SUPREME COURT OF NOVA SCOTIA
Citation: *Boyce v. Abousamak*, 2014 NSSC 258

Date: 2014-07-11
Docket: Hfx. No. 344479
Registry: Halifax

Between:

Michael Boyce and Kimberley Susan Arnold-Boyce

Plaintiffs

v.

Wael Abousamak, Allison Williamson

Defendants

Judge: The Honourable Justice Peter P. Rosinski

Heard: April 14, 15, 16 and 17, 2014 in Halifax, Nova Scotia

Final Written Submissions: **May 20, 2014**

Counsel: Philip Chapman and Christine Nault, for the Plaintiffs
Wendy Johnston, Keirston Amos and Katie Archibald, Articled Clerk, for the Defendants

Introduction

[1] On April 25, 2010, a mere three weeks after they moved into rental premises owned by the Plaintiffs, the Defendants noticed a fire outside their back door which had engulfed the large wooden deck abutting the back of the house. The fire caused such extensive damage that the house was rebuilt.

[2] On February 24th 2011 the Plaintiffs filed a Notice of Action against the Defendants alleging in part:

> On or about April 25, 2010 a fire broke out under a deck to the rear of the house located on the premises. Through subsequent investigation, it was determined that the fire was caused by the careless use and disposal of lit cigarette material. At all times material hereto, the defendants were both cigarette smokers… The fire, and resulting damages, were caused by the negligence of the defendants, the particulars of which negligence include the following:
>
> a) the careless use and disposal of cigarette material; and
> b) such further and other negligence as may appear.
>
> The plaintiff also states that by causing the fire and resulting damages, the defendants were in breach of their tenancy with the plaintiff. The plaintiff pleads and relies on the *Residential Tenancies Act* RSNS 1989 C. 401.

Overview

[3] The parties agree that the crucial issues for determination for the court are:

1. Was the fire caused by the use and disposal of lit cigarette material and, if so;

2. Was that use and disposal of the lit cigarette material negligent?

[4] There are also incidental issues regarding:

1. Did the Plaintiffs' expert Grant Rhyno stray beyond his role as an expert and become an advocate for the plaintiffs; and if so what effect that should have on his expert opinion offered at trial?

2. What evidentiary use can the court make of the failure of Ms. Williamson to testify?

3. To what extent if at all, should the court award a "betterment" credit to the defendants, if they are found liable for the damages to the house?

4. What is the appropriate prejudgment interest rate?

Position of the Parties regarding whether negligence has been established

Plaintiffs' Position

[5] In their closing written submissions the Plaintiffs state:

> In his investigation, Mr. Rhyno ruled out electrical and other causes internal to the building. The fire was confined to the exterior when it ignited, so the question became one of how combustible material could have ignited underneath the deck. There were three possibilities:
>
> a) spontaneous combustion of the peat moss;
>
> b) intentional act of a third party [arson]; and
>
> c) the careless handling and/or disposal of smoking materials.

In terms of spontaneous combustion, Mr. Rhyno was of the opinion that the circumstances and ambient weather conditions were not favorable to spontaneous combustion, and therefore he ruled that possibility out. This does not appear to be seriously contested by Mr. Neal (the Defendant's Expert).

In terms of the act of a third party, Mr. Rhyno is of the opinion that that possibility is highly unlikely. Apart from what he specifically states in his report we also refer to the following:

> a) there was no evidence of the application of accelerant or and in or around the fire's point of origin. This was the evidence of Mr. Rhyno and Mr. Kamperman.
>
> b) there is no evidence of suspicious activity by any individuals in the area in the timeframe leading up to the fire. This was the evidence of Mr. and Mrs. Kline, as well as Mr. Richard, which we submit is reliable.
>
> c) while the deck was accessible to anyone who wanted to enter the property, there is no evidence that this area was frequented by anyone other than those who live there. This is the evidence of Mr. Kline.
>
> d) when this fire was first observed by Mrs. Kline, the flame was quite small, yet no one was in the backyard.

…It is reasonable to conclude that the fire was not caused by the incendiary act of a third party.

…This then leaves the only other logical conclusion, namely, that the fire was started by the handling or disposal of smoking material. This is logical, since the only "competent source of ignition" introduced into the area was smoking material. Clearly, the defendants had smoked on the deck that afternoon. Mr. Abousamak admits to being out on the deck approximately 10 minutes prior to the fire. He said in a statement that he had had a cigarette 30 to 40 minutes prior to the fire. He admitted to Mr. Richard that he was out on the deck smoking 20 to 40 minutes prior to the fire.

…The careless disposal or handling of cigarettes is not a "speculative theory". It is one that is based upon the elimination of other potential causes and the association of the activities of the defendants on the day in question… All the plaintiff needs to do is show that the inference upon which the case depends is a "reasonable inference" and that it is one that is "more reasonable" than any other explanation provided… [See paragraphs 33 – 34] *Highland Fisheries Ltd. v. Lynk Electric Ltd.* [1989] NSJ No. 323 (SCTD) per Richard J. [Paragraphs 20 – 26 closing submissions brief of Plaintiffs]

…

Was Mr. Abousamak negligent?

> …[The question for the court is] whether the evidence, taken as a whole, will allow you to infer negligence on the part of Mr. Abousamak. We submit that there is sufficient evidence that negligence can be inferred.
>
> The plaintiff's position is that the circumstantial evidence does point to negligence:
>
> > a) If you accept that the evidence shows that Mr. Abousamak was more likely than not smoking on the deck 30 to 40 minutes [or even 10 minutes] prior to the fire, why does he continue to deny it? In our view, he is attempting to hide his own actions.
> >
> > b) Ms. Williamson did not testify. Again, you should draw a negative inference from that fact.
> >
> > c) Mr. Abousamak had previously been observed to flick a cigarette over the side of the deck – an observation that he himself seems to tacitly accept. The fact that cigarette butts were found after the fire serves to indicate that he had done so more than once in the short time he had lived there.
> >
> > d) The evidence of Mr. Rhyno was that this fire could only have occurred by one of two means: either a live ember fell from Mr. Abousamak's cigarette or he disposed of it [the butt] over the side of the deck. As between the two, he said that the more likely was the disposal of the cigarette butt as it would more readily ignite combustibles under the deck. Either one of these scenarios disclose evidence of negligence.
>
> Mr. Abousamak himself acknowledged that had he dropped a live ember from his cigarette he would've noticed it. He also acknowledged that it would have been "common sense" not to leave it there. Further, he confirmed in evidence that it would have been a dangerous practice to flick, or drop, a cigarette in the backyard on a dry and windy day. Indeed he confirmed that if it was windy, the cigarette butt could end up "anywhere". [Paragraphs 36 – 37 closing submission Plaintiffs' brief]

[6] The Plaintiffs also expanded upon these propositions in their brief, and I have not overlooked their oral arguments at the conclusion of the hearing either.

Defendants' Position

[7] In their closing written submissions the Defendants state:

> The Plaintiff's claim and negligence is grounded in the report and opinion of Grant Rhyno…[Who] opined that, because the Defendants were smokers, and because

there was evidence that the male defendant smoked on the back deck the day of the fire, the cause of the fire was careless use and disposal of smoking materials… The Defendants say the expert opinion evidence of Mr. Rhyno offered by the Plaintiff should be given little to no weight on the basis that Mr. Rhyno assumed the role of an advocate contrary to the underlying purpose of his role as an expert in this court proceeding. Furthermore, we say Mr. Rhyno relied upon material facts in forming his opinions which were not proven at trial. [paragraphs 7 and 11 closing written submissions of Defendants]

We respectfully submit that Mr. Rhyno's objectivity and independence as an expert in this matter can be questioned given the following frailties in his evidence:

a) …

b) …

c) the NFPA [National Fire Protection Association] 921 guide(2011) section 18.6.6 states: "…it is improper to opine a specific ignition source that has no evidence to support it even though all other hypothesized sources were eliminated" [see Trial Exhibit 2; Tab Q; Page 8]. Mr. Rhyno's expert reports of October 2013 and April 2014 were contrary to the standard.

d) Mr. Rhyno authored three reports opining that smoking materials caused the fire when by his own admission there was no physical evidence to support a conclusion of smoking materials as the ignition source of the fire.

e) …No evidence was advanced as to how a lit cigarette smoked on the deck could find its way to ignite combustible material in the enclosed area below the deck.

f) Mr. Rhyno could not point to any evidence regarding how the smoking materials were introduced from above to below the deck, but speculated in his oral testimony that the wind blew the butt or an ember under the deck. This speculation is contrary to direct evidence offered at trial by Robert Kamperman and Charles Kline that the wind was blowing from the front of the house to the back of the house thus, blowing the fire away from the back deck… This theory was not addressed in any of the Contrast [Engineering Limited] reports .

g) In his May 2010 report, Mr. Rhyno opined that the cause of the fire was probably "a normally harmless cigarette ash ember or a carelessly discarded glowing cigarette butt…" igniting peat under the deck [Trial Exhibit 2; Tab A; Page 9 of 21]. In his two subsequent reports, Mr. Rhyno does not consider or rule out this possible ignition source. He effectively abandons this part of his May 2010 opinion without explanation or reasons. However, Mr. Rhyno agreed on cross examination that another cause of the fire could have been an innocent ember.

h) In all three reports, Mr. Rhyno fails to address how material variables would affect his opinion, including: whether the peat under the deck was open or enclosed in the plastic bags discovered, and if open, how relative moisture and humidity would affect the ignition potential ;

i) Mr. Rhyno's October 2013 expert report relies on information from Ms. Bridgette O'Driscoll Burns… in support of his theory that he spent cigarette would take between 7 to 10 minutes to ignite. He relied on this information despite the fact that she withdrew the information she provided to the adjuster Jason Purdy, and in any event the information she provided did not suggest she observed the defendant smoking at that time [Trial Exhibit 1; Volume 1; Tab 6; Section 5.6]

j) In the October 2013 report, Mr. Rhyno relies on a supplemental statement he obtained from Mr. Kline [Trial Exhibit 1; Volume 1; Tab 6; Section 5.3] which he appended to his report [Trial Exhibit 1; Volume 1; Tab E]. The statement reads "Middle Eastern male and white female observed them on more than one occasion dispose of cig onto ground from back deck". This statement was inconsistent with Mr. Kline's evidence at trial that he observed only the male tenant flick a cigarette onto the ground from off the back deck on one occasion only…

k) Mr. Kline's evidence at trial was at all other times he observed the defendants smoking on the back deck, they disposed of their cigarettes in a can or receptacle. There is no mention of this evidence in Mr. Rhyno's reports [but he did report that there was evidence to this effect – October 1, 2013 Report – Trial Exhibit 1; Vol. 1; Tab 6; Section 7.3.4; pages 26 of 45].

l) In the April 2014 report, Mr. Rhyno relies on information provided to him from Mr. Chapman regarding statements made to Mr. Chapman by an unidentified neighbor… Melvin Richard. Further, Mr. Richard also provided Mr. Chapman with information that it was the male defendant, not both, and that the male defendant also mentioned that he disposed of the alleged cigarette in a can. None of this information was included in the supplemental expert report and no explanation was offered by Mr. Rhyno as to how that relevant information would affect his opinion [paras 15(a) – (l); Defendants' closing submission April 25, 2014].

[8] At paragraphs 78 and 89 the Defendants state in summary:

… The plaintiff has offered no evidence that Mr. Abousamak was smoking in the timeframe of the fire. When he did smoke that day, he disposed of his cigarettes in a cup. There is no evidence of a lit cigarette butt or smoking materials being disposed of under the deck. We respectfully submit that the plaintiff has not met the burden of proof required to establish that smoking materials caused the fire.

. . .

> … The plaintiff has offered no evidence that Mr. Abousamak was smoking in the timeframe of the fire, or that when he did smoke that day, he disposed of his cigarettes in a careless or negligent manner. The Plaintiff has offered no proof of negligence [Closing written submission Defendants brief filed April 25, 2014].

[9] The Defendants go on in greater detail in their brief to expand upon these propositions. As in the case of the Plaintiffs, I have not overlooked the oral arguments made at the end of the hearing by the Defendants.

[10] In their rebuttal written submission (May 20, 2014) the Defendants state:

> The plaintiffs suggest that Mr. Neal [the Defence expert] did not offer alternative explanations for the cause of the fire when he should have. The implication is that the absence of any alternative explanations by Mr. Neal supports that careless smoking was the only reasonable cause. Mr. Neal's report was a rebuttal expert report. Under rule 55.05(e) Mr. Neal's opinion was specifically limited to "the rebuttal opinion and no further opinion". Further, to the extent permitted under the rule, Mr. Neal's uncontested and unchallenged opinion does speak to alternative causes. He opines that "an incendiary act cannot be eliminated as a possible cause of fire", and the actions of third parties "whether intentional or accidental". In any event the burden is on the plaintiffs to meet their case and not on the defendants to establish alternative theories (*Fiddler Enterprises Ltd. v. Allied Shipbuilders Ltd.* 2003 FCT 463 at paragraph 173). [Page 5 of 5]

[11] Furthermore the Defendants state therein:

> With respect to the plaintiff's assertions that allowing a live ember to fall from a lit cigarette is negligent, or that the very act of smoking invites a heightened responsibility, we say the plaintiffs are mistaken. There is no support in law that a heightened standard of care is required of smokers. Nor are there any cases would suggest a person will be liable in negligence for a lit cigarette ember that goes undetected and causes a fire, where due care is otherwise shown. [Page 5 of 5].

Evidence Presented at Trial

[12] The Plaintiffs' case rises or falls on the evidence of its expert witness Grant Rhyno. Consequently, its case also rises or falls on proof of the underlying material facts relied upon by Mr. Rhyno in coming to his conclusion in his April 7, 2014 report that:

> Regardless of the first material ignited, I remain of the opinion that it is more probable than not that the fire was caused by the careless disposal or handling of smoking material.

[13] The Defendants have argued that the material facts relied upon by Mr. Rhyno in coming to his conclusions have not been proved. Furthermore they state:

> We respectfully submit that Mr. Rhyno's objectivity and independence as an expert in this matter can be questioned given the following frailties in his evidence:
>
> …" [Paragraph 15 Defendants' closing submissions filed April 25, 2014].

The alleged lack of objectivity and independence of Grant Rhyno – see *Abbott and Haliburton Co. Ltd. v. White Burgess Langille Inman* 2013 NSCA 66 at para. 104-109 per Beveridge JA – leave to Supreme Court of Canada granted [2013] S.C.C.A. No. 326.

[14] Firstly, I will note that in subparagraphs (a) through to (l) of paragraph 15 the Defendants conflate: evidence that relates to the alleged lack of objectivity and independence of Mr. Rhyno; and evidence that relates to the weight the Court ought otherwise to give to his opinion based on the argued lack of proof of material facts underlying his opinion. I will deal with the bias issue first.

[15] In accordance with *Civil Procedure Rule* 55:

> An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:
>
> > (a) the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party;
> >
> > (b) the witness is prepared to testify at the trial or hearing, comply with directions of the court, and apply independent judgment when assisting the court;
> >
> > (c) the report includes everything the expert regards as relevant to the expressed opinion and it draws attention to anything that could reasonably lead to a different conclusion;
> >
> > (d) the expert will answer written questions put by parties as soon as possible after the questions are delivered to the expert;
> >
> > (e) the expert will notify each party in writing of a change in the opinion, or of a material fact that was not considered when the report was prepared and could reasonably affect the opinion, as soon as possible after arriving at the changed opinion or becoming aware of the material fact.

[16] In his October 1, 2013 report Mr. Rhyno [assisted by Dr. Richard J. Smythe, Senior Analytical Chemist and Bill Murphy, Senior Fire Investigator (Technical Reviewer)] stated:

> I, Grant Rhyno, am a professional engineer. A copy of my curriculum vitae setting out my qualifications is attached to this report [Appendix J]. I have prepared this report regarding a fire that occurred in a single family residence at 15 Abrams Way, Spryfield, Nova Scotia. The fire occurred at approximately 19.07 hours on Sunday, April 25, 2010. This report represents my objective opinion as to the cause and origin of the fire and is provided to assist the court.
>
> I am prepared to testify at the trial or hearing into this matter, to comply with any directions given by the court and to apply independent judgment when assisting the court in relation to this matter. I will answer written questions put to me by the parties as soon as possible after receiving them. I will also notify each party in

> writing, as soon as possible, should my opinion change or should I become aware of a material fact that I had not considered in preparing this report and which could reasonably affect the opinions expressed herein.
>
> This report includes everything I consider relevant to the opinions expressed therein, even such matters as may reasonably lead to conclusions other than those I have reached.

[17] To my mind, before an expert is formally challenged at trial for a lack of objectivity and independence, there should be a significant basis for doing so. An expert cannot defend themselves when their objectivity and independence are attacked. For this they rely upon the counsel who has presented them as a witness.

[18] Counsel may legitimately have other concerns, and are no doubt focused primarily on the interests of their client, which in some cases may not entirely overlap with the personal interest an expert may have in defending their reputation. To be clear, I do not suggest that was the case here.

[19] On a review of the complaints made by the Defendants here, I do not find a significant basis for challenging the objectivity and independence of Mr. Rhyno. I bear in mind that this was the first time that Mr. Rhyno has been put forward and qualified by a Court as an expert in the area of fire investigations and the causes of fires. His limited experience may well account for the Defendants' criticisms of his report and evidence.

[20] In summary I shall set out the Defendants complaints and my responses:

1. That Mr. Rhyno's reports were "contrary to the standard" in the National Fire Protection Association 921 Guide [2011] Section 18.6.6 which states:

> …It is improper to opine a specific ignition source that has no evidence to support it even though all other hypothesized sources were eliminated.

[21] Mr. Rhyno, as an expert, is presented with facts that counsel anticipate will be borne out at trial. Experience shows they are never entirely consistent with pretrial expectations. Potential "competent ignition" sources as defined in the NFPA 921 Guide are limited to those that have "sufficient energy and [are] capable of transferring that energy to the fuel long enough to raise the fuel to its ignition temperature". With that in mind Mr. Rhyno identified three possible competent ignition sources in this case: spontaneous combustion of the peat moss stored under the deck; the intentional act of a third party [arson]; and the handling and/or disposal of smoking materials. Mr. Rhyno concluded that while the first two were possibilities he could discount them as not being probable. In relation to the handling and/or disposal of smoking materials, he was led to understand during the preparation of his expert reports that there was information, considered sufficiently reliable by his counsel, that one or both of the Defendants were on the back deck between 10 to 30 minutes before the fire broke out at approximately 7:07 p.m.; and

that they were smokers and were seen to have been smoking on the deck in the past. He reviewed the literature in relation to the ignition characteristics of peat moss, and concluded that:

> It is my opinion that is more probable than not that the fire was caused by the careless disposal or handling of smoking material and the first material ignited by the smoking material was the dry peat moss… Once the peat moss ignited, the fire would have quickly spread…" [October 1, 2013 report; and] "the absence of Ms. O'Driscoll Burns evidence alone places some degree of uncertainty on the 10 minute time frame used to explain how the fire could have ignited and so quickly spread. However, the additional information provided in Mr. Chapman's April 3, 2014 email eliminates this uncertainty, as discussed below in Section 2.0.… With an increased timeframe of up to 30 minutes, it is also possible that the first material ignited by the smoking materials was not the peat moss, but rather one of the other combustibles that were observed under the deck [i.e. bark mulch, possibly household garbage]. It is also possible that dry grass or leaves were present under the deck; however, if present, they were consumed during the fire. Ignition of bark mulch and household garbage [and grass or leaves] by spent cigarettes are well documented in the literature. Regardless of the first material ignited, I remain of the opinion that it is more probable than not that the fire was caused by the careless disposal or handling of smoking material.

[22] Clearly there was some "evidence" anticipated at trial to support his opinion.

2. That Mr. Rhyno opined in his May 11, 2010 report that the cause of the fire was probably "a normally harmless cigarette ash ember [or a carelessly discarded glowing cigarette butt]" which ignited peat moss under the deck, yet in his October 1, 2013 and April 7, 2014 reports he effectively abandons this part of his opinion without explanation or reasons, presumably suggestive of his intention to favour the Plaintiffs' position.

[23] In his October 1, 2013 report Mr. Rhyno stated in Section 7.3 "Cause of Fire":

> My thorough search and examination of the charred fire debris within the fire's area of origin did not yield any conclusive evidence regarding the competent ignition source responsible for the fire's. In light of the extensive fire damage sustained within the fires area of origin in my opinion, it is more probable than not that the competent ignition [source] responsible for the fire was consumed during the course of the fire. Although no conclusive evidence regarding the competent ignition source responsible for the fire was found, an analysis of the items found within the immediate vicinity of the fire's area of origin were examined and analyzed in relation to the reported information and their ability to be associated with the cause of the fire [next he goes on to rule out as unlikely, an electrical or spontaneous combustion ignition source]…

[24] At trial in cross-examination, he conceded that there was no direct evidence that the source of the fire was a glowing ash ember falling from a cigarette on the deck area or that it was from a carelessly discarded glowing cigarette butt which then came into contact with combustibles [which he opined was most likely peat moss]. Later in his cross-examination he confirmed that in his opinion either a cigarette butt was dropped into the bottom area of the deck or embers thereof fell or were blown into the bottom area of the deck and caused the peat moss to ignite. Even later, when counsel put to him that the National Fire Protection Association Guide [2011], Section 18.7.4 "undetermined fire cause" seems to accurately describe the situation in the case at Bar, he again acknowledged that an innocent ember could have fallen off the cigarette and caused the fire. Near the end of his cross examination on April 14, 2012 he again confirms that an innocent ember falling from a cigarette could have caused this fire in his opinion.

[25] In redirect on April 15, 2014, he was referred to his May 2010 report regarding his opinion that either, glowing embers falling from a cigarette or a disposed cigarette butt that came into contact with peat moss, are the most likely cause of the fire. He went on therein to note that a cigarette butt generally has more fuel and therefore longer heat release time which will last longer as a potential ignition source than would embers falling from a cigarette.

[26] Thus, it is apparent to me that he did not "abandon" his position regarding embers falling from a cigarette as a possible competent ignition source, but that without having expressly said so in his later reports, he did conclude that it was less likely to be the competent ignition source in the case at Bar.

[27] To my mind, this oversight in his October 1, 2013 and April 7, 2014 reports is not significant.

3. That he relied on the information provided by Bridgette O'Driscoll Burns to Jason Purdy the insurance adjuster taken April 27, 2010, that she had seen Mr. Abousamak on the back deck 10 minutes before the fire started , even after he was aware that she retracted that information, and that she had never claimed to have seen him smoking at that time.

[28] In her initial statement Ms. O'Driscoll Burns verbally told the adjuster that she had spoken with the current tenants after the fire and "he was out on the deck approximately 10 minutes before the fire started". Later, when asked to confirm

the details, insurance adjuster Jason Purdy noted on her summary of verbal statements that "she recanted on her statement and said that her memory is very bad…She said that the renter was at the green bin approximately 10 minutes before the fire. Ms. O'Driscoll Burns stated that she would not provide any details or confirm any conversations on this fire."

[29] Clearly Ms. O'Driscoll Burns had not retracted her statement that she saw Mr. Abousamak on the deck 10 minutes before the fire.

[30] In section 7.3.4 of his October 1, 2013 report Mr. Rhyno stated:

> It was also reported by Mr. Abousamak that he was outside around 1900 hrs. [see Section 5.1.1 or Appendix "A" [his statement to Jason Purdy which reads in part: " I went outside around 7 p.m. and did not see anything".]. This was also confirmed by Ms. Bridgette O'Driscoll Burns [see Section 5.6 or Appendix "H"]. Mr. Abousamak's activities while outside just prior to the fire are unknown as they were not disclosed in the reported information… Based on Mr. Abousamak's statement information, he was outside prior to the fire. He discovered the fire approximately 10 minutes after he went back inside the residence and upon discovery the fire was well involved… Given the minimal time for dried peat to ignite [approximately 7 seconds] when exposed to a spent cigarette, and the relative short timeline between no signs of a fire to a well involved fire [i.e. approximately 10 minutes] it is my opinion that it is more probable than not that the fire was caused by the careless disposal or handling of smoking material and the first material ignited by the smoking material was the dried peat moss located within the enclosed underside of the deck.

[31] In his report in Section 7.3.4 he also refers to having found cigarette butts on the ground outside the perimeter of the deck, one specifically of the same kind as were located in the kitchen of the residence. It is apparent that Mr. Rhyno inferred

that Mr. Abousamak was likely on the back deck smoking 10 minutes before the fire.

[32] While he had no direct evidence [other than Mr. Richard's later information received in April 2014] of smoking on the deck by Mr. Abousamak in the 10-40 minutes before the fire, he did have information from which he could infer such.

[33] There is nothing significant in these materials that would rise to the level at which the court could credibly question the objectivity and independence of Mr. Rhyno in this case.

4. That Mr. Rhyno received a statement from Charles Kline on September 13, 2013 which he reduced to writing as "Middle Eastern male and white female observed them on more than one occasion dispose of cig onto ground from back deck", yet this was inconsistent with the testimony of Mr. Kline at trial which was that he had observed only the male person flick a cigarette onto the ground from the back deck on one occasion only.

[34] At trial Mr. Kline was not asked specifically what he had told Mr. Rhyno on September 13, 2013. Therefore it is possible that he did intend to communicate exactly what Mr. Rhyno summarized he said, or perhaps Mr. Rhyno misunderstood what Mr. Kline told him.

[35] There is nothing significant in these materials that would rise to the level at which the Court could credibly question the objectivity and independence of Mr. Rhyno in this case.

[36] Neither individually or collectively do these references or others raised by the Defendants, rise to the level at which the court could credibly question the objectivity and independence of Mr. Rhyno in this case.

Is there proof of the material facts underlying the expert opinion of Grant Rhyno?

[37] The Plaintiffs, at paragraphs 26 and 32 of their closing submissions state:

> Stated in plain terms, all he plaintiff needs to do is show that the inference upon which the case depends is a "reasonable inference" and that it is one that is "more reasonable" than any other explanation provided. This is what was made clear in *High Land Fisheries Ltd. v. Lynk Electric Ltd.* [1989] NSJ number 323 [SC TD] [per Richard J, who at paragraphs 33 and 34 stated]:
>
> 'I find that, in the opinions of [2 expert witness electrical engineers] ,there are just too many unanswered questions to permit me to bridge the gap between speculation and probability…
>
> The burden of proof rests with the Plaintiff and in this case the burden has not been met… I adopt, as did MacIntosh J. in *Italian Village Limited v. J.A. Moulton & Son Limited* [1981] 47 NSR(2d) 14 the following comment of Doull J. in *F.G. Spencer Company Limited v. Irving Oil Company Limited* [1951] 28 MPR 320 at 363:
>
> In civil cases, it is usually sufficient that as between the parties, the plaintiff prove his case by a preponderance of evidence. In applying this rule to cases which depend upon inference from facts, the plaintiff must show that the inference upon which the 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 must fail.' [Paragraph 26]
>
> …
>
> It is a reasonable inference that this fire was caused by smoking material. There is no other reasonable explanation, given the facts of the case. [Paragraph 32]

[38] In summary, the opinion of Grant Rhyno is that the most probable cause of fire is the ignition of peat moss [or less likely other combustibles such as bark mulch/dry grass etc.] by a discarded glowing cigarette that found its way under the deck and onto the peat moss [or less likely, other combustibles], but he acknowledged a less probable, but also possible cause of the fire, is the ignition of the peat moss [or less likely, other combustibles] by a live ember falling off a cigarette and finding its way under the deck and onto the peat moss [or less likely, other combustibles].

[39] I note that the other possible causes of the fire [arson or spontaneous combustion of the peat moss] were not only excluded as much less likely ["highly improbable"], but also do not involve any negligence on the part of the Defendants.

[40] In his written reports and testimony Mr. Rhyno does not seriously put forward a case for a live ember falling off a cigarette as the cause of the fire.

[41] In his May 11, 2010 preliminary report he states under Section 4.2 "Cause of Fire:

> In our opinion, it is far more probable [than spontaneous combustion] that a normally harmless cigarette ash ember or a carelessly discarded glowing cigarette butt from one of the tenants cigarettes caused the ignition of the peat moss.

[42] In his October 13, 2013 report he states:

> Given the minimal time for dried peat to ignite [approximately 7 seconds] when exposed to a spent cigarette, and the relative short timeline between no signs of a fire to a well involved fire [i.e. approximately 10 minutes] it is my opinion that it is more probable than not that the fire was caused by the careless disposal or handling of smoking material and the first material ignited by the smoking material was the dry peat moss located within the enclosed underside of the deck.

[43] In his April 7, 2014 supplemental report he states:

> [Based on Mr. Richards information that the Defendants stated in his presence that they " were smoking on the back deck of the Boyce property 20 to 30 minutes prior to the outbreak of the fire"] this increased timeframe [i.e. up to 30 minutes] become significant regarding the first material ignited, the initial growth of the fire and the spread of the fire for the following reasons:
>
> > Based on the original timeframe of 10 minutes, the fire had to have initiated, grown and spread relatively quickly in order to become as fully developed as described by Mr. Abousamak [i.e. visible flames at the back door leading to the deck]. As such, I opined that it was more probable than not that the first material ignited by the smoking materials was the dry peat moss.
> >
> > With an increased timeframe of up to 30 minutes, it is also possible that the first material ignited by the smoking materials was not the peat moss but rather one of the other combustibles that were observed under the deck [i.e. bark mulch, possibly household garbage]. It is also possible that dry grass or leaves were present under the deck; however, if present, they were consumed during the fire. Ignition of bark mulch and household garbage [and grass or leaves] by spent cigarettes are well documented in the literature [footnote 2 – Kirks fire investigation, sixth edition, 2007 by John D Dehaan, pages 172 – 173, ignition handbook by vytenis babrauskas PhD, 2003, pages 716 – 719]
> >
> > Regardless of the first material ignited, I remain of the opinion that it is more probable than not that the fire was caused by the careless disposal or handling of smoking material.

[44] It would appear that Mr. Rhyno assumes that cigarette smoking took place on the back deck either: 10 minutes before the fire broke out when Mr. Abousamak admitted he went out onto the deck [although he denied smoking]; or within 20 to 30 minutes before the fire broke out [according to what Mr. Richard stated to

counsel for the Plaintiff during trial preparation; namely that he overheard one of the Defendants say this in his presence on the night of the fire].

[45] Notably, in his testimony, Mr. Richard stated that the timeframe was 20 to 40 minutes before the fire. Furthermore, in cross-examination he said he was "99% sure" that it was Mr. Abousamak who said this, and that he alone had done the smoking on the back deck.

[46] The only evidence at trial that Mr. Abousamak was on the deck 10 minutes before the fire broke out arises from his own pretrial and trial admissions to that effect. In his statement to Jason Purdy given April 26, 2010 he stated [and did not amend that aspect of his Purdy statement when he met and corrected portions thereof on May 27, 2010 with Tina Holloway] :

> I went outside around 7 PM and did not see anything. I went in and started to preheat the oven. I had the chicken on the counter. I asked her [Ms. Williamson] if the sauce was okay, she checked the sauce and I went to open the door again at the back. I opened the inside door and the glass door was shut and locked. I opened it up and saw a huge flame… The last smoke I had on Sunday was around 3:30 PM and it was at the end of the soccer game that I was watching… She was dyeing her hair around 6:30 PM or 6:40 PM.

[47] In his Response to Interrogatories [in part corrected by a letter from counsel dated April 1, 2014] Mr. Abousamak stated under affirmation on January 13, 2013:

> Question: In the 24-hour period leading up to the discovery of the fire:

> (a) – approximately how many cigarettes did you and to your knowledge, Allison Williamson, smoke in the area of the back deck?
>
> Answer: I smoked four cigarettes on the back deck and the 24 hours leading up to the discovery of the fire. To my knowledge Allison Williamson did not smoke any cigarettes on the back deck in the 24 hours prior to the discovery of the fire.
>
> (b) approximately what time was each one smoked?
>
> Answer: I smoked one cigarette at approximately 11:30 PM the evening before the fire. I smoked one cigarette after getting up the next morning. I smoked a third cigarette at approximately 1 PM and a fourth between 3 PM and 4 PM.
>
> …
>
> Question: when was the last time prior to the discovery of the fire that you and/or Allison Williamson smoked a cigarette on the back deck or the backyard? Did you detect the smell of burning smoke at that time?
>
> Answer: the last time I smoked a cigarette on the back deck was between 3 PM and 4 PM. I cannot recall if there was a smell of burning smoke at that time. To my knowledge Allison Williamson did not smoke any cigarettes on the back deck or in the backyard on the date of the fire.

[48] In his statement to Halifax Fire Department investigators on April 26 at roughly 10 a.m. in the morning:

> When was the last time you smoked
>
> That was 330? Maybe watching show. Eight episodes on the laptop.
>
> Where was that?
>
> Was on the deck.

[49] Allison Williamsons' evidence was before the Court by virtue of her Response to Interrogatories affirmed on January 13, 2013. A portion thereof reads:

> Question: in the 24-hour period leading up to the discovery of the fire:
>
> (a) approximately how many cigarettes did you, and to your knowledge Wael Abousamak, smoke in the area of the back deck?
>
> Answer: I did not smoke any cigarettes in the area of the back deck and the 24 hours prior to the discovery of the fire. I saw Wael Abousamak smoke one cigarette in the 24 hours prior to the discovery of the fire.

> (b) approximately what time was each one smoked?
>
> Answer: I was on the deck with [my husband] at approximately 1 PM on April 25, 2010 and saw him smoke one cigarette
>
> …
>
> Question: when was the last time prior to the discovery of the fire that you and/or Wael Abousamak smoked a cigarette on the back deck or the backyard? Did you detect the smell of burning smoke at that time?
>
> Answer: I did not smoke any cigarettes on the back deck or in the backyard on the date of the fire. I did not go out onto the back deck after 1 p.m.

[50] At trial Ms. Williamson did not testify. Her Response to Interrogatories is however evidence that the Court can rely upon – *Rule* 19.10.

[51] In his direct examination at trial Mr. Abousamak testified that after the soccer game he was watching finished, and before he watched a sequence of Anime shows on his computer, which he estimated at approximately 3:30 – 4 p.m., he had his last cigarette on the deck prior to the fire, which he extinguished in a cup of water. He indicated while preparing supper he decided to go out onto the back deck to throw something in the garbage. Next he found it "getting hot – I opened the balcony door to get some air in"; at this time he discovered a "really intense fire coming from all over". When asked how long after he had been on the deck that was, he responded that I "can't really put a time" on how long after he was on the deck that he noticed the fire.

[52] In cross-examination he admitted that Ms. Williamson "dyed her hair not long after the soccer game" [ended]; and that he estimated that the soccer game

ended between 3:30 and 3:45 p.m.. He says she went to lay down on the couch and at some point thereafter he went to ask her for advice regarding the sauce to be used in cooking the chicken for supper. He went back to watching his Anime shows on the computer and an undetermined period thereafter when his shows ended, he went out onto the deck, and it was shortly thereafter when he went to open the door to let some air in that he discovered the fire.

[53] It was put to him that, in his statement to Jason Purdy he had stated: "I had the other one [cigarette] by myself. She was dyeing her hair at the time. She was dyeing her hair around 6:30 p.m. or 6:40 p.m.". He responded "it's incorrect yes". He reiterated that "soon after the soccer game she dyed her hair and then I had the last cigarette".

[54] Plaintiffs' counsel put to him that then" she left the dye on for three hours?" [Since she still had it on when she exited the house and went to the front yard of Mr. and Mrs. Richard at 7:10 p.m.]. He answered "yes - it was over dyed".

[55] Counsel also put to him that Mr. Richard overheard him admit to having a cigarette "30 to 40 minutes before the fire". He responded "I don't recall ever saying that…I don't smoke [just] before I eat".

[56] Counsel put to him that although in his April 26 statement to Jason Purdy he said: “my first cigarette was around 2:15 p.m. when she had woke up… I had the other one by myself. She was dyeing her hair at the time. She was dyeing her hair around 6:30 p.m. or 6:40 p.m..”, yet in his testimony he was claiming his first cigarette was at approximately 1:15 p.m. and his last cigarette was between 3:30 and 4:00 p.m.

[57] Counsel put to him that if his last cigarette was at 3:30 – 4:00 p.m. it would have been about three hours since he had his last cigarette? Mr. Abousamak responded that he did not “need to smoke”. Presumably he meant he did not “need to smoke” every so many hours, regardless of other circumstances.

[58] Counsel put to him that in his Response to Interrogatories, he had stated under affirmation that: “I smoked Canadian Classic tobacco in Players tubes” . He acknowledged at the time of the fire he had Belvedere tubes as shown on the kitchen counter in photo 123 of Robert Kamperman’s photographs. He elaborated that he bought those because he could not get Players’ tubes.

[59] Plaintiffs’ counsel put to him that Mr. Kline had observed him toss a cigarette butt over his shoulder as he was leaving the deck on one occasion. He responded “that’s not my usual practice, but if one or two were tossed…I don’t

recall throwing cigarettes – if they say so – I will not call them a liar – but that day I put it in a can I know for sure…I don't recall ever doing it…I don't deny it could have been me, but I don't recall doing that…That day I did not throw anything".

[60] Plaintiffs' counsel put to him that he was in fact on the deck having a cigarette 20 to 40 minutes before the fire. He responded: "I don't recall doing that…I would not have done it – it's not my practice". This is presumably a reference to his earlier testimony that on weekends he would smoke one cigarette after getting up and one after dinner but not before bed. The remaining two or three cigarettes would be spaced throughout the day, but that he would not smoke just before a meal. This is somewhat consistent with his Response to Interrogatories that his typical consumption of cigarettes was that: "I smoked on the back deck 2 to 3 times a day on workdays and 5 to 6 times a day on weekends or days off"; and that in the 24 hour period leading up to the discovery of the fire: "I smoked four cigarettes on the back deck in the 24 hours leading up to the discovery of the fire…I smoked one cigarette at approximately 11:30 PM the evening before the fire. I smoked one cigarette after getting up the next morning. I smoked a third cigarette at approximately 1 p.m. and a fourth between 3 p.m. and 4 p.m."

[61] When asked about why there were inconsistencies in his statement to Jason Purdy on April 26, 2010 Mr. Abousamak suggested that he gave information "as

good as I could at that time" and that Jason "was typing fast and asking a lot of questions and made a lot of mistakes". Nevertheless he conceded he had the opportunity to review that statement, not just with Jason on April 26 but with Tina Holloway on May 27, 2010 when he did make "corrections" to his Jason Purdy statement. He also suggested that "it's five years later", yet conceded his memory would have been better closer to April 25, 2010. He reiterated however there was a lot on his mind on April 26 and even on May 27 because of the consequences of the fire and the difficult pregnancy which Ms. Williamson was experiencing.

[62] For myself, I observe that when asked on April 1, 2010 in the rental form application whether either he or his wife were smokers they both indicated: "nope". When asked to explain this given their continued smoking at the time, Mr. Abousamak testified that: we were optimistic that we would quit smoking", especially since she was pregnant. However he did not curtail his smoking at all according to the evidence between April 1 and 25th 2010.

[63] At this juncture I should point out that there is absolutely no evidence that Ms. Williamson could in any way be responsible for the fire.

[64] In relation to when Mr. Abousamak had his last cigarette on April 25, the Defendants' rebuttal brief puts their position as follows:

> The plaintiffs ask Your Lordship to infer, from an ambiguous comment in Mr. Abousamak's statement to Mr. Purdy about Ms. Williamson dyeing her hair, that he is incorrect regarding the timing of his last cigarette. We say that Mr. Abousamak's comment, which the plaintiffs rely on to suggest he is incorrect in his timing, is an ambiguous comment made in a rambling narrative statement. We submit it is unreasonable to draw such an inference from this comment in light of the two clear and consistent references to a specific time contained elsewhere in the same statement.

[65] The Defendants refer to Ms. Williamson's audiotaped Jason Purdy statement on April 26. Therein I note that she stated:

> …Sometime in between waking up and dyeing my hair, I had gone out to tell him about the raccoons that got into the garbage the night before…**So I went out to show him**, like, "wow look at that mess", you know, and look how they clawed open – there's paw prints and stuff and that's when I said, like that's when I smelled smoke outside for the first time…Like it was pungent, you know, it was hard to breathe it in every breath, there was no relief from it **and we just decided to go back in and I'd say between that time and fire breaking out, you know, leaving the house, was probably 45 minutes to an hour.** I really wasn't judging the time, honestly, like it wasn't something in my mind. From the time…When I…Like I got up…I went out to show you about the raccoons…And then…
>
> [my emphasis]

[66] The Defendants in their rebuttal submission suggest that this is an ambiguous comment because Ms. Williamson's statement repeatedly refers to her not specifically paying attention to the time of day.

[67] Moreover they say, in relation to the evidence of Mr. Richard, that he heard Mr. Abousamak say that he had been smoking on the deck 20 to 40 minutes before the fire, that the Court must consider that Mr. Richard was not clear about whether he overheard a comment or whether the comment was made directly to him insofar

as its potential as an "admission" is concerned. Moreover, he did not mention it until the week of April 2, 2014, which is odd given its importance and the fact that he suggested in his statement to Jason Purdy on April 27 or 28th 2010 "we did not have any other conversation with them".

[68] There are quite a number of inconsistencies, internal to Mr. Abousamak's evidence, as well as external. I also viewed him giving his testimony in person in court. While I do not place much weight on his demeanor while testifying, I did take note that he repeatedly gave the impression, and expressly suggested, that these events that happened so long ago that his memory could be faulty, and that such should serve as an explanation for any inconsistencies or his lack of memory when asked about specific items.

[69] However, he seemed quite adamant in rejecting evidence which might suggest he had a closer connection to the time that the fire broke out.

[70] On April 26, 2010 he confirmed to Jason Purdy that Ms. Williamson was dyeing her hair around 6:30 or 6:40 p.m. He reviewed this statement on April 26 and signed it. He again reviewed it with Tina Holloway on May 27, 2010 and signed it. He offered no explanation why as he stated in his testimony he wrongly,

yet so precisely identified the time when Ms. Williamson was dyeing her hair. He stated therein:

> My first cigarette was around 2:15 p.m. when she had woke up [which he confirmed in his testimony was not his first cigarette, but rather that, consistent with his regular "habit", his first cigarette was around 1:15 p.m. before the soccer game]…I had the other one by myself. She was dyeing her hair at the time. She was dyeing her hair around 6:30 p.m. or 6:40 p.m.

[71] On April 26 Ms. Williamson gave an audiotaped statement which is an Exhibit at trial. In her statement she appears to put herself and her husband out on the deck looking at the mess the raccoons had created 45 to 60 minutes before the fire. I do not accept that interpretation. Ms. Williamson did not testify and therefore could not be asked about her statement, including when she would say she had applied the dye to her hair on April 25. I note that Lois Richard testified that Ms. Williamson was on her property in her company and that it was only after about half an hour of conversation that Ms. Williamson brought up that she had the dye in her hair and should get the dye washed out. I found Miss Richard credible about this.

[72] Nevertheless, I accept that Ms. Williamson and Mr. Abousamak were on the deck together around 2 p.m. on April 25, 2010, and it was most likely that at that time they while together, first saw the mess created by the (nocturnal) raccoons on the back deck.

[73] I found Mr. Abousamak's credibility [reliability and/or honesty] questionable on some matters. However, I can, and do accept some of his evidence as outlined herein. Although it is difficult to accept that Ms. Williamson had hair dye on for more than three hours, even if she did not, that does not change my conclusion regarding there being insufficient proof of Mr. Abousamak's negligence.

[74] Mr. Richard testified that he was "99% sure" that Mr. Abousamak had stated in his presence that he had been out on the deck smoking 20 to 40 minutes before the fire. I carefully watched Mr. Richard give his testimony. He presented as a conscientious and honest witness. The fact that he said in his Purdy statement, "we did not have any other conversation with them", does not diminish my conclusion that his evidence is reliable insofar as he honestly and reliably recalls overhearing Mr. Abousamak making the above-noted comment.

[75] Notably, even Mr. Abousamak admitted in his statement to Jason Purdy, and in his testimony, that 10 minutes before the fire he was on the back deck albeit not smoking.

[76] I am satisfied in all the circumstances that it is more likely than not that Mr. Abousamak was on the back deck alone and smoking between 10 to 40 minutes before the fire broke out.

[77] I am however not satisfied that it is more likely than not that Mr. Abousamak's actions or inactions amounted to negligence, and that they caused the fire.

[78] I say this because:

1. I accept that Mr. Abousamak only smoked on the deck when at home, and that he accurately described his smoking pattern at home as four to six cigarettes per day on non-working days, whereas if he was working, he might have only had two cigarettes at home. As to the evidentiary considerations relevant to a habitual practise such as this, see Doherty JA's comments for the Court in *R. v. Watson* [1996] OJ No. 2695 (CA).If he alone disposed of every cigarette butt he smoked on the deck by tossing it off the deck in the days between April 2 and 25th 2010 that would accumulate to roughly [accepting that he worked five days out of every seven] sixty-eight cigarette butts. Yet only four were found by investigators [two Canadian classics; one Belvedere; and one Lucky Seven cigarette butt]. Of those, the evidence suggests only the Belvedere butt was more likely than not smoked by Mr. Abousamak. If only one butt is found yet sixty-eight might be expected if he were routinely tossing butts off the deck, one is driven to the conclusion that his overwhelming practice was to extinguish butts and dispose of them inside the house. Although Mr. Kline observed [on one occasion only] Mr. Abousamak flick a butt over his shoulder as he was entering that house from the deck, [there was no evidence if it had been extinguished at that point], I conclude it more likely than not that Mr. Abousamak disposed of any remaining cigarette material that he smoked on the deck in the 10 to 40 minutes

prior to the fire, by extinguishing the cigarette and taking the butt inside the house. There are also other problems with the underlying facts regarding Mr. Rhyno s opinion which I canvas below.

2. The Plaintiff's own expert Mr. Rhyno did not appear to seriously put forward a case for a live ember falling off the cigarette as the cause of fire. I note here that even if he had put greater emphasis on it, and it could be shown that that was the cause of the fire, I would not find that to be negligent behaviour in all the circumstances here. However, Mr. Rhyno did not detail in his report any information which would support an opinion that in the circumstances prevailing on April 25, 2010, a live ember originating from Mr. Abousamak's lit cigarette could have caused the fire. He did know the composition of the peat moss which was found below the deck, and thus was unable to either do any testing or search through the literature to come to a specific conclusion regarding its ignitability, upon being exposed to a live ember [or lit cigarette butt]. Moreover, such opinion would also rest upon a presumption that the peat moss which ignited was of the same nature and origin as the peat moss which remained unburned on the pallet under the deck.

3. While Mr. Rhyno found spontaneous combustion of the peat moss as "highly improbable", he did not rule it out as a possible cause of the fire. Notably in their April 26 statements to Jason Purdy both Mr. Abousamak and Miss Williamson noticed "something burning" when they were standing out on the deck in the afternoon on April 25, 2010.

I acknowledge that the defence expert Mr. Neal states in his report [since he did not testify I did not have the benefit of cross examination] that Mr. Rhyno's use of the scientific literature cannot be used to support his opinion regarding the ignition times that should properly be associated with the peat moss under the deck, because he did know the composition of, nor test the peat moss under the deck. Nevertheless the "something burning" observation is, as I understand it, consistent with the process of spontaneous combustion. Notably in Mr. Rhyno's May 11th 2010 report we find the following:

> Note: A more detailed scientific explanation concerning the chemistry involved in self heating/spontaneous heating of peat moss and a significantly lower probability of it being the source of the fire's ignition can be provided if required. [No such testing or follow-up was done].

4. Mr. and Mrs. Kline made observations of the fire in its infancy. While they had good sightlines to the fire, the latticework shown in Exhibit 13 and 14 would have obscured their view underneath the deck. Mrs. Kline identifies the fire as appearing to be in an area close to where the pallet with peat moss would have been stored under the deck. Mr. Kline described what he saw as drawn in Exhibit 14 as: "I always described it as a fireplace under the deck… It spanned the length of the deck 10 to 12 inches high". His suggestion that the fire may have originated right of center as one is looking at the deck and then spread in an even pattern 10 to 12 inches high across the deck is not consistent with Mr. Rhyno s opinion at trial that at least one bag of peat moss was off the pallet and likely at the far left of center of the deck and the most likely source of fuel. In his October 1, 2013 report Section 7.1 fire area of origin he stated:

   > … It was evident from the fire patterns observed, that the fire originated within the enclosed area of the underside of the deck. More specifically, it is my opinion that based on the depth of char comparison and a mass loss of material comparison, the fire's area of origin was in the enclosed area under the deck to the left [Southside] of the deck's main level door… Mr. Charles Kline's initial observations of the fire … also place the fire's origin within the enclosed area under the deck and near the left side of the decks main level door. [Examining Exhibits D and E to his report does not lead me to the conclusion that Mr. Kline suggested that the origin of the fire was isolated to the left side of the deck].

5. Mr. Rhyno's opinion that the origin was on the left side of the deck also requires there to have been combustibles [peat moss, possibly bark mulch or dry grass he suggested] present, which could reasonably have been entirely consumed by the fire. The evidence does not support such. The only witnesses who were able to give reliable evidence about what was underneath the deck were Ms. Williamson and Mr. Abousamak.

[79] Ms. Williamson, in her statement to Jason Purdy April 26, told him that there were two milk crates on the deck and three garbage bags which he had cleaned up earlier in the day after the raccoons got into. She confirmed that there had been carpet on the deck which she had ripped up and placed underneath the deck near to the door/stairs. She had also noted that underneath was a pallet on the right side of the deck with bags of topping soil or such piled on top. She noted that it appeared a dog had been penned underneath the deck by previous tenants.

[80] Mr. Abousamak testified that there were milk crates and the garbage bags on top of the deck. Ms. Williamson had removed the carpet that had been on the surface of the deck about a week after they moved in and it had been put under the deck. Having looked under the deck he also saw bags on a pallet near the wall to the right side of the deck, and noted that there was no grass under the deck.

[81] David Neal, the defence expert pointed out, in response to other potential combustibles under the deck:

> In my opinion it is possible that a source (s) of ignition was destroyed as a result of fire, firefighters actions, or during examination of the site. It is also possible that a source of ignition was removed at the time of the fire initiation. Without the ability to determine the source of ignition with reasonable certainty it is not possible to determine a cause of fire with reasonable probability… In my opinion, there was no evidence, conclusive or otherwise, of a competent source of ignition anywhere beneath the deck.

No adverse inference drawn against the Defendants by reason of the absence of Ms. Williamson's testimony.

[82] I confirm that I came to the above-noted decision, after consideration of the Plaintiff's argument that the court ought to draw an adverse inference as against the Defendants collectively, because they did not produce for testimony and cross examination, Allison Williamson.

[83] In some respects, her evidence was before the court by virtue of: her Response to Interrogatories; her statements to Jason Purdy, Robert Kamperman, and verbal statements she may have made while speaking to persons after the fire.

[84] Most importantly, it would appear that the Plaintiffs were deprived of her cross examination. The Plaintiffs list six items at paragraph 16 of its closing brief as to why Ms. Williamson should be considered a material witness:

(a) when was the last time she saw Mr. Abousamak smoke on the back deck that afternoon?

(b) exactly when did she commence dyeing her hair and how long does she normally keep the dye in her hair?

(c) had she previously seen Mr.Abousamak throw cigarette butts over the side of the deck?

(d) what combustible material was under the deck?

(e) did Mr. Abousamak say anything about what caused the fire?

(f) did Ms. Williamson, herself, smoke on the deck that day, and if so, how did she dispose of her cigarette?

[85] The Plaintiffs concludes paragraph 17:

> …The failure to call Ms. Williamson to give evidence leads to the natural conclusion that her evidence would not have been favorable to the defendants' case.

[86] In support of its position in law the Plaintiffs cite the following cases:

1. McMaster (Litigation Guardian of) v. York (Regional Municipality) [1997] O.J. No. 3928 [Ont. H.C.];
2. *Scotia Fuels Ltd. v. Lewis* (1991) 102 NSR (2d) 12(SCTD) per Saunders J, as he then was;
3. *Jessome v. General Accident Assurance Company* (1999) 178 NSR (2d) 47 (SCTD) per Saunders J, as he then was.

[87] The Plantiffs also rely upon a reference in the *Law of Evidence in Canada*, Bryant Letterman and Fuerst, (3rd Edition) 2009 at para. 6.449 which states:

> In civil cases, an unfavorable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the fact and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the parties case, or at least would not support it.

[88] The Defendants respond that the only fact identified by the Plaintiffs for which there is no evidence from Ms. Williamson is how long she had dye on her hair. "As such, the plaintiff's request for an adverse inference is necessarily limited to what her evidence would have been on this point." – Relying upon the following case: *McIlvenna v. Viebig* 2012 BCSC 218 at para. 70, affirmed 2013 BCCA 411.

[89] The Defendants also note that an adverse inference should only be drawn against a defendant where the plaintiff has made out a *prima facie* case on the evidence – it should not be drawn to prove the plaintiffs' claim i.e. "where the effect of drawing such an inference is to reverse the onus of proof" – per *McIlvenna*, supra at para. 70 (BCSC).

[90] I agree that of the six points the Plaintiffs mention, the timing of her dyeing her hair is the only one of significance.

[91] Of relevance as well is that pursuant to Section 49 of the *Evidence Act* RSNS 1989 c 154, "… No wife shall be compellable to disclose any communication made to her by her husband during the marriage". The evidence is that the parties were married at the time of this fire.

[92] In the circumstances of this case, the timing of her dyeing her hair is significant because it may put Mr. Abousamak (smoking) on the back deck 45 to

60 minutes before the fire. However, as I noted, there is other evidence which I accepted to that effect. In fact, Mr. Abousamak himself said he was on the back deck 10 minutes before the fire, albeit not smoking.

[93] Therefore, I do not find that I could draw a significant adverse inference as against the Defendants, as a result of their failure to produce Ms. Williamson to testify, even though she was present in this province from her Québec home during a portion of the trial. I keep in mind that the Plaintiffs took no objection to the representation that Ms. Williamson had a pre-purchased plane ticket which required her to leave in the afternoon of April 16, and that that is the predominant reason why she left when she did.

Remaining Incidental Issues

(i) Should a "betterment" credit be given to the Defendants?

[94] Although I have not found the Defendants liable, I will provisionally address this issue. The parties agreed that the house was properly rebuilt.

[95] In the Plaintiffs' pretrial brief at paragraph 33 and 34 they stated:

> The parties are in agreement as to the costs incurred, including those for the tear out, cleanup and reconstruction of the home.
>
> The total claim is as follows:

(a) emergency services – $7155.59;
(b) demolition/teardown – $8446.75;
(c) rebuild – $157,329.76;
(d) supplemental costs – gravel, anchor bolts – $2458.59;
(e) contents – $900;
(f) loss of rental income – $3859

Total $180,149.69

[96] Invoices for these expenses (except (e) and (f)) were contained in Tab 20 of the Plaintiffs' Book of Exhibits. On April 14, all counsel specifically turned their mind to the Plaintiffs' Exhibit Book, and acknowledged that by consent, the items in tabs 1,2, 3,4,14 and 20 were agreed to without further proof required therefor.

[97] Therefore, of the Plaintiff's claims itemized above (a) to (f), the only ones that are not consented to are items (e) and (f) – see also the Defendants' closing submissions at paras. 98 and 99.

[98] There being no evidence of those two items, I would not include them in a damages award.

[99] Correspondingly, while the Defendants have agreed that the cost of rebuild totals to $175,387.69, and insist that the law requires that liability is limited to the reasonable replacement costs i.e. those incurred to restore the property to its pre-fire condition and no greater condition (see *McPhee v. Gwynn-Timothy* 2005

NSCA 80 at para. 67), they have presented no evidence regarding the difference between the pre-fire value of the property and the rebuilt cost.

[100] The Defendants argue that I could assess a betterment allowance as was done in *Desmond v. McKinlay* [2000] NSJ No. 195 (SC), where it appears that no witness testified to the betterment allowance issue. Justice Wright there allowed a betterment allowance "because the plaintiff now has brand-new water supply and sewage disposal systems servicing her property in contrast to what was there before… which… represent a substantial betterment and it would be appropriate, in my view, to make an allowance for that betterment of one third of the above referenced invoices which I have allowed".

[101] The Plaintiffs in their closing submission take the view that the burden is on the Defendants to prove that the Plaintiffs have been placed in a better position than they had been in prior to the fire, and to what extent there is a betterment which should be credited to the favour of the Defendants –*Decoste Manufacturing Ltd. v. A & B Roofing Ltd*. 2004 NSSC 79.

[102] The Plaintiffs submit that in the absence of expert opinion evidence regarding the betterment credit issue, "this court really has no choice, but to award the full amount of the rebuild costs" – para. 47.

[103] In this case, the Court is left with no evidence, or agreement between the parties, upon which to base its assessment in determining whether a betterment credit ought to be granted here. That being the case, the Court is not in a position to assess a betterment credit, and therefore would not assess any amount as a betterment credit in favour of the Defendants.

(ii) Prejudgment Interest

[104] In its pretrial brief the Defendant suggested "any prejudgment interest should be calculated at the rate of 5% per annum" (para. 77). In their closing brief the Defendants note that:

> The Civil Procedure Rules are silent regarding an amount for or calculation of prejudgment interest on unliquidated damages. We submit the proper rate of interest which applies is the prevailing rate of interest for the relevant period of time as determined by the average rates of interest for a term deposit treasury bills.
>
> According to the Bank of Canada website, the interest rates for one-year treasury bills for the period it from April 26, 2010 to present is 1.1% with a high of 1.43%. On this basis, we respectfully submit that the rate of prejudgment interest should not exceed 1.5% per annum.

[105] The Plaintiff in its closing brief states its position:

> We note that Defendants' the defense counsel has indicated in their closing submissions that prejudgment interest should be applied at a rate of 1.5% per annum. However, the pretrial brief of the defendants submitted that prejudgment interest should be applied at 5% per annum. On the basis of the pretrial brief, we were prepared to agree with 5%, but if it remains an issue, we are prepared to compromise at 3%.

[106] I am satisfied that the appropriate rate of prejudgment interest in the circumstances is 2%.

(iii) Costs

[107] In the unlikely event that the parties are not able to agree on costs, I will receive written submissions from them to be delivered within 30 days of the date of the decision.

Rosinski, J.