and on multiple occasions reviewed the basis for this conclusion. His answers were consistent. He explained that the arcing in the Bidart home demonstrated the appearance of "arcing through char" or "fire effects", that the arcing damage was not extensive enough to have generated much heat energy, that the "location of the arcing was basically in free air" or not proximate to the location of fuel packages and that the burn patterns supported the damage being caused by the fire. He maintained that "he was not on the fence anywhere" in this aspect of his opinion.

[133] Subsequently, Wentzell was asked whether the existence of a shelf in front of the storage cavity would change his opinion. He said it would not. He acknowledged that a shelf filled with combustibles could be a possible cause of the fire if some of the materials were subject to spontaneous combustion. But he went on to testify that he examined the debris field and found no burnt rags. A variety of screw top containers were identified but they weren't burned and therefore he

concluded they were not in the area of the origin of the fire. Further, Wentzell was of the view that pieces of wood found in the debris field had been there before the fire because the burn patterns indicated drop down burning. He concluded that his examination of the debris field revealed nothing of interest to him as a fire investigator.

[134] In my view, Wentzell successfully withstood cross-examination. At all times, he demonstrated himself to be an experienced, knowledgeable and prepared witness. He made reasonable concessions when appropriate and explained the evolution of his written reports. I am not persuaded that any bias existed in his opinion or that he was retained to do anything other than a full cause and origin opinion.

Estate Cause and Origin Opinions

[135] In response to the theory of arson advanced by Portage, the Estate relied upon the cause and origin opinions of O'Donnell and Chapdelaine.

[136] O'Donnell was retained by the Estate on December 1, 2014, to carry out a cause and origin investigation. He viewed the fire scene on December 15, 2014, and prepared a report dated June 23, 2015 (*Exhibit 8*). His report was entered into

evidence by consent and O'Donnell did not testify at trial. O'Donnell is a former police officer who obtained his NFPA certification in 2005. He has been employed as a fire investigator since 2005 and had conducted over 480 fire investigations. While O'Donnell was qualified by consent, I note the absence of any specific training or education in the electrical field.

[137] In terms of origin, O'Donnell agreed that the fire began in the area of the basement stairway but he could not further identify the area of origin. As to cause, it was O'Donnell's opinion that the fire should be classified as "undetermined". In his view, both electrical failures in the area of origin, and evidence of smoking materials in the home, prevented him from isolating a specific cause. He did eliminate incendiary fire as a classification based on the "absence of evidence of deliberate application of flame to combustible material". Nevertheless, he concluded that there remained two possible accidental causes of the fire: (1) electrical failure; and (2) discarded smoking materials. With two possibilities, he classified the fire as "undetermined".

[138] The second opinion came from Chapdelaine. Chapdelaine has considerable experience in fire investigation, dating back to 1993. He entered the field as a firefighter and has considerable education in the fire investigation field dating to

2002. As with O'Donnell, Chapdelaine's expertise in the electrical field is limited (*See*: *Exhibit 9, Tab 3, pp. 59-61*: 2005 "*Electrical Inspection Training Program*", 2006 "*The Principles of Electrical Fires*", 2012 "*Arc Mapping Basics*" and 2015 "*Residential Electricity for Fire Investigators*").

[139] Chapdelaine was retained on July 2, 2015, to conduct an "independent review" of the other cause and origin opinions. He was later asked to prepare a Cause and Origin report, which was concluded on February 7, 2016 (*Exhibit 9*). Chapdelaine did not view the scene until September 7-8, 2017. He relied on the scene photos taken by the other experts and Sgt. Morrison.

[140] Chapdelaine's report totals 61 pages. However, 41 pages are devoted to a generic discussion of the NFPA fire investigation standards and methodology as well as a review of the various documents. As I understand the evidence, much of this material is not contested. The remainder of the report is a critique of the opinions provided by O'Donnell, Penny and Wentzell. The sole exception is the last paragraph of the report which provides Chapdelaine's cause and origin opinion:

> Upon completion of my review of the provided documents, photographs and a review of the technical literature, I am unable to determine a specific origin other than I concur that the origin was in the general area of the basement stairwell. As a result of not being able to conclusively state the location of the origin, the

> material first ignited, the ignition source or the sequence of events I am compelled by the provisions of the NFPA 921 to classify the cause of the fire as undetermined at this time.

[141] There are several points raised by Chapdelaine's report. First, I find that most of his work was devoted to a critique of the other opinions. With respect to his criticism of Wentzell, I find that Wentzell's Rebuttal Report and testimony amounted to a full answer to the criticism. By way of example, I find that Wentzell followed the NFPA standard and was well versed in its application in the circumstances. In stark contrast, Chapdelaine provides his cause and origin opinion in one paragraph at the end of his report. This paragraph provides none of the kind of analysis demanded of Wentzell. In view of this, I agree with the concluding comments of Wentzell's Rebuttal report at pp. 18-19.

[142] Further, I find that the weight given to Chapdelaine's opinion is significantly impacted by two things. First, Chapdelaine's expertise in the electrical field is far inferior to that of Wentzell. To the extent that opinions are expressed on matters involving electrical cause, I find that Wentzell's opinion deserves much more weight. This is not only a common-sense assessment but reflects the quality of the evidence offered by Wentzell on the possibility of electrical ignition.

[143] Second, Chapdelaine did not visit the scene of the fire loss until after his report was provided. He relied upon the photographs taken by others to formulate his opinion. His opinion is therefore based upon his interpretation of photos of a scene that he never personally observed. By contrast, both Penny and Wentzell assessed the scene in the immediate aftermath of the fire and the photographs represent documentation of what they observed and the particulars of their respective investigations.

[144] Chapdelaine devotes a considerable portion of his report to a discussion of origin determination and then concludes that he is unable to determine a specific origin. There is no surprise in this outcome. It was his evidence that origin determination requires the investigator to reference the direction in NFPA 921, section 18.1.2. This section of NFPA 921 says that origin determination requires coordination of information derived from one or more of (1) witness information; (2) fire patterns; (3) arc mapping; and (4) fire dynamics.

[145] Chapdelaine did not interview any witnesses. He did not do any arc mapping. His analysis of the fire patterns and dynamics was not based on his personal observations but rather on photos taken by others. And he admitted during his testimony that the photos did not reflect all the possible viewpoints of

the basement stairway area. I find that Chapdelaine's inability to access the required information makes his conclusion on origin unreliable.

[146] In contrast, I found Wentzell's evidence on this point persuasive. I am satisfied that he gathered and considered the required information and properly located the origin of the fire as the south side of the storage cavity underneath the first step of the stairs to the second floor.

[147] Determination of the origin of the fire allows the investigator to proceed to a cause analysis. Having failed to find the origin, Chapdelaine did not proceed to analyze the possible causes. Wentzell did proceed with his assessment.

[148] In his Rebuttal report, beginning at p. 18, Wentzell explained his approach. He developed five hypotheses using the scientific method and the information available to him. He then proceeded to eliminate all possible causes but incendiary fire. According to NFPA 921, an incendiary fire is one "that is deliberately set with the intent to cause the fire to occur in an area where the fire should not be". I accept this conclusion. Let me explain.

[149] The first possible cause excluded by Wentzell was electrical ignition of combustibles, either wood floor boards or other combustibles stored in the cavity area. It was his opinion, based upon his observation and experience, that the

circuits in the area adjacent to the origin did not ignite a fire. The damage to the adjacent circuits was a result of the fire, not an ignition source. He explained the basis for his conclusion on this point and I accept this evidence.

[150] As Wentzell explained his analysis of this point, he referred to a number of photographs of the area of origin. I found photo 57 particularly instructive (*Exhibit 14, p. A30*). This photo shows an area immediately below the origin of the fire and highlights the location of a hole created when the fire penetrated the floor boards. This area is not materially proximate to the branch circuits which are shown below and to the left in photo 57. In other words, if the branch circuits ignited the floor boards, one would expect that the hole would be immediately above the circuits.

[151] Photos 35 and 36 provide different perspectives of the same area. However, in these photos, one can clearly see that the branch circuits are not immediately below the floor boards of the storage cavity. Rather, the branch circuits are located some distance, perhaps inches, below the floor boards. And the amount of char on the bottom of the cavity area is much greater than the char on the underside of the floor boards. This supports the conclusion that the fire began on top of the boards and burned through to the underside, not the other way around (contrary to the

theory advanced by O'Donnell, *Exhibit 8, p. 8*). This begs the question then as to what else could have caused ignition in that space.

[152] Before leaving the issue of electrical causation, I note a further point raised by Wentzell. He observed that the arc-site damage was small, indicating a very short lived event with limited energy expended before the circuit breakers tripped. He further observed that the electrical panel was in working order. He referenced NFPA 921, section 9.11.10 which explains that short circuits on branch circuits have been known to ignite and cause fire. Normally however, a short circuit could only overload and become an ignition source if the overcurrent protection was defective. Considering all of this information, it was Wentzell's opinion that the arcing was caused by the fire and that the circuit breakers in the panel worked properly to isolate the effected circuits. This is a compelling point.

[153] After concluding that an electrical cause was "highly improbable", Wentzell examined other hypotheses.

[154] The next possibility examined was the careless disposal of smoking materials. Wentzell eliminated this possible cause for a number of reasons. The first was the fact that the storage cavity was an unusual location for anyone to discard smoking materials. To this I would add that the evidence does not support

this as a likely cause. Bidart was only in the house briefly on two occasions between 5:15 p.m. and 5:30 p.m. on September 9, 2010. He was in the house to get beer and went in and out of the kitchen area quickly. He would have passed by the open stairway to the basement, but there was no evidence that he was smoking at the time. There was evidence that Bidart smoked in the house but no evidence of smoking materials carelessly discarded. As I say this I note the evidence as to discarded cigarette butts in a fruit basket on the living room floor. In my view, this was not evidence of any propensity to randomly discard smoking materials in the house. And the evidence of smoking compiled by O'Donnell suggested that Bidart did most of his smoking in the garage and used ash trays for disposal (*See*: *Exhibit 8, Tab 1, photos 3 – 4*).

[155] The third hypothesis was spontaneous combustion. The most likely possibility was the careless storage of rags contaminated with linseed oil. In considering this option, Wentzell did not consider the existence of a storage shelf full of combustibles extending out in front of the storage cavity. He did consider that the storage cavity itself contained material capable of spontaneous combustion.

[156] Wentzell discounted this as a probable cause based upon an absence of evidence. The only identifiable remains in the storage cavity were curtain pleat pins and the metal handle of a paint roller. The contents of the debris field below were examined and contained no evidence of spontaneous combustion. There were no burnt rags. There were metal containers but they were not burned, suggesting that they had not been anywhere near the origin of the fire. And Bidart's own statement to Shane Walker did not place items of this kind in the storage cavity. He had no idea what could have caused the fire. He expressed no concern about dangerous combustibles in the house even though he had those concerns about the combustibles stored in the garage. And by the time he gave his statement, the general area of origin of the fire would have been common knowledge.

[157] The fourth hypothesis of a lightning strike was quickly eliminated on the basis of the available weather information.

[158] The last hypothesis was that the fire was incendiary. It was Wentzell's evidence that he could not exclude this as a possible cause of the fire. He went on to conclude that the cause of the fire was most likely ignition of ordinary combustibles by open flame.

[159] Having reviewed the conflicting opinions on this point, I find Wentzell's analysis of both origin and cause to be the most persuasive. His opinion was based upon his personal examination of the scene in the immediate aftermath of the fire loss. His investigation was in keeping with the appropriate standards and his factual conclusions were either in keeping with other evidence or a clearly explained part of his investigation, properly documented and demonstrated with clear photos taken at a time proximate to the loss. His experience, especially in the electrical field, deserves considerable weight. I accept his evidence without reservation.

[160] Penny's opinion was consistent with Wentzell's, although he provided a somewhat different basis for discounting smoking materials as a cause. I found the reasoning introduced by Penny consistent with the evidence. Penny brought a wealth of expertise and many years of practical experience to his opinion and he properly relied upon Wentzell's opinion to exclude an electrical cause to the fire.

[161] By contrast, I found both O'Donnell and Chapdelaine's approach flawed. Neither could identify an area of specific origin, albeit for different reasons. None brought particular electrical expertise to the assessment. And for reasons already expressed, I find their opinions of much less assistance.

[162] In coming to a conclusion on the question of whether the fire was incendiary, I am directed by the reasons of Doull, J. in ***Spencer (F.G.) Co. v. Irving Oil Co.*** (1951), 28 M.P.R. 320 (N.S.S.C.), at p. 363 (as adopted by MacAdam, J. in ***Tait***, *supra*, at p. 8):

> In civil cases, it is usually sufficient that as between the parties, the plaintiff proves his case by a preponderance of evidence. In applying this rule to cases which depend upon inference from facts, the plaintiff (in the present case the defendant) must show that the inference(s) upon which his case depends, is a reasonable inference and in order to turn the scale, he must be prepared to weigh that inference against any other suggested explanation and show that his explanation is more reasonable. If it appears that some contrary explanation is equally reasonable, the plaintiff (in this case the defendant) must fail. (Underlining added in ***Tait***)

[163] I am mindful that one of the purposes of opinion evidence is to assist the Court in providing ready-made inferences. These inferences must, of course, be consistent with facts established by the evidence. Speculation has no place in the fact finding process.

[164] In the present case, on the question of origin, none of the opinions were based upon the existence of a storage shelf filled with combustibles in the basement stairwell. Nonetheless, a theory was advanced that such a shelf existed and that the materials stored there could have been ignited by electrical fault or spontaneous combustion. I have found the existence of such a shelf has not been

proven. Based upon the evidence I do accept, I am satisfied that the origin of the fire was the storage cavity underneath the first step of the stairs leading to the second floor. This cavity was accessible from the basement stairwell.

[165] The assessment of cause flows from conclusions on origin. The evidence supported a finding that there was a storage cavity that existed underneath the first step of the stairs leading to the second floor. There was evidence that it was used for storage, as the remains of a paint roller and curtain pleat pins were found in that space. But the space was not large. It was 7" high by 35" wide and roughly the depth of the stair (See: *Exhibit 8, p. 6*). Other than the paint roller handle and the pleat pins, there was no evidence as to what was in that space at the time of the fire. But it is, in my view, more than a reasonable inference that combustible material ignited in that space.

[166] Before moving further in this assessment, I refer to two decisions which provide direction as to the inference drawing process. First, in ***R. v. Villaroman***, 2016 SCC 33, Cromwell, J. made the following comments as to whether inferences must be based upon proven facts:

> [36] I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon

the evidence or lack of evidence": para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

> [37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, 1938 CanLII 14 (ON CA), [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd 1938 CanLII 7 (SCC), [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28 (CanLII), 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, 1971 CanLII 13 (SCC), [1972] S.C.R. 2, at p. 8. "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.
>
> [38] Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.
>
> [39] I have found two particularly useful statements of this principle.
>
> [40] The first is from an old Australian case, *Martin v. Osborne* (1936), 55 C.L.R. 367 (H.C.), at p. 375:
>
> > In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed. [Emphasis added.]
>
> [41] While this language is not appropriate for a jury instruction, I find the idea expressed in this passage — that to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative — a helpful way of describing the line between plausible theories and speculation.

> [42] The second is from *R. v. Dipnarine*, 2014 ABCA 328 (CanLII), 584 A.R. 138, at paras. 22 and 24-25. The court stated that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences"; that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.
>
> [43] Where the line is to be drawn between speculation and reasonable inferences in a particular case cannot be described with greater clarity than it is in these passages.

[167] Although Justice Cromwell's reasons were given in the context of a criminal matter, I find them instructive as to the process of inference drawing generally. In a civil context, I reference the decision of our Court of Appeal in ***Halifax (Regional Municipality) v. Cheevers***, 2006 NSCA 54.

[168] Returning to the present case, in assessing what ignited the materials stored in the storage cavity, I have considered the theories of careless disposal of smoking materials and spontaneous combustion. I find both theories nothing more than speculation and not in keeping with the evidence which I do accept. In the case of both theories, there was no evidence offered by Bidart, or any other witness, which would provide any foundation for the required inferences or which could support competing reasonable inferences as to the cause of ignition. As I say this, I wish to emphasize that the onus is always on the proponent of arson. Although I have

weighed the evidence on these points and come to factual conclusions, I have not shifted the overall burden to the Estate to prove anything.

[169] The remaining possible causes of ignition were lightning, electrical and intentional. I accept the reasoning path offered by Wentzell on these possible causes of ignition. Neither lightning nor electrical ignition is a reasonable inference based upon the facts established. This leaves one possible cause – an intentionally set fire. I find this is the only reasonable inference in the circumstances.

[170] I therefore conclude that the fire was of incendiary origin.

(b) Opportunity

[171] The next consideration is whether Bidart had the opportunity to set the fire.

[172] In my view, the evidence on this point was straightforward. Bidart was home working in the garage from just after 5 p.m. on September 9, 2010, until the fire started. The fire department received a dispatch call at 8:45 p.m. By the time they arrived, the fire was well developed. In the intervening period, Bidart said he was in his home two times and would have passed by the open door to the basement stairway on four occasions. During this period of time, the front door

was locked and the back door was unlocked. It was daylight hours and Bidart's van was parked in his driveway. His neighbors were also home next door with their car parked in their driveway immediately adjacent to Bidart's home.

[173] I have already noted reason to question Bidart's credibility. However, I accept that he was in the immediate area at the time the fire was set. He clearly had opportunity to set the fire. It cannot be said that he had exclusive opportunity. It is possible that some other person could have entered the back door and set fire to materials in the storage cavity. It would seem very unlikely. Nonetheless, it is possible.

[174] The issue of non-exclusive opportunity was canvassed by Justice MacAdam in ***Tait, supra.*** In that case, the authorities on the issue of opportunity were reviewed and MacAdam, J. adopted the following reasoning:

> Justice Catzman rejected the "appropriate opportunity" description given by the trial judge and adopted by Goodfellow J. in **Pentagon Investments Ltd. v. Canadian Surety Co.** (1991), 108 N.S.R. (2d) 148 and Saunders, J. in **Webber v. Canadian Surety Co.** (1992), 112 N.S.R. (2d) 284. At p. 105 Catzman, J.A. says, where the evidence of opportunity is accompanied by other inculpatory evidence:
>
> > …the proper inquiry should be whether, on all of the evidence inculpatory of the insured, including motive and opportunity, the insurer has proven the defence of arson according to the standard of proof appropriate to the establishment of that defence in a civil case.

> The principle that opportunity does not necessarily involve "exclusive opportunity" or "last opportunity" was similarly referred to by Mandel, J. in **Burden v. Progressive Casualty Insurance Co.,** [1994] I.L.R. 1-3013 at p. 2640, where, after observing that for a defendant to successfully prove a defence of arson they must show that the fire was of incendiary origin and the plaintiff had sufficient motive the fire be set, accepted as a third requirement:
>
> > (c) Either exclusive opportunity on the part of the plaintiff or opportunity accompanied by other inculpatory evidence.
>
> In **Lewis v. Royal Insurance**, supra, the insured, having left his residence between 9:30 and 10:00 in the morning, testified that there was nothing unusual about anything in the house at the time. The fire was discovered approximately 15-20 minutes after the insured had left the residence. Justice MacDonald, at p. 177, in dismissing the plaintiff's claim, said:
>
> > I further find that the only people in the Lewis household on the morning of the 13th of April, after the sons had left shortly after 8:00 o'clock for school, were Mr. and Mrs. Lewis. Any suggestion that a stranger could have started the fire, during the short space of time between the Lewis' leaving their house and the fire being discovered is not, on the evidence before me, worthy of serious consideration.
> >
> > I find the plaintiff, or some person acting with the plaintiff's knowledge and approbation started the fire and I therefore, dismiss the action.
>
> Clearly, it was not necessary, in the opinion of MacDonald, J. for the defendant, in order to succeed on the defence of arson, to establish that there was no opportunity for anyone else, between the time the plaintiff left and the fire was discovered, to have entered the premises. As such, although not stated in the same language as Catzman, J.A. he clearly held that it was not necessary for the defence to establish exclusive opportunity in order to uphold the defence of arson.

[175] A similar conclusion was reached by Saunders, J. (as he then was) in ***Fraser v. Antigonish Farmer's Mutual Fire Insurance Co.***, [1998] N.S.J. No. 483.

[176] In the present case, the plaintiff suggested that there had been break ins in the area around the time of the fire and that there were people that Bidart didn't

know watching the fire. There was no cogency to the evidence and no connection to the actual time of the fire loss. It was pure suggestion.

[177] The evidence was that Bidart was last in the home sometime around 5:30 p.m. and the fire was well underway at 8:45 p.m. Bidart said he was in the adjacent garage the entire time. The door to the garage is only a few steps from the bottom of the rear entry to the house (See: *Exhibit 14*, photo 5). There was no evidence as to how long it would have taken for the fire to develop to the point of being discovered. Bidart could easily have entered the home and set the fire, or perhaps set the fire on one of the occasions he admitted being in the home. I consider it only remotely possible that someone else would have or could have entered the home and set the fire.

[178] A final consideration on the issue of opportunity relates to the disconnected alarm. Bidart said to the insurance adjuster that he thought that his alarm was functional and he was surprised when told that it was not operational because the two power sources had been disconnected. He had no explanation. He said he didn't use the alarm very much but he did not say that he disconnected it for any reason.

[179] In terms of opportunity, the non-operational alarm system increased the opportunity to set a fire and have it go undetected until it was well underway. There was evidence that the security alarm and the smoke detector were connected. If a random person entered the house to set a fire and the alarm wasn't armed, I question whether there exists any possible reason that they would disconnect the power and then set the fire. It doesn't accord with common sense.

(c) Motive

[180] The final consideration is the issue of motive.

[181] Portage presented evidence of a financial motive for the fire. In response, it was submitted that Bidart's asset to debt ratio was "far superior to most individuals suffering financial crisis" and that although he was behind in his bill payments and "struggling financially" that it was "not of a significant nature". Finally, it was argued that Bidart could have asked his brothers for financial help at any time.

[182] The evidence is clear that Bidart did not ask for financial assistance from his family proximate to the time of the fire. There is no evidence as to why he made no request for assistance. In his statement to Shane Walker, Bidart acknowledged being behind in his bill payments but was vague on the details. A

credit check performed by Portage shortly after the fire loss (a standard procedure), revealed concerns about Bidart's financial position. The financial picture included:

(a) Arrears of municipal taxes and interest totalling $3,553.23 (the tax account had not been paid since sometime in 2008);

(b) A CitiFinancial write off dated August 2010 in the amount of $71.00;

(c) Cancellation of a Royal Bank visa in September 2010 after his outstanding balance of $3662.00 had been delinquent more than 120 days;

(d) An August 2010 credit report from TD bank that Bidart's line of credit in the amount of $44,580.00 was 60-90 days in arrears (the payment was in the range of $200/month);

(e) A Canadian Tire credit report dated August 2010 that the balance of Bidart's credit card in the amount of $368.00 was greater than 90 days in arrears;

(f) A second Canadian Tire credit card with a balance of $993 was in arrears 30-60 days in August 2010;

(g) Arrears in his municipal water account; and

(h) Cancellation of a TD visa in August 2010 after his outstanding balance of $4,470.00 was greater than 120 days in arrears.

[183] In addition to the foregoing evidence, Bidart disclosed a judgement against him by a prior spouse. He told Shane Walker that the amount owing was $11,000.00. The amount owing was $16,024.54 (See: *Exhibit 4*, Tab 22). Bidart told Shane Walker that he had to pay this debt because an appeal had never been

filed. In fact, an appeal was filed on January 8, 2009, and dismissed on May 26, 2009. Bidart admitted to Shane Walker that the judgement had gone to execution and that his bank account balances had been seized and wages garnished. He told Shane Walker that this was why he was using his credit cards and that the debt was then fully paid.

[184] Even if it was true that Bidart's judgment was paid, his ongoing financial picture was bleak. He had no credit remaining, credit balances owing and was approaching a critical point with his line of credit, tax and water accounts. I find this to be cogent evidence of a financial motive to set the fire and collect the proceeds in order to assist himself financially.

[185] I have considered the submission made by the Plaintiff that Bidart had an asset base to pay his debts. While that may be true, there is no evidence as to how Bidart perceived his financial situation and whether he considered it a reasonable option to sell his property to pay off his outstanding debts. To the contrary, the evidence was that his home was not for sale at the time of the fire loss.

Conclusion

[186] There is no direct evidence that Bidart, or anyone acting under his direction, set fire to the house at 32 School Street on the evening of September 9, 2010. The

question is whether Portage has established on a balance of probabilities, with clear and cogent evidence, that arson was perpetrated and that there is no other reasonable inference.

[187] In so many ways, the circumstances of this case are unfortunate. It was difficult to listen to Bidart's brothers testify about their brother's life and death. The perspective they carried into this proceeding is understandable and compelling. But my decision in this matter must be consistent with the evidence and the law.

[188] In keeping with both, I conclude that the fire at 32 School Street on September 9, 2010, was an incendiary fire. Furthermore, I conclude that Bidart had both opportunity and motive to set the fire. The only reasonable inference I draw from the totality of the evidence is that Bidart set the fire. I am satisfied of this conclusion on a balance of probabilities.

[189] In light of this conclusion, an assessment of damages is not necessary. The Plaintiff's claim is dismissed. I would note however, that I found no factual or legal basis for a claim of bad faith or punitive damages.

[190] Portage is the successful party. It is entitled to its costs. The parties shall have thirty days to agree on costs. Failing agreement, the parties shall submit their respective positions on costs in writing on or before June 16, 2017.

Gogan, J.