

IN THE PROVINCIAL COURT OF NOVA SCOTIA

R. v. Bou-Daher 2013 NSPC 114

Date: November 21, 2013

Docket: 1982660

Registry: Halifax

Between:

Her Majesty the Queen

v.

John Bou-Daher

TRIAL DECISION

Judge: The Honourable Judge Anne S. Derrick

Heard: November 12 – 19, 2013

Decision: November 21, 2013

Charge: section 435(1), of the *Criminal Code*

Counsel: Alicia Kennedy and Terri Lipton, counsel for the Crown

Elizabeth Buckle, for John Bou-Daher

By the Court:*Introduction*

[1] Just after 1 a.m. on Monday July 7, 2008 fire damaged Key Largos, a bar at 70 First Lake Drive in Lower Sackville. Investigators determined that two fires had been deliberately set on the second level of the bar, which was known as the VIP lounge. This trial has been about whether they were set by the accused for a fraudulent purpose, that is, insurance fraud.

[2] John Bou-Daher was originally charged with Taleb Badour with arson for a fraudulent purpose. Their joint trial began on November 12 and on November 15, following his motion for a directed verdict, I directed that Mr. Badour be acquitted. (*R.v. Badour, 2013 NSPC 108*)

[3] Mr. Bou-Daher remains charged that

...on or about July 7, 2008, with intent to defraud Canadian World Wide Underwriting Agencies Ltd., c/o Maxwell Claims Services, Lloyds of London and Temple Insurance Company, [he] caused damage by fire to Key Largos, property of Starfish Properties, situate at 70 First Lake Drive, Lower Sackville, Nova Scotia, contrary to section 435(1) of the Criminal Code of Canada.

[4] The trial has proceeded on the basis of an Agreed Statement of Facts, the admission by consent of several experts' reports and other evidence, and the testimony of 15 witnesses called by the Crown. The Defence called one witness, Taleb Badour.

The Essential Elements of the Offence

[5] To secure a conviction in this case, the Crown must prove each of the following essential elements beyond a reasonable doubt:

- 1) that Mr. Bou-Daher caused the fire damage at Key Largos;
- 2) that Mr. Bou-Daher caused the damage intentionally or recklessly;
and
- 3) that, when Mr. Bou-Daher caused the damage he intended to defraud the insurance company.

[6] The central issues in this case are identity and intent. The Crown has led evidence relevant to the issues of opportunity and motive. For reasons I will explain, I find the motive evidence in this case to be of “negligible weight since on the facts disclosed by the record, there was no clear evidence that [the accused] stood to benefit financially from the fire.” (*R. v. MacFarlane*, [1981] O.J. 117, paragraph 7 (C.A.)) Consequently I find that in this wholly circumstantial case, the Crown must prove beyond a reasonable doubt that Mr. Bou-Daher had exclusive opportunity to set the fires at Key Largos. I am guided in this regard by the Supreme Court of Canada where it was held in *R. v. Yebes* that:

...where it is shown that a crime has been committed and the incriminating evidence against the accused is primarily evidence of opportunity, the guilt of the accused is not the only rational inference which can be drawn unless the accused had exclusive opportunity. (*R. v. Yebes*, [1987] S.C.J. No. 51)

[7] What I must therefore examine is whether the Crown has proven beyond a reasonable doubt that Mr. Bou-Daher had exclusive opportunity to set the fires that damaged Key Largos, which would constitute the included offence of arson, and whether he did so with the intention of defrauding the insurance company, which would constitute the offence charged, arson for a fraudulent purpose.

[8] As I just noted, this is an entirely circumstantial case. The burden on the Crown is to prove beyond a reasonable doubt that Mr. Bou-Daher’s guilt is the only reasonable inference to be drawn from the evidence. (*R. v. Griffen*, [2009]

S.C.J. No. 28, paragraph 34) The “mere existence of any rational, non-guilty inference is sufficient to raise a reasonable doubt.” (*Griffen, paragraph 34*) I must only draw inferences that are supported by the evidence and not engage in speculation or conjecture.

Reasonable Doubt and the Presumption of Innocence

[9] It is not Mr. Bou-Daher’s responsibility to demonstrate, establish, or prove his innocence or to explain away the allegations made against him. He is not required to establish who did set the fires, if not himself, nor is he required to explain the evidence presented by the Crown. (*R. v. Boucher, [2011] N.S.J. No. 545 (S.C.), paragraph 45*) He is presumed to be innocent until proven guilty beyond a reasonable doubt. The Crown bears this onus of proof beyond a reasonable doubt throughout the trial and it never shifts.

[10] The onus resting upon the Crown to prove Mr. Bou-Daher’s guilt beyond a reasonable doubt is inextricably linked to the presumption of innocence. (*R. v. Lifchus, [1997] S.C.J. No. 77, paragraph 27*) A reasonable doubt is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence. A reasonable doubt is not a doubt based on sympathy or prejudice, or one that is imaginary or frivolous. Proof establishing the probability of guilt is not sufficient to establish guilt beyond a reasonable doubt. It is not proof beyond a reasonable doubt when guilt is suspected. Proof beyond a reasonable doubt falls much closer to absolute certainty than it does to a balance of probabilities. (*R. v. Lifchus, paragraph 36; R. v. Starr, [2000] S.C.J. No. 40, paragraph 242*)

Evidence Relevant to the Issue of Opportunity

[11] A significant amount of the evidence is not in dispute. I will now discuss what has been established about the fires, the sprinkler system at Key Largos, the fire alarm system, the entrances to Key Largos and the emergency exit door, and Key Largos’ security system.

The Fires

[12] The fires on the second level of Key Largos were each deliberately set and were not connected to each other, that is to say, one fire did not spawn the other. One fire was started in the office on the second floor and the other fire was set in a nearby carpeted hallway off which there were two washrooms.

[13] A liquid accelerant was used to ignite the fires. The area smelled strongly of gasoline or some similar petroleum product. Carpet and wood samples were removed from the scene: charred carpet samples from the office floor, charred carpet and wood samples from near the VIP lounge area washrooms, carpet from near the upstairs bar, and carpet from near the desk in the office. Forensic testing indicated gasoline and a light petroleum distillate in the charred carpet sample from the office. Gasoline was detected in the other three samples, which included two unburned carpet samples taken from near the upstairs bar and near the desk in the office. Gasoline and light petroleum distillates are ignitable liquids and can act as a fire accelerant. (*Exhibit 3*)

[14] Scott Wheeler was qualified without objection by Defence as an expert in the field of fire cause determination with expertise in the areas of identification and examination of fire burn patterns, the cause and origin of fire, and fire travel. According to him, the pattern on the carpet in the burned areas indicated that something had been poured there. It was his opinion that the point of origin of the fire in the office was just past the doorway on the carpet up against the wall. He located this in Exhibit 1, Photograph 20. Soot patterns on the office door enabled Mr. Wheeler to determine that the door had been open at the time of the fire. Referring to Photograph 26 in Exhibit 1, Mr. Wheeler noted that soot on the edge of the door would not have been there had the door been closed.

[15] Mr. Wheeler indicated there was nothing in the office that would have permitted the fire to have done the damage it did. This lack of fire load, that is, combustibles, was consistent with the use of an accelerant.

[16] The report of Philip Juby, a “fire cause determination and travel” expert was admitted by consent and included the following opinions:

- There were two distinct areas of deliberately set fires;
- A liquid accelerant was used;
- Liquid accelerants are commonly ignited by the use of a match or lighter;
- The fires could not have occurred without human action;
- The fires were set intentionally to cause damage to the contents and structure of the business;
- The amount of “Burn Time” or time of open flame in this fire scene was more than 3 minutes and less than 5 minutes.
- The sprinkler system minimized the damage which was limited to flooring, moulding, and light soot throughout. The fire was also minimized by the absence of a considerable volume of flammable material immediately at the flame source.

[17] Whoever set the fires did not add any combustible material to them. This was the opinion of both Mr. Wheeler and Mr. Juby. Mr. Juby noted that, “Had wooden and paper objects been placed on the fire, the damage would have been much greater.”

The Sprinkler System at Key Largos

[18] The fires were extinguished by the sprinkler system. Both fires were set in proximity to sprinkler heads which were triggered by the heat of the flames. After

the fires, a sprinkler head was replaced in the office, right over the desk (*Exhibit 1, Photographs 29 and 31*) as well as one outside the washrooms in the VIP lounge area. (*Exhibit 1, Photograph 55*)

[19] A sprinkler system is designed to react to heat. Its heat-reacting mechanisms are triggered at 165 degrees Fahrenheit, causing the release of pressurized water in the sprinkler pipes. Factors that can affect when the sprinkler system is activated include the size of the room and the height of the ceilings.

[20] When fire fighters responded to Key Largos on July 7, the sprinkler system was gushing water. Once the premises had been searched, the system was shut off.

The Triggering of the Fire Alarm

[21] The fire alarm at Key Largos was triggered by the sprinkler system. The Agreed Statement of Facts states that Terry Muise, monitor of the alarm for Key Largos and other properties, received the alarm at 1:09 a.m. “as reflected by the alarm log prepared by Mr. Muise.” (*Exhibit 10, Agreed Statement of Facts*) The Halifax Regional Fire Service was notified of the fire alarm at 1:15:13 a.m. (*Exhibit 10, Agreed Statement of Facts; Exhibit 22, HRM Fire and Emergency Dispatch Log*) and Engines 9 and 10 were dispatched at 1:15:58 a.m. They arrived at 70 First Lake Drive at 1:21:52 and 1:25:39 respectively. (*Exhibit 22, HRM Fire and Emergency Dispatch Log*)

[22] Exhibit 22, the HRM Fire and Emergency Dispatch Log, appears to be computer generated. The alarm log prepared by Terry Muise was not entered into evidence. I do not know that it was computer generated and I do not know how the time of 1:09 a.m. recorded by Mr. Muise corresponds to the time recorded by the HRM Fire and Emergency Dispatch Log. There is a six minute delay between when Mr. Muise recorded receiving the fire alarm at 1:09 and when HRM Fire Services were notified at 1:15 a.m. This strikes me as an unusually long time in the circumstances of a fire alarm. It raises the possibility that the time recorded in Mr.

Muise's log might not be accurate. For reasons I will discuss, I don't think this is an accurate time.

The Entrances to Key Largos and the Emergency Exit, Door #4

[23] There were three entrances to Key Largos, all doors along the front of the building facing the parking lot. Two of these entrances were double doors: double doors were the main entrance to the bar and double doors also opened into the VLT area on the main floor. (*Exhibit 1, Photograph 2*)

[24] There was also a single door that led from the outside into the coat check area. (*Exhibit 1, Photographs 2 and 113*)

[25] A fourth door, on the side of the building, which I will call Door #4, (*Exhibit 8, hand drawn diagram of 70 First Lake Drive*) could not be opened from the outside. It was an emergency exit door only, with a panic bar on the inside. It was this door that firefighters pried open to gain access to the building.

The Emergency Exit - Door #4

[26] Door #4 opened into a long hallway. Off the hallway was a set of stairs leading up to the VIP lounge on the second floor of Key Largos. It was possible to follow the long hallway past the stairs leading up to the VIP lounge area and arrive at two doorways that led either to a set of main floor washrooms or the kitchen.

[27] Key Largos rented its space at 70 First Lake Drive from Starfish Properties. Starfish Properties had an alarm system on four exterior doors, three in the back of the building and the emergency exit door, Door #4. The only evidence about the Starfish Properties' external door alarm system was given by Gary Wambolt who did maintenance work for Starfish Properties. The system was triggered by opening any of the four outside doors. The door alarm system was not monitored by the police. Door #4 was not alarmed during the hours that Key Largos was open. If the door was not closed, the Starfish Properties' alarm system would not

set. Mr. Wambolt recalled an occasion when he had to contact Mr. Bou-Daher because Door #4 had been left propped open all night.

[28] As I mentioned earlier, when the fire fighters arrived at 70 First Lake Drive, they had to pry open Door #4 to gain access to the building and Key Largos. There is no evidence as to whether doing so triggered the alarm system that related to this door. I do not know whether Door #4 was armed when Key Largos closed on July 7.

Key Largos' Security System

[29] The Key Largos' security system had originally been installed in 2000. The system included a central panel with two key pads, three motion detectors, five door contacts and a 15 watt interior siren that would sound when the alarm was tripped. The motion detectors would pick up motion in an area of approximately 800 square feet. There is no evidence about where any of the motion detectors were located. The door contacts would trigger the system if the contact was broken while the alarm was armed.

[30] The evidence indicates that the system was probably installed with a delay to enable the system to be armed or disarmed without the person doing so immediately triggering the alarm. In other words, the alarm system would not automatically go off as soon as someone entered the premises or the instant someone armed the alarm as they were leaving. There was no evidence as to how long this delay was on the Key Largos system.

[31] The evidence established that on July 7, 2008, there were no problems with the Key Largos' system. It was in good working order. There had been no calls for service. There were no calls for service after July 7, 2008 either.

[32] When firefighters entered through Door #4 they went along the hallway and up the stairs to the second level of Key Largos. Water was coming down the stairs and flowing out under Door #4. At the top of the stairs the firefighters encountered a locked door. This door also had to be forced which set off an intrusion alarm associated with Key Largo's security system.

The Arming of the Key Largos Alarm System on July 7, 2008

[33] The computer generated monitoring report for the Key Largos' alarm system (*Exhibit 11, Alarm Systems Log*) shows that the Key Largos' alarm system was armed at 1:10:44 a.m. on July 7, 2008. User #40 armed the system. User #40 was the master code for the system.

[34] The 1:10 a.m. arming of the Key Largos alarm system was done by John Bou-Daher. In a statement to police on July 8, 2008, Mr. Bou-Daher indicated he had armed the system using his code when he left Key Largos.

Searching Key Largos on July 7 after the Fires

[35] According to the Alarm Systems Log for Key Largos' security system (*Exhibit 11*), the forced entry by firefighters through the upper rear door at the top of the stairs was at 1:41:50 a.m. This was 31 minutes after the system had been armed by John Bou-Daher.

[36] Captain Grimes of the Halifax Regional Fire Service and some firefighters did a primary search of Key Largos to make sure there was no one inside. This involved searching every part of the premises. They found no one.

[37] One of the areas searched was a closet on the second level of the bar, near the burned areas. It was 15 to 20 feet to the right of the upstairs door that had been forced open and 25 feet from the fire damaged office. Dwayne Dodge, a fire fighter with Engine 9, described a strong odour of petroleum in that closet, stronger than the smell in the rest of the area. He put its potency at an 8 or 9 out of 10.

How Secure was Key Largos?

[38] I find there is no rational basis for inferring that someone may have been able to get into Key Largos once Mr. Bou-Daher set the alarm. There is no evidence that entry could have been gained through a window. An examination of Exhibit 1, the booklet of IDENT photographs, does not reveal any windows that could have been a point of entry from the outside.

[39] I also find that none of the exterior doors that could permit access into Key Largos were found to be in a damaged condition. Police IDENT photographs from July 8, 2008 (*Exhibit 1*) include close-ups of the locking mechanisms for the three entrances into Key Largos. None of these locking mechanisms show any signs of damage or forced entry. These three entrances were on the Key Largos' security system.

[40] The security system at Key Largos was working on July 7. It was a monitored system and the monitoring report shows that it was armed and later breached, the intrusion being by the firefighters breaking through the upper rear door. No earlier dis-arming of the system or intrusion was recorded by the monitoring entity. The only rational inference to be drawn from the evidence is that whoever set the fires on the upper level of the bar had to have already been inside before Mr. Bou-Daher armed the system. And whoever set the fires had to have left the premises before the firefighters arrived as they conducted a thorough search and found no one. The only door that someone could exit from without triggering the Key Largos' security system was Door #4. I will return to Door #4 in due course.

The Interior Video Surveillance System

[41] The video surveillance DVR from Key Largos was examined as part of the police investigation after the fires. The DVR was located in the office where one of the fires was set. There is evidence that it got wet when the sprinkler came on. However this caused it no damage according to Daryl Strickland, a software

engineer who received the DVR from the police. Mr. Stickland testified he found the DVR to be in good working order.

[42] The Crown led evidence establishing that the DVR had failed to record any video from inside Key Largos during the time of the fires. In the Crown's submission, the person making regular use of the office, John Bou-Daher, disconnected the DVR so there would be no evidence of him setting the fires.

[43] I am satisfied that the evidence indicates someone deliberately disrupted the DVR's power source. Brian Hooper was qualified without Defence objection as an expert in computing systems and information technology. He explained how the DVR operated and the log that it generated during its operation. The unit was designed to run 24/7 and was built with "fairly robust PC components." It had the ability to detect a problem with the computer and re-boot it. The system was designed to come back on automatically after a power outage once power had been restored. Mr. Hooper described it as a unit that is built to be turned on and then left to run "for years." There is no need to turn the unit off unless it is going to be serviced.

[44] Mr. Hooper went over the Microsoft Windows Event Log for the DVR. (*Exhibit 17*) He noted that the system is "constantly writing to the log." His examination of the log led him to conclude that sometime in the period of July 6 to 9, 2008 there was "an unclean shut-down" of the video surveillance system. This indicates that "power was removed from the unit." According to Mr. Hooper this could mean a power outage, a plug pulled from the unit or the wall, or the back power switch was turned off. As the DVR was fully functioning, there were no other explanations for the system being down.

[45] The time of the "unclean" DVR shut down can be narrowed down. The system was programmed to search for confirmation of the time but as the DVR was not connected to the internet this was futile. The DVR would cycle through this futile process every 24 hours. On July 6 at 12:43 p.m. it started its process of

looking for the time. It stopped functioning at 3:19 p.m. (*Exhibit 17*) Had there been a simple power interruption caused by a circuit breaker for example, then it would have recorded its failure to find the time as soon as the power was restored. There was power at Key Largos when Mr. Bou-Daher and Mr. Badour left on July 7 around 1:10 a.m. and, as the Crown has pointed out, the IDENT photographs show lights on inside Key Largos when the photographs were taken sometime during the day of July 7. The DVR log did not record any activity on July 7. The unit remained down until July 9 when it started writing to the log again. (*Exhibit 17*)

[46] There is only one reasonable inference to be drawn from the evidence about the DVR: someone deliberately shut down the Key Largos' video surveillance system on the afternoon of July 6. The only reason to have done so was to ensure the video surveillance cameras could not record the planned arson.

The Activation of the Sprinklers and the Externally Monitored Fire Alarm

[47] As I have mentioned already, on July 7 at 1:10:44 a.m., John Bou-Daher armed the Key Largos security system. Taleb Boudour was waiting for him to close the bar and they left immediately. Their departure is confirmed by footage from a rooftop camera on the Staples call centre that panned the front of Key Largos. I will return to discuss that camera footage.

[48] If the time recorded by Terry Muise, the fire alarm monitor, in his log is accurate, when Mr. Bou-Daher armed the Key Largos' security system the fires on the second level would already have been burning for several minutes. Let me unpack that. According to Terry Muise's log, at 1:09 a.m. the sprinkler system went off in Key Largos triggering the fire alarm system. The two deliberately set fires on the second level of the bar had to have been burning long enough prior to

that to build up the heat reaching the sprinkler heads to a temperature of 165 degrees Fahrenheit. As it is Philip Juby's opinion that the time of open flame in the fire scene was more than 3 minutes and less than 5 minutes, then, in this scenario, at least one of the fires had to have been set around 1:04 – 1:06 a.m.

[49] I have been unable to see how that could be possible. The evidence indicates there would have been two short-lived but intense fires on the second level of Key Largos. Prior to his arming the Key Largos' internal security system, John Bou-Daher was in the office on the second level, tallying up the day's revenues. Both Mr. Badour and Asal Vakili, the waitress on shift on July 6, saw him in the office doing this. I do not see how the fires could have been burning for as much as 4 to 6 minutes before Mr. Bou-Daher armed the security system and left the building.

[50] If the fires started around 1:04 a.m. – 1:06 a.m. then they would have been blazing while Mr. Bou-Daher and Mr. Badour were still on the premises. It is not reasonable to think the men would have remained inside while the fires burned. Mr. Badour testified he noticed nothing out of the ordinary before he left Key Largos with Mr. Bou-Daher. It is possible that is not true but even then it makes no sense that he and Mr. Bou-Daher would have lingered inside with the fires burning.

[51] I do not see how the 1:09 a.m. time of the fire alarm can be accurate. I find that the sprinkler system activated the fire alarm closer to 1:15 a.m. which is the time when the HRM Fire Service received notification of the fire.

The Staples Call Centre Camera Footage

[52] 70 First Lake Drive housed, in addition to Key Largos, a Staples training centre space, a Needs store, a Tim Hortons, and an Armed Forces Military Police depot. A person emerging from one of Key Largos' main doors into the parking lot would find the Needs Store and Tim Horton's to their left.

[53] Directly across the parking lot and facing the front entrances for Key Largos, was an external camera fixed to the roof of a Staples call centre. Footage from this

camera was entered by consent as Exhibit 2. Police investigators were unable to obtain video from the Needs store or Tim Horton's.

[54] There is no evidence that the time from the Staples camera footage is synchronized to any other times recorded in the evidence. The video does however provide some useful evidence even though the images are grainy and the footage flickers.

[55] At 1:08:31 – 1:08:48 a.m., Staples' camera time, a person emerges from around the brightly lit area in front of Tim Horton's and goes to their left. At 1:09:30 a.m. a truck starts moving in front of Key Largos, swinging around to pause near Tim Horton's at 1:09:52 a.m. The Defence acknowledges that this is John Bou-Daher who had just left Key Largos with Mr. Badour. At 1:10:18 a.m. – 1:10:20 a.m. it appears as though a shadowy figure moves toward the truck. At 1:10:22 a.m. the truck starts to move. The shadowy figure is no longer visible. Mr. Bou-Daher's truck turns left around to the side of the building, the same side as Door #4, and then turns back around and leaves the parking lot. It is gone from the view of the Staples call centre camera by 1:10:40 a.m. In due course I will note that Mr. Bou-Daher's statement to police of July 8, 2008 describes events very similar to what the Staples call centre camera shows.

[56] By the time Mr. Bou-Daher leaves the parking lot at 70 First Lake Drive, Mr. Badour is gone, having left directly at 1:10:05 a.m., according to the Staples camera.

[57] Nothing of note is visible in the footage after this until 1:16:48 a.m. when a taxicab pulls up outside of Tim Horton's. A figure gets into the cab from that area of the building. At 1:17:31 a.m. the cab leaves the parking lot. It does not go around to the side of the building.

Sunday July 6 into Monday July 7

[58] I have already found that it is not a reasonable inference that someone broke into Key Largos and set the fires. Whoever set them had to have been inside already. As Sunday July 6 turned into Monday July 7, the evidence indicates there were only three people at Key Largos – John Bou-Daher, Asal Vakili, and then, Taleb Badour.

[59] Asal Vakili, who had waitressed at Key Largos on Sunday, July 6, noticed nothing out of the ordinary with Mr. Bou-Daher at the end of her shift. The bar's customers were all gone by around midnight so she ended up leaving early. She closed out her shift, handing in her money and receipts to Mr. Bou-Daher who was in the upstairs office. There was no one else in the office. There were no smells in the office when she was there.

[60] I find that when Ms. Vakili left everything was, as she testified, “fine, normal.” There was no smoke, no fire, and no alarms going off.

[61] Ms. Vakili left Key Largos through the doors leading from the VLT lounge on the main floor. Taleb Badour was waiting there to get in. He wanted to see Mr. Bou-Daher. He took the opportunity of Ms. Vakili leaving the bar to go inside.

The Evidence of Taleb Badour

[62] Taleb Badour was called as a Defence witness. He had met Mr. Bou-Daher some years ago and became reacquainted with him four or five months before the Key Largos' fires. Mr. Badour did not socialize with Mr. Bou-Daher and they did not visit each other or have a relationship outside of Mr. Bou-Daher engaging Mr. Badour to do work at Key Largos.

[63] Mr. Badour had done various carpentry, electrical, and plumbing jobs at Key Largos. On Saturday, July 5, Mr. Badour had done some work on a sink. Mr. Bou-Daher was there when Mr. Badour arrived but by the time he had finished the job, Mr. Bou-Daher had left. Consequently Mr. Badour knew he would have to collect

payment for the work later. This had happened before and was not a matter of any concern for Mr. Badour.

[64] Key Largos was a stop for Mr. Badour on his way home on Sunday night, July 6. He had been visiting a friend in Lower Sackville with his 16 year old son and was headed back to Dartmouth alone after agreeing his son could stay overnight. Mr. Badour decided to swing by Key Largos to collect the money he was owed for the work he had done on the sink. It was his intention to get his money and leave. He could reasonably have expected the bar to be open. I note that in a statement to the insurance adjuster on July 9, 2008, Mr. Bou-Daher indicated that Key Largos was open until 1 a.m. seven nights a week. (*Exhibit 12*)

[65] The front door to the bar was locked when Mr. Badour tried it. As Ms. Vakili testified, Mr. Badour went in as she left. The bar was in darkness. Mr. Badour went up to the office on the second level where he found Mr. Bou-Daher sitting at the desk counting money. It was Mr. Badour's recollection at trial that Mr. Bou-Daher asked him how much he was owed and passed him the \$80 at this point. Mr. Badour testified that he then went to leave but Mr. Bou-Daher said he was finished and they should leave together.

[66] According to Mr. Badour, their shared Arabic culture meant that it would have been disrespectful for him to have ignored Mr. Bou-Daher's suggestion and just left. He went downstairs to the main floor of the bar. Mr. Bou-Daher was counting money and Mr. Badour did not want to watch him while he did that. I inferred from his evidence that he did not think it was any of his business. I did not infer, as the Crown suggested, that this meant Mr. Badour did not want to watch Mr. Bou-Daher light the fires. The inference I have drawn is more logical given the context in which Mr. Badour's comment was made.

[67] Mr. Badour waited in the area by the main double doors leading outside. At trial he recalled waiting a couple of minutes and was emphatic that he would not

have waited as long as thirty minutes, which is what is suggested by his statement to the police of July 8, 2008.

[68] On cross-examination, Mr. Badour was asked about his July 8 statement where he said he had waited for Mr. Bou-Daher for half an hour – “...so I just walked out, I don’t want to see what he’s doing in there and waited for him, I don’t know, maybe half an hour, something like that. I’m not sure exactly how long I waited...” (*Exhibit 6, page 3*) Mr. Badour testified there must have been a misunderstanding when the police took his statement and that he would have meant the entirety of his visit to Key Largos that night was a half-hour. Mr. Badour did acknowledge that his memory on July 8, 2008 would have been better.

[69] I do not accept Mr. Badour’s explanation at trial for what he said to police on July 8, 2008. I find Mr. Badour’s July 8 statement to be quite clear: he said he waited for Mr. Bou-Daher, “...I don’t know, maybe half an hour, something like that, I’m not sure exactly how long I waited...” (*Exhibit 6, page 3*) There was no suggestion that the wait was a few minutes only or that he was referring to the duration of his whole visit. I find Mr. Badour was at Key Largos as long as half an hour waiting for Mr. Bou-Daher. In Mr. Badour’s July 8 statement to police he said that it was when he and Mr. Bou-Daher left Key Largos that Mr. Bou-Daher handed him the money he was owed, \$80 for the sink job. (*Exhibit 6, page 3*) It is reasonable to infer that Mr. Badour waited for Mr. Bou-Daher so he could get paid.

[70] Mr. Badour has testified that some of that time Mr. Bou-Daher was not visible to him. Mr. Badour could not see upstairs from where he was standing by the doors. He testified he was able to see Mr. Bou-Daher come down the main staircase and go in the direction of the alarm panel which was on the first floor beside the walk-in coolers near the kitchen area. Mr. Bou-Daher then walked to the front doors and he and Mr. Badour left right away. Mr. Badour did not see Mr. Bou-Daher actually set the alarm although the evidence indicates the alarm was set.

[71] According to Mr. Badour there was no one around when he and Mr. Bou-Daher left. There was nothing unusual and no smell of gas or smoke, no water, and no alarms sounding. Mr. Bou-Daher did not seem to be in a rush and was carrying only a small zippered pouch for money.

[72] I know from the evidence that the sprinkler system not only triggered a monitored alarm but also what the fire fighters referred to as a “water gong”, an external alarm located on the left side of 70 First Lake Drive. The fire fighters heard it during a perimeter search of the building. The Captain of Engine 9, William Grimes, testified that he heard the gong as soon as they got out of the fire engine at the front of the building. Dwayne Dodge, one of the fire fighters with Engine 9, testified he only heard the gong when they got to the back of the building while doing their circumnavigation of the exterior.

[73] I have no evidence as to when the water gong would have started to sound. I do not know if it would have gone off at precisely the same time as the sprinklers. It has not been established that it would have been sounding or audible when Mr. Badour and Mr. Bou-Daher stepped out into the parking lot to leave especially as the sprinkler system may not have been activated at that point.

[74] Before I complete my discussion of the evidence for July 6 into July 7, 2008, I must consider the statements given by Mr. Bou-Daher to the police on July 8 and October 1, 2008.

John Bou-Daher's Statements of July 8 and October 1, 2008

[75] Mr. Bou-Daher's statement of July 8 indicates that Mr. Badour arrived around 12:20 or 12:30 a.m. on July 7, just after Ms. Vakili had left.

[76] Mr. Bou-Daher describes being in the office counting the money. He paid Mr. Badour and they left Key Largos together. Just before they left, Mr. Bou-Daher set the alarm using his own code. Mr. Bou-Daher told police that once he was outside he saw a “guy” who raised his suspicions. He started his truck and

drove to where the guy was near “the store” and spoke to him. He then went around the building to check Door #4 and after that he left. (*Exhibit 5, pages 3 and 4*) This narrative fits with what is observable on the Staples call centre camera footage.

[77] On October 1, 2008, Mr. Bou-Daher gave a cautioned police statement. He reiterated what he had said in his July 8 statement about leaving Key Largos with Mr. Badour. He emphatically denied setting the fires and pointed out what a clumsy, amateurish arson it had been – the fires were lit right under sprinkler heads and the business was under-insured. He told the investigating officer: “You think if I want to do something stupid like that, I would have put the insurance for \$2 million. Our insurance is less than it costs what the place to fix.” (*Exhibit 7, page 30*)

[78] Mr. Bou-Daher’s statement about the insurance coverage was confirmed by the testimony of James Matheson, an adjuster with Marsh Adjustments, who expressed his opinion that the business was underinsured for equipment loss given the improvements that had been made to the premises.

[79] Mr. Bou-Daher claimed to police that the Key Largos’ alarm system hadn’t been working although it is unclear from his statement when this was: “...a couple of days later, I call the guy for the alarm because the alarm wasn’t...the door...we have a problem with the system too.” (*Exhibit 7, page 48*) Mr. Bou-Daher went on to say the system got fixed.

[80] There is no evidence that the security system at Key Largos was malfunctioning on July 7.

Did John Bou-Daher have Exclusive Opportunity to Set the Fires?

[81] It is not denied that John Bou-Daher had the opportunity to set the Key Largos’ fires. He was seen in the area where the fires occurred, using the office where one of the fires was started. As I noted at the start of these reasons, proof

beyond a reasonable doubt of exclusive opportunity is required in this case for a conviction.

[82] If someone else other than John Bou-Daher set the fires, they would have had to do so before he set the alarm because it would have been necessary for them to get out through the rear upstairs door before the intrusion alarm on this door became active.

[83] There is no evidence that the upper rear door triggered an alarm before the arrival of the fire fighters. The evidence satisfies me that the Key Largos security system was working: the arming of it at 1:10:44 a.m. was logged and the intrusion through the upper rear door was logged as well, at 1:41:50 a.m. I find that no one could have left through the upper rear door after the system was armed by Mr. Bou-Daher at 1:10:44 a.m. without tripping the alarm.

[84] Before I go further I will briefly re-visit Door #4 as the Defence has submitted that someone could have slipped out of Key Largos and into the night through this door.

Door #4

[85] I heard evidence about two stationery cameras that overlooked Door #4 and were maintained by the next-door Armed Forces military police depot. I don't intend to review this evidence in any detail.

[86] The camera footage was erased and reused before police could seize it. However prior to this happening, an Armed Forces administrative employee, Helen Newman-Simoneau viewed it as a result of a request passed from Halifax Regional police investigators to her through a colleague. I am satisfied from her testimony that Ms. Newman-Simoneau conducted a singular, dedicated viewing of the video footage.

[87] It is most likely that the time period for Ms. Newman-Simoneau's viewing was from 11 a.m. on Sunday July 6 to 4 a.m. on Monday July 7, which is what she

reported in the statement she gave to police on November 21, 2008. She was asked on cross-examination if, before the firefighters arrived, she had seen another vehicle coming around the building from the front, past the Tim Hortons, and into the camera's view. She said she did not see this.

[88] What Ms. Newman-Simoneau did not see was Mr. Bou-Daher's truck which can be seen on the Staples' call centre footage going around to the side of 70 First Lake Drive where Door #4 was located. It would seem that this should have been captured by the Armed Forces' cameras.

[89] I find it is possible that Ms. Newman-Simoneau's careful scrutiny of the footage from the two cameras may not have been infallible. Mr. Bou-Daher's truck may have been something she missed despite what I find was the careful and focused viewing she undertook. However I do not find that this undermines the Crown's case against Mr. Bou-Daher.

[90] I return now to the issue of whether Mr. Bou-Daher had exclusive opportunity to set the fires. Although Ms. Buckle quite rightly points out that my task is not to solve a mystery, in considering whether the Crown has proven beyond a reasonable doubt that Mr. Bou-Daher as the arsonist is the only rational inference to be drawn from the evidence, I have to ask myself if there is any evidence to support a rational inference that someone other than Mr. Bou-Daher had the opportunity to set the fires.

[91] Even assuming that an arsonist could have slipped out through Door #4 without Ms. Newman-Simoneau noticing this when she was watching the video footage, I find it is wholly unreasonable to infer that another person could have evaded Mr. Bou-Daher, splashed the accelerant around in two separate places, lit the fires, and taken off through the upstairs rear door all in the time between when Mr. Bou-Daher went downstairs and when he alarmed the security system.

[92] There is no evidence that while Mr. Badour waited downstairs anyone was upstairs at Key Largos other than Mr. Bou-Daher. There was a period of time

while Mr. Bou-Daher was still upstairs during which Mr. Badour could not see him. During this time Mr. Bou-Daher had exclusive opportunity to set the fires. The only one rational inference to be drawn from the evidence is that he used the opportunity just before going down to set the alarm to do so. He then left promptly with Mr. Badour, did not linger in the area, and was gone by the time the sprinkler system had triggered the fire alarm.

[93] Although Ms. Buckle suggested in her very able closing submissions that I should view the appearance of the taxicab at 1:16:48 a.m. in the Staples video as suspicious, its presence is not inconsistent with Mr. Bou-Daher's exclusive opportunity. It pulled up by the Tim Horton's where its fare may have been an end-of-shift employee.

[94] I note that I have considered the evidence of James Matheson, the insurance adjuster, who testified to being called by John Bou-Daher to look at a contact point on the single door on the front of Key Largos. He identified this door as the door shown in Exhibit 1, Photograph 113. This happened early in the claims investigation, within the first couple of weeks after the fire. Mr. Matheson saw that something had been placed over the sensor on the door, a substance like chewing gum. He thought the substance was turned over to police but if that occurred, it has disappeared.

[95] Mr. Matheson's evidence does not raise a doubt in my mind about how the fires got set in Key Largos. I am satisfied beyond a reasonable doubt that the fires had activated the sprinkler system and the fire alarm by 1:15 a.m. on July 7. This was within five minutes of Mr. Bou-Daher leaving the premises. Even if there was an accessible door, it is not a rational inference that someone could have slipped into Key Largos at this time and set the fires without being seen by anyone. I also find it is a common-sense inference from the evidence about Key Largos' security system that the system would not have been able to arm the upper rear door if the contact on this lower door had been disrupted.

[96] I have considered the issue of Mr. Bou-Daher's demeanor and found that it does not raise a reasonable doubt about his involvement with the fires. Mr. Badour may not have told the whole truth about his observations on July 7 at Key Largos when he and Mr. Bou-Daher left. As for Mr. Bou-Daher's conduct after getting into his truck – apparently stopping to speak to someone and briefly swinging around in the vicinity of Door #4 – I note that this only took him a minute to a minute and a half, from 1:09:30 a.m. Staples camera time, when his truck starts to move to 1:10:40 a.m. when it is gone from view.

[97] Another issue raised by Ms. Buckle was the absence of a gas container. I acknowledge that no container that could have been used to transport gasoline was seized by investigators. How thoroughly investigators searched for such a container or how it might have been removed by Mr. Bou-Daher is information I do not have.

[98] Finally, I do not believe Mr. Bou-Daher's denials. The evidence, particularly in relation to the time frame and circumstances just before Mr. Bou-Daher set the alarm, supports only one rational inference, that of Mr. Bou-Daher having exclusive opportunity to be the arsonist. This conclusion supports a conviction against Mr. Bou-Daher for arson as I am satisfied the Crown has proven beyond a reasonable doubt that there is no other rational inference to be drawn from the evidence.

[99] It is difficult to understand some aspects of this arson. It was very poorly executed. No steps were taken by Mr. Bou-Daher to make it seem that someone else could have had access to the bar to set the fires. And yet, to the extent that Mr. Bou-Daher had anything to do with the disabling of the internal video surveillance cameras, there is an indication of some planning. I find it is most likely Mr. Bou-Daher disabled the system but there could have been other people with access to the office on July 6 who could have done so.

[100] Ms. Buckle did a very capable job in her closing submissions. She concluded by saying that a number of lingering questions remained at the end of the Crown's case. Why commit the arson on that particular date? Why do it on a night when Mr. Badour had dropped by? Where did the container for the gas go? I think answers could be supplied to those questions but doing so would involve conjecture. I am mindful that Ms. Buckle also told me this case is not a mystery for me to solve. She is correct and while aspects of the case are mysterious, one aspect that is not is the identity of the person who had exclusive opportunity to set the fires. I find the Crown has proven beyond a reasonable doubt that this person was John Bou-Daher.

Motive

[101] Mr. Bou-Daher had no direct motive to set fire to Key Largos in order to fraudulently collect insurance proceeds. He was not an owner of the business or a beneficiary of the insurance policy. His son, Joey, and a nephew, Johnny Namnoun, owned Key Largos through a numbered company and he worked for them. Presumably burning the business would see him out of a job.

[102] James Matheson testified that the beneficiaries of the insurance policy were the numbered company and the owners, and, Mr. Matheson thought, possibly a bank.

Key Largos and the Monthly Rent Payments

[103] In his October 1 cautioned statement Mr. Bou-Daher denied that Key Largos was having any serious financial difficulties. He told police that rent arrears had been paid back, "...we don't owe them much money..." (*Exhibit 7, page 60*) He explained that they had "spent too much money on the place" but that the business was doing well.

[104] Robert Landry, the property manager for Starfish Properties, presented a different picture. He testified that Joey Bou-Daher and Johnny Namnoun

purchased Key Largos in July 2007. They had difficulty keeping up with the monthly rent and were consistently in arrears.

[105] Payment was made to Starfish Properties by cheque. In the twelve month period of July 2007 to July 2008, Key Largos had seven cheques returned non-sufficient funds (NSF). (*Exhibit 9 – Tenant Ledger*) The first NSF cheque was returned on July 12, 2007. Two cheques were returned in September 2007: September rent and the repayment for July's rent. There were then no issues until February 2008 when, on February 6, a cheque was returned NSF. Cheques were returned NSF on March 5 and April 16, 2008, and again on June 18. On occasion, Starfish Properties was owed as much as \$33,000 in rent although these peaks were always paid down somewhat by the end of the month. At the end of some months, Key Largos owed as much as \$21,000 in rental arrears.

[106] On one occasion, in November 2007, Key Largos asked Starfish Properties not to cash the rent payment at the first of the month but to hold the cheque until November 7, which Starfish Properties did. It was an accommodation the company sometimes made for its tenants. There was no problem with the rent payment for November and the cheque cleared.

[107] Gary Wambolt was aware that Key Largos had some trouble paying their rent because he was asked by Mr. Landry to convey messages and collect cheques. This happened at least half a dozen times over a 3 to 4 month period. Mr. Wambolt testified that "99 percent of the time" he dealt with John Bou-Daher. He and Mr. Bou-Daher did not have in-depth discussions about the rent issues.

Arson for a Fraudulent Purpose

[108] There is no evidence that Mr. Bou-Daher would have been able to benefit from a fraudulent insurance claim. He had no direct claim as he was not an insured. He was also not liable for the arrears of rent as he was not an owner of the company that was leasing the premises. It is speculative to assume that Mr. Bou-Daher would burn Key Largos in order to enable his son and nephew to benefit

from the insurance proceeds. While the circumstances are highly suspicious and it very probable that the fires were set to recover insurance proceeds, I am not satisfied that this has been proven to the high standard required of proof beyond a reasonable doubt.

[109] I am therefore convicting Mr. Bou-Daher of simple arson, an offence under section 434 of the *Criminal Code* and acquitting him of the section 435(1) offence, arson for a fraudulent purpose.